



State of New Jersey
Board of Regulatory Commissioners

Two Gateway Center AGENDA DATE: 9/25/91
Newark, N.J. 07102

CABLE TELEVISION

IN THE MATTER OF A REPORT ON)	
THE STATUS OF CONSTRUCTION BY)	<u>ORDER</u>
SHORE CABLE COMPANY OF NEW)	
JERSEY, INC. OF A NEW CABLE)	
TELEVISION SYSTEM IN THE)	
COMMUNITIES OF VENTNOR,)	
LONGPORT AND MARGATE)	DOCKET NO. CE89050499

(SERVICE LIST ATTACHED)

BY THE BOARD:

This Order memorializes action taken by the Board of Regulatory Commissioners at its September 25, 1991 agenda meeting by a vote of three Commissioners.

On August 1, 1990, the Board of Public Utilities, predecessor agency to the Board of Regulatory Commissioners (Board), issued Certificates of Approval to Shore Cable Company of New Jersey, Inc. (Shore Cable) for the construction and operation of a new cable television system in Ventnor, Longport and Margate in competition with Sammons Communications of New Jersey (Sammons). Such a competitive cable television system is commonly referred to as an overbuild.

The proposed overbuild is the first such case since the Legislature promulgated the New Jersey Cable Television Act. The Board has been committed to the implementation of competition in the cable television industry in the State. To that end, the Board Staff and the Office of Cable Television (OCTV) have devoted considerable time and effort to assist Shore Cable throughout every step of the entire process and have worked diligently with all affected parties in an attempt to remove any real or perceived obstacles to the successful completion of the project and to resolve the outstanding problems attending this overbuild in a manner that is fair and responsive to the concerns of all parties and consistent with the public welfare. Despite

extensive efforts on the part of Board Staff and the OCTV to facilitate construction of the system, Shore Cable appeared reluctant to proceed with construction of the system without an up-front resolution of disputes concerning the need for certain make-ready work and the allocation of associated costs.

Because of concerns as to the lack of progress on the part of Shore Cable in constructing the overbuild, this matter was brought to the Board's April 24, 1991 agenda meeting for discussion. At that meeting the Board, consistent with its desire to encourage competition in the cable television industry, determined to institute a proceeding to ascertain, investigate and resolve the outstanding issues in dispute with respect to the implementation of the proposed overbuild. The Board memorialized its decision by written order dated April 30, 1991. That order set forth the scope of the proceeding and detailed an explicit procedural schedule which called for the staggered submission of the parties' positions on outstanding issues and provided an opportunity for replies. The Board's order further provided that it was anticipated that certain make-ready work could and should proceed even during the conduct of this proceeding.

Pursuant to the procedural schedule established by the Board, Shore Cable submitted its initial submission on June 3, 1991. Initial submissions from Atlantic City Electric (ACE), New Jersey Bell (NJB), Sammons and the New Jersey Cable Television Association (NJCTA) were received on June 11, June 24, June 25 and July 1, 1991, respectively. The OCTV submitted its review of the initial responses and its recommendations on July 15, 1991. Replies were submitted by Shore Cable, Sammons and NJB on August 8, 1991.

As part of its reply submission Shore Cable submitted affidavits from George Miller, Jr., President of Shore Cable, as well as from John Davis, an engineer employed by a subsidiary of Hill International, a construction claims and project management firm. Mr. Davis indicated that Hill International had been retained by Shore Cable to, among other things, examine certain pole attachments and other facilities in Shore Cable's franchise area, to see whether these were constructed in accordance with industry standards. He indicated, among other things, his conclusion that the existing CATV pole attachments in many cases are not attached at the reference gain. Mr. Davis' affidavit constituted new information, which more properly should have been part of Shore Cable's initial position. Because of the nature of the procedural schedule, the other parties did not have an opportunity to reply to or rebut Mr. Davis' analysis.

In its cover letter accompanying its reply brief, Shore Cable inserted the following sentence:

"Please list this matter on the Board of Public Utilities' next agenda to schedule a hearing for immediate and emergent relief."

By letter dated August 19, 1991, Shore Cable submitted a memorandum of law to "supplement" its submissions and contentions with respect to the above matter. By way of that submission, Shore Cable requested Oral Argument. In its papers, Shore Cable alleged that it has entered into certain agreements with subscribers to provide certain cable television services as of September 3, 1991, but that it is unable to provide such service because it has been unable to access the communication space on the utility poles in its franchise area due to the underlying dispute.

By letter dated August 22, 1991, the Deputy Attorney General representing the OCTV Staff in this matter filed a response to Shore Cable's August 19, 1991 letter. OCTV Staff contends that Shore Cable's August 8, 1991 filing does not meet the minimum requirements for emergent relief, and that emergent action by the Board is not required as a matter of law. The OCTV also submits that the Board should reject any attempt to expand the scope of the issues in this proceeding to include the Board's authority over pole attachments.

At its September 11, 1991 agenda meeting, the Board granted Shore Cable's request for oral argument and scheduled oral argument for September 19, 1991. Shore Cable, Sammons, New Jersey Bell, Atlantic Electric, the New Jersey Cable Television Association and the OCTV Staff all participated in the oral argument before the Commissioners.

In addition, a representative of the South Jersey Condominium Manager's Association appeared at the oral argument and was permitted to make a statement. The representative supported Shore Cable's motion for emergent relief, and stated that service to two condominiums in the area had been curtailed by Sammons and its residents were without cable television service. Sammons responded that it had been unable to make the necessary repairs to correct a problem with signal leakage since the two condominium associations in question had denied Sammons access to the premises, and that Sammons was currently in litigation attempting to get access to the buildings to make the necessary repairs.

The Board has reviewed the submissions of the parties and the arguments advanced at oral argument. In essence, the key elements of the parties' positions can be summarized as follows:

Shore Cable Shore Cable argues generally that the other parties are seeking to thwart competition and has requested that 1) it be permitted to immediately attach to those poles on which New Jersey Bell has completed make-ready, irrespective of whether Sammons has reviewed the proposed attachments and/or completed its make-ready work and 2) existing cable television pole attachments which "don't conform", e.g. which are not located at the reference gain, be corrected at the expense of those parties which caused the non-reference gain attachments. On the issue of drop wires and internal wiring, Shore Cable contends it will evaluate the consumer's ownership and rights in any existing wires on a case-by-case basis.

Sammons argues generally that it does not oppose competition, but that it should not be made to subsidize Shore Cable's going up on the poles. Sammons acknowledges that any party causing violations of the National Electrical Safety Code (NESC) standards should be required to correct such violations at its expense. Sammons argues, however, that there is no violation of pole attachment requirements per se, merely because plant does not appear to be at the reference gain. Sammons contends that it and/or its predecessor has attached where NJB, the pole licensor has assigned it to attach.

Sammons also indicates that it has completed two license reviews for Shore Cable (about 200 poles) but it has not been paid. Sammons indicates it will perform no further work until payment has been made.

New Jersey Bell New Jersey Bell argues that it does not oppose competition and, in fact, has devoted extraordinary time and effort to helping Shore Cable get access to the poles. New Jersey Bell indicated that as a result of concessions it had made, including a decision to allow Shore Cable to use both sides of the poles, Shore Cable's make-ready costs had been reduced from a conservative estimate of \$2,100,000, and Shore Cable's own earlier estimate of \$960,000 to a level more like \$200,000. New Jersey Bell argues, however, that Shore's request to attach before Sammons had the opportunity to complete its make-ready work should not be permitted, because such a situation could lead to a hazardous condition on the poles. New Jersey Bell indicates

that there is nothing stopping Shore Cable from proceeding to get on the poles, but that they must make the proper arrangements with New Jersey Bell, Sammons and Atlantic Electric, as needed, just as new any attachers would have to make. New Jersey Bell argues that it is appropriate for the new applicant to pay for make-ready work, except for NESC violations, because the new applicant is the cost causer of the work.

Atlantic Electric Atlantic Electric takes issues with certain newspaper articles attached to Shore Cable's submissions concerning a fire in Atlantic City. ACE argues that the articles are irrelevant and immaterial. ACE contends that it has cooperated with Shore Cable throughout the entire process. ACE believes that any safety violations on the poles should be promptly corrected.

New Jersey Cable Television Association The NJCTA argues that it does not oppose competition, but that an existing cable television operator should not be assessed those costs of getting the newcomer on the poles which are the legitimate responsibility of the newcomer. The Association also noted that there is no absolute statutory or regulatory requirement that Sammons be attached at the reference gain. The NJCTA points to sections of the standard license agreement which it believes demonstrates that the pole owning utility (NJU) assigns the cable television company its designated space on the pole. NJCTA contends that the party seeking to attach plant takes the poles as it finds them and, except for cases of safety code violations, is obligated to bear the cost of rearrangement. It also argues that cable operators are presumed to own all service drops installed by them or their predecessors.

OCTV Staff The OCTV Staff reiterates its support for competition and notes the extraordinary efforts that it has made throughout this entire process to try to get the parties to work together to expedite successful completion of the overbuild. Staff notes, that while it is undisputed that any party creating a NESC violation should be required to remedy that violation at its expense, it would be unfair to shift Shore Cable's proper costs of getting on the poles to other parties. In its position paper the Staff analyzes the submission of the other parties and makes the following specific recommendations:

1. The Board should reject Shore's contention that the reference gain is the mandatory point of attachment for an incumbent cable television operator.

2. Except for the correction of NESC violations, the Board should find that Shore is responsible for make-ready and attachment costs incurred due to its desire to attach to the poles.

3. The Board should order Shore to immediately continue the make-ready process and that Shore be required to conduct make-ready and attach its facilities in accordance with the standard License Agreement it has executed. As specified in that agreement, NJB is the appropriate entity to determine the place of attachment.

4. Shore should be required to submit a time-table for accepting its licenses, completion of make-ready and commencement of construction.

5. The other parties should continue to work with Shore to expedite the process.

6. The parties should be ordered to keep detailed records of make-ready costs, including administrative and engineering costs, to verify Shore is not charged for the correction of NESC violations.

7. The Board should require Shore and Sammons to submit detailed positions on the use of drop wiring and internal wiring. The positions should include a discussion of single and multi-unit dwellings.

Based on its review of the entire record, including the oral arguments of the parties, the Board is not persuaded that there exists any compelling legal or policy grounds to grant Shore Cable's request for emergent relief. In fact, to the contrary, public policy and safety consideration appear to require that Shore Cable follow the existing policies and regulatory requirements and make the proper arrangements for the completion of necessary make-ready work with New Jersey Bell, Sammons and Atlantic Electric prior to being allowed to attach to the poles.

Shore Cable has not met its burden of demonstrating immediate and irreparable harm and its filings do not meet the minimum requirements for emergent relief. Crowe v. DeGioia 90 N.J. 126, 132-134 (1982). The Board notes that Shore Cable was certified approximately fourteen months ago and, to date, has not attached to the poles. Significant construction is usual during

the first year to eighteen months following certification. The Board notes that on numerous occasions since the awarding of the Certificates of Approval, the OCTV has advised and encouraged Shore Cable to proceed with make-ready and construction work, even though certain cost responsibilities were in dispute. In fact, the Board's April 30, 1991 Order initiating this proceeding put the parties on notice that it expected make-ready and construction work to proceed pending the Board's review of the disputed cost issues. Despite these efforts, Shore Cable apparently chose not to complete the proper arrangement with Sammons for make-ready work until certain cost allocation issues were resolved. The Board finds no merit to Shore Cable's allegation that it was unable to access the communications space on the pole due to the underlying dispute. The Board agrees with New Jersey Bell that there is nothing preventing Shore Cable from proceeding to get on the poles, but that they must first make the proper arrangements with New Jersey Bell and Sammons, just as any new attachee would have to make.

Finally, on August 5, 1991, Shore Cable asked New Jersey Bell, the pole owning utility, for permission to make certain temporary attachments. New Jersey Bell responded by letter dated August 13, 1991 asking for more specific information regarding the location of these attachments. To the best of Board's information, Shore Cable has not responded to New Jersey Bell's letter. In the absence of such information and in the absence of any showing of good cause on the part of Shore Cable as to why it has not made the proper arrangements for make-ready work with Sammons, there does not appear to be sufficient legal or policy basis for the Board to depart from long standing regulatory policy to permit large scale temporary attachments without the completion of the necessary make ready work and appropriate attachment authorization. Without more detailed information, and without good cause shown, such a blanket waiver by the Board is inappropriate because it could possibly compromise safety, and would set an improper precedent for future pole attachments by other cable television operators seeking access to the poles.

For all these reasons Shore Cable's request for emergent relief is HEREBY DENIED.

The Board wishes to emphasize, however, that it remains committed to the implementation of competition in the cable television industry in the state, and that it is committed to removing any real or perceived obstacles to the successful

completion of this project and resolving the outstanding issues attending this overbuild in a fair and reasonable manner. The Board, having completed its full review of the submissions of the parties and the outstanding issues, is prepared at this time to make certain findings with respect to the disputed issues and to establish a detailed make-ready timetable for the construction of Shore Cable's system which it DIRECTS the parties to follow in order to achieve a timely and successful completion of this project.

1. The Board REJECTS Shore Cable's contention that the reference gain is the mandatory point of attachment for an incumbent cable operator. Shore's interpretation of the reference gain as a mandatory attachment location for a cable television system is unsupported, and in fact contrary to existing practice and procedure. The reference gain is a location on a utility pole which demonstrates the beginning of a neutral zone, the separation between power supply conductors and communications facilities. The reference gain usually represents the highest point for communications attachments, but is not the mandatory point of attachment. Additionally, the location of a reference gain may, in fact, be adjusted higher or lower by changes in space allocations between the utilities pursuant to their Joint Use Agreement. Such reallocations are often made to accommodate a cable company's attachment to avoid more involved plant rearrangements. Moreover, the NJB License Agreement indicates that the NJB can specify attachment locations and the "40/48 Stipulation" is explicit in requiring space reallocations and minimal attachments above/below a reference gain subject to NESC clearances and future utility needs. Additionally, certain varying field conditions such as pole setting depth and changes in final grade may effectively alter the reference gain.

The procedures developed for pole attachments and associated make-ready are designed to allocate pole space in a safe, efficient and economic manner. There is no statute, regulation, agreement or Board Order which requires that Sammons be attached precisely at the reference gain or which prohibits reassignment of the reference gain location. In fact, given predictable field conditions and necessary adjustments which are made in the field on an ongoing basis, it would be unreasonable to expect Sammons' plant to always be at the reference gain or for the reference gain to remain in a fixed location over time given field conditions and requirements.

2. The Board FINDS that as a result of extraordinary measures taken by the parties to mitigate Shore Cable's make-ready costs, Shore Cable's expected make-ready costs have been

substantially reduced from earlier estimates. In particular, the Board commends New Jersey Bell for its mitigation efforts and its willingness to try other non-standard methods of cable attachment, including allowing Shore Cable to use both sides of the poles. These measures should reduce the number of required pole replacements, which is the single most costly element of make-ready in most cases, and should reduce substantially the rearrangement work by all parties. The Board also notes that New Jersey Bell stated at oral argument that as a result of these mitigation measures, Shore Cable's make-ready costs could be reduced to a level of approximately \$200,000, as compared with early estimates which ran as high as \$2,100,000. New Jersey Bell's most recent estimate appears to be well below even Shore Cable's most optimistic earlier estimate.

The Board is troubled by Shore Cable's failure to address the impact of the measures taken by the parties to mitigate Shore Cable's make-ready costs. Further, Shore Cable has not provided any evidence that its make-ready costs would be lower if Sammons were to move its plant to the location which Shore Cable contends is the proper location for an initial cable operator. To the contrary, New Jersey Bell argues that this would actually cause Shore Cable's make-ready costs to be far greater, because NJB's wires would need to be lowered on every pole and a larger number of pole replacements would also be required. The Board believes that the proper focus of make-ready should be to minimize the proper costs of the applicant while avoiding unnecessary work being required of the existing pole users, consistent with all applicable safety standards. The Board is satisfied that the mitigation measures taken by the parties should reduce Shore Cable's make-ready costs, to a level considerably lower than even the most optimistic estimates made at the time the Certificates of Approval were awarded. Additionally, make-ready should provide for the most efficient use of the finite space available on utility pole structures. The Board believes that New Jersey Bell's make-ready process will result in efficient use of the pole space.

3. The Board FINDS that any pole attachment which violates the National Electrical Safety Code (NESC) must be corrected at the violating party's expense. This requirement is consistent with applicable law, regulations and agreements.

4. The Board FINDS that all the make-ready work, including but not limited to rearrangements, pole replacements, bonding, guying etc., undertaken to accommodate a new license applicant and not otherwise required to be performed because of NESC violations, is to be done at the expense of the new license applicant. Shore Cable is HEREBY DIRECTED to immediately

continue with the make-ready process in accordance with the schedule set forth in paragraph 7 below, and to attach its facilities in accordance with the Standard License Agreement it has executed. As specified in that agreement, NJB is the appropriate utility to determine the place of attachment. Shore Cable is HEREBY DIRECTED to pay NJB, Atlantic City Electric and Sammons for all make-ready work necessary for Shore Cable's attachment to the poles, except for NESC violations which are to be corrected at the expense of the responsible party. The Board agrees with the positions of the NJCTA, NJB, Sammons and Staff that, absent any NESC violation, the party seeking to make the attachment takes the plant on an existing pole as it finds it, with attachments as designated by the pole licensor, and that it is obligated to bear the cost of rearrangement on the pole in order to accommodate its attachment. This is consistent with all applicable statutes, regulations, Board orders and agreements.

5. The Board FINDS that, absent a showing to the contrary cable television operators are presumed to own all service drops and internal wiring installed by them or their predecessor entities to provide for the delivery of cable television service. The cable television company is required to maintain the integrity of such plant under both the regulations of the OCTV and the Federal Communications Commission. Thus, absent agreement of the parties or a showing to the contrary, a cable television operator is presumed to own such drops and internal wiring. Shore Cable shall install and use its own drop wiring absent any agreement with Sammons to do otherwise, or absent a future Board order to the contrary.

6. The parties are HEREBY DIRECTED to keep detailed records of make-ready costs and work, including administrative and engineering costs and copies of all make-ready surveys and worksheets.

7. In order to assure a successful and timely completion of this overbuild the parties are HEREBY DIRECTED to comply with the performance schedule as set forth herein. The Board notes that on September 25, 1991 all parties were sent a fax containing the preliminary outline of the make-ready schedule as adopted by the Board at its September 25, 1991 agenda meeting. Shore Cable is advised that in the event it decides to contest any specific make-ready cost assignment, and Shore Cable is ultimately deemed entitled to a reimbursement of any such make-ready costs, the time value of those costs paid by Shore Cable can be considered. The Board notes that NJB has completed rearrangement work on the first three licenses on September 9, 1991. The Board further understands that Sammons has reviewed

and provided an estimate on two of the make ready licenses. Therefore, the parties shall concentrate their initial make-ready efforts on these licenses. The performance schedule shall be as follows:

- Sammons shall immediately provide Shore Cable with the cost estimates for work to be performed on the first two licenses.

- Shore Cable shall make the estimated payments to all parties within 72 hours of receipt of those cost estimates.

- Sammons shall begin rearrangement work on the two licenses within 72 hours of receipt of payment by Shore Cable.

- By Monday, October 7, 1991, Shore Cable shall submit all outstanding make-ready surveys to NJB and Sammons with a schedule of the order in which each application should be reviewed.

- Beginning on Monday, October 14, 1991, and on each Monday thereafter, NJB, Sammons, and where necessary, Atlantic Electric, shall have reviewed and returned to Shore Cable an estimate for make-ready work on at least one license (approximately 200 poles). Licenses shall be completed in the order of priority requested by Shore.

- Beginning on Monday, October 21, 1991, and on each Monday thereafter, Shore Cable shall sign off on the make-ready estimates received the previous Monday and submit its payments to each party doing rearrangement work.

- Beginning Monday, October 28, 1991, NJB, Sammons and Atlantic Electric shall begin rearrangement work on the license it received payment for on the previous Monday. All parties shall continue to complete rearrangement work on at least one license within two weeks of the Monday on which it was received. Using this schedule, at least one license application consisting of approximately 200 poles should be ready for construction by Shore Cable every two weeks.

- On or before Monday, November 11, 1991, Shore Cable shall begin construction of the sixteen remaining licenses as they receive them from the parties. Shore Cable shall construct its entire coaxial cable system by July 1, 1992, barring any unforeseen circumstances or events beyond the parties' control.

- This is an ongoing process of review, rearrangement and release to Shore Cable of a continuing supply of poles ready for attachment. This process will enable Shore Cable to begin

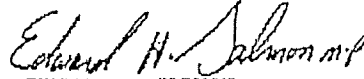
construction on the first license by October 21, 1991 and to continue through to completion on or about July 1, 1992. This schedule calls for the release of an average of 100 poles per week to Shore Cable for construction.

- All parties engaged in make-ready shall notify the other parties and the Director of the Office of Cable Television of any unforeseen circumstances which will delay the schedule outlined above within 24 hours of knowledge of such situation.

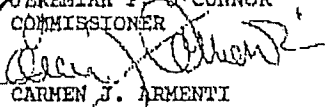
The Board believes that the schedule outlined herein is a reasonable one. The Board recognizes that schedule that is brisk, but does not believe it to be unduly burdensome. If the parties can agree among themselves to a modified or more expedited construction schedule, such a schedule should be brought to the Board's attention for consideration. In the absence of such a Board approved agreement, with the exception of unforeseen situations beyond the control of the parties, such as weather conditions, the Board anticipates and expects that the schedule set forth herein will be adhered to by all the parties. The Board urges all the parties to cooperate in order to bring this project to a timely and successful completion.

DATED: October 4, 1991

BOARD OF REGULATORY COMMISSIONERS
BY:


DR. EDWARD H. SALMON
CHAIRMAN


JEREMIAH P. O'CONNOR
COMMISSIONER


CARMEN J. ARMENTI
COMMISSIONER

ATTEST: 
CHRIS WILSON
SECRETARY