BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of the Ohio Cable Telecommunications Association, Coaxial Communications, Inc., and Time Warner Cable,	)	
Complainants,	)	
v.	)	Case No. 96-1309-EL-CSS
Columbus Southern Power Company dba American Electric Power and Ohio Power Company dba American Electric Power,	)	
Respondents,	)	
Relative to Alleged Violations of Section 4905.71, Revised Code, and 47 U.S.C. Section 224(F)(1), Regarding Discriminatory Treatment of Pole Attachments by Cable Television Operators.	)	

OPINION AND ORDER

The Commission, coming now to consider the above-entitled matter, having considered the record in this case, and being fully advised, hereby issues its Opinion and Order.

APPEARANCES:

Vorys, Sater, Seymour and Pease, by Philip Downy and Stephen M. Howard, 52 E. Gay Street, P.O. Box 1008, Columbus, Ohio 43215-1008, on behalf of the Ohio Cable Telecommunications Association, Coaxial Communications, Inc., and Time Warner Cable.

F. Mitchell Dutton and Jay E. Jadwin, on behalf of Columbus Southern Power Company and Ohio Power Company 215 North Front Street, Columbus, Ohio 43215.

NATURE OF THE PROCEEDINGS:

I. Background

On December 6, 1996, the Ohio Cable Telecommunications Association (OCTA), Coaxial Communications, Inc. (Coaxial), and Time Warner Cable (Time Warner)

(collectively referred to as the "complainants") filed a complaint against Columbus Southern Power Company (Columbus Southern) dba American Electric Power (AEP) and Ohio Power Company (Ohio Power) dba AEP (collectively referred to as the respondents or AEP), pursuant to Section 4905.71(B), Revised Code, alleging that respondents have violated Section 4905.71(A), Revised Code, by offering discriminatory, preferential treatment to another cable television operator, Ameritech New Media, Inc. (New Media), relating to utility pole attachments and by denying the same treatment to the complainants. Complainants allege that AEP has entered into a joint-use agreement with Ameritech Ohio (Ameritech) relating to each utility's poles and has permitted New Media to attach cable to AEP poles pursuant to that joint-use agreement, but that complainants have been required to sign individual pole attachment agreements with AEP. Complainants allege that New Media has been permitted to attach its facilities at points on AEP poles beneath the existing cable television (CATV) facilities and within the telecommunications space (the lowest three feet on a utility pole) and they have not. Complainants also allege that New Media has been permitted to install attachments to AEP poles which do not achieve an 18-foot minimum road clearance, but complainants have always been required to achieve such clearance.

Complainants also allege that New Media was permitted to use standoff brackets to obtain clearance space horizontally instead of vertically, and they have only been permitted to use such devices to avoid obstructions. Complainants allege that New Media has been able to install its cable on AEP poles without AEP requiring New Media to participate in field surveys or joint ride-outs with AEP, but that complainants have always been required to have joint ride-outs with AEP. Complainants contend that New Media has not been required by AEP to pay the annual tariffed pole attachment rate for attaching to AEP poles but has been billed for attachments through the joint-use agreement with Ameritech, whereas the complainants have been required to pay pole attachment fees pursuant to AEP's tariffs. Complainants ask the Commission to find that AEP has discriminated against complainants, that AEP be directed to cease such discriminatory treatment and treat all attaching parties on a non-discriminatory basis, and that all discriminatory attachments or favored positions of New Media be removed, vacated, rearranged, or dismantled from all AEP poles.

On January 17, 1997, respondents filed their answer, admitting, in part, and denying, in part, the allegations in the complaint. AEP admits that New Media is an affiliate of Ameritech and that AEP has entered into a joint-use agreement with Ameritech and its subsidiaries and affiliates. AEP admits that New Media has been authorized to attach to AEP's poles since 1995, but deny that New Media has been given preferential treatment in occupying AEP's poles. AEP admits that New Media has attached within pole space according to the joint-use agreement with Ameritech, that New Media has been permitted to install its facilities with brackets in limited instances, and that New Media has been permitted to install facilities without field surveys or ride-outs. AEP also admits that, in some cases, such attachments are located beneath telephone attachments. AEP, however, denies that any treatment it provided to New Media constitutes

unjust, unreasonable, and unlawful discrimination against complainants. AEP requests that the complaint be dismissed.

By entry of March 28, 1997, the attorney examiner found reasonable grounds for the complaint and scheduled a prehearing settlement conference on April 8, 1997. The prehearing settlement conference was held as scheduled; however, the parties failed to resolve this matter. On April 8, 1997, respondents filed a motion to dismiss the complaint for failure to join Ameritech and New Media as indispensable parties to this matter, moved that OCTA be dismissed from the complaint for lack of standing, and filed a motion to strike a portion of the request for relief of the complaint. On April 18, 1997, complainants filed memoranda contra respondents' motion to dismiss and respondents' motion to strike.

By entry of April 24, 1997, the attorney examiner denied respondents' motion to deny standing to OCTA, and determined that the motion to strike certain requested relief from the complaint should be denied as inappropriate at this time. With respect to respondents' motion to dismiss this case for failure to join Ameritech and New Media as indispensable parties to this matter, the attorney examiner also denied this motion. The attorney examiner determined that respondents could present evidence of its rights and obligations under the joint-use agreement without Ameritech or New Media being a party to this case. Further, he determined that, if Ameritech or New Media believed their interests could be affected by Commission actions in this proceeding, those entities could have requested participation. Both Ameritech and New Media were served a copy of the April 24, 1997 entry; however, neither requested intervention in this proceeding.

The hearing in this matter commenced on May 12, 1997, and concluded on May 15, 1997. Complainants presented the testimony of Joel Rudich, Daniel McKay, Mark Capwell, and Dean Ringle, and respondents presented the testimony of Brandon Wagner. Initial briefs were filed on June 16, 1997, and reply briefs were filed on July 3, 1997. On June 3, 1997, AEP filed a letter, at the request of the attorney examiner, indicating that New Media has made 6,041 attachments on Columbus Southern poles where no Ameritech telephone attachments exist and 1,233 attachments on Columbus Southern poles where Ameritech attachments are present on the pole. AEP also reported that New Media made 786 attachments prior to receiving a permit which and 712 pending pole attachment requests of New Media. AEP reported that there are no New Media attachments on any Ohio Power poles.

II. Evidence

Complainants' witness Rudich testified that AEP has required non-affiliated cable operators, but not New Media, to go through a permitting process. He stated that, according to the permitting process, Coaxial would provide to, and AEP would receive and review permit requests and, thereafter, a joint ride-out was scheduled to determine make-ready costs. He stated that make-ready costs were required to be billed and paid be-

fore Coaxial was permitted to install its cable plant, and that complainants were required to sign pole attachment agreements, and to participate in joint ride-outs before such cable operators have been permitted to hang cable on AEP poles (Complainants' Ex. 4, at 3). He stated that, pursuant to its pole attachment agreement, Coaxial has been required by AEP to attach to poles above the telephone attachments on poles, but that New Media has been permitted to attach below the telephone line. He also stated that, since 1982 when AEP and Coaxial signed a pole attachment agreement, AEP would not permit Coaxial to use brackets in order to avoid having to purchase longer poles in situations where adequate clearances could not be achieved vertically but that, beginning in 1995, New Media was permitted to use such devices (*Id.* at 3-4). Mr. Rudich contends that, because New Media was able to attach below the telephone line and use brackets, New Media's construction costs have been substantially less than complainants. Further, he contends that New Media's preferential attachments have eliminated future maintenance costs, which he claims results in New Media having lower costs and being able to offer service for lower rates and still achieve the same or better return on its investment than complainants (*Id.* at 5).

Mr. Rudich testified that "make-ready" is the process of preparing or making a pole ready to accept a new attachment. He stated that, in cases where the height of the pole is insufficient to accept a new attachment, a new pole must be purchased and installed. He also testified that the costs of rearranging the attachments on existing poles and purchasing and installing a longer new pole are borne by the company that proposes a new attachment to the pole (*Id.* at 5-6). He also claimed that construction can be done more rapidly and at less cost below the lowest attachments on a pole because there is no interference from any other attachments on the pole and little or no make-ready costs, thereby saving labor and construction costs. He claimed that this produces a cost advantage for New Media (*Id.* at 6).

Mr. Rudich requests that the Commission find that AEP discriminated in favor of New Media, with respect to attachments to utility poles, and that such discrimination is unjust, unreasonable, and unlawful. He also requests that the Commission order that all public utilities be required to conduct standardized ride-outs in which all parties with attachments on poles are invited. He also requests that the Commission order New Media to remove, vacate, rearrange, or dismantle all discriminatory attachments or favored positions, to relocate all existing plant above phone attachments, eliminate the use of brackets except in extenuating circumstances where use of a bracket is required to avoid a tree or other obstacle, and correct any instances where the cable fails to maintain an 18-foot minimum ground clearance (*Id.* at 14). He also requests the Commission require AEP to direct New Media to correct all safety concerns related to the use of brackets, build all new prospective plant at the same standards that were applied to non-affiliated cable operators, and fix all previously installed attachments that do not meet the National Electrical Safety Code (NESC) and that depart from safe practices (*Id.* at 16-17).

On cross-examination, Mr. Rudich acknowledged that his cost testimony in this case is the same as that submitted in the complaint case complainants filed against

Ameritech [*In the Matter of the Complaint of Ohio Cable Telecommunications Association, Coaxial Communications, Inc., and Time Warner Cable against Ameritech Ohio* , Case No. 96-1027-TP-CSS (96-1027)] (Id. at 139, 142). He also acknowledged that he was unaware of Ameritech's or New Media's costs and that he was unaware of how AEP made pole attachment or make-ready decisions (Tr. II at 130-131). He acknowledged that, on poles where there are no telephone facilities, Coaxial might not have to pay any make-ready costs to access that pole, but he did not know what percentage of Coaxial's plant is installed on poles that do not have any telephone facilities. He stated that, had cable plant been installed within the telecommunications space on AEP poles, and Ameritech subsequently decided to attach to the AEP pole according to its joint-use agreement, Ameritech could displace the cable plant (*Id.* at 136). Mr. Rudich also stated that it is accepted industry practice that the attaching party pays the make-ready costs when there is insufficient space on the pole (*Id.* at 137). Mr. Rudich explained that a pole attachment agreement is an agreement between two parties to set standards and specifications for attaching to a utility pole, whereas a joint-use agreement is an agreement where two parties, which own poles, agree to share poles and set rules and specifications of how their respective pole space will be used (*Id.* at 147). He believed that, under the pole attachment agreement between Coaxial and Columbus Southern, Coaxial is not required to own poles (*Id.* at 148).

Complainants' witness McKay testified that Coaxial and Columbus Southern entered into a pole attachment agreement in 1982 and that this agreement sets forth specifications and restrictions on the placement of cable facilities including clearances and location (Complainants' Ex. 2 at 4). He indicated that, under the pole attachment agreement, Coaxial is required to maintain a one-foot minimum vertical space between cable and telephone cables at mid-span and that Coaxial was not permitted to use brackets (*Id.* at 8-9). Mr. McKay testified that Coaxial was not notified that AEP had permitted New Media to use brackets on AEP poles. He also stated that, when Coaxial inquired of AEP about New Media's bracket use, AEP advised Coaxial that it had approved two specific types of brackets for use by New Media. He also stated that, in October 1996, AEP advised Coaxial that it had changed the policy back to prohibiting all types of brackets. Mr. McKay alleged that New Media has been permitted to continue and has continued to install its cable on AEP poles using brackets (*Id.* at 9). He provided pictures which he testified represented a random sample of attachments to AEP poles by New Media (Tr. II, 198). He stated that the photographs depict New Media facilities on what he claimed were Columbus Southern poles, which are below the Ameritech telephone lines, lower than 18 feet along some roadways, and attached to the poles with the use of brackets (Complainants' Ex. 3, at 9-16).

On cross-examination, Mr. McKay testified that AEP, as well as all other electric companies to which Coaxial has pole attachments, impose bracket restrictions except in exceptional circumstances, such as to avoid an obstacle (Tr. II at 6). He stated that it is the practice of Coaxial to position itself at the top of the telecommunications space, so that it would have less opportunity to incur make-ready costs or be forced to move its lines in the future when new entities make attachments to poles (*Id.* at 10-11). Mr.

McKay testified that in the past, when it has attached within the telecommunications space, it has been required to move out of the telecommunications space (*Id.* at 15). While Mr. McKay testified that he relied on the pole ownership tags to base his assumption that New Media was attaching to Columbus Southern poles, he stated that there have been many occasions when his ownership assumptions has been wrong (*Id.* at 13).

He stated that Coaxial received from Columbus Southern a notice of construction problems which was related to a 12-year time period (*Id.* at 30). He also stated that Columbus Southern notified Coaxial to correct these violations within 90 days (*Id.* at 31). He acknowledged that Coaxial has made unauthorized contacts to AEP poles that were not permitted by AEP, but for which permits have been applied for (*Id.* at 36). He stated that, since the filing of his testimony in this case, he advised Columbus Southern of the pole attachment violations depicted in the photos attached to his testimony, but he opined that these violations do not pose an immediate threat to public safety. He claimed that New Media is still using brackets on its attachments but he did not cite to any specific examples (*Id.* at 65). He agreed that a 90-day period of time to correct those violations was reasonable (*Id.* at 58-59).

Complainants' witness Capwell testified that the process by which Time Warner attaches its cable facilities to AEP poles is substantially the same process described by Mr. McKay and Mr. Rudich (Complainants' Ex. 1 at 3). Mr. Capwell testified that the pole attachment agreement between Time Warner and AEP was signed in 1981, and that the standards by which cable operators have been required to follow in making attachments to AEP poles were established in the NESC (*Id.* at 4-5). Mr. Capwell stated that the NESC has no standards on the physical location of attachments on the pole or on the use of extension brackets to attach to poles, but only establishes minimum ground clearances and clearances between cables (*Id.* at 5). Mr. Capwell testified that the standards described in Mr. McKay's testimony have always been applied to Time Warner by AEP. (*Id.* at 7-8). He testified that the photographs attached to his testimony represent a random sample of New Media attachments on what he claimed were Columbus Southern poles, and show New Media facilities attached below Ameritech's telephone lines, lower than 18-feet along some roadways, and cable attached to poles with the use of brackets (*Id.* at 10-15). He testified that, in some cases, the New Media attachments are out of compliance with the NESC minimum ground clearance (*Id.* at 14). Mr. Capwell contended that the use of brackets impedes access to higher cables by workmen on the pole, and lower clearance over roadways creates hazards by increasing the chance that the cable will be struck by a vehicle (*Id.* at 15).

On cross-examination, Mr. Capwell indicated that sometimes Time Warner has been authorized by AEP to begin construction before all make-ready work is completed (*Id.* at 31-32). He acknowledged that he recalled some occasions where Time Warner has requested, and Columbus Southern has agreed to accept, modifications to construction practices and grounding and bonding requirements (*Id.* at 32-36, 39). He also indicated that Columbus Southern occasionally does field inspections and informs Time Warner of violations which are discovered, but that no other entities are informed of Time

Warner's violations (*Id.* at 42). Mr. Capwell acknowledged that, like New Media, Time Warner has received billings from Columbus Southern for unauthorized contacts, ones for which no permit to attach was issued, and that retroactive billings have been applied (*Id.* at 52). He also indicated that Time Warner was directed to remove cables from AEP poles on one occasion when it was discovered that the cables were located on a transmission line (*Id.* at 54).

He acknowledged that Time Warner has received notices of changes in AEP pole attachment procedures and notices of pole attachment construction violations either through written notices and telephone calls (Tr. I at 63). He stated that AEP grandfathered existing unmetered power supply units on its poles, but that subsequent power supplies would have to be metered and ground mounted (*Id.* at 66). He also indicated that Time Warner had requested and met with Columbus Southern to discuss use of an alternative power supply unit, but that Time Warner decided to drop its request (*Id.* at 80). Mr. Capwell testified that Time Warner has recently changed its preference to attach to poles as high on a pole as it can without incurring make-ready costs because it believes this maximizes public safety and minimizes service disruptions from facilities getting knocked down (*Id.* at 100). Mr. Capwell acknowledged that Time Warner believes that it could attach within the telecommunications space, but that Time Warner would have to evaluate the risks of such a decision (*Id.* at 122). He claimed that all the poles on which his photos are based are AEP poles and that he based his ownership opinion on the pole tags and markings (*Id.* at 127).

Complainants' witness Ringle testified that Franklin County operates salt trucks during the winter in order to clear roads. He stated that the dump trucks operate with the dump bed raised so as to enable salt to be spread out the back of the truck (Ex. 4 at 1-2). He indicated that the height of such trucks varies from 12 to 15 feet and that a cable should be at a minimum height of 16 feet under the worst of winter conditions. He stated that Franklin County recommends that when cable is strung it should be strung at a minimum ground clearance of 18 feet (*Id.* at 2). Mr. Ringle stated that, whenever a cable is found to be too low, Franklin County attempts to contact the owner of the attachment and requests that they raise the attachment (*Id.* at 3). On cross-examination, he indicated that Franklin County's practice is not to operate its trucks with the truck-beds fully extended, but there are times when they have to be (Tr. III at 10). He opined that, under the worst of winter conditions, a 16-foot minimum mid-span ground clearance was recommended, but that there was universal measure by which all cables would sag, due to length of the cable, the manner in which the cable is attached to the poles, the kind of cable, and other variables (*Id.* at 11).

AEP witness Wagner testified that AEP enters into joint-use agreements because it allows two pole owners to receive benefits by placing facilities on the other owner's pole with certain mutual obligations, such as defining the specific space to place facilities (AEP Ex. I at 4). She stated that, in Ohio, Columbus Southern and Ohio Power maintain attachments on over 78,500 Ameritech owned poles and Columbus Southern is presently utilizing space on approximately 32,000 Ameritech poles (*Id.* at 5). By using

joint-use agreements, she stated that AEP saves on construction of additional poles, maintenance, personnel, and equipment. She indicated that the current joint-use agreement between AEP and Ameritech was signed in May 1996. She stated that, under the joint-use agreement, AEP obtains the use of the uppermost nine-feet and Ameritech and its subsidiaries and affiliated companies have use of the lowest three feet measured upward from the point that would obtain basic ground clearances of any AEP pole (*Id.* at 7). She opined that it was her understanding that all prior existing agreements signed prior to the 1996 joint-use agreement between the companies were terminated and this became the sole arrangement for the use of space on poles between AEP and Ameritech (*Id.* at 7). She indicated that pole attachment agreements are fundamentally different than joint-use agreements primarily because under a joint-use agreement, both parties must own poles and both parties take on the responsibility of maintaining and installing poles, and that under pole attachment agreements, the attaching entities do not assist AEP with any repairs and maintenance to the pole plant and no reciprocal rights are granted to AEP (*Id.* at 13).

She testified that New Media has had some problems in their installation of cable but AEP has notified New Media through Ameritech to correct these problems. She indicated that, through this process, AEP also uncovered problems with some of the complainants' facilities (*Id.* at 18). She testified that, under the pole attachment agreements with complainants, all attachments and equipment are to be installed and at all times maintained by the operator so as to comply with the NESC (*Id.* at 19). She testified that, the NESC makes an allowance for facilities existing in the field that met a previous edition of the code and does not require these facilities to be changed out to meet the newer editions of the NESC (*Id.* at 20).

She indicated that AEP's current policy is not to permit the use of brackets. AEP is concerned about safety and reliability with regard to brackets because it is another piece of equipment that must be worked over, around, or through for any personnel who are accessing the pole (*Id.* at 20). She testified that, over the years, AEP has received various requests with regard to the installation of brackets of all shapes and sizes and AEP always reviewed these requests in the same fashion considering issues of safety reliability and engineering principles. AEP has always had concerns about the use of brackets (*Id.* at 24). She indicated that, in the fall of 1994, AEP received a request from Ameritech to install brackets and AEP informed Ameritech that it did not want brackets on its poles, but later determined that a limited pilot installation of brackets would be permitted. She stated that the use of brackets was to be restricted to less than ten percent of New Media's new construction, consist of only two specific types, only be used where necessary to achieve road clearance, and only be used on AEP poles where Ameritech was already present (*Id.* at 25). She indicated that, after field inspections, AEP discovered that brackets different than those it had approved were being installed by New Media, many brackets which were installed did not achieve the requisite minimum ground clearance, and many brackets were installed on AEP poles where Ameritech was not already present (*Id.* at 26). She indicated that AEP then ended the pilot program prema-

turely and advised New Media to discontinue the use of brackets and to remove all improperly installed brackets (*Id.* at 27).

She testified that, in January 1983, AEP also issued a system policy of no longer allowing standby or battery back-up power supplies to be mounted on AEP poles due to the increased size of the units but all existing units were grandfathered (*Id.* at 27). She indicated that, in March 1984, Ohio Power adopted a policy of metering all power supplies because load checks revealed the units were drawing more electricity than they were being billed. She indicated that this policy is uniformly applied to all CATV power supply units. Since the policy change, new cable TV providers have complained that there are additional costs and time delays associated with the metering process and that suppliers who installed under the old guidelines did not have to bear these costs. While existing units are grandfathered, AEP reserved the right to meter any existing power supply that was previously not metered by AEP when it is found to be using more load than is being billed (*Id.* at 28). She indicated that, when AEP is not the pole owner, AEP cannot control another owner mounting or permitting others to mount these units on their own poles. She also disputed the allegations of complainants regarding make-ready expenses and stated that in her opinion the differential is not significant (*Id.* at 30).

She indicated that any party seeking to attach to an AEP pole must submit in writing to AEP a list of the poles they want to attach to and the details of what they are asking to attach to the poles. She indicated that the engineering personnel review the request for the attachment based on information that may be gathered from pre-construction inspections. She indicated that, if the person reviewing the request believes it would be beneficial, the party requesting the attachment is asked to ride along with the person reviewing the poles (*Id.* at 32). Any rearrangement of existing attachment necessary to accommodate the new request would be communicated by the pole owner to the affected attachees (*Id.* at 33). On some occasions, both parties to the joint-use poles will sometimes do a joint field inspection. She testified that, in her opinion, the change in the NESC did not impact complainants because their facilities are placed above the telecommunications space. She indicated that the Franklin County Engineer's office sent out a letter requesting specific facilities be raised in order to achieve a minimum ground clearance of 18-feet within Franklin County (*Id.* at 35). She stated that, after New Media informed AEP that it was going to comply with the NESC ground clearance standard of 15.5 feet and not the 18-foot standard, AEP reviewed the requirements for roadway clearances and AEP decided to conform its Columbus region with the rest of AEP construction practices across AEP's distribution regions by using the 15.5 foot standard (*Id.* at 37).

On cross-examination, AEP witness Wagner stated that it was AEP's position that parties making attachments, whether under pole attachment agreements or under a joint-use contracts, are to be made according to the NESC (Tr. III at 107). She stated that there are no New Media attachments on Ohio Power poles, but there are Ohio Power poles which are the subject of a joint-use agreement with Ameritech (*Id.* at 110-111).

She indicated that, currently, Coaxial and Time Warner have pole attachment agreements with Columbus Southern and Ohio Power (*Id.* at 116-117). She testified that New Media had, at one time, a pole attachment agreement with Columbus Southern, dated June 27, 1995, but that, in her opinion, it was superseded by the joint-use agreement with Ameritech (*Id.* at 118). She indicated that under the Columbus Southern and Ohio Power pole attachment agreements with Coaxial and Time Warner, pole attachment fees are paid in advance annually, in accordance with Columbus Southern's and Ohio Power's tariffs (*Id.* at 120, 122). She indicated that, when New Media makes an attachment to a Columbus Southern pole, it does not pay a fee under the pole attachment tariff, but pays a fee under the joint-use agreement, and the bill is sent by AEP to Ameritech (*Id.* at 148-149). She indicated that New Media has never paid a pole attachment fee to either Columbus Southern or Ohio Power (*Id.* at 152). She also indicated that the amount Ameritech pays for such an attachment would not change regardless on how many lines are attached to the pole (*Id.* at 150-152). She also testified that New Media had made attachments to AEP poles without receiving a permit to do so as some of the complainants have done (*Id.* at 181-183). She also indicated that on those poles where no permission to attach has been issued Columbus Southern has done no pre-construction inspections or loading calculations, and has not received any loading calculations from New Media (*Id.* at 185-187).

She acknowledged that New Media had made attachments to Columbus Southern poles prior to the joint-use agreement signed May 1996 (*Id.* at 123). She stated that on a Columbus Southern or Ohio Power pole, the telephone company using space on the pole is a licensee and that Columbus Southern and Ohio Power owns the pole (*Id.* at 131). She stated that, if AEP was aware of an attachment that was made that did not conform with the NESC, she believed that AEP had the right to request that the attachment be corrected (*Id.* at 134). She clarified that there is no prohibition or allowance for brackets in the joint-use agreement (*Id.* at 135). She indicated that Columbus Southern has a policy against the use of brackets and that the 12-inch vertical clearance for cables spacing set forth in the pole attachment agreements is a preference and not a requirement that Columbus Southern imposes on attaching parties as good industry practice (*Id.* at 136-137).

III. Arguments and Recommendations of the Parties

A. Complainants

Complainants argue that AEP has the obligation to insure that discrimination does not take place on its poles which it failed to do with respect to the New Media attachments. Complainants argue that Columbus Southern has the right to require that Ameritech correct any contacts on AEP poles that do not conform with the NESC. Complainants contend that AEP cannot allow New Media to use the joint-use agreement to bootstrap itself into a superior competitive position merely because of its affiliation with Ameritech. Complainants also argue that the joint-use agreement was never submitted to and approved by the Commission. Section 4905.48, Revised Code, requires

the consent and approval of the Commission where two or more public utilities furnish a like service in the same municipal corporation or locality and enter into contracts with each other to enable them to operate their lines or plants in connection with each other. Complainants argue that the record reflects that Ameritech and AEP are public utilities and both operate in Columbus and lease portions of their poles to the other. Complainants argue that the joint-use agreement between AEP and Ameritech is not valid without consent and approval of the Commission.

Complainants also contend that AEP allowed New Media to use brackets to attach its facilities to AEP poles while it always denied complainants the opportunity to use brackets. Complainants contend that, sometime in the fall of 1994, Ameritech approached AEP about using brackets and that in February 1995, AEP informed Ameritech that it did not want brackets on its poles due in part to concerns of safety expressed to AEP from crewmen. Complainants argue that despite these concerns, AEP made a decision to permit a pilot installation of brackets but to permit it only to New Media. Complainants argue that there was no formal evaluation study of the pilot project but the pilot was terminated in October 1996. Complainants contend that this program was discriminatory as there were safety concerns expressed, the pilot was available only to one entity, and no evaluation study was done.

Complainants also argue that AEP exempts New Media from the vertical clearance and mid-span clearance requirements that AEP imposed upon complainants. Complainants argue that both the vertical and mid-span clearance standards are requirements of the NESC and that AEP requires both Time Warner and Coaxial to comply with these standards as set forth in the pole attachment agreements. However, complainants argue that Columbus Southern has permitted New Media's attachments within the joint-use space under the joint-use agreement. Complainants argue that it is discriminatory treatment against them and in favor of New Media to apply one set of standards to New Media and another set to complainants.

Complainants also contend that Columbus Southern has required complainants to participate in pre-construction inspections or ride-outs process in the Columbus region where representatives of Columbus Southern, the telephone company, and the requesting party would ride-out and visually inspect the poles that were to be attached prior to attaching. Complainants contend that the practice of using joint ride-outs was changed and that there have been no joint ride-outs of New Media attachments where representatives of the electric company, the telephone company, and New Media have been involved. Complainants also argue that, while there have been final inspections of Time Warner and Coaxial facilities done in 1995, no such inspections have been done of New Media's attachments nor did Columbus Southern know if any were planned. Complainants also argue that Columbus Southern adopted a policy of prohibiting standby power supplies on poles and requiring the metering of all such power supplies. However, complainants argue that Columbus Southern has permitted New Media to build power supplies on AEP poles to which it was making an attachment. Complainants also argue that Columbus Southern had a policy where cable operators

had to demonstrate that they had a franchise or a contract with a municipality before Columbus Southern would permit such a cable operator to attach its poles in that location but that policy was changed so that New Media did not have to demonstrate that it has a franchise before building.

Complainants also contend that Franklin County seeks a minimum road clearance standard of 16-feet under the worst of winter conditions and that the Commission should direct AEP to utilize a standard which does not compromise the safety of the traveling public. Complainants contend that Ameritech's treatment of New Media has given it a substantial advantage over the complainants and other potential cable market entrants by reducing the time, costs, and resources it takes to build its system as well as in the avoidance of make-ready charges when it becomes necessary to rearrange attachments or replace a pole.

Complainants state that they expect that, if the Commission finds that respondents violated the law, the Commission would regulate and supervise the respondents to correct the wrongs and remedy the injuries incurred by complainants. Complainants ask the Commission to direct AEP to require New Media to comply with the same terms and conditions that the complainants were required to meet, and that AEP be directed to cease discriminatory treatment and to treat all pole attachees on a non-discriminatory basis. Complainants request that the Commission direct respondents to conduct a standardized ride-out procedure in which all parties with attachments on poles would be invited to participate.

Complainants also request the Commission direct AEP to require Ameritech and New Media to remove, vacate, rearrange, or dismantle all discriminatory attachments or favored positions. Complainants also request that, to the extent AEP engages in or will engage in the telecommunications business as AEP Communications, the Commission should direct AEP to impute to its costs of providing such telecommunications service, an equal amount to the pole attachment rate for which the company would be liable pursuant to Section 703(g) of the Telecommunications Act of 1996. As relief, complainants request that the Commission order AEP to direct New Media to relocate existing plant above Ameritech's facilities, eliminate the use of brackets except in extenuating circumstances where use of a bracket is required, and correct all instances where New Media's cable fails to meet the NESC standards for mid-span, vertical, and road clearances. Complainants also request that the Commission should find that brackets are a safety issue and that, at a minimum, the Commission should direct AEP to issue a written policy to be included in its tariffs that brackets will not be permitted except in rare circumstances to avoid an obstacle, such as a tree. Complainants also request the Commission to direct AEP to require New Media to correct any violations of the pilot program for those brackets installed during the effective time of the pilot installation program. Complainants also request that the Commission require all prospective build by New Media to be in conformance with the requirements imposed upon complainants, and provide the complainants with some financial compensation for the competitive advantage given New Media. Complainants argue that the record contains

insufficient information for the Commission to develop a credit to be applied to the AEP's pole attachment tariff which would extend to the complainants the financial benefits New Media received from AEP's preferential treatment.

B. AEP

AEP states that Columbus Southern and Ameritech initially had an agreement for the joint-use of poles which was effective in 1981, and that this agreement was superseded by the joint-use agreement in May 1996. AEP stated that, beginning in 1995, New Media began making installations to poles within the exclusive space reserved for Ameritech under the joint-use agreement. AEP argues that it required New Media to sign a pole attachment agreement effective as of January 1, 1995, only for liability and indemnity reasons, but acknowledged that New Media was never billed under the pole attachment agreement. AEP argues that once the 1996 joint-use agreement was signed, New Media, as a subsidiary of Ameritech, was required to make attachments under the joint-use agreement. AEP states that the pole attachment agreement required attaching parties to comply with the NESC.

AEP argues that the joint-use agreement provides for the assignment or transfer of the right to contact specified pole space and that, Ameritech, by virtue of its control of its joint-use space, is solely responsible for providing a pole attachment service to New Media. AEP argues that Ameritech controls the manner in which the joint-use space is utilized so long as such use is consistent with the terms and conditions of the joint-use agreement. AEP further states that the joint-use agreement grants an exclusive license to attach within a defined space on the poles of the other party. AEP argues that Columbus Southern does not have the power to admit or exclude complainants or New Media from attaching in the joint-use space. Columbus Southern also contends that it does not require an attachment under a pole attachment agreement to be above the telephone line within the joint-use space on a joint-use pole.

Respondents dispute that they are discriminating by permitting New Media to pay for its attachment in accordance with the joint-use agreement rather than the pole attachment tariff. It argues that any New Media attachment to a Columbus Southern pole creates a joint-use pole and Columbus Southern bills Ameritech for each such pole for the use of three feet of space regardless of the number of attachments. If a New Media attachment is outside the joint-use space, Columbus Southern bills for providing additional height on the pole. Respondents state that they are unaware if Ameritech charges New Media for such attachments and respondents treat attachments by New Media within the joint-use space as analogous to the use of overlashing by complainants under the pole attachment tariff. Respondents acknowledge that New Media is disputing Columbus Southern's billing of New Media attachments of Columbus Southern poles with a telephone attachment at the joint-use agreement rate. Respondents assert that the joint-use agreement governs these attachments.

Respondents also argue that there is no evidence that AEP engaged in discriminatory attachment practices for the purpose of unfairly and unduly benefiting New Media. Respondents claim that Columbus Southern has always treated construction inquiries from New Media in the same manner as it has treated similar inquiries from the complainants and that it has administered its pole attachment policies and procedures consistent with all applicable contractual obligations, safety requirements, and engineering practices. Respondents argue that complainants' position that all Columbus Southern policies and practices as historically applied must remain unchanged is not logical, does not make common sense, is anti-competitive, and wasteful.

Respondents argue that the use of brackets is not addressed by the NESC, the joint-use agreement, pole attachment tariffs, or any local ordinances. Respondents contend that it has always had a strong position against the use of brackets, except in limited circumstances of clearing an obstacle, and that, over the years, it has received numerous inquiries and that it treated New Media's request as a pilot project. Respondents assert that it similarly treated Time Warner's request for alternative grounding and requests for burying cable in trenches in the same fashion as it has with any request for a special project. The practices and proposals are discussed internally with various groups and a decision is made. Respondents contend that, in the case on New Media's bracket request as with complainants' requests for alternative power supplies and grounding, several meetings were held and alternatives were discussed. Respondents contend that complainants have not shown that AEP's testing of the use of brackets is undue or unjust discrimination.

Respondents also dispute complainants' contention that it has discriminated with respect to the use of power supply units. Respondents assert that the evidence clearly refutes any discrimination and that, Coaxial, like New Media, has not been permitted to attach unmetered power supplies on Columbus Southern poles since November 1995. Respondents also argue that the only evidence offered was a photograph of a pole purporting to show instances of pole violations occurring on AEP poles. Respondents argue that the photographs show the existence of a meter connected to the power supply and that, in any event, the pole ownership tag indicated that it was an Ameritech pole.

Respondents also dispute the claims of the complainants' with regard to joint ride-outs and contend that complainants misrepresent the purpose of a pre-installation inspection. Respondents claim the pre-installation inspection allows a review of utility-provided pole line maps and provides an opportunity to identify and examine any problems. Respondents contend that the information gathered from joint ride-outs can also be conveyed by other means and it is not always the most cost-effective process. Field information can be effectively conveyed to the party requesting the attachment and to other affected attachees on the pole verbally or in writing.

Respondents also dispute complainants claims of discriminatory treatment by allowing New Media to attach cable while maintaining roadway clearances based on the

current NESC 15.5 foot minimum ground clearance standard rather that the previous NESC standard of 18 feet. Respondents argue that, in AEP's 12 distribution regions, 11 regions had the same engineering practice of determining roadway clearance based on the 15.5- foot standard, and only the Columbus Distribution region did not adopt this standard and continued to engineer all attachments including telephone and cable within its area to the 18-foot standard. Respondents claim that, after it received a letter from the Franklin County Engineer indicating that it preferred the 18-foot clearance, AEP discovered that there was no Franklin County ordinance requiring, an 18-foot ground clearance standard and it responded to the Franklin County Engineers office that it complied with the most current NESC ground clearance standard. Respondents also argue that, after its experience with New Media which was attaching to meet the 15.5-foot standard, it decided that AEP's Franklin County Region would switch to the 15.5-foot standard adopted by the remaining 11 of 12 regions of AEP. Respondents assert that the decision to use the 15.5-foot standard resulted neither in undue nor unjust discrimination and was uniformly applied to all subsequent applicants for attachments.

Respondents also argue that there is no evidence that AEP intentionally allows New Media to avoid the permit process. Respondents contend that the evidence shows that AEP uniformly requires compliance with its permitting process, and the same process is followed whether the party is requesting a permit to attach pursuant to a pole attachment agreement or a joint-use agreement. Respondents argue that New Media has submitted the pole attachment application and permit forms just as complainants have been required to do and that any attachment made to a Columbus Southern pole without the submission of such forms is an unauthorized attachment. Respondents also state that, when there is no permit issued for an attachment, there is no means to bill such attachment, undertake a pole loading calculation, or inspect the location for compliance with applicable safety codes.

Respondents also argue that it is Ameritech and not them, which is responsible for the non-discriminatory administration of joint-use space on a joint-use pole. Respondents argue that AEP assigned and transferred the right to contract the joint-use space in accordance with the joint-use agreement to Ameritech and it is Ameritech by contract who is responsible for allocating that joint-use space as Ameritech deems appropriate. Respondents argue that complainants ignore the statutory reference to utilities that control poles. Respondents argue that Ameritech alone has the duty to provide non-discriminatory access to its joint-use space on Columbus Southern/Ameritech poles

Respondents also assert that the record evidence clearly establishes that there are no New Media attachments on Ohio Power Company poles and, therefore, Ohio Power should be dismissed from this proceeding. Respondents also request that the Commission strike the part of the complaint with regard to complainants' arguments that AEP's provision of telecommunication service or cable service must impute costs of pole attachments. Respondents argue that the there is no evidence of discriminatory conduct or a violation of any federal laws with regard to complainants' allegation in the

complaint. Respondents contend that the only evidence offered was a reference made to AEP's witness whether she was aware of AEP involvement in the telecommunications business but no other evidence was offered.

DISCUSSION

Initially, we agree with respondents that, based on the evidence of record, there are no permitted pole attachments by New Media to any Ohio Power poles. Respondents' witness indicated that there have been no permits issued for any New Media attachments to any Ohio Power poles. Complainants offered no evidence of any New Media attachments on Ohio Power poles and only suggested that there may be New Media attachments to Ohio Power poles which have never been permitted. We find complainants' supposition of the possibility of New Media attachments on Ohio Power poles constitutes insufficient evidence on which to base a finding that there are New Media attachments on Ohio Power poles. Accordingly, it is appropriate that there be no finding of liability upon Ohio Power related to this complaint, and that the respondents' request to dismiss Ohio Power from this proceeding should be granted.[1]

Secondly, we find that the evidence supports a finding that Columbus Southern violated its tariff by permitting New Media to make pole attachments according to the joint-use agreement between Columbus Southern and Ameritech rather than the pole attachment agreement between Columbus Southern and New Media. The evidence shows that, on June 27, 1995, Columbus Southern and New Media entered into a pole attachment agreement to govern attachments by New Media. Yet none of the attachments of New Media have ever been billed according to the pole attachment agreement. The evidence also shows that, on May 28, 1996, AEP and Ameritech entered into an agreement covering the joint-use of poles. The language of the joint-use agreement states that it is an agreement between AEP and Ameritech Services, Inc., as agent for and on behalf of Ohio Bell Telephone Company, an Ohio Corporation, Michigan Bell Telephone Company, a Michigan Corporation and Indiana Bell Telephone Company, an Indiana corporation, a corporation of the State of Delaware, hereinafter called the Telephone company. Further, under the terms of the joint-use agreement, "telephone company" includes Ameritech and its parent, subsidiary and affiliated companies <u>to the extent that such companies are not covered under separate agreements with AEP</u> as agent for is affiliated operating companies.

In this case, New Media has a separate agreement with Columbus Southern governing pole attachments. Thus, by the terms of the joint-use agreement, New Media is excluded from the joint-use agreement. Complainants have also suggested that there is a question whether New Media could be a participant to the joint-use agreement with AEP, because New Media owns no utility poles which would be shared with AEP. Furthermore, AEP provided evidence at the hearing that New Media is claiming that

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[1] Although we are dismissing Ohio Power from this case for the reasons noted, of course, on a prospective basis Ohio Power is to follow the directives of this order in the same manner as its affiliate, Columbus Southern.

the pole attachment agreement and not the joint-use agreement should govern pole attachments fees on Columbus Southern poles where no Ameritech pole attachment exists. We find that New Media's lack of ownership of any poles and the existence of a pole attachment agreement between New Media and AEP provides additional basis to make our finding. Therefore, we find that Columbus Southern should have required New Media's pole attachments be made in accordance with the terms of its pole attachment agreement with Columbus Southern, rather than under the terms and conditions of the joint-use agreement between AEP and Ameritech. We find that Columbus Southern violated its tariff by treating New Media in this fashion.

Section 4905.35, Revised Code, provides that no public utility shall give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage. By allowing New Media to attach cable according to the terms of the joint-use agreement with Ameritech rather than the terms of the pole attachment agreement, AEP created an undue preference for New Media to the detriment of the complainants.

The evidence also shows that the result of AEP's position has been to permit New Media to avoid certain clearances on some of its attachments such as the 12-inch vertical clearance on the pole between installations within the joint-use space, whereas such clearances have been required of complainants under the pole attachment agreements. Such treatment does constitute preferential treatment. The evidence also shows that Columbus Southern has not required New Media to participate in joint ride-outs, as it has of complainants. We cannot accept Columbus Southern's minimization of the purpose of joint-rideouts as any justification for exempting New Media from its joint-rideout requirement which was applied to complainants. We also find that Columbus Southern's policies and practices as they relate to how New Media has been permitted to attach to Columbus Southern's poles according to a joint-use agreement rather than the pole attachment agreement, and the manner in which Columbus Southern required the complainants to attach to its poles, constitutes unjust discriminatory and preferential treatment to New Media, which results in a violation of Section 4905.35, Revised Code. We find it more appropriate that all attachments made by complainants and New Media, and any subsequent affiliates of complainants or respondents, be subject to pole attachment agreements regardless of the location of the pole where the attachment is made. Accordingly, we find that, because New Media has a pole attachment agreement, its attachments must conform to the terms and conditions as set forth in the pole attachment agreement rather than the joint-use agreement, regardless of whether those attachments are made within the telecommunications space or not. Further, to the extent Columbus Southern Power requires complainants to participate in joint rideouts, it must practice the same joint rideout policy for all New Media's attachments.

We find that Columbus Southern should have been billing New Media for attachments to Columbus Southern poles according to its pole attachment agreement, rather than under the terms of the joint-use agreement with Ameritech. New Media

should also have been paying annually its pole attachment fees and making advance make-ready payments prior to attachments as done by complainants. Accordingly, Columbus Southern should, within 45 days, provide to the Commission's utilities staff records that it has billed and received appropriate compensation from New Media for all New Media attachments to Columbus Southern poles. After review of these records, staff should file in this docket a statement of its determination as to whether New Media was underbilled for its attachments and needs to make further payment to Columbus Southern or whether Columbus Southern overcharged New Media for all of its attachments made to the date of this Opinion and Order. Furthermore, on a going-forward basis, all further billing by Columbus Southern for New Media attachments should be made according to the pole attachment agreement between Columbus Southern and New Media and according to Columbus Southern's tariff and made directly to New Media and not through Ameritech. Further, all New Media's attachments made to Columbus Southern poles commencing from the date of this Opinion and Order should be made according to the terms, conditions, and rates set forth in the pole attachment agreement between New Media and Columbus Southern.

Having determined that New Media's attachments should be made according to the pole attachment agreement, the issue is raised as to the location of the attachments to Columbus Southern poles. According to the pole attachment agreement, the general location for attachments shall be made in accordance with a diagram depicting CATV attachments located above telephone facilities. However, AEP's witness indicated that AEP has no specific prohibition against locating CATV facilities above or below telephone facilities. While the complainants argued that they were required to attach above the telephone facilities while making their attachments on AEP poles, there is no evidence that their pole attachment agreements require such placement and insufficient evidence why such attachment placements were made. The evidence shows that complainants have been permitted to attach anywhere on the pole provided that the attachment maintains sufficient clearance from the electrical cable. Further, the testimony of complainants' witnesses was that they preferred locating higher on the AEP poles rather than lower on the poles. Faced with a lack of contractual prohibition or mandate for or against any certain placement on Columbus Southern poles, the Commission finds insufficient evidence that Columbus Southern unfairly treated New Media or complainants in it placement of New Media cables above telephone facilities on its poles.

Section 4905.71(B), Revised Code, provides, in part, that every telephone, telegraph, or electric light company, which is a public utility as defined by Section 4905.02, Revised Code, shall permit upon reasonable terms and conditions the attachments of any wire, cable, facility, or apparatus its poles or pedestals and that the company shall file tariffs with the Commission containing the charges, terms, and conditions for attachments. We note that we have previously reviewed and approved the pole attachment tariffs of both Columbus Southern and Ohio Power. Nevertheless, as a result of the controversy regarding the attachments in this case, the Commission finds that Columbus Southern’s and Ohio Power’s pole attachment tariffs fail to

incorporate all terms and conditions under which attachments are to be made. Accordingly, Columbus Southern and Ohio Power should revise their pole attachment tariffs to incorporate all terms and conditions governing pole attachments.

Section 4905.48(A), Revised Code, requires the consent and approval of the Commission where two or more public utilities furnish a like service in the same municipal corporation or locality and enter into contracts with each other to enable them to operate their lines or plants in connection with each other. In addition, Section 4905.48(C), Revised Code, requires Commission consent and approval for agreements involving a public utility which sells or leases its property to any other public utility. On the issue of the Commission's approval of the joint-use agreement between AEP and Ameritech, we agree with complainants that there is no evidence that this agreement was ever approved by the Commission. The joint-use agreement provides the terms and conditions under which AEP and its affiliates and Ameritech and its affiliates shall use each others' utility poles and the rates to be charged. Upon review, we find that the joint-use agreement between AEP and Ameritech has not been approved by the commission. Accordingly, AEP should file, within 30 days, an application with the Commission for approval of its joint-use agreement with Ameritech, pursuant to Section 4905.48, Revised Code.

With respect to the issue of AEP's "pilot "program for the use of brackets, we find that the evidence supports a finding that AEP did not discriminate against complainants and in favor of New Media in a limited use of brackets. The evidence shows that Columbus Southern permitted New Media to use brackets for some of their installations under certain conditions. Further, the evidence shows that there was a difference of opinion internally at Columbus Southern on whether to allow brackets; nevertheless the decision was made to allow these devices. Further, we do not necessarily find that allowing only New Media to use brackets was necessarily discriminatory, as there was insufficient evidence that any other entity requested the same involvement in the pilot program or that AEP denied any request by complainants for the use of brackets during this time period. Of note also is that AEP ended the pilot program after it discovered New Media making attachments with brackets which did not conform to the conditions of the pilot program and that AEP, upon its discovery of the violations of its pilot conditions, resumed its current policy against the use of brackets for all attachments, including those of New Media. While AEP grandfathered these attachments, we are satisfied that there was insufficient evidence that the existence of such devices constitutes a safety risk to the general public. With respect to the issue of whether AEP's use of a pilot program to only one entity was discriminatory, we note that there is evidence that AEP discusses various ideas such as modifications to pole attachments and variance with its standards with many of the complainants and does not necessarily include all entities within those discussions, such as when one of the complainants entered into discussions with AEP on special grounding devices. Accordingly, we find that AEP's pilot program was not intended to be discriminatory. Nevertheless, we find that all brackets installed by New Media, which do not conform to the conditions of the pilot program established by AEP, should be removed. Therefore, Columbus Southern

should file a report with the Commission in this docket, within 45 days, which identifies all brackets installed by New Media which do not conform to the conditions of the pilot program and directs New Media to remove all such nonconforming brackets within the subsequent 45-day period. The Commission's compliance division should review Columbus Southern's report and conduct a random audit of identified nonconforming brackets and removal of such brackets.

There was also evidence that AEP, at one time, required CATV operators to provide proof of franchise agreements for those areas in which they sought to attach cable. However, there was insufficient evidence that this policy was indiscriminately applied to the complainants or that, once the policy changed, complainants were required to provide proof of franchise agreements and that New Media was not so required. Accordingly, we find insufficient evidence to find that AEP provided preferential treatment with regard to requiring proof of franchise agreements prior to issuing pole attachments permits. With respect to complainants' arguments that Columbus Southern treated New Media preferentially as related to the use of power supply units, we find that the evidence is insufficient to justify this claim. The evidence of record demonstrates that in the one instance of a photograph of a power supply unit, this was identified as an Ameritech pole and not an AEP pole. There was no other evidence establishing preferential treatment toward New Media with respect to power supply units.

Complainants alleged that Columbus Southern gave notice to complainants that certain of its attachments were in violation of various standards but that no such compliance letter had been sent to New Media. We do not agree with complainants that such action constitutes discriminatory treatment. The evidence shows that such notification occurred for a ten-year period and occurred some time after complainants had completed a series of attachments to Columbus Southern poles. New Media, on the other hand, has only been making attachments since 1995, and the fact that Columbus Southern has not completed a similar review does not necessarily constitute discriminatory treatment. We would, however, expect Columbus Southern to complete its review of attachments according to its tariff and pole attachment agreement with New Media and to notify New Media and all attachees of any attachments which are in violation of any pole attachment standards or NESC requirements.

Complainants suggest that the Commission order that all New Media attachments be dismantled and rehung according to the standards applied to complainants. Complainants requested that the Commission order AEP to order New Media to remove, vacate, rearrange, or dismantle all discriminatory attachments or favored positions. With respect to these requests, we find these remedies to be excessive and economically wasteful. When complainants made attachments to Columbus Southern's poles, they did so under the NESC in place at the time of the attachment. As the NESC standards change, so too does the requirement that the most current NESC standard be applied to the attachment. Thus, just as the NESC standards are not retroactively applied to existing attachments, so too should old versions of the NESC not be

prospectively applied to new attachments of New Media or any other attaching party. To do so would unreasonably apply standards deemed inappropriate.

Furthermore, while complainants have requested that New Media be made to remove all such attachments from the "much preferred" bottom portion of the telecommunications space on a pole, it is not clear from the evidence that all complainants believe that New Media's position is necessarily the "most favored position". We note that at least one of the complainants' witnesses indicated that their policy was to attach at the highest level on a pole rather than the lowest position for a variety of reasons and, if given the opportunity, would decline such. Therefore, it is not a uniformly held position that all complainants necessarily believe that New Media's lowest position necessarily is the "much preferred" position. While we agree that attaching at the lowest point on the pole may have afforded New Media some advantage in avoiding make-ready costs, the Commission cannot endorse the suggestion of the complainants that all New Media attachments made to date be taken down and reinstalled to comply with standards applied to complainants. Such a remedy would be a waste of resources and anti-competitive. We recognize, as should complainants, that the standards of the NESC change and we will not require any attaching party to comply with outdated editions of the NESC, simply because attachment standards may affect one company differently than another company provided those standards are applied in a nondiscriminatory fashion.

There was evidence that there are attachments made by New Media which do not conform to the ground clearance standards of the NESC. There was also evidence that some attachments do not meet the separation requirements between cables at mid-span. Accordingly, we agree with complainants' suggestion that New Media be made to correct all attachments in violation of the NESC. While we recognize that Franklin County Engineers Office may have a preference toward some particular ground clearance standard, we will continue to require that all new installations of attaching parties conform to the standards of the most current NESC. In the event that a municipality, township, or county lawfully establishes standards for pole attachments stricter than those contained within the NESC, all affected entities should then comply with such stricter standards. We also find that AEP's explanation as to its initial requirement for attaching parties to use the ground clearance standard of 18-foot and subsequent policy change toward a company-wide 15.5-foot ground clearance standard is sufficient to find that such was a reasonable practice as it relates to all the parties and we do not find that such treatment, in this case, constitutes discriminatory or preferential treatment.

We note that there was testimony that if complainants attached within the telecommunications space and New Media sought to attach, it was complainants' opinion that complainants, and not New Media, would be required to pay make-ready costs. We note that there was insufficient evidence that this practice did occur. We also agree with respondents that there is insufficient evidence that AEP intentionally permits New Media or any other attachee to by-pass its pole permit process. The evidence shows

that AEP uniformly requires compliance with its permitting process and that New Media has submitted the permit and application for attachment forms just as complainants have been required to do.

As we determined in 96-1027, AEP has the duty to notify, pursuant to its tariff, all attaching parties of all violations of the NESC to which it has knowledge or which have brought to its attention and to require such nonconforming attachments be corrected, or to correct such attachment violations. Accordingly, AEP should notify all attaching parties of all violations of the NESC of which AEP has been notified or has knowledge, notify all such parties to correct such violations, and file a report in this docket detailing how those NESC violations were corrected. Staff is similarly ordered to review AEP's report as it has been ordered in 96-1027 and to conduct similar inspections of identified attachments as ordered in 96-1027.

Complainants sought that AEP, to the extent it engages in the provision of telecommunications service or cable service, must impute to its cost of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable pursuant to Section 703(g) of the telecommunications Act of 1996. Respondents argue that there is no evidence of discriminatory conduct or a violation of any federal laws with regard to complainants' allegation in the complaint. Respondents contend that the only evidence offered was a reference made to AEP's witness whether she was aware of AEP involvement in the telecommunications business, but no other evidence was offered. Upon review of the evidence, we find insufficient evidence that AEP violated any federal laws with regard to complainants' allegations in the complaint. Accordingly, we find respondents' request to dismiss this portion of the prayer for relief should be granted. Nevertheless, AEP has an obligation to treat its affiliate the same as other nonaffiliated entities and therefore should take all appropriate steps now to avoid the problems which arose in this case and in 96-1027.

Finally, there was evidence that there are New Media attachments already in place on Columbus Southern poles which were never authorized by Columbus Southern. As a result, there have been no loading calculations done on the poles for these attachments. Accordingly, we direct Columbus Southern to issue a directive to New Media to identify all pole attachments for which no permits have been issued and to prepare such loading calculations for these attachments to insure pole integrity is maintained. Furthermore, we would encourage Columbus Southern to issue a warning to all attaching parties suspected of unauthorized attachments, that if such non-permitted attachments are made in the future, Columbus Southern would cease permitting the unauthorized party to attach to its poles.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) This complaint was filed on December 6, 1996.

(2) On January 17, 1997, respondents filed an answer to the complaint admitting, in part, and denying, in part, the allegations of the complaint.

(3) The evidentiary hearing commenced on May 12, 1997, and concluded on May 15, 1997. Complainants presented the testimony of four witnesses, and respondents presented the testimony of one witness.

(4) AEP is an electric company as defined in Section 4905.03(A)(4), Revised Code, and a public utility as defined by Section 4905.02, Revised Code. AEP is, therefore, subject to the jurisdiction of this Commission.

(5) Section 4905.35, Revised Code, provides that no public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.

(6) Coaxial and Time Warner have pole attachment agreements which govern the terms and conditions by which complainants' cables were attached to AEP's poles.

(7) New Media has a pole attachment agreement with Columbus Southern which govern the terms and conditions by which New Media's cable was attached to Columbus Southern's poles.

(8) New Media currently has approximately 6,041 attachments to utility poles owned by Columbus Southern where no Ameritech facilities are present. New Media currently has approximately 1,233 attachments to utility poles owned by Columbus Southern where Ameritech facilities are present. There are no New Media attachments on Ohio Power poles which have been permitted.

(9) New Media made 786 attachments to Columbus Southern poles prior to receiving a permit from Columbus Southern.

(10) Section 4905.71, Revised Code, provides, that the terms and conditions for pole attachments shall be reasonable and that the Commission shall resolve any controversy which may arise among the parties as to such attachments.

(11) Section 4905.35, Revised Code, provides that no public utility shall give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.

(12) Based on the evidence of record, the Commission finds that Columbus Southern violated Section 4905.35, Revised Code, by its inadequate and discriminatory treatment of complainants and in favor of New Media.

It is, therefore,

ORDERED, That Columbus Southern cease and desist all preferential treatment of New Media. It is, further,

ORDERED, That the pole attachment agreement between Columbus Southern and New Media be used for all New Media attachments on Columbus Southern poles. It is, further,

ORDERED, That AEP should file within 30 days, an application for approval of its joint-use agreement with Ameritech pursuant to section 4905.48, Revised Code. It is, further,

ORDERED, That Columbus Southern submit to the Commission utilities staff a record of accounting for all attachments by New Media to its poles and that Commission staff file a statement in this docket related to Columbus Southern's accounting. It is, further,

ORDERED, That AEP, to the extent it has knowledge or has been notified of attachments in violation of the NESC, notify all attaching parties to correct all attachments in violation of the NESC as set forth above and that AEP file a report in this docket within 45 days of all violations which were identified. It is, further,

ORDERED, That Columbus Southern issue a directive to New Media to identify all pole attachments for which no permits have been issued and insure loading calculations are made for these attachments. It is, further,

ORDERED, That Columbus Southern and Ohio Power revise their pole attachment tariffs as set forth above. It is, further,

ORDERED, That Columbus Southern file a report identifying all New Media‘s nonconforming brackets and issuing a directive to New Media as set forth above. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

_____
Craig A. Glazer, Chairman

_____ _____
Jolynn Barry Butler Ronda Hartman Fergus

_____ _____
David W. Johnson Judith A. Jones

SEF/pdc

Entered in the Journal
August 27, 1997

Gary E. Vigorito
Secretary