



State of New Jersey

DEPARTMENT OF ENERGY
BOARD OF PUBLIC UTILITIES
1100 RAYMOND BLVD.
NEWARK, NEW JERSEY 07102

6/6/79
CATV/LEGAL

IN THE MATTER OF THE OFFICE OF CABLE)
TELEVISION'S INVESTIGATION INTO THE)
PRACTICES AND OPERATIONS OF CATV)
COMPANIES AND CERTAIN UTILITIES UNDER)
THE PROVISIONS OF SECTIONS 20 AND 21)
OF THE CABLE TELEVISION ACT.)

HEARING EXAMINERS'
REPORT
AND
RECOMMENDATIONS

DOCKET NO. 769C-6206

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BEFORE HEARING EXAMINERS JOSEPH J. FISCHER, ESQ., AND EDWARD D. BESLOW, ESQ.:

This inquiry examines the practices and operations of cable television companies, electric utilities and telephone utilities with regard to their shared use of facilities.

PROCEDURAL HISTORY^{1/}

On September 10, 1976, the Office of Cable Television (Office), by Director John P. Cleary, issued a Notice of Inquiry (published in the October 8, 1976 New Jersey Register) inaugurating an informal investigation into certain aspects of the use of public utility facilities by cable television companies. Comments were requested regarding pole attachment agreements and their development, the basis of the rates therein, problems in implementation, problems in restoration and maintenance of service, considerations in the determination of the terms and conditions of agreements and the possibility of a pole rental formula and the criteria therefor.

Comments and reply comments were filed in late 1976 and early 1977. It is significant to note that in those comments the question of the Board's and Office's jurisdiction to conduct this inquiry was raised.

On March 10, 1977, a Notice of public hearing concerning the topics of the September, 1976 Notice was published in the New Jersey Register. At a March 31, 1977 informal conference we requested that the parties (1) brief the jurisdictional issue and (2) prepare all direct testimony. Hearings, to continue through the pendency of the jurisdictional question, were held on April 5 and 6, 1977 and on May 12, 1977, with an informal conference held on April 7, 1977.

On May 12, 1977, hearings were indefinitely suspended until the resolution of the jurisdictional question. Similarly, on July 14, 1977, we suspended the conduct of discovery and the filing of testimony. In its Order of September 8, 1977, the Board found that proper jurisdiction existed and directed that this inquiry continue. On October 3, 1977, New Jersey Bell Telephone Company (NJBT) filed a Petition for Reconsideration of the Board's September 8 Order. On November 29, 1977, the New Jersey Cable Television Association (NJCTA) filed an appeal with the Board relative to our rulings with regard to certain interrogatories. Oral argument on this appeal was held before the Board on January 6, 1978. During this argument, upon clarification of the September 8 Order by Commissioner McGlynn, NJBT's Petition for Reconsideration was withdrawn.

^{1/} For the most part the history outlined herein is in the nature of a summary of that contained in the Board's September 8, 1977 and January 31, 1978 Orders in this matter.

On January 31, 1978, the Board approved an Order Granting Appeal From Rulings of Hearing Examiners. This Order, modifying our rulings with regard to certain interrogatories, directed that the discovery process and the prefilling of testimony continue. In accordance therewith, the time-consuming discovery process concluded during August, 1978. Statements summarizing the views of each party with regard to this investigation, were filed in September, 1978.

In the cover letter to its September 6, 1978 Legislative Statement, the NJCTA moved to incorporate by reference into the record of this investigation, all pleadings, testimony and exhibits developed in In The Matter Of The Petitions Of Micro-Cable Communications Corp., d/b/a UA-Columbia Cablevision of New Jersey; Cablevision of New Jersey; and Suburban Cablevision Requesting The Board of Public Utilities To Require Conformance To Standard Practice With Respect To Cable Television Pole Attachments And To Prevent The Imposition Of Unreasonably Higher Standards By New Jersey Bell Telephone Co. And Public Service Electric And Gas Co., Docket Numbers 786C-6375, 786C-6376 and 787C-6386.^{2/} Oral argument on this Motion was held before the Examiners on October 19, 1978. On December 14, 1978, we granted the NJCTA Motion to incorporate the above noted dockets into the record in this matter.

Seven days of legislative type hearings were held during October, 1978.^{3/} Subsequently, in accordance with our directive, Final Briefs were submitted during January, 1979.

THE CABLE TELEVISION/UTILITY CONTRACTUAL RELATIONSHIP

Subject to numerous technical requirements contained in different codes, the historical relationship between cable television companies and utilities for the joint use of facilities is contractual in nature. The terms and conditions of these contracts, and the rights and liabilities apportioned thereunder, are the framework upon which hangs the disputed areas discussed herein. Thus, an understanding of the historical basis for these contracts becomes essential.

The NJBT Agreement: NJBT's first involvement with the cable television (CATV) industry regarding the attachment of CATV facilities on utility poles began with its December 31, 1952 License Agreement with South Jersey Television Cable Company. At that time it was decided by NJBT that

^{2/} This matter, sometimes referred to as the "40/48 dispute", involved in part a dispute over the fair distribution of make-ready costs (see later discussion) among the various users of the pole space. After twenty-one days of hearings and extensive settlement negotiations on October 5, 1978 Stipulation of Settlement was agreed to. This Stipulation was approved by the Board.

^{3/} In conformance with the Board's desire that this investigation proceed in as nonadversarial a manner as possible, all questions at these hearings originated with the Examiners and Dennis Linken, Deputy Director of the Office.

such attachment of facilities was in the public interest. It should be noted that this was a departure from NJBT's previous policy which limited pole attachment accommodations to electric utilities, Western Union and certain governmental agencies such as police and fire. This early contract, developed by members of NJBT's Engineering Department, became the model for all subsequent agreements with CATV companies.^{4/} These subsequent agreements contain modifications made (1) to accommodate the changing operational requirements of the CATV companies and (2) to clarify certain agreement provisions, such as construction standards. In particular, the 1970 version of the agreement reflected a change in policy whereby pole attachment accommodations were made available not only to a single CATV applicant but to all legally qualified applicants.^{5/} This 1970 agreement, and presumably its earlier versions, is the result of research by NJBT staff forces and its operating field forces, its corporate experience as well as input from American Telephone and Telegraph Company. (ATT)^{6/}

From its earliest form, the agreement has emphasized the mandate of the telephone company to provide "safe, adequate and proper service." Thus, the intent of such CATV pole attachment agreements is that they reflect fair business practices while insuring (1) the integrity of the telephone and power facilities attached to the pole, (2) the safety of all persons working on and near the pole and the public in general, (3) that NJBT is compensated for the attachment accommodation it provides and any associated expenses it incurs in making such accommodations available and (4) that there is definitive liability protection and responsibility for all parties attaching to the pole.^{7/}

4/ The agreement now is in its third revision. With the exception of 15 CATV companies, all are covered under 1970 type agreements. Six companies are covered by the 1952 agreement, one by the 1965 agreement and eight by the 1967 agreement.

5/ A legally qualified applicant would possess necessary municipal and Board approvals and would have signed a standard agreement with NJBT.

6/ ATT provides a variety of services under License Contracts between it and each of the Bell System Operating Companies. These services give NJBT the benefit of the experience and expertise of ATT's General Department and of the Bell Telephone Laboratories. In the course of this relationship, NJBT and ATT have discussed the development of the language of CATV attachment agreements.

7/ These four areas are additionally addressed in Bell System Practice Manual 937-120-901, CATV Bulletins and the NJBT Manual of Construction Procedures.

Perhaps the best summary of the policy of NJBT with regard these agreements is contained in its September 1, 1978 Statement wherein it was noted at pages 1-2, that:

"... Fundamental to an examination of the relationship between New Jersey Bell and New Jersey's CATV industry is a recognition of the Status of New Jersey Bell as a public utility. New Jersey Bell's primary responsibility as a public utility is the provision of common carrier communications services.... The license agreements recognize New Jersey Bell's responsibility to give primary consideration to its public utility service obligations when permitting others to use its property for their purposes... It is New Jersey Bell's intent that its license agreement reflects fair business practices without compromising the legal responsibility of the Company as a public utility."

The importance of the NJBT agreements becomes obvious when one realizes that on poles jointly owned, or jointly used by NJBT and another utility company, in accordance with joint use and joint ownership agreements between utilities, usual practice is for NJBT to execute the agreement with the CATV company.^{8/} In that regard we point to such agreements NJBT has with Atlantic City Electric Company (ACE), Jersey Central Power and Light Company (JCPL), Public Service Electric and Gas Company (PSEG) and Rockland Electric Company (REC). Typical of the joint use agreements is that between NJBT and JCPL.

8/

It should be emphasized that the joint agreements between the power companies and NJBT provide that attachment by anyone else to jointly held facilities must be subject to those obligations of the utilities.

As noted by JCPL at page 1 of its November 23, 1976 Comments:

"...Under that agreement (JCPL) and (NJBT) have agreed to each own approximately 50 percent of the utility poles which are jointly used by both companies. With respect to third party attachments, regardless of which company owns the jointly used pole, (JCPL) is responsible for all agreements covering the attachment by a third party of supply circuits; (NJBT) is responsible for all agreements covering the attachment by a third party of communications circuits including CATV wires....^{9/}

As a result of the foregoing joint use agreement between (JCPL) and (NJBT), the only poles owned by (JCPL) which are subject to a joint use agreement between (JCPL) and a CATV company are those poles which are not in joint use with (NJBT). The number of such poles is relatively small.^{10/} Most of (JCPL's) poles to which CATV companies are attached are in joint use with (NJBT), and the CATV attachment agreement is the responsibility, in such cases, of (NJBT)." (emphasis and footnotes added)

The rationale for allowing NJBT to administer agreements with CATV companies, at least in the case of PSEG, was that it was assumed the market for CATV would be limited to fringe areas. Thus, since foreseeable growth was minimal and CATV was considered a minor communications facility, PSEG created the attachments as under the jurisdiction of NJBT with all associated rights, obligations and liabilities. It is interesting to note that as of November 22, 1976 about 38,000 CATV attachments were on joint poles in PSEG's territory. However, since a 50 percent penetration of television households in New Jersey by CATV would represent approximately 400,000 PSEG poles, PSEG had indicated that on that date it was discussing changes in the joint use agreement between it and NJBT to enable PSEG to participate in rental revenues for CATV attachments to poles.

^{9/} It is interesting to note the opinion of John F. Born, testifying on behalf of ACE, that:

"...(O)ur joint pole agreement with Bell Telephone Company treats third-party attachments as sort of a diminutive thing. (I)n the context of that agreement (it) was not expected that there would be a great many third-party attachments..." (October 13, 1978 transcript pp. 8-9).

^{10/} JCPL's first agreement with a CATV company for joint use of poles was executed July 7, 1975 with Morris Cablevision. By way of comparison, as of November 22, 1976, ACE had no agreements with CATV companies relevant to pole rentals, but such attachments had occurred since the early 1930's under ACE's joint use agreement with NJBT. Similarly, as of December 22, 1977, REC had no agreements with CATV companies for solely owned, solely used poles but were in "negotiations" with TA-Columbia and with Cablevision of New Jersey.

There has been a great deal of testimony going to the issue of the degree of negotiating that occurs between CATV companies and NJBT with regard to the terms of attachment agreements. In this regard, it is the position of NJBT that the License Agreement used for third party attachments includes terms and conditions of use designed to assure the safety of NJBT employees and subscribers, as well as the integrity of telephone plant and service.^{11/} Negotiations with CATV companies are conducted in accordance with Bell System Practice Manual 937-120-901 by the appropriate District Engineer and approved by the appropriate Area Engineer. Subsections 4.01 and 4.02 of the Practices, (Administration of CATV Agreements), entitled "Negotiation of License Agreement," state that:

"The District Engineer upon determining that an applicant is qualified will notify him by letter and advise him that we will proceed with the preparation of the agreement upon receipt of the Agreement Preparation Fee and a Certificate of Approval from the P.U.C. He should also be reminded that no work will be undertaken until the Surety Bond and Liability Insurance requirements are fulfilled.

Upon receipt of the Agreement Preparation Fee the District Engineer shall forward the check by letter to the Treasury Department and proceed with the preparation of the agreement."

Bulletin 24, noted by NJBT in response to NJCTA interrogatory IV of June 15, 1977 relative to negotiation of attachment agreements, discusses planning for joint use with CATV facilities, but is silent on the subject of negotiations. Bulletin 26, also cited by NJBT, is directed toward specific make-ready problems encountered with CATV "dual franchises" - not a common situation in New Jersey. It would appear that usual practice between NJBT and a CATV company would commence with a request for use of telephone poles, such request being referred to the appropriate NJBT District Engineer who meets with CATV company representatives to determine the area to be served, proposed schedules and other related matters. The CATV company is then given an unsigned copy of the standard License Agreement with a signed letter of intent to execute the agreement. When the CATV operator acquires the necessary governmental approvals to occupy the public right-of-way, the License Agreement is signed in duplicate by the authorized representatives of NJBT and the CATV company. In all cases in which poles are owned or used jointly by a power company, acceptance of the CATV attachment (third-party attachment) must be obtained in accordance with existing NJBT/electric company joint agreements.

^{11/} NJCTA feels this results in unilateral, unpredictable changes in the CATV attachment agreements, such changes based on NJBT's joint use agreement with power utilities.

It is the position of the NJCTA that the above does not constitute "negotiation" of agreements in the true sense of the word. As set forth in its December 2, 1976 Comments, at pages 3-6:

"The form of agreement... was developed over a period of time prior to the enactment of the Cable Television Act. The legal status of cable television systems at such time was uncertain. Aside from the additional source of revenues..., there was little incentive to permit the cable television systems to use utility facilities. In that framework, the cable television operator can hardly be said to have enjoyed a bargaining position equal to that of the utility in negotiating for the use of utility facilities. Those contracts were not "negotiated" in any true sense of the word, and were offered by the utilities on a "take it or leave it" basis....

It should be noted that notwithstanding... disagreement with the contracts, the cable television operator in a developing area is still faced with an unpleasant dilemma when the utility seeks to have him agree to the form of contract submitted by the utility. He can either execute the agreement in the form submitted by the utility and endure... expenses and problems... for the sake of expediting the development of his system or he can file a petition with the Board and the Office... for relief under Section 20 of the Cable Television Act. This latter course of action generally presents the less attractive option to the operator. Not only will he be unable to develop his plant to the satisfaction of the municipal governing body which granted the original franchise..., (but) he will also have to incur the costs of litigation. Additionally, there is the risk of rupturing whatever good relations may have been developed with utility field personnel over time, thus, running the risk of even further delays, should he be successful. On balance, typically, he will acquiesce to the demands of the utility companies, even though he does not agree with the terms, conditions and rates set forth in the contract proffered."

The PSEG Agreement: PSEG's first attachment agreement with a CATV company was its February 4, 1972 agreement with Plainfield Cablevision Inc. This standard agreement, developed by PSEG Utility Relocation Engineers with the assistance of the Law Department, is modeled after that used by NJBT.

Pursuant to its joint ownership agreement with NJBT, the policy of PSEG with regard to pole attachments by CATV companies has been to allow NJBT to handle all requests for attachments to jointly owned poles. Requests to attach to PSEG solely owned poles shall be granted if the CATV company has a valid franchise covering the requested attachments in the specific municipality and (1) the pole line is the only one available or (2) if a choice of pole lines is available, the PSEG line will not require substantial rebuilding to accommodate CATV attachments. All CATV attachments to PSEG solely owned poles shall be covered by a signed agreement containing the general conditions for the use of PSEG poles. The agreement must be fully executed and the insurance coverage and surety bond required by the agreement accepted by PSEG before any attachment permits are approved.

As to the degree of negotiating that actually occurs prior to the preparation of attachment agreements, the following series of questions and answers from the October 5, 1978 hearing is illuminating:

"Q - You state that pole owners and users should be free to negotiate terms and conditions which are appropriate for their particular situations. By situation, do you mean their technical and timing needs or do you mean their relative economic strengths?" (page 24).

"A - I think where you're negotiating with them, there may be specific requirements..., particularly where they are represented by legal counsel..., that they would want in the agreement which might differ from the standard form agreement in terms that we have established... We should be free to sit down and talk those things over with them, not that we would expect that anything would change... the intent or that we would agree to provide special considerations for one CATV company, as opposed to the other... Rather, more in the terminology of just being sure that everyone is satisfied with what the terms are and that they all understand them." (page 25).

"Q - Do you have in mind any particular terms and conditions that you feel are negotiable?" (page 25).

"A - Yes, I believe there are some that might be negotiable... so long as it doesn't jeopardize our responsibility to provide safe and adequate service...." (pages 24-25).

"Q - You talk (of) putting cable television companies in the same bargaining position as the utilities... so as to have a more equitable approach to all parties.... More equitable than what?" (page 26).

"A - I don't think there's any question that as the owner of a facility, it puts you in a little better bargaining position in dealing with anyone who is looking to use your facilities. ... (One of the proposals that we have made, which I think would eliminate this problem or make things more equitable, would be if the CATV company was a joint owner of the pole." (page 27).

"Q - What I am saying here is, you do not agree with me that it would be more equitable that the Board allocate the costs and rates and liabilities for such agreements than if the parties do it, and what I am asking you is, isn't that really ignoring the reality of the situation, that, in fact, utilities do own the poles, in fact, they are in a stronger economic position and, in fact, the cable company has no place else to go? (pages 35-36).

"A - From an economic position, I would tend to agree that they have no place else to go... I think this is just one of the growing pains which the CATV industry has to contend with, just as the communication and electric utilities had to at one time...." (page 36).

"Q - In other words if negotiations fall through, you would anticipate resorting to the Board?" (page 38).

"A - What we are talking about is negotiating something brand new. I think that that would be the responsibility of the CATV company to determine a course of action in that area, since they are the ones looking for agreement with us. I don't know that we would have any particular impetus to come to the Board or any other agency and ask them to get in the middle of such negotiations." (page 38).

The NJCTA's contentions above with regard to negotiations with NJBT encompasses negotiations with PSZG.

Independent Telephone Company Agreements: Answers to interrogatories indicate minimal activity between independent telephone companies (Non-NJBT) and CATV companies.^{12/} The agreements in use by such companies are very similar to those used by NJBT.^{13/} Due to lack of activity between such telephone companies and CATV companies, there is limited data or testimony relative to the negotiation of these agreements. United Telephone Company did provide its practice manual for administering agreements with CATV companies, but this manual like that of NJBT never discusses the degree to which standard agreements may be modified via negotiations.

Summary: CATV relations with utilities are historically contractual in nature. The prevalent agreement in force is NJBT's 1970 agreement, or one of its earlier versions. The reason for this stems from NJBT's joint agreements with the State's power utilities. Those joint agreements, which predate the CATV agreements, treat third party attachments (such as CATV) in a de minimus fashion and assign responsibility for all third party communications attachments to NJBT.

12/ Garden State CATV, Inc. has agreements with United Telephone Company of New Jersey, Continental Telephone Company of New Jersey and Warwick Valley Telephone Company. Washington Cable Company has agreements with New Jersey Telephone Company and West Jersey Telephone Company.

13/ We do note that a number of these companies use a joint use form of agreement rather than the usual pole attachment agreement. Such agreements allow the telephone company to (1) dual lash to the same strand with the CATV company and (2) rent unused CATV channel capacity.

The NJBT attachment agreement with CATV companies stresses the telephone company's mandate to provide "safe, adequate and proper service." As a result of this mandate, there would appear to be a reluctance on the part of NJBT to negotiate on most, if not all, provisions of the standard attachment agreement. Due to what it perceives as the inequitable relative bargaining positions of the parties to the agreement, the NJCTA contends that NJBT's reluctance to negotiate is equivalent to no negotiation at all.

In general, we agree that there has been very limited negotiation of attachment agreements. Thus, our discussion below relative to these agreements and the myriad of issues tangential thereto, should be viewed in light of (1) the "negotiated" posture of these agreements and (2) utility company mandates as to service.

RELATED MAKE-READY CONCERNS

The concerns of utility and CATV companies relative to the preparation and maintenance of poles may best be understood by examining the procedures involved in attaching to poles.

Pole Attachment Procedures: Initially, a CATV company must secure a municipal consent and a Board Certificate of Approval, prior to attachment to utility poles. As noted earlier, the power utilities have agreements with most of the telephone companies in their service area regarding the joint use of poles. Under the terms of those joint agreements, any third party who wishes to attach to the communications space on the pole must make the necessary arrangements through the appropriate telephone company. In those instances where the pole in question is not being used jointly, then by the terms of the joint use agreement, the appropriate telephone company still must determine whether it wants to use the communications space and/or keep control over that space. Only if it decides that it desires to retain neither of those options will the telephone company release the pole to the power company, which will then deal directly with the CATV company. At all other times, CATV companies deal with the telephone company.^{14/} The telephone company in most cases is NJBT.

As noted earlier, the entire process of pole attachments between CATV companies and NJBT commences with the CATV company's acceptance of the "negotiated" licensing agreement. This is subsequently followed by individual attachment applications for specific poles.^{15/} The CATV company, NJBT and the appropriate electric utility (if involved) review the CATV company's plans and adopt a proposed construction schedule, to commence with a make-ready survey.

A make-ready survey is a procedure of "walking the poles" in order to determine what work must be done on the poles in order to accommodate the additional attachment. Such work is usually performed to bring the new attachment in conformance with the National Electrical Safety Code (NESC). That code, among other things, provides for the clearances that must be established and maintained between different facilities. The purpose of clearance is to ensure that the different facilities do not come in contact with each other to cause service interference and hazardous conditions. In arranging attachments, electric facilities generally occupy the top of the pole and telephone and CATV facilities occupy lower portions at specified intervals. If the pole in question cannot accommodate the new attachment, it may be necessary to "change-out" that pole. Such a procedure would involve the replacement of the existing pole with a new, higher pole that will accommodate all attachments without violation. In addition to rearrangements, make-ready work may involve additional guying and anchoring if it appears that the additional facility would create such stress as to require further support for the pole. If the pole itself does not have the strength to sustain the additional burden, it is changed out.

14/

An exception to this occurs between JCPL and Continental Telephone Company, whereby the actual pole owner makes all arrangements with CATV companies for use of its poles.

15/

In 1976, NJBT waived the fee for these applications in the interest of encouraging their submission for all poles. It has been recommended that the NJBT agreement be modified accordingly. In that we concur.

With regard to poles governed by the NJBT/electric utility joint agreements, there are three different procedures used for the conducting of make-ready surveys. Either (1) the power and telephone company conduct the survey jointly, (2) NJBT conducts an initial survey alone and the power company joins NJBT in surveying problem poles, or (3) NJBT conducts the make-ready survey for all parties.

The first of these survey procedures is typified by the relationship between NJBT and REC. In such a case, the make-ready survey, conducted at the CATV company's expense, consists of REC and NJBT representatives evaluating all poles on which the CATV company is to attach. On all poles and spans where a clearance problem is suspected, measurements are made at those poles or at midspans. If proper clearances cannot be maintained with the addition of CATV facilities, work must be performed to attain such clearances. In such a case, the pole number and location are noted on a survey sheet, which includes the work that must be done by REC. After the survey for the CATV expansion has been completed, the survey sheets are forwarded to the responsible Estimating Department. The estimator will prepare a work authorization for the necessary work and develop an estimate cost for same. The authorization is written so as to assign each pole a unique item number, to which the crew performing the work will charge all time spent on the pole. Upon NJBT's request, an estimate of the costs is forwarded to NJBT. Once the completed work authorization and estimate is approved, it is forwarded to the line construction group which assigns it to a crew for completion. Upon completion of work, the completed work order and charges accumulated by item number are reviewed by the REC Plant Accounting Department. A bill for actual costs incurred will then be forwarded to NJBT for payment.

The second of the survey procedures is typified by the relationship between NJBT and JCPL. In such a case, NJBT conducts an initial sole survey. Based on such survey, NJBT notifies JCPL that a CATV company wishes to attach to a jointly used pole. JCPL would also receive a list of suggested rearrangements from NJBT. JCPL and NJBT (and the CATV company if it chooses) would then resurvey NJBT's recommendations, and the JCPL representative would write up the terms of the work orders for its crews.^{16/} If clearances cannot be maintained due to the addition of CATV facilities, rearrangement is required. This entire second survey generally takes one week to complete. During the next week, the work orders would be prepared. These orders would include the work to be done on each pole and an estimate of the material needed to complete the work. The next two weeks would entail receipt of internal approvals and the automation of the work to be done. Again, a bill for actual costs incurred will then be forwarded to NJBT for payment.

The third of the survey procedures is typified by the relationships of (1) NJBT and ACE and (2) NJBT and PSEG. In each case, the power company's joint agreement with NJBT provides that NJBT do all survey work for both NJBT and power company plant. The power company would only become involved in such a survey in what would be considered a unique situation. Regardless of who conducts the survey, the work done on power company facilities would be done by power company personnel and billed to NJBT.

^{16/}

We note that JCPL feels that two surveys are no more costly than one since JCPL has never charged a CATV company for this second survey in the past.

In all three survey situations, when rearrangement of NJBT facilities is deemed necessary, the CATV company is given an estimate of specific work to be done and the charges for such work. It should be noted that this estimate is then presented to the CATV company on a, more or less, "take-it-or-leave-it" basis. Once the estimates are "accepted" by the CATV company, the make-ready work is performed and invoices for the make-ready work are rendered by NJBT.

As the number of non-NJBT solely owned poles is rather small, experience with regard to make-ready surveys therefor is limited. Nevertheless, as is evident from the PSEG policy statement with regard to CATV companies submitted herein, such surveys and subsequent work are conducted in a manner similar to that used by NJBT.^{17/}

To complete the picture with respect to pole attachment construction, the Board should be aware that the above make-ready survey and make-ready work is often followed by reinspections of plant and subsequent make-ready work.

In general, on poles not subject to the NJBT joint agreements, the policy of the power companies has run the gamut from periodic inspections to a reservation of the right to reinspect. The basis of all such policies is the preservation of utility safety and clearance requirements. It must be stressed that all such policies must be viewed in light of the power company's relations with NJBT under the joint agreements. Under such agreements, on the majority of poles in New Jersey, NJBT may reinspect on its own initiative or may require the power company to reinspect. NJBT's policy with regard to reinspections is summarized in section 11.03 of the Bell System Practice Manual as follows:

"Subsequent inspections will be made at the discretion of the District Engineer within the limitations of the agreement. His judgement will be guided by the original inspection, past history of the company, expansion of building in the area and violations picked up on routine."

Again, the purpose of such reinspections is to maintain safe and proper attachments of CATV facilities to utility poles.

If NJBT (or an electric company in joint use with NJBT) requires additional pole space, it may under the terms of the license agreement request that the CATV company remove its attachments or pay the cost of any necessary rearrangement or replacement of poles.^{18/} As NJBT is unaware of such provision ever being utilized to require a CATV operator to remove its facilities, NJBT has proposed its elimination from the agreement. In this we concur. Pole rearrangements and replacements should be adequate to provide for subsequent, necessary pole attachment requirements.^{19/}

17/

See para. 3, Page 2, Attachment Two, to PSEG November 10, 1977 Answers to Interrogatories propounded by NJCTA.

18/

NJBT notes that the purpose of this provision is to protect utility ratepayers and to avoid delays in providing customers utility services for which the pole was originally placed.

19/

We note that a portion of our later discussion with regard to rental fees equates the right to require CATV removal with a tenancy-at-will. For the purposes of comparing the relative status of CATV companies under the agreements now in effect, such status still applies.

Within the above framework, two distinct problem areas have emerged. They concern (1) the timely completion of make-ready surveys and make-ready work by utilities and (2) utility billing policy and charges for make-ready surveys and make-ready work, as well as the relative rights of utilities and CATV companies with regard to reinspections and subsequent make-ready work. Each of these areas is discussed, in turn, below.

Timeliness of Make-Ready: The NJCTA alleges that CATV construction in the State has been delayed due to utility company inability to complete make-ready surveys and make-ready work in a timely fashion. Utility company responses to this allegation range from REC stating they have experienced no scheduling problems to JCPL stating that to the extent problems exist they have been caused by the CATV companies themselves. In that regard, JCPL views the problem as one of inadequate notice from the CATV companies rather than of utility inability to meet planned CATV construction commitments. As noted by PSEG at the October 5, 1978 hearing:

" (T)he lead time required is not fully understood by the CATV operator, and... (he) will make a commitment to a municipality as to meet a particular service date without checking with Public Service to see whether we could meet our end of that particular commitment." (Page 66, line 5)

While NJBT takes the position that complaints concerning delays in construction have been virtually eliminated, it also stresses that problems in this area, to the extent they exist, are caused by the lack of finite scheduling of activities by CATV companies.

An examination of the record herein reveals that both CATV companies and utility companies err to the extreme in their assessments of the situation. The timing problems noted by the parties are not as serious as the CATV companies would have the Board believe, nor are such companies blameless for the problems that do exist. Additionally, utility company testimony that scheduling problems have been virtually eliminated flies in the face of reality as does the position that the companies are blameless for problems that do exist.

We find that sporadic delays in CATV construction do occur. Such delays may be directly attributed to temporary fluctuations in utility manpower available for make-ready surveys and make-ready work. Contrary to the position of all parties herein, the blame for such fluctuations lies with neither the CATV companies nor the utility companies alone. Rather, these manpower fluctuations are caused by a historic lack of understanding and communication between the CATV and utility industries. ^{20/} The recommended solutions to this problem are as varied as the parties themselves. As discussed below, a combination of these recommended solutions should adequately match CATV manpower requirements with utility manpower capabilities.

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We do note that the Joint Utility Cable Technical Committee (JUCTC) formed under the Director's guidance has to some extent alleviated this problem in the last year.

Premake-Ready Attachments: The NJCTA has proposed that CATV attachments should be allowed prior to completion of a make-ready survey where hazardous condition would not result. It is felt that such a procedure, set forth at section 202 (C) of the NESC, would mitigate to some degree the bottleneck in CATV construction in the State. Under this proposed procedure a CATV company would be allowed to attach to utility poles prior to a make-ready survey when such attachment is a nonhazardous violation of the NESC or of the NJBT/utility joint agreement. This procedure is premised upon the assumption that a CATV company utilizing it would be chargeable for any additional survey or work costs incurred by this process. ^{21/} Disputes as to the hazardous nature of attachments would be decided by utility company personnel.

Adoption of this procedure is not without reservations. Mr. Robert Bilodeau, on behalf of Suburban Cablevision, testified at the hearing of October 6, 1978 that:

"I'm not suggesting ... (premake-ready attachments) ... as an alternative to the speeding up of the process because I think the disadvantage in doing that is the cable operator that leaves himself open to an unknown billing situation, unknown timing situation as to when the make-ready will be done and conceivably might find six years later he gets a bill for relocating the telephone equipment that he thought was done at that time, or, likewise, power equipment on the pole." (page 104, lines 15 to 24).

PSEG opposes premake-ready attachments in violation of the NESC even on a temporary basis. It is PSEG's opinion that section 202 (C), relied upon by NJCTA, only applies in cases of emergency or for temporary installations in unusual circumstances. It does not apply to routine construction work as is contemplated here. Thus, it is felt that proper coordination will obviate the need to create such violations.

NJBT points out that attachment of CATV cable to utility poles prior to the completion of make-ready is prohibited under the terms of the License Agreement between NJBT and a CATV company. The purpose of this provision is to protect the safety of NJBT and CATV company employees by reducing the possibility of hazardous conditions. Thus, NJBT opposes construction of CATV plant in violation of the NESC.

Section 202 (C) of Part 2 of the NESC, entitled "Safety Rules for the Installation and Maintenance of Overhead Electric Supply and Communication Lines", provides that:

"The person responsible for the installation may modify or waive certain rules in cases of emergency, temporary installations, or installations which are soon to be discarded or reconstructed, but shall promptly notify all parties directly concerned."

Thus, while the NESC would not specifically allow such attachments, it does not prohibit them, especially in the case of installations "soon to be discarded or reconstructed." However, while permissible under the NESC, the Code clearly makes such attachments optional at the utility company's option. In cases of NESC violations this should remain so. For non-Code violations of the NJBT/utility joint agreement, we feel there should be more latitude allowed to CATV companies. This is due to both the "negotiated" relationship between CATV and utility companies and the public interest to be served in promoting the availability of CATV service. Such a right to attach should be conditioned on all such attachments being surveyed on the initial make-ready survey and corrected, to the extent necessary, during initial make-ready work.

All additional costs for such work should be the responsibility of the CATV company.^{22/} Clearly, in cases of disputes as to the hazardous nature of any such attachment, utility personnel determinations should control. We are not unmindful of Mr. Bilodeau's reservations as to construction costs or time savings to be gained here. Frankly, we agree with him. At the least, all premake-ready attachments that are in violation of the NESC or joint agreement will have to be redone. However, in the case where (1) speed of CATV construction is of paramount importance and (2) there are no hazardous conditions created, we feel that post-Certificate of Approval, premake-ready attachments in violation of the joint agreement, but not the NESC, should be permitted at the CATV companies' option with prior notice of all such attachments to all parties involved. Such a procedure may speed up construction of CATV facilities while exposing utility companies to no additional excessive liability or harm. There has been no reason given not to permit it.

B. Make-Ready Surveys by CATV Companies: Normal procedure for the performance of survey work for NJBT requires that, at the time of an initial request by a CATV company for the right to attach within a municipality, NJBT district forces and CATV operators meet to discuss procedures and construction practices. A determination of work loads is then made and a schedule for completion of the survey and make-ready work is established.

In response to requests from several CATV companies, following a trial period NJBT offers CATV companies the option to perform their own make-ready surveys. Such survey work would be subject to:

"...the District Engineer's ... spot check in the field to determine the accuracy of information provided. The extent of spot-checking will be at the District Engineer's discretion; however, areas of known pole line congestion and areas in which no make-ready work is indicated should be given particular attention. If it appears that the quality of the survey is poor, the survey should be returned to the CATV operator with a request to resurvey the area. A survey custom work order shall be issued by the District Engineer to cover time involved in checking the operator's survey.

When the engineer is satisfied that the make-ready information is complete, he shall refer sheets involving power company... to the proper offices, and release a CWO for Telco make-ready work." NJBT Engineering Department Bulletin No. 23, 2/28/77.

It must be noted that in cases of continual poor performance, the NJBT option is subject to withdrawal at NJBT's discretion. NJBT's experience with this policy is that the quality of survey work varies from company to company. Generally, it is NJBT's position that the most practical survey method to minimize delays is to perform the survey simultaneously between CATV companies, electric utilities and NJBT.

22/

Those costs above those required for make-ready survey and work in the absence of such a premake-ready attachment.

The NJCTA notes that, due to uncertainty over the application of technical standards by utilities on the district level, there have been numerous resurveys following CATV sole-surveys. It is hoped that resolution of the "40/48 dispute" would clarify application of such standards in the future. However, even with such inconsistencies, the position of the NJCTA with regard to sole-surveys by CATV companies is typified by Mr. Bilodeau's testimony at the October 6, 1978 hearing whereat he stated:

"It was much quicker, more efficient for the cable company to simply do his own survey, assuming that it would be done properly, because he could accomplish a lot more in the same given period, and the cost was really not a factor. We weren't reducing our costs any, particularly in instances where a total resurvey was to be performed by the local engineer of the respective utility....The real cost to us is not being able to deliver the subscriber X number of months earlier. That's where the costs really build up. That can amount to hundreds of thousands of dollars when you're dealing with a large subscribing basis." (page 84, lines 4 to 23).

PSEG notes that, due to substantial disagreements between PSEG, NJBT and CATV companies relative to the "40/48 dispute", it has been more involved with make-ready surveys than in the past. As was the case with NJBT, PSEG has had good and bad experiences with sole-walks, but it is willing to let them continue subject to a right to resurvey. While it has considered the possibility of allowing sole-walks, REC presently has all parties on the pole take part in a joint survey.

We feel that sole survey walks can be beneficial to a CATV company that properly implements the NESC, the Bell Blue Book and other technical codes. Regardless of possible higher direct costs for such work, earlier receipt of revenues can still be beneficial to CATV companies. Thus, subject to two modifications, we feel the Board should adopt the NJBT standard as to sole walks. Such sole walks should be subject to (1) spot checks to determine accuracy and (2) possible resurveys by utility companies if numerous violations are found. In cases where such spot checks reveal continual compliance by a CATV company, the number of such spot checks should be reduced. In such a case, the need for a subsequent compliance survey by utility personnel would seem to be eliminated. In the alternative, should such spot checks reveal continual violations, the utility company should not be permitted to terminate this option. As the CATV company must pay for all spot-checks and subsequent surveys, we feel there is adequate deterrent to such continual violations.^{23/} Additionally, it is hoped that in the spirit of cooperation, utility and CATV personnel would work together to clarify any misinterpretations of technical specifications to avoid such continual violations.

The NJBT sole walk procedure should be further modified as to notice to power utilities. To the extent the power utility customarily accompanies NJBT on make-ready surveys, they should coordinate efforts with NJBT personnel as to spot checks and resurveys. In any case, whether a usual participant in make-ready surveys or not, the power utility should receive a copy of sole-walk survey results regarding poles it is attached to.

^{23/} Whether completely resurveyed or not, the CATV company should be responsible for costs to correct all violations that should have appeared on the original sole-walk survey, regardless of when discovered.

C. Expedited Make-Ready Work: After completion of all surveys, usual procedure by JCPL is to internally route automated work orders for approval prior to the commencement of make-ready work. In response to CATV industry requests for speedier make-ready work, JCPL has instituted a policy of allowing make-ready work to commence prior to advance internal approval of specific costs, materials and manhours. Such advance work, to be approved by JCPL's district managers, is dependent on cost and normal utility commitments. All such work would be done on weekends and not during normal business hours. Regularly scheduled construction work would not be delayed by such a process. JCPL indicates that, to date, no detrimental effects of this policy have been evident.

We are of the opinion that JCPL's expedited make-ready work procedure, while more costly due to utility overtime manpower needs, could save valuable time in the construction of small areas of CATV plant. The problem with an across the board implementation of this policy is that different utility companies have different internal work order routing approval procedures, inventory controls and manpower availabilities. Thus, we do not recommend imposition of a set requirement in this area. However, we strongly urge all utility companies presently doing make-ready work to investigate the possibility of a JCPL-type procedure. Implementation of such a procedure, at least on a temporary basis, would alleviate make-ready work backlogs and would more completely utilize utility personnel for make-ready work.

D. Notice To Utilities: As was indicated earlier, the general consensus among the utility companies is that any shortages in manpower available for CATV make-ready surveys and work are caused by inadequate notice by CATV companies to the utilities involved.

Present CATV practice is to notify the utility involved of the need for make-ready either (1) after filing a certification petition but prior to Board certification or (2) after certification. In either case it would appear that the lead-time necessary for utility manpower planning is ignored. Further, subject to limited exceptions, there is a general practice within the CATV industry to be silent as to necessary utility approvals and work when addressing municipalities during franchise proceedings. Thus, commitments as to service availability dates are made without reference to utility capabilities. Frequently, commitments and capabilities do not match. This situation is exacerbated by telephone company delays in forwarding make-ready applications to the appropriate power company.

The policies of the various utilities with regard to predicting manpower needs are, again, as varied as the companies themselves. PSEG trains their employees on a 6 month basis, but plans its requirements 18 months in advance. REC's manpower needs are based on the budget principle, whereby every 12 months it considers manpower hours available, maintenance work anticipated, capital work anticipated and CATV work anticipated. Due to its own minimal construction requirements, as well as its minimal involvement with CATV, REC normally needs two weeks notice to have men available for the survey and two months notice to have men available to perform make-ready work.^{24/}

Each year or two, JCPL develops a system development plan that, in effect, lays out and predetermines jobs that need to be done. Then, based on its manpower requirements for the particular type of work, JCPL might hire employees necessary to perform the work. Via their development plan, JCPL seeks to levelize their work to match their work force. With the caveat that its first and foremost work to be done is connecting new customers, JCPL thus develops its make-ready schedules.

It would appear that, on average, utility manpower planning occurs 12 to 18 months in advance of actual work performed. With some exceptions, CATV companies give anywhere from 2 months to no lead-time to utilities in their make-ready requests.^{25/} To whatever extent this planning gap could be closed, make-ready surveys and work should become more efficient from all perspectives. Thus, we recommend that when a CATV company applies to a municipality, a copy of all construction commitments be sent to the involved power and telephone utilities. By this we mean planned mileage of plant, both above and underground, on a yearly basis. A copy of all maps filed with the municipal consent application should accompany such notice to the utilities.^{26/} While, due to the uncertainties inherent in CATV franchising, the information received by the utilities may be less than desirable from an actual system design viewpoint, raw mileage figures alone should greatly enhance manpower forecasting. This early notification to the involved utilities will, on average, predate make-ready requests by 9 months broken down as follows:

- 2 to 3 months to schedule hearing
- 1 month to complete hearing
- 1 month to make decision
- 2 months to pass ordinance
- 2 months to receive certificate

To eliminate confusion as to promised commencement dates for CATV construction, all municipal consent applications should specifically state that cable will be attached to poles only after utility make-ready work is completed and that all construction commitments run from that date. While this will not speed up construction, it will greatly reduce the level of public criticism that utility companies, CATV companies, the Board and the Office must endure relative to the initial availability of CATV service in a community.

While the recommended procedures herein reduce the gap in lead time for manpower planning, they do not eliminate such a gap. It is hoped that utility companies would adjust their planning procedures to lessen the gap further. To whatever extent that is not possible, we would anticipate that the involved utility companies would attempt for forecasting purposes to annualize the 9 month advance notices so as to minimize shortages in manpower available for CATV make-ready.

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We note that, while the JUCTC has greatly improved this lead time, a more formal solution would seem to be indicated.

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Certainly, any additional information thought useful in utility manpower planning could supplement this minimal requirement.

E. Use of Outside Contractors:

In most instances make-ready surveys and work are performed by the utility company's own personnel. These persons, generally from the utility's engineering department, are required to have an understanding of most, if not all, of the following areas: outside plant construction techniques, splicing, cable, installations, equipment and materials, engineering theory and accounting. It should be noted that the specific qualifications for each job title are usually established by union contract.

As the timeliness of work by these crews is at issue, an examination of NJBT's procedures is useful. NJBT separates engineering activities into those projects with specific telephone service due dates and those involving maintenance, rehabilitation and rearrangement. Priorities are assigned to assure that due dates are met. Thus, lower priority telephone engineering work is performed when the availability of manpower permits. Within this framework, it is the position of NJBT that all assignments and rearrangements are made to assure timely completion of CATV commitments.

With the exception noted above as to sole CATV surveys, almost uniformly, the attachment agreements require that all survey and make-ready work be performed by utility company personnel. The primary concern of such employees is the provision of utility service. Thus, despite assurances of timely completions, the development of CATV service is accomplished by these personnel only if there is not a requirement for their utilization in utility activities. It is the NJCTA's position that substantial delays often result from utilities performing CATV work at their convenience and not necessarily in accordance with the construction schedule of the CATV company. To remedy this situation, the NJCTA recommends that the Board allow the use of qualified ^{27/} independent contractors committed to meeting the CATV company's schedule. It is perceived that use of such contractors will reduce costs for surveys and make-ready. However, regardless of the cost, the NJCTA feels that the real savings to CATV companies will be in its ability to arrange schedules and to modify same as new franchises cause modifications in construction plans.

There are three different utility positions relative to the use of outside contractors. Common to all three is the premise that a CATV company should not be able to hire its own outside contractors to work on utility facilities. The three different positions relative to the use of outside contractors are (1) the utility may hire and use them at its discretion, (2) the utility's union contract prohibits the use of outside contractors on pole line construction, and (3) the utility's union contract raises the cost for use of outside contractors in a prohibitive manner, but it will allow use of utility hired outside contractors.

Falling into the first of the above categories are PSEG and ACE. While PSEG has never used outside contractors specifically for CATV make-ready surveys or work, it has in the past hired such contractors and will continue to do so when PSEG management feels it is appropriate. At the hearing of October 3, 1978, it was stated, with regard to such a discretionary decision, that:

^{27/} Acceptable to both the CATV company and the utility involved.

"It may be a question of work load and ability to have its own people either trained and/or hire people to do that, it may be an interim period where there might be an anticipation of a peak load period where the company may elect, rather than to increase its work forces for a short period of time and then have to release them, that they might opt to use a contractor to do that type of work, but it still goes back to a basic over-all management decision on how we would approach such a problem and in any period of time that thing can vary substantially." (page 70, lines 8 to 20)

PSEG specifically points out that, for very short term use, the time necessary to train an outside contractor would negate its benefit. Rather, if the problem were serious enough, PSEG would shift personnel priorities internally. Accordingly, a CATV company dealing with PSEG would have to rely on PSEG's discretionary use of an outside contractor to do surveys and make-ready work on PSEG facilities.

Until 1974, ACE utilized outside contractors for pole line construction. Due to economic conditions subsequent thereto, ACE was faced with potential lay-offs so it released all outside contractors. While today ACE could, at its discretion, use outside contractors for pole line work, they object to CATV use of same to perform make-ready work on ACE facilities. This is based on the lack of training for such outside contractors and the need for direct supervision of same by ACE. Accordingly, a CATV company dealing with ACE would have to rely on ACE personnel or ACE hired outside contractors to do CATV surveys and make-ready work on ACE facilities.

The second above category is typified by the policies of NJBT and JCPL. NJBT has never used outside contractors for pole line construction. This is based on NJBT's belief that, based on its current labor situation, there would be significant problems associated with the use of outside contractors (see later discussion). Accordingly, a CATV company dealing with NJBT would have to rely on NJBT personnel to do surveys and make-ready work on NJBT facilities.

Until 1973, JCPL used outside contractors for overhead pole work. Today, JCPL's position is that its union agreement provides that outside contractors may not be used for work regularly and customarily performed by employees as long as "employees are available" or in a layoff status. Additionally, even if there are no employees available, JCPL would still oppose use of outside contractors as it would prohibit employees from possibly doing work normally done by them. Thus, JCPL depends entirely on its system development plan (see "notice" above) to assure adequate availability for CATV work.

The third category of utility company positions relative to the use of outside contractors is typified by the independent telephone companies and REC.

The policy of the independent telephone companies generally has been to continually use outside contractors to meet construction requirements, but only when needed to supplement regularly employed linemen, not to exclude them. The reason for this is that in recent years they have been forced to lay off pole line construction employees because of slower growth during the recession a few years ago and the exclusive use of underground

plant to serve new residential developments. Since then, the unions involved with some of the companies have insisted that no outside contractors be employed when layoffs were in effect.^{28/} Under this policy, they have no experience with use of outside contractors for CATV surveys or make-ready work. The outside contractors that have been hired were subject to utility company inspections and supervision. Accordingly, a CATV company dealing with an independent telephone company with regular manpower availability would probably have to rely on utility personnel to do CATV surveys and make-ready work on independent telephone company facilities.

REC had used outside contractors on its distribution system until 1973 at which time expansion of electric service dropped substantially. While its union collective bargaining agreement does not specifically prohibit the use of outside contractors, it does require the payment of overtime to REC personnel who could do the work on an overtime basis when the outside contractor is called in. This would appear to be the case even if the outside contractor were, in fact, a member of the same union as the men who normally work for REC. Thus, the use of outside contractors by REC is effectively prohibited except in situations of a tremendous work load. Additionally, REC feels that, insofar as electric facilities are concerned, any work required must be done by electric company personnel or by contractors engaged by and responsible to the electric company. The main reason for this is that allowing CATV companies and their contractors to perform such highly specialized and potentially dangerous work would create unnecessary risks. Thus, a CATV company dealing with REC would have to rely on REC personnel or REC hired contractors to do CATV surveys and make-ready work on REC facilities.

As an example of the type of work an outside contractor is capable of, the NJCTA introduced, as a witness, Mr. Richard Jackson. Mr. Jackson is the owner and Chairman of the Board of Jackson Communications, (Jackson), which is a mapping, engineering and construction firm performing services for CATV companies as well as for telephone companies.^{29/} Services performed by Jackson include (1) mapping services,^{30/} (2) make-ready surveys and (3) physical construction of CATV systems.

When performing survey work, Jackson initially meets with the utilities involved to make sure they will accept the work (i.e. form) as well as the qualifications of the person that is doing the survey. The next step is to perform the survey on a per map basis and present the survey to the utility company involved on separate forms showing them where the make-ready is that has to be performed and what has to be done to correct the problem. After the survey, if Jackson is to perform the make-ready work, the telephone company would check the work to see that it was done properly and would bill the CATV company for any necessary engineering time.

28/ In the past, when outside contractors were used to do work union employees could do, in some cases the unions have successfully arbitrated employees' "right" to overtime.

29/ We note that Mr. Jackson's company has worked mostly for non-New Jersey independent telephone companies.

30/ Blueprint showing each company where to build its system and all the facilities it is going to hang on utility poles.

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NJBT has an existing contractual relationship with the union representing the personnel which normally do make-ready work.^{31/} It is believed that if non-telephone personnel were permitted to do such make-ready work, there might arise a claim of breach of this contract which could have an adverse impact on NJBT's ability to carry out its public service obligations.

As evidence of the sensitive nature of this area, NJBT points to 1977 when the issue of subcontracting was bargained during national negotiations between ATT on behalf of Bell System Companies (including NJBT) with the Communications Workers of America (CWA) and IBEW Unions. In those negotiations, the unions urged adoption of limitations on the abilities of Bell System Companies to utilize the services of subcontractors, and specifically recommended elimination of subcontracting of bargaining unit work. Further, NJBT points to a July, 1976 job action resulting from a contention that NJBT had contracted out bargaining unit work. Thus, NJBT contends that it must anticipate that Local 827 of the IBEW would rely on its contractual relationship with NJBT and claim that subcontracting of CATV make-ready work constitutes a violation of such relationship.^{32/}

Additionally, NJBT points out that the issue of subcontracting falls within the category of "wages, hours and other terms and conditions of employment" and is therefore a mandatory subject of collective bargaining under the National Labor Relations Act (NLRA), Section 8(a) (5), 8(b)(3) and 8(d), 29 USC 158 (a)(5), 158(b)(3) and 158(d). In accordance with its interpretation of Lodge 76, Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976), NJBT maintains that Federal labor policy as reflected in the NLRA has been construed to preempt state regulatory authority with respect to such mandatory subjects of collective bargaining. Thus, NJBT contends that the Board lacks jurisdiction to regulate subcontracting of make-ready work.

Briefly, there are two fundamental ideas that lie at the core of national labor policy: (1) freedom of employee organization; and (2) the voluntary private adjustment of conflicts of interest over wages, hours and other conditions of employment through negotiation and administration of collective bargaining agreements. If it were assumed that the issue of subcontracting of CATV make-ready work was a bona fide subject of the collective bargaining agreement and was incorporated as such, the Board might be precluded from invading this area of regulation. The presently controlling rules are stated by the Court in San Diego Building Trades Council v. Garman, 359 U.S. 236, 244, 79 S. Ct. 773 (1959) as follows:

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7, of the Relations Act or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield...

^{31/} Telephone Workers' Union Local 827 of the International Brotherhood of Electrical Workers (IBEW) Union.

^{32/} We note that NJBT never has actually questioned the Union on this despite a specific request to do so.

At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections... When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

In short, a state may exercise "historic powers over such traditionally local matters as public safety and order the use of streets and highways," Allen Bradley Local v. Wisconsin Board, 315 U.S. 740, 62 S. Ct. 820 (1974), for "policing of such conduct is left wholly to the states." International Union, U. Automobile Workers v. Wisconsin Board, 336 U.S. 245, 69 S. Ct. 516 (1949). In this case, while outside contracting was a subject of collective bargaining, it was not part of any such agreement. Further, an examination of Lodge 76, supra, indicated that, contrary to NJBT's interpretation thereof, the Court held a union's concerted refusal to work overtime was peaceful conduct constituting activity that must be free of state regulation if the congressional intent in enacting the comprehensive federal law of labor relations is not to be frustrated. Further, it was held that Congress meant that self-help economic activities whether of employer or employee, were not to be regulable by States any more than by the NLRB for neither States nor the NLRB is afforded flexibility in picking and choosing which economic devices of labor and management would be branded as unlawful.

NJBT further cites White Motor Corporation v. Malone, 545 F.2d 599, 606 (8th Cir. 1976) for the proposition that any inquiry into the subject of subcontracting is prohibited since it may "influence the substantive terms of some subsequent bargaining agreement." An examination of White indicates that it held that a state antitrust statute cannot apply to negate the terms of a collective bargaining agreement settling wages and rates, vis-a-vis, states may not attempt to influence the substantive terms of collective bargaining agreements by regulating the conduct of the parties to collective bargaining negotiations. That is not to say that, where the regulation of conduct is in the public interest, such conduct may not be regulated by states if outside the area of negotiations as evidenced in a collective bargaining agreement.^{33/} Clearly, the provision of CATV service through utility facilities is an area requiring regulation of conduct in the public interest. Thus, we find the Board has complete jurisdiction over the issue of subcontracting.

After reviewing all the testimony herein, we are of the opinion that, subject to certain qualifications set forth below, the Board should, to the extent not prohibited by a collective bargaining agreement, order utility use of outside contractors for make-ready work and surveys if so requested by a CATV company. There is no easier way to speed up the rate of CATV construction in this State. Such adequately trained and supervised subcontractors would be more responsive to CATV construction needs than utility personnel, while still maintaining the integrity of utility plant. This right to hire subcontractors^{34/} should be subject to the following:

33/ As the NJCTA points out, regulation to that effect would not be regulating the conduct of the parties to a negotiation between NJBT and its employee unions any more than the setting of speed limits by a state would influence negotiations between employee truck drivers and their employer trucking companies.

34/ Subcontractors would be paid directly by the CATV or utility company, in whatever manner was mutually convenient.

- (1) Due to the nature of the attachments, the strenuous objections of the power utilities and the lack of such experience by subcontractors, no such independent contractor make-ready work should occur to power facilities. Such work should only be done by power company personnel;
- (2) All subcontractors must be trained and supervised by utility personnel at the CATV company's expense;
- (3) All subcontractors must be approved by the utility and CATV companies involved;
- (4) To avoid possible conflicts of interest, no subcontractors should be used for make-ready surveys when they have performed premake-ready nonhazardous attachments (see discussion above);
- (5) All parties should strive to hire outside contractors who are members of utility personnel unions;
- (6) All extra costs incurred by the utility as a result of use of independent contractors, including, but not limited to overtime payments under union contracts, should be the responsibility of the CATV company; and
- (7) All subcontractor sole walk surveys and make-ready work should be subject to the same spot-checks as recommended earlier for use with sole CATV surveys.

BILLINGS, REINSECTIONS AND
SUBSEQUENT MAKE-READY
WORK

The NJCTA has six concerns in this area. They are: (1) The consistency of rates for make-ready work and surveys, as well as the application of technical standards, which may vary from time to time and from district to district within the same utility company; (2) The form of billing which may preclude analysis as to reasonableness; (3) The seemingly high rates charged for make-ready work and surveys, especially when compared to subcontractor rates; (4) The unilateral right of utilities to reinspect plant at CATV's expense; (5) The limited rights of CATV companies relative to subsequent make-ready work; and (6) The right to order CATV vacation of poles.

While many sample bills have been submitted herein, there has been no indication of inconsistent applications of billing or technical standards by utility companies.^{35/} Accordingly, we feel no further directions to the utilities need be issued relative to this area.

Unfortunately, the form of utility billing for make-ready surveys and work leaves much to be desired. While there was testimony given that this is an area in which utility performance has improved, we feel that specific directives as to the form of bills is needed. Accordingly, all survey and make-ready work bills should include the following: (1) An

^{35/} There was much bill waving and many allegations by individual CATV companies, and the NJCTA, but no proof of impropriety.

indication of the specific poles worked on; (2) An explanation of what was done to each pole indicating the extent of any extraordinary work thereon; (3) An indication of which employees actually are being billed to the CATV company, their loaded hourly rate ^{36/} and the actual time being billed for; (4) An indication of exactly what materials were necessary for the work and the rate they are being billed at; (5) An explanation of any extraordinary charges; (6) An indication, when performing make-ready work, as to what survey it is pursuant to; (7) An indication of the exact date the work was performed; (8) An indication when notice of the work was given, or why no such notice was given; (9) An indication whether subsequent work is anticipated on the pole; (10) An indication of the exact community in which the pole being worked on is located; and (11) An explanation of all billing done for another utility. ^{37/}

The amounts being billed for make-ready work and surveys by the various utilities are very close in both the amounts being billed and in the method of billing. Most bills can be broken up on an hourly basis into three components: (1) labor, (2) direct costs (overhead) and (3) indirect costs (materials). Together, they make up what is referred to as the "loaded hourly rate". The indirect component of this rate typically includes trucks, automobiles, equipment, small tools, line supervision and engineering, local clerical and miscellaneous expenses, local administrative expenses and general office engineering and supervision. The direct component of this rate typically includes pensions, insurance, taxes and other similar benefits. The policy of NJBT as to billing is typical of the way bills are calculated:

"Billing for work performed....shall be computed, in general, on the same basis as used by the Telephone Company when determining charges and credits to the telephone plant, maintenance and reserve accounts for similar work initiated by the Company and performed on its own plant, with the following exceptions:

Loading for social security taxes, relief and pension expenses and general expenses shall be included in the billing for work chargeable to the maintenance and reserve accounts as well as to the telephone plant accounts.

Credits for used service life of plant may be allowed. When telephone plant is replaced by plant of increased facilities an appropriate credit shall be allowed for the value of such increased facilities.

Ordinarily, no billing will be made for the premium portion of overtime costs other than the increment included in the average hourly labor rates. However, if in connection with custom work for an individual it is anticipated that an exceptional amount of premium overtime will be involved for reasons beyond the control of the Telephone Company, the Division Head involved may authorize billing of such costs." Response to NJCTA's 6/15/77 Interrogatory Question II-1(a).

36/ We would anticipate that the utilities would regularly provide CATV companies, when requested, a breakdown of the elements in the loaded hourly rate as well as an explanation of changes therein.

37/ Under the joint agreements, telephone company billing of CATV companies for all utilities is not uncommon.

COMPARISON OF UTILITY MAKE-READY
SURVEY AND MAKE-READY WORK - RANGE OF UNLOADED HOURLY RATES

	<u>NJBT</u>	<u>H&M TELCO</u>	<u>WARWICK TELCO</u>	<u>CONT'L. TELCO</u>	<u>ACE</u>	<u>PSEG</u>	<u>REC</u>	<u>JCPL</u>
SURVEY-	\$10.12 to 16.09 ^{38/}	\$ 6.25 to 10.09	\$ 7.83 to 9.76	\$ 309/wk to 1712/mos.	-	\$8.31 ^{40/}	\$ 8.01 to 11.07	-
WORK	4.32 to 8.56 ^{39/}	6.25 to 7.49	8.10 to 11.30	7.67 to 7.82	\$ 4.33 to 10.76	8.31 ^{40/}	6.25 to 10.18	\$7.43 to 9.43

As noted earlier and as evidenced by the above chart, there is a consistency in the range of unloaded utility rates for make-ready surveys and work. The NJCTA contrasts these rates with the somewhat lower rates charged by Jackson Communications and questions the propriety of the utility charges. In particular, the NJCTA points to two such subcontractor rates that appeared low: (1) Jackson Communications' indication that an engineer and truck for survey work would cost \$22.50 an hour and (2) New Jersey Telephone Company's indication that they had used an outside contractor, Henkel and McCoy, for survey work and were charged \$16.45 per hour including vehicle costs. In comparison, the NJCTA points to the fully loaded October, 1977 rates of PSEG (\$42.51/hr.) and NJBT (\$63.72/hr.) and states they are extraordinarily high.

REC, JCPL and PSEG all question the NJCTA's contention that subcontracting out make-ready work or surveys would be less expensive than allowing the utility to do the work. PSEG notes that, at the least, the CATV company would have to pay the cost of training and supervising all subcontractors. We agree. As noted earlier, there also may be extra costs incurred by the utility as a result of use of subcontractors. This too is the responsibility of the CATV company.

The main area of difference between the two rates is the addition of overhead expenses. Based on its experience, PSEG suggests that whenever a subcontractor is used, the CATV company is still responsible for all overhead expenses (loaded rate minus the unloaded rate). It is this allocation of charges that the NJCTA finds objectionable.

After examining all of the above, we find that both utility billing policy and rates seem reasonable. When compared to the rates charged by outside contractors, these utility rates seem high. This is due to the absence of CATV accounting for (1) subcontractor training and supervision,

38/ Loaded rate = \$63.72

39/ Loaded rate = \$23.08

40/ Loaded rate = \$42.51

(2) utility overhead and (3) statistics taken from different years. However, while we agree with the utilities that some overhead expenses remain when using a subcontractor, we cannot see how such overhead expenses would equal the difference between the utility's loaded and unloaded hourly rates. Such difference contains such things as trucks, tools, engineering supervision, benefits and the like that could not all possibly still exist in the presence of outside contractors. Thus, due to the lack of experience with subcontractors in New Jersey, we recommend that the Board view seriously any future CATV allegations as to improper allocation of overhead expenses when using subcontractors.

The NJCTA notes that, while the utilities should have the right to reinspect plant, it is now a unilateral right to do so at the CATV company's expense. It is felt that there is a severe "potential" for abuse here, although none has been shown. REC notes that such inspection is necessary to safely accommodate CATV plant on the poles. In this we agree. We have seen no abuse of this right to inspect and, in fact, feel it is an appropriate safeguard.

The NJCTA feels that, since subsequent inspections of pole plant will benefit all to the extent they may report violations to each other, CATV companies should not have to bear the entire cost of such reinspection. In response thereto, NJBT states that it only bills a CATV company for reinspections for such CATV company's benefit.

There is no doubt that it is the responsibility of all pole occupants to maintain plant in conformance with applicable codes and standard construction practices. Clearly, to the extent violations are seen and reported, reinspections benefit all parties. Thus, while we agreed with the utilities earlier that they should have unilateral rights to reinspect, we disagree that the costs for such reinspection should be borne totally by the CATV company. Instead, we recommend that all reinspection costs be shared by all users in proportion to the allocation of annual costs used to calculate their pole rentals as discussed below. Such a methodology (1) avoids cross-subsidization of CATV plant by utility subscribers, (and vice-versa), and (2) is consistent with CATV rights on the poles. 41/

The NJCTA complains that if a CATV company is to be charged for reinspections it should be noticed therefor ahead of time. Such a procedure seems fair and we urge its adoption.

The NJCTA notes that, whenever a reinspection reveals any violation, it is assumed that the CATV company caused it. It would appear that, while such a policy is followed by a number of the utilities, not all utilities charge CATV companies for utility plant found in violation of technical codes. In accordance with our discussion above, we recommend that there be no presumption that CATV companies have caused violations in utility plant. Rather, if fault cannot be properly allocated, the cost to correct all violations should be borne by all parties in proportion to the division of reinspection costs.

The NJCTA also notes that if utility space requirements require subsequent rearrangements of facilities or replacements of poles the entire cost of same must be borne by the CATV company. As discussed below with regard to rental rates, the real problem here is the unequal status of

41/ In accordance with our discussion earlier as to the utility's right to spot-check and reinspect outside contractor work, we feel that any such reinspection of outside contractor work should be at CATV's sole cost.

CATV companies on the pole. Since the pole is owned by the utility company, the degree to which they wish to rent a CATV company equality of status thereon should be left to the utility. Clearly, the less rights to space on the pole afforded the CATV company, the less should be the rental, the allocation for rainspections and the allocation for correction of nonassignable utility violations. In all cases, however, these rights should be negotiable by the parties in accordance with our discussion herein.

Under the earlier cited "40/48 dispute", a CATV operator may attach either above or below a certain point on the pole (the reference gain) in certain circumstances. If a CATV company does this and subsequent make-ready work or rearrangements are needed for one of the purposes set out in the stipulation therein, the CATV company is responsible to move its own plant to the reference gain. Again; it is the NJCTA's position that a CATV company should not be responsible for rearrangements caused by additional utility pole requirements.

Our position earlier with regard to costs for rearrangements and replacements is that it is a negotiable matter. Clearly, the parties in the "40/48 dispute" fairly negotiated the settlement therein, and the Board accepted same. As this matter is now the subject of a proposed rule-making before the Board, we will not comment on it further during its pendency.

The NJCTA objects to the utility's having the right to evict a CATV company, upon notice, so as to allow themselves more pole space. In light of our discussion herein, we feel such a right of eviction is totally inappropriate given the public interest in the provision of CATV service. Clearly, utility rights to pole space are adequately protected through pole rearrangements and replacements.

EASEMENTS

N.J.S.A. 48:7-1 and N.J.S.A. 48:17-8 deal with the rights of power and telephone companies, respectively, to erect poles to sustain the necessary wires, conduits and other fixtures for their lines. Such rights are conditioned upon their first obtaining the landowner's consent, in writing, to the erection of such poles.

During the last two years, problems with regard to easement rights as they pertain to the attachment of CATV facilities to utility poles have been greatly eased with the inclusion of CATV companies into the easement negotiation process. For example, NJBT has indicated that since May, 1977, an amended form of right-of-way agreement has been adopted which specifically includes CATV operations within the permissible uses created by the easement. REC has indicated that it intends to provide in its agreement with CATV operators that a CATV company representative be present at all negotiations for easement rights.

With regard to easement rights received prior to this period, however, the utilities have shared a common view that these grants cover only the right to erect poles to carry and support facilities for (1) the transmission of telecommunications or (2) the distribution of electricity for light, heat or power. They thus conclude that such easements are not broad enough to include the attachment of CATV plant.

The utilities argue that, as a general rule, a CATV company may not lawfully utilize existing utility company easements in the absence of an agreement with affected property owners. Indeed, NJBT notes that the obtaining of such rights from private property owners is a prerequisite for joint use of the poles by a CATV company. Article 7, paragraph (a) of the standard pole, conduit and trench license agreement offered by NJBT to CATV operators states, in pertinent part, that:

"Licensee shall submit to Licensor evidence of Licensee's lawful authority to place, maintain and operate its facilities within public streets, highways and the thoroughfares and shall receive any necessary permits and consents from Federal, State, County and Municipal authorities and from the owners of property to construct, maintain and operate facilities at the location of poles, conduit systems or trench systems of Licensor which it uses."

NJCTA, in response to an assertion that an easement entered into prior to the existence of the cable television industry could not possibly include the right to attach CATV plant, argues that the fact that a particular use of an easement is not contemplated at the time of the acquisition of such easement does not prevent the holder of the easement from acquiring rights legally broad enough to include such uses. The NJCTA is of the opinion that most, if not all, of the easements secured by the electric and telephone utilities across private property are, in fact, sufficiently broad enough to permit the assignment of rights to cable television operators. Thus, the NJCTA requests that the Board require such assignment when the utility easement rights are sufficiently broad.

The NJCTA contends that the existing forms of poles attachment agreements, required by the utilities, are vague as to what grants of easements are made thereby. The Association argues that the language of these licensing agreements, such as Article 7, paragraph (a) of the NJBT agreement, requires the cable operator to obtain separate easements only where the utility does not possess an easement from the landowner broad enough to cover CATV facilities. Citing sections 20 and 21 of the Act, which specifically include the term "right-of-way", the Association further argues that the language of the pole attachment agreements should be clarified so that they indicate

that the utility therein grants to the CATV operator all such rights which it then has.

As the NJCTA feels that utility easements are sufficiently broad, it is of the opinion that the utilities are not placed in jeopardy by the attachment of CATV plant to their poles. In that regard, the NJCTA has taken the position that where a CATV operator has placed his plant on a pole pursuant to an assignment of whatever rights may exist in the utility to do so, that operator would indemnify the utility if the property owner brought an action as a result of the attachment of the CATV plant. The NJCTA disagrees with several of the utilities that a possible outcome of an action brought by a landowner is the ejection of the utility from the pole. However, where a defect in utility easement rights existed prior to a CATV company's attachment, the NJCTA has taken the position that, while this will not be a major problem, it is up to the utility involved to defend its presence on the pole.

Additionally, the NJCTA argues that, where the Board finds that the public convenience and necessity requires the use by a CATV company of utility owned facilities on, over or under any right-of-way belonging to a public utility, that use may be permitted by the Board. N.J.S.A. 48:5A-20(b). Further, the NJCTA points out that the terms and conditions imposed by any public utility under any lease, rental or other method of making available to a CATV company any facilities or rights-of-way are subject to the jurisdiction of the Board. N.J.S.A. 48:5A-21.

As the Cable Television Act does not specify that a CATV operator must receive the prior consent of the owner of the soil, JCPL indicates that it has not refused any CATV company permission to attach to its poles on the ground that it legally cannot do so. However, in its licensing agreement, which is similar in language to that employed by NJBT, JCPL states that it does not represent that it has rights from or consent of the property owner for CATV attachment to its poles and it places the burden on the CATV operator to acquire any necessary consents.

JCPL indicates that many of the easements taken jointly by it and NJBT grant the right to erect poles and other facilities for the:

"...transmission and distribution of electricity, the operation of communication systems, and in addition thereto to erect and maintain such other wires or appurtenances on said poles and cross-arms as said companies may deem necessary and proper to be attached thereto, upon, over, across, along and beyond said property."

JCPL is aware that the cable television industry has been impressed with a public interest as expressed through the Cable Television Act. However, it contends that whether its easements are sufficiently broad enough to encompass CATV plant, as well as power and telephone equipment, or whether the attachment of CATV plant constitutes an increase in servitude not contemplated in the original easement grant are questions to be determined by a court and not by the Board of Public Utilities.

JCPL is of the opinion that it should not be asked to endanger the easements that it has acquired over many years through the outlay of much effort and money, or expend additional money to protect them. Rather, that risk and those costs should be accepted by the CATV companies. Therefore, JCPL's position is that, when the right of a CATV company to attach to a JCPL pole is questioned on the ground that the easement does not encompass CATV plant, the CATV Company will have to vacate the pole unless it can show that it has valid rights and promises to indemnify and hold JCPL harmless from any damage done by any CATV attachments.

The basic position of PSEG is that cable television operators do not and cannot have any rights under N.J.S.A. 48:7-1 as they are not engaged in the distribution of electricity for light, heat or power. PSEG is of the opinion that the municipality that creates an ordinance granting a franchise to a CATV operator to serve that municipality should provide (1) the necessary rights for the CATV company to use the public rights-of-way for the installation of the facilities and (2) provide for the CATV company to install poles and use the existing poles of others in the conduct of its business.

PSEG states that it will agree to allow a CATV company to attach to any of its poles installed on private easements, within the rights established in a particular easement agreement, as long as such construction does not interfere with the conduct of its business. If a particular easement is restrictive and does not allow the attachment of CATV plant, PSEG will give its written consent to the CATV operator to attach to said easement poles so as to allow the CATV operator to negotiate an easement agreement with the property owner.

REC states that it is willing to extend easements granted to it to CATV companies where those easements are broad enough to permit communications facilities to be installed on the poles. REC further indicates that it intends to provide, in its agreement with CATV operators, that a CATV representative be present at all negotiations for easements rights. It is hoped that such a procedure will dispell any ill feelings caused by an attempt to persuade a property owner to allow further impositions on his property.

The independent telephone companies contend that a property owner who gives a telephone utility a right-of-way need not submit to some other use of the pole. Thus, any joint use agreement should require that, where requested, the CATV company present evidence of municipal consent and right-of-way before attachment. It is noted that many rights-of-way were acquired prior to the use of television itself. Thus, it is felt that property owners could not be deemed to have consented to the extended use of the telephone company rights-of-way by CATV companies.

The Independents indicated that, where they have a right-of-way agreement permitting attachment for communication lines, they allow CATV companies to attach. Their contracts with CATV companies require that the CATV company obtain the consent of the municipal authority and private property owners as a condition of making attachments. However, to the best of their knowledge, none of the CATV companies with whom they do business have acquired any significant pole rights-of-way. Accordingly, the contracts with the CATV operators provide that the telephone utilities can require the CATV company to remove its facilities at any time. It is claimed that, until rights-of-way are obtained by CATV companies, utilities must be free to require the removal of CATV facilities if challenge is made to installation by a property owner. In the alternative, they feel they should at least be able to require any damages to be paid by the CATV operator.

These utilities argue that the public rights in the street do not include the right to erect poles within the right-of-way, nor to string wires on the poles for the purpose of providing private telephone service, private electrical service or the transmission of electricity without the prior consent of the adjoining property owner. Thus, they contend that CATV companies have no right to attach facilities to a telephone or electric pole without such consent as the installation of the larger poles, required under the terms of rearrangement for CATV plant, would possibly be illegal. They contend that, at least until CATV rights-of-way are obtained, the Board has no jurisdiction to enforce the continuance of pole attachments or the installation of larger poles under any terms and conditions. While they concede that N.J.S.A. 48:5A-20(a) purports to authorize CATV companies to attach to poles located in or along highways, the Independents are of the opinion that if the adjoining property owners have the right to prevent such use without their consent, the statute must be interpreted to require such

consent. If not, it must be held unconstitutional as the acquisition of the right to erect poles and place wires therein, within a public right-of-way, without such consent, constitutes the taking of private property in a constitutional sense which can only be acquired through condemnation under the power of eminent domain, a right not available to CATV companies.

New Jersey Telephone Co. (N.J. Tel.), United Telephone Company of New Jersey (United) and West Jersey Telephone (WJT) indicate that the right-of-way agreements currently in use are designed to provide a right-of-way for the telephone company and JCPL, which is the power company in the affected service areas. These telephone utilities claim that these agreements, which are similar in language to the form employed by NJBT and JCPL cited hereinabove, do not mention CATV facilities, nor have their agreements ever referred to such attachments. WJT did state, however, that its right-of-way agreements do permit it to attach facilities to the poles and may permit the attachments of CATV facilities. All three agree that it is a question of law (1) as to whether these right-of-way agreements would permit the attachment of CATV facilities to the poles of a utility company and (2) as to whether the provisions of the Cable Television Act, which suggest that the Office may order the attachment of CATV plant to utility poles under reasonable terms and conditions, means that, whatever rights the adjoining property owner has, have been abrogated by statute. United raises the additional question of whether, if a right-of-way does exist which may permit the attachment of CATV plant, a larger pole may be installed on the adjoining owner's property to accommodate that plant. In that regard United points to Deuss v. Public Service Electric and Gas Co., 3 N.J. Super 439 (Ch. 1949), which suggests that even the company which has the adjoining property owner's consent cannot install a larger pole for its own facilities without obtaining an additional consent from the property owner.

The Independents further argue that, as an easement granted for one type of use may not be used for another purpose or in a materially different way, the rights obtained by the telephone and electric companies are not assignable. Therefore, it is contended that the Board may not order the assignment or use of utility pole lines unless the CATV operator has obtained the consent of the adjoining property owner. In the event that pole attachments are permitted, the independent telephone companies are of the opinion that the CATV company should indemnify the owners of the pole against counsel fees, other costs and damages occasioned by attacks on the assignment or use by the CATV company.

ACE adopts the arguments set out by the independent telephone companies. ACE has taken the position that the consents that it gets from abutting owners for the installation of its poles along the streets do not give ACE the power to make further assignments to or give permission for, CATV facilities. Therefore, ACE contends that the Board cannot undertake to order assignment.

NJBT states that the easements acquired by it, prior to May of 1977, were only for the provision of telephone service as CATV use was not contemplated. NJBT argues that it cannot jeopardize its rights by giving CATV operators that which it does not have thereby creating an additional servitude on the right-of-way resulting in its inability to use its acquired grants. The record reflects that as an accommodation to CATV and in accordance with its recognition of the benefits of the joint use of poles, NJBT permits CATV operators to attach their facilities pursuant to license agreements which recognize NJBT's responsibility to give primary consideration to its service obligations when permitting others to attach. Therefore NJBT argues that the language in Article V paragraph (a) of its license agreement as set out above, requiring CATV companies to submit evidence of their authority to use the property, is a necessary prerequisite in order to avoid imposing an additional servitude on the right-of-way. NJBT further contends that as a CATV company may not lawfully utilize existing utility

company easements in the absence of an agreement with the affected property owners, the Board's authority to prescribe terms and conditions for CATV operators' use of its poles is limited to those situations where the CATV operators have independently obtained that consent from the private property owners, over whom the Board has no jurisdiction. NJBT also argues that as an assignment is the transfer of the whole of one's interest, the question is whether NJBT can apportion its easements to CATV. NJBT contends the answer to be negative as its easements refer to its "successors and assigns" and CATV companies are but licensees.

After consideration of the material and arguments placed on the record, we interpret the right-of-way agreements granted to the various utilities to be broad enough so as to include the attachment of CATV facilities. We also note that, despite the contrary contentions of the utilities and any language in the licensing agreements with CATV operators requiring them to get prior consent before attachment, the utilities have, in effect, adopted a similar interpretation as they have, as a matter of course, continually allowed the attachment of CATV plant to their poles. In addition, none of the utilities, when asked, indicated that they have ever exercised their rights under such an agreement to require a CATV company to remove its facilities.

We believe that this interpretation, along with the provisions of N.J.S.A. 48:5A-20 and 48:5A-21, give the Board the authority to allow CATV operators to construct and maintain their own facilities necessary for their business or to use the existing equipment of another CATV company or public utility. To do otherwise would ignore the legislative findings that CATV operators are affected with a public interest. N.J.S.A. 48:5A-2.

It should be emphasized that we are not attempting to have the Board require any public utility to give what is not theirs to give, or to expose it to any liability which may result from an action brought by any private property owner. Nor are we recommending that the Board replace the courts of law as the final decider as to the availability of the easements with regard to CATV operators. If, in fact, a court of law subsequently determines that a particular easement does not have the breadth to include CATV plant, the CATV company should be required to indemnify the affected public utility for any and all costs and damages which may result from an action by the property owner.

The aforementioned provisions of the New Jersey Cable Television Act already give the Board the power to approve the attachment of CATV plant when it finds that it is required by public convenience and necessity. In order to so act, the Board, of necessity, must be able to make findings of fact as to the applicability of the easements involved. By such an action, however, the Board does not assume its determination to be an adjudication of any property rights, that jurisdiction being in the Courts. Erie R.R. Co. v. Bd. of Public Utility Commissioners, 64 N.J. Super 479 (App. Div. 1960).

An additional situation that may arise is that, when a CATV company plans to attach its plant, it might be discovered that no valid easement was ever obtained by the public utility. As negotiations between the potential pole users and the private property owners will be required, the eventual cost of the easement should be allocated in the same percentages that we have allocated for the ownership of the poles for the calculation of the annual pole rental rates set out herein.

BONDING

The license agreements between the utilities and CATV companies for the attachment of the latter's plant generally require the posting of a surety bond to guarantee the payment of all monies due to the utilities for make-ready work and pole attachment fees. The cost of removal of CATV facilities is also taken into consideration.

The NJCTA has taken the basic position that the requirement of posting any performance bond for such purposes is onerous on the CATV operators. The Association further argues that, as the Board must determine the financial integrity of a CATV company prior to permitting it to construct and attach its plant, and as all CATV companies are regulated by the same body that regulates public utilities, the requirement of posting a surety bond is excessive and should be eliminated from the standard form of attachment agreements.

The utilities have uniformly contended that the posting of the surety bonds is a necessary requirement that must be continued.

NJBT states that Article III(c) of its existing attachment agreements require the CATV company to post a bond in the amount of \$2,000 for the first 100 poles and \$2,000 for each additional 500 poles with a maximum of \$50,000 total. NJBT further states that if its experience with a CATV company is satisfactory, a reduction to \$500 per 500 poles may take place after five years.

Article III (b) of the NJBT attachment agreement provides that:
"Nonpayment of any amount due under this agreement shall constitute a default of this agreement."

NJBT indicates that it has never exercised its right under the surety bonds as it is reluctant to jeopardize the credit rating of any CATV company. However, NJBT indicates that a significant number of CATV operators have not paid undisputed monies due within 30 days of the presentment of its bills.

NJBT has suggested that Article III(b) be modified to provide for the assessment of a monetary penalty, equivalent to or slightly above the existing lending rate to induce the prompt payment of fees for make-ready work and pole attachment rentals. Said penalty would be assessed for a specified number of months before NJBT would exercise its rights under the surety bonds. To do otherwise, it is argued, would continue the situation whereby NJBT would be extending credit to CATV companies without interest. NJBT also indicates that it is agreeable to having a time allowance set out prior to the automatic implementation of the penalty in which CATV companies could dispute charges as long as it was acceptable to normal business practices and not excessively long.

As a result of various CATV companies requesting it to re-examine its bonding requirements, NJBT has proposed to amend the current surety bond arrangement set out in Article III(c) by creating a two-tiered system based on the extent of risk to itself. This modification is to be in the form of a construction bond and a continuing surety bond. The construction bond would be required to secure the payment of monies owed the utility for make-ready work in each municipality in which more than a fixed number of poles^{42/} are in some stage of pole attachment activity. The duration

^{42/} New Jersey Bell suggested the number be set at 50 poles.

of the construction bond would be from the receipt by NJBT of a license application until the satisfactory completion of a post construction inspection. NJBT has suggested that this bond should be in an amount which reflects the approximate total make-ready expenditure.

The continuing surety bond, as contemplated by NJBT, would be required to secure the payment of monies owed to the utility after the CATV operator had made his attachments to the pole; i.e., pole attachment fees and removal costs. This bond would be an on-going bond in an amount equivalent to the anticipated one-year total of pole attachment fees for a given municipality plus the estimated cost of removal. NJBT is agreeable to giving consideration to lowering the required bond in cases where a CATV company has a good payment record.

PSEG states that, while many billing problems had been eliminated through the work of the JUCTC and by the present policy of the utilities to include more detailed information in its bills to CATV operators, it was still experiencing late payments by some CATV operators. PSEG testified that its bonding requirement, which is dependent on the number of poles, exists throughout the life of the franchise of a particular CATV operator and has a maximum of \$50,000.^{43/} PSEG indicates that it has not experienced any problems with its bonding arrangements, as it has never exercised its rights in that area preferring, rather, to attempt to resolve any problem directly with the involved CATV company. The utility further states that it has agreed with at least one CATV company, at the latter's request, to allow it to provide a certificate of deposit, for the same dollar amounts as required in the attachment agreement, in lieu of a surety bond.

PSEG further indicates, upon review of the two-tier bonding proposal introduced by NJBT, that it is in favor of it. Support for this proposal was also voiced by JCPL which stated that under existing agreements, all rentals charged to CATV companies on jointly owned poles are collected by the telephone company. With regard to its solely owned poles, which total less than 2,000 in number, JCPL indicates that it has not experienced any problems in collecting payments due it.

REC has not experienced any collection problems with regard to any charges associated with make-ready work. It also indicates that it has no difficulties with pole rentals as 97% of its poles are occupied jointly with the telephone company, to whom all pole rentals are paid. REC's stated position, however, was that each utility must be able to secure 100% of the estimated make-ready work it will do in the form of either a surety bond or a deposit.

The independent telephone companies have stated that CATV companies should be required to give assurance of payment to the utility. They argue that even though a utility may discontinue service to customers if proper payment of undisputed charges is not made, interruption of service is not a practical remedy available to the utility in this case. They contend that without some sanction a CATV company could continually finance its operations with monies due and owing the utility.

United indicates that in its agreement with Garden State CATV Company, estimates of the cost of make-ready work are presented to the Company when a request for attachment is received. The CATV operator is then required to deposit the estimated cost of work before any work proceeds. After the make-ready work is completed, any charges above the original

^{43/} Under the terms of its attachment agreements, Public Service may, when it becomes necessary, increase the maximum level of the bonds. This right, however, has never been exercised.

estimated cost are billed to the CATV company. Conversely, if the estimated costs exceed the initial costs, the difference is returned to the CATV Company. The utility feels that this arrangement is advantageous in that (1) a CATV company can dispute the need for a cost of work before it is started; (2) any past construction collection problems are virtually eliminated and, (3) where additional costs over the original estimate are billed, the CATV company can demand and receive an explanation of the overruns.

With the arguments of both the utilities and the NJCTA in mind, it is apparent to us that there is a unique problem concerning payment by CATV companies. Part of the problem is attributable to poor billing form policies. We have attempted to eliminate these problems as previously set forth in the body of this report. Another part of the payment problem, however, is due to bad payment practices by certain CATV operators. The utilities have contended that when bills to CATV companies are past due, they are in fact, lending money to the CATV companies without interest. We agree that utility subscribers should not have to subsidize CATV pole attachments.

As stated above, the existing bonding requirements provide for the coverage of make-ready work, pole attachment fees and the estimated cost of removal. Under NJBT's two-tiered proposal, a construction bond would cover the cost of make-ready while a continuing surety bond would take care of the pole rental fees and the cost of removal.

With regard to the removal of CATV plant from utility poles, no substantiation or justification was placed on the record as to what removal costs should be. Indeed, it is not clear if such figures, in fact, exist. N.J.S.A. 48:5A-28(d) provides that a CATV company must supply a performance bond to the municipality. It states that the CATV company application must contain:

"Evidence of sufficient bond, or commitment therefor, with sureties to be approved by the municipality, in the penal sum of not less than \$25,000 for the faithful performance of all undertakings by the company as represented in the application; the sufficiency of which shall be subject to review by the director and approval by the Board."

One purpose of this provision is to provide monies with which to remove facilities if the CATV company fails to perform its duties or abandons its system. In addition, N.J.S.A. 48:5A-37 provides that:

"No CATV company shall abandon all or any part of its system or other property necessary or useful in the performance of its duties to the public or discontinue or temporarily suspend all or any part of the service which it is rendering to the public by the use of same, without first obtaining the approval of the Board. In granting such approval the Board may impose such terms, conditions or requirements as in its judgment are necessary to protect the public interest."

In light of the authority set out above, we are of the opinion that the cost of removal should not be considered as an element of a necessary surety bond.

With regard to the attachment fees, as previously noted, we recognize that there have been payment problems in the past and we feel some measure of protection for the utilities is necessary, be it a bond or other form of secured payment. Accordingly, we recommend that, where the credit of a CATV company is not established or where a CATV company is in default of payment of pole rental charges (except where a justified dispute exists),

the utility should be allowed to require a reasonable deposit or the posting of a reasonable bond as a condition of supplying or continuing service. In our opinion, the protection afforded a utility through a deposit or a bond is equal. Therefore, the choice of which instrument is to be used should be left to the negotiation of the parties. The amount of said deposit or bond should be reasonably related to the charge for pole rentals during a yearly rental period providing that such sum does not amount to more than one-half of the annual pole rentals due to a utility.^{44/} In the case of deposits to insure payment, simple interest at the rate of 6% per annum should be paid by the utility company on all credits and deposits held by it providing that the credit or deposit has been held by the utility company for at least six months. With regard to surety bonds, the sureties should be subject to the approval of the utility companies.

With regard to construction work, as with attachment fees, we recommend that where the credit of a CATV company is not established or where a CATV company is in default of payment for construction work charges (once again, except in the case where a valid dispute exists), the utility should be allowed to require a bond in the full amount of the projected construction costs. The right of the utility to collect under such bond should be conditioned upon a determination by the Board that the bill for construction charges is, in fact, undisputed and owing.^{45/} It is our opinion that a bond for construction work is not necessary where the credit of a CATV company is established. To require a bond in such a situation places an undue burden on the CATV company and ultimately, on their subscribers. Several of the parties have spoken to the question of the apportionment of liability for equipment placed on the poles. The NJCTA contends that, typically, attachment agreements have sought to place liability upon CATV companies as a result of the mere presence of their plant on utility poles. It is the NJCTA's position that if an injury is caused as a result of negligence in the placing of CATV plant by the CATV company, that CATV company should sustain the liability. The NJCTA argues, however, that when such plant is properly placed, and the damage is the result of the negligence of others, the liability should rest with the party who committed the negligent act.

It is the belief of the independent telephone companies that CATV companies should be compelled to accede to the liability provisions which commonly appear in all joint use agreements between utilities. Paragraph 12 of the Joint Use Agreement executed by United N.J. Tel. and JCPL deals with the liability of joint users. Its provisions are set forth below:

"TWELFTH: Whenever any liability is incurred by any one or more of the parties hereto for damages for injuries to or loss of life by employees or for injury to the property of another party, or for injuries to or loss of life by other persons or damage to their property, arising out of the Joint Use of poles, guy stubs, guy anchors and guys under this Agreement or due to the proximity of the wires and fixtures attached to the Jointly Used poles covered by this Agreement, the liability for such damages as between the parties hereto shall be as follows:

^{44/} We note that NJBT appears to be billing six months in advance for such charges.

^{45/} We note that in the case of any billing disputes, all undisputed charges should be paid when due.

1. Each party shall be liable for all damages for such injuries to persons or property, exclusive of employees of the parties, caused solely by its negligence or solely by its failure to comply at any time with the Specifications; provided that construction temporarily exempted, by mutual agreement, from the application of said Specifications shall not be deemed to be in violation of said Specifications during the period of such exemption.

2. In cases of damages for such injuries or loss of life to persons other than employees of any of the parties and/or damages for such injuries to property not belonging to any of the parties hereto that are caused by the concurrent negligence of any of the parties hereto or that are due to causes which cannot be traced to the sole negligence of any party, the parties shall be liable for said damages as follows:

Owning Company 50%

Attaching Company 50%

3. As between the Electric Company and the Telephone Companies only and not for the benefit of any third party, each of the companies hereto assumes the entire liability for all injury or damage to its employees or its property or to the employees or property of its contractors, arising out of the Joint Use of poles, guy wires and guy anchors under this Agreement, or arising from the proximity of the attachments of the companies hereto on the Jointly Used poles covered by this Agreement without regard to the negligence of any of the companies hereto.

4. All claims for damages arising hereunder that are asserted against or affect two parties hereto shall be dealt with by those parties jointly, provided, however, that in any case under the provisions of paragraph 2 of this section where the claimant desires to settle any such claim upon terms acceptable to one of the parties hereto but not to the other, the party to which said terms are acceptable may, at its election, pay the other party 50% of the amount which such settlement would involve, including out-of-pocket expense incurred to the date of payment, and said other party shall protect the party making such payment from all further liability and expense on account of such claim.

5. In the adjustment between the parties hereto of any claim for damages arising hereunder, other than one settled by one party under the preceding paragraph 4, the liability assumed hereunder by the parties shall include, in addition to the amounts paid to the claimant, all expenses incurred by the parties in connection therewith, which shall comprise costs, disbursements and other proper charges and expenditures, but shall not include salaries and disbursements of employees of any party hereto.

6. Where a Jointly Used pole has been replaced and one of the parties hereto has transferred its attachments to the new pole and has removed all of its construction from the old pole and has so notified the other party in writing, if the other party fails to transfer its attachments and remove its construction from the old pole within sixty (60) days from the receipt of such notice from the other party, it shall become solely responsible for said old pole and said attachments and shall be solely liable for injury to or loss of life

by persons not in the employ of any of the parties hereto and for damage to property not belonging to any of the parties hereto"

The Independents contend that, except for paragraph 3 set out above, which fully places the liability for injuries or damages to employees, and their property or employees of contractors and their property, on the employing utility without regard to the negligence of any utility, vicarious liability is not imposed. Paragraph 1 makes each party liable for the suits of its employees against the other user of the pole. The Independents state that, while power company attachments are probably the most dangerous, the power companies argue that the third party suits by telephone company employees are avoidable costs, which they do not want to assume for the benefit of joint use, in that most injuries to employees are the result of the negligence of the employee, himself, or his fellow employees, and only the cost of defense is involved.

JCPL states that in its Joint Use Agreements with NJBT liability is determined solely by presence on the pole. JCPL has always been of the opinion that as CATV companies receive rights to attach in communication space and are claimants under NJBT the concept of presence liability applies to them as well. To do otherwise, JCPL contends, would increase its risk without compensation. Such risks would not have been affected but for the presence of CATV plant.

PSEG states that the liability requirements included in its standard agreement with CATV companies for attachment to PSEG poles is necessary to protect PSEG, its employees, stockholders and customers as it saves PSEG harmless from any legal proceedings arising from the actions of the CATV operator, its employees or contractors. This agreement also absolves PSEG from any responsibility for damage caused to CATV facilities by PSEG.

The Joint Use Agreement, with regard to liability, utilized by NJBT, as evidenced by the agreement entered into with ACE, is similar in context to the provision in the agreement employed by United and N.J. Tel referred to above. NJBT's agreement contemplates three different types of employee claims against the users of the pole. First, if an employee brings an action under the provisions of any workman's compensation act or other disability plan, all expenses are assumed by the employer. Secondly, when an employee of one of the users brings an action for damages caused by the concurrent negligence of both parties or due to causes which cannot be traced to the sole negligence of either party, the employer shall be liable for all damages. And, thirdly, in those cases where the employee is injured or suffers damages solely through the fault of either user, that party shall bear all liability for damages.

In addition, NJBT argues that its attachment agreements with CATV companies reflect fair business practices and therefore, it does not wish to modify Article XIII paragraph (c) of that standard agreement which indemnified NJBT from all liability based, among other things, on the presence of an attachee. NJBT contends that the ability to use utility facilities, even though provided for by statute, is a convenience for the CATV industry and the public and that it is appropriate that the responsibility for potential liability arising out of CATV use of utility facilities rest solely with CATV companies. Article XIII, paragraph (c) provides that:

Licensor shall indemnify, protect and save harmless Licensee from and against any and all claims and demands for damages to property and injury or death to persons, including payments made under any Workmen's Compensation Law or under any plan for employees' disability and death benefits, which may arise out of or be caused by the erection, maintenance, presence, use or removal of Licensee's cable, equipment and facilities or by the proximity of the cables, equipment and facilities of the parties hereto, or by any

act of Licensee on or in vicinity of Licensor's poles, conduit or trench system. Licensee shall also indemnify, protect and save harmless Licensor from any and all claims and demands of whatever kind which arise directly or indirectly from the operation of Licensee's facilities including taxes, special charges by others, claims and demands for damages or loss for infringement of copyright, for libel and slander, for unauthorized use of television broadcast programs, and for unauthorized use of other program material, and from and against all claims and demands for infringement of patents with respect to the manufacture, use and operation of Licensee's equipment whether arising from the use of Licensee's equipment in combination with Licensor's poles, conduit system, trench system or otherwise."

We are of the opinion that the degree of liability to which a party should be held is akin to the status it enjoys on the pole. To the extent that a CATV company has a higher status on a pole, it should bear a higher burden for liability associated with the use of that pole.

Any apportionment must be initially reviewed in terms of actions commenced either by non-employees or by employees of the pole users. We agree with the provisions of the Joint Use Agreements employed by United, N.J. Tel and NJBT which provide that each party shall be liable for all damages for such injuries to non-employee persons or property caused solely by its negligence or its failure to comply with construction specifications. Such policy should be binding on an attaching CATV operator. In those instances, however, where the alleged damages result from the concurrent negligence of the pole users or are due to negligence which cannot be ascribed to any individual pole user, we feel that, at least with regards to themselves, each user should be liable for that amount of any award granted based on the apportionment of its pole use as determined herein.

We further agree with the utilities that the cost of the defense to any employee action under the provisions of any workman's compensation act or disability plan should be borne by the employer as liability thereunder is assessed vicariously without regard to negligence. However, we envision several possible occurrences from actions commenced by the employee of one pole user against the other pole users. In those situations where a non-employer pole user is found to be solely liable for any damages, we are of the opinion that that party should be liable for the entire award and all expenses. Where the non-employers are found to be concurrently liable for the damages they should share the expense based on the percentage of pole use as determined herein. But where no liability is found against the non-employer pole users, the employer pole user should be liable for all legal expenses incurred to defend the action.

We note that the amount of insurance coverage required to be carried by CATV companies pursuant to Article XIII(d) of NJBT's attachment agreement is no less than \$50,000 as to any one accident and an aggregate amount of \$200,000 during the policy year for property damage and, with regard to the injury or death of persons, no less than \$300,000 as to any one person and \$500,000 as to any one accident. While there was no negative response by the NJCTA with regard to these insurance requirements, NJBT has proposed that the levels of coverage be increased to between \$500,000 and \$1,000,000 to more accurately reflect current liability exposure in the event of a claim. As we have determined that liability, for the most part, should be apportioned pursuant to the pole use formula herein developed, we recommend that the parties negotiate the amount of any required insurance coverage based on that apportionment.

We also note that any party on the pole who, as a result of its negligence, causes damage to the plant of another pole user shall be liable for such damages.

EMERGENCY CREWS

JCEP and PSEG have expressed the opinion that, because of the extensive growth and increase in the installation of CATV construction in their respective service areas, CATV companies should provide 24 hour emergency service to work in conjunction with the utility emergency crews in order that decisions as to the treatment of the various attachments can be properly made. It was indicated that while the utilities are provided by the CATV operator with telephone numbers to use in times of emergency, they are often connected to answering services or CATV personnel who cannot respond immediately.

It is our opinion that public policy requires a CATV company to have emergency crews available on a 24 hour basis to adequately cover its service area. To the extent that they do not presently have this service, CATV companies should provide such from their own personnel or from personnel of independent contractors. If necessary, the CATV companies may also contract with the utilities for the latter's employees to do the necessary emergency work.

To the extent that there seems to be a communications problem, we suggest that the utilities and CATV companies exchange telephone numbers of the units that will handle the emergency work as well as exchanging emergency procedures.

RENTAL RATES FOR POLE ATTACHMENTS

Rental Methodologies

The general jurisdictional grant to the Board which underlies its authority over pole rental rates is found in section 21 of the Act. Section 21 states, in pertinent part, that:

"Upon the prior approval of the Board, any person may lease or rent or otherwise make available facilities or rights-of-way, including pole space, to a CATV company for the redistribution of television signals to or toward the customers or subscribers of such CATV company...The terms and conditions, including rates and charges to the CATV company, imposed by any public utility under any such lease, rental or other method of making available such facilities or rights-of-way, including pole space, to a CATV company shall be subject to the jurisdiction of the Board..., in the same manner and to the same extent that rates and charges of public utilities generally are subject to the Board's jurisdiction by virtue of Title 48 of the Revised Statutes."

The NJCTA interprets this section to mean that the service that the utility provides to a CATV company by permitting it to use space on its poles is just like any other public utility service that is provided to other utility customers. Thus, the NJCTA maintains that the Board must look at the rates, charges and cost allocations associated with this service in the same manner that it would look at rates and charges for utility service. The NJCTA notes that, among other things, this implies that as a basis of pole rentals the Board should look at original cost of plant used and useful for the provision of that service. Therefore, the NJCTA anticipates no uniform rate throughout the State. Rather, the NJCTA requests that there be established an appropriate range within which the allocation of costs should fall. The maximum allocation of costs to occur under the NJCTA suggested rental formula would coincide with those cases when the status of the CATV company is equal to that of other users on the pole. (See discussion below). To the extent the status of a CATV company is subordinate to that of other users, the NJCTA maintains that the rate should be set at a minimum allocation of costs equal to the incremental costs incurred by the utility in providing space to the CATV company. It is alleged that the current attachment agreements make the CATV company a licensee present at the sufferance of the utility, and thus, an incremental user of utility plant.

JCPL disagrees that the provision of pole space to CATV companies by utility companies is the same as providing utility services generally. While it does not question the Board's authority over the terms and conditions of attachment agreements, due to the different nature of services provided by power companies, JCPL maintains that the full panoply of Board rate jurisprudence need not apply.

The independent telephone companies maintain that section 21 of the Act requires a strict adherence to Title 48 methodologies and policies. It is then noted that among such Board determinations is that rates to be charged by telephone companies for any service other than basic residential telephone service shall make a contribution to the provision of basic residential services on a forward looking basis (see the October 28, 1977 Order rejecting Hillsboro and Montgomery Telephone Company's decorator phones tariff, Docket No. 738-378). Therefore, it is maintained that any rate approved must be fully compensatory and demonstrate no cross subsidization between CATV and utility services. Thus, the independent telephone companies perceive the issue herein to be whether CATV companies should pay incremental costs of its joint use of utility facilities or fully allocated costs. The independent telephone company solution is to use fully allocated costs.

Our interpretation of the requirements of section 21 of the Act differ slightly from those outlined above. While there is no doubt that the topics raised, such as cost allocation, are an integral part of the rental rate issue, neither section 21 nor Title 48 predetermine the issue. Rather, we find that section 21 is a broad delegation of authority to the Board as to the terms and conditions of pole attachment agreements, including rental rates. The extent of this jurisdiction clearly encompasses all rates of both utility companies and CATV companies. While the different parties hereto would like the Board to read into this jurisdictional grant various utility rate-making concepts as a matter of law, we find such not to be mandated. Rather, we find that section 21 and Title 48 requires the Board to determine if a proposed rental fee is unreasonable, unduly preferential or discriminatory. If so determined, the Board could modify any such rental fee. In the context of the investigatory nature of this proceeding, we hope to recommend criteria for reviewing attachment agreements (including rental fees) submitted to the Board for approval. Acceptance of the positions of either the NJCTA or the independent telephone companies would moot any determination we make herein. Thus, we reject the position that Title 48 requires that a particular rate methodology be utilized in Board review of pole attachment rental rates.

It is essential to understand that, while the proposed rental formulas herein all differ significantly in details, they are strikingly alike in basic approach. Each formula divides the rental approach into three steps. Step one consists of determining a value of investment in pole plant on a per pole basis from which a rental can be derived. Step two involves a determination of the total yearly ownership expenses per pole expressed as a percentage of investment per pole. Step three consists of a method for allocating a portion of that cost to cable television systems. We shall explain these steps in more detail below.

As detailed in our later discussion there were essentially four methods proposed for determining a value of investment in pole plant on a per pole basis from which a rental can be derived. Subject to certain options available to the parties, we recommend use of weighted (as to pole size) or non-weighted average original installed pole cost.

The yearly ownership expense on a per pole basis includes such items as depreciation, cost of capital, maintenance expenses, administration expenses and taxes. It is difficult to obtain a value for these items as most utility books do not contain a separate allocation of expenses attributable solely to pole plant. While the data supplied herein were estimates, there was a surprising consistency in the final total of such expenses on a percentage of gross plant pole basis. Whatever average annual expense is applicable to the utility involved, that number must be multiplied times the investment in pole plant on a per pole basis to arrive at an average annual cost per pole.

Having obtained the average annual cost per pole, it is necessary to determine what percent of this figure should be borne by the CATV company. In accordance with our discussion below, we recommend a range of responsibility for annual costs per pole. This range is based strictly on the status of the CATV company on the pole in relation to utility users. To the extent there is an equality of status, responsibility for such costs is divided most equally. To the extent the CATV company is a subordinate user of pole space, the responsibility for such annual costs should be reduced. An example of the calculation of a pole rental under the recommended formula is shown on the next page.

- Assumptions:
- (1) PSEG solely owned 35 foot poles
 - (2) Original cost including guys and anchors equals \$82.37 per pole (12/31/76)
 - (3) Common Space
2 users = 30' - 6"
3 users = 28' - 0"
 - (4) Usable Space - 2 users
Power = 3' - 6"
CATV = 1' - 0"
 - (5) Usable Space - 3 users
Power = 3' - 6"
CATV = 1' - 0"
Telco = 2' - 6"
 - (6) Annual costs = 17.7% + \$6.00

Calculations:

- (1) Total yearly ownership expense
(original cost) X (annual cost)
 $(\$82.37) \times (17.7\%) + \$6.00 = \$20.57$
- (2) Allocation of annual costs:
(See chart on next page)

TWO PARTY POLE ANNUAL COST ALLOCATION

	<u>TENANCY -AT-WILL</u>		<u>CATV PAYS ALL REPLACEMENT AND REARRANGEMENT COSTS</u>		<u>EQUAL STATUS</u>	
	<u>CABLE</u>	<u>POWER</u>	<u>CABLE</u>	<u>POWER</u>	<u>CABLE</u>	<u>POWER</u>
Common Space (30'-6")	0'-0"	30'-6"	6'-9" (1/4.5) x (30'-6")	23'-9" (3.5/4.5) x (30'-6")	15'-3" (30'-6")/2	15'-3" (30'-6")/2
Usable Space (4'-6")	1'-0"	3'-6"	1'-0"	3'-6"	1'-0"	3'-6"
% of Space Allocated	2.86% (1/35)	97.14% (34/35)	22.14% (7.75/35)	77.86% (27.25/35)	46.4% (16.25/35)	53.6% (18.75/35)
Annual per Pole cost Allocation (%) x (\$20.57)	\$5.59 per pole per year	\$19.98 per pole per year	\$4.55 per pole per year	\$16.01 per pole per year	\$9.54 per pole per year	\$11.03 per pole per year

THREE PARTY POLE ANNUAL COST ALLOCATION

	<u>TENANCY-AT-WILL</u>			<u>CATV PAYS ALL REPLACEMENT AND REARRANGEMENT COSTS</u>			<u>EQUAL STATUS</u>		
	<u>CABLE</u>	<u>TELCO</u>	<u>POWER</u>	<u>CABLE</u>	<u>TELCO</u>	<u>POWER</u>	<u>CABLE</u>	<u>TELCO</u>	<u>POWER</u>
Common space 8'-0")	0'-0"	14'-0"	14'-0"	4'-0" (1/7) x (28)	10'-0" (2.5/7) x (28)	14'-0" (3.5/7) x (28)	9'-4" (28/3)	9'-4" (28/3)	9'-4" (28/3)
able Space 7'-0")	1'-0"	2'-6"	3'-6"	1'-0"	2'-6"	3'-6"	1'-0"	2'-6"	3'-6"
of Space located	2.86% (1/35)	47.14% (16.5/35)	50% (17.5/35)	14.29% (5/35)	35.71% (12.5/35)	50% (17.5/35)	29.52% (10.3/35)	33.81% (11.8/35)	36.67% (12.8/35)
annual per pole cost location (%) x (\$20.57)	\$.59 per pole per year	\$9.70 per pole per year	\$10.28 per pole per year	\$2.94 per pole per year	\$7.35 per pole per year	\$10.28 per pole per year	\$6.07 per pole per year	\$6.95 per pole per year	\$7.54 per pole per year

It is important to note that the joint-use agreements between utilities do not apportion costs as we recommend. Instead, they either split costs equally or in a proportion determined by a field survey as to use of poles. In either case, since under the joint-use agreement each party strives to own an equal number of poles, they merely credit each other for the appropriate rental. We see no need to alter this arrangement between utilities. As to agreements with CATV companies, all have been submitted to the Board for approval and lay dormant. We suggest they all be renegotiated as to rentals consistent with our suggestions herein. Such newly negotiated agreements should then be refiled with the Board for review consistent with our recommendations herein.

It is clear from our discussion so far that CATV companies must pay costs attendant to the right to attach. The question has come up during these proceedings over whether such costs would be better developed through a "buy in" of pole plant rather than by rentals.

To summarize the position of the parties (except JCPL) relative to a buy in, they all to varying degrees support the concept. There also seems to be agreement that the option should be available to buy in either through traditional joint use (where each party owns an equal number of poles and all rentals cancel out) or joint ownership (where all poles are owned in common).

The question has arisen as to how many poles should be bought ultimately under either option. Under joint use plans, the number of poles owned would be equal between any utility and CATV company agreeing to jointly use each other's solely owned poles. In such a case, annual ownership costs would be credited by the parties to each other as needed. The allocation of such costs should be in accordance with our allocation of annual costs on an equality of status basis for either 2 or 3 party poles. With jointly-owned poles, all poles are jointly owned and annual costs should be in accordance with the above percentage allocation.

The issue of when the CATV company should buy in has also been raised. Initially, we must note that the entire buy in option should be a freely negotiated issue requiring mutual consent to make it effective. JCPL, REC and NJBT suggest that to avoid unnecessary administrative problems, piece-meal purchases or purchases at the time of replacement should be avoided. Thus, they recommend that the purchase of poles be made at the time of attachment. ACE suggests that poles be purchased when setting new poles or replacing existing ones, rather than purchasing poles already in place. They would be collecting some rents and paying some with the ultimate goal of proportionate number of poles so net rentals would be zero. The perceived advantage of this is that it would not require large initial capital investments. PSEG suggests that any ownership plan should not financially burden the CATV company. Thus, in light of the large capital investment required by a CATV company to purchase a large number of poles, PSEG suggests rentals with an option to purchase. Such a plan would require full ownership over a fixed period of time, 10 - 15 years, mutually agreeable to all parties. During initial construction the CATV company would buy into a fractional number of poles based upon an equal number of poles annually over the agreed upon period. Rental poles replaced during the year would also be brought under joint-ownership. Due to anticipated administrative, procedural and legal details necessary to any such plan, PSEG suggests that variations of this plan should be left open to the parties. We agree with PSEG. Any ownership plan should encourage CATV pole ownership of pole facilities. To the extent that initial costs would overburden a particular CATV company, any plan that would spread the costs of pole ownership over a reasonable period of time should be encouraged.

All utility companies herein have mentioned CATV maintenance capabilities for CATV owned plant. We anticipate that under any ownership arrangement, each party would be capable of maintaining its poles. This would include adequate manpower and equipment for all responsibilities of pole ownership, but not limited to (1) periodic pole inspections for soundness and/or decay, (2) replacement of defective poles, and (3) emergency crews. If no such capability exists during the early years of an ownership plan, we would anticipate utility provision of such services with appropriate billing to the CATV company.

There have been three suggestions as to the appropriate price at which to purchase pole plant. REC suggests depreciated book cost. NJBT suggests use of the "structural value" of the pole.^{46/} The NJCTA suggests use of the values used by PSEG and NJBT in their joint-ownership agreement (Appendix B, page 23).^{47/} To most equally divide actual costs we believe the parties should be free to negotiate a pole price based on either REC's or the NJCTA's suggestions. As evidence of the inequity of pricing a pole based on replacement cost, we note that under the PSEG/NJBT agreement one-half interest in a 40' wood pole in 1978 cost \$132. However, under NJBT's methodology, the same one-half interest in a pole sold to a CATV company would be valued at \$290.

^{46/} Equivalent of in-place replacement costs of the plant adjusted for its general condition and functional life.

^{47/} Each year a reciprocal pole price arrangement is agreed upon between the parties based on cost to the company, internal expenses, space requirements, etc.

BASIC NUMERICAL CALCULATIONS

1. Investment in pole plant on a per pole basis: There have been presented herein four methods to calculate investment in pole plant on a per pole basis. They are (1) forward looking embedded cost, (2) average original installed pole cost, (3) depreciated replacement value of pole plant and (4) weighted average original installed pole cost.

NJBT would apply ownership costs to what it calls "forward looking embedded cost". It is felt that such a method will take into account the added costs in NJBT's pole account (No. 241) and the reduced costs in that account due to the adding of new poles and the replacing of old poles. The initial step in this approach would be to establish the embedded cost of the pole plant. This would be equal to the entire amount in the pole account, exclusive of those items of plant not useful to CATV,^{48/} divided by the total number of poles in place. NJBT then, based on past history, theorizes what costs will likely be over the next five years. The time value of this amount is calculated and the amount is amortized. This results in a pole cost (projected June, 1980 embedded value) of \$147.30 for a 35 foot pole.

REC recommends use of the average installed per pole investment in REC-owned undressed wood distribution plant. As REC's pole account (No. 364) contains poles, anchors, guys and associated hardware, REC suggests that the amount therein be reduced by 38% to take such hardware, etc., into account.^{49/}

The NJCTA also advocates adoption of average installed per pole investment. It is noted that the average cost per pole will vary from utility to utility, and, depending on the reporting system used, will include a number of components which may or may not be useful to a CATV licensee. It is suggested that these components, estimated at 30%, be excluded in determining the average value per pole.^{50/}

PSEG advocates adoption of depreciated replacement value of pole plant. Under this method, the replacement value of pole plant is reduced by a credit given the CATV company for expired life of the pole. It is felt that this credit reflects capital investment in plant, survivors from original plant, and replacements of original plant. Thus, the pole is valued at its current value, and therein lies the key to the PSEG method. They give value for part of the pole used and when a third party comes on the pole they expect that party to contribute its proportionate share of the value of the remaining life of the pole. Thus, PSEG attempts to retain company revenue requirements as if a portion of the pole were sold and someone else owns it. PSEG feels this is preferable for two reasons. First, by using this measure, they feel PSEG customers are not subsidizing CATV

48/ NJBT estimates that 15-20% of the account is nonuseful to CATV. This number would equal 25% if you exclude anchors and guys NJBT says CATV companies need and use.

49/ It should be noted that REC anticipates 17% for crossarms and hardware and 21% for anchors and guys. All anchoring and guying would be done by the CATV company at its own expense.

50/ NJCTA suggests that CATV companies be allowed to attach a guy to utility anchors and be charged separately therefor.

customers. Second, book cost doesn't take into account the fact that the depreciation annuity allows for early retirements. Under PSEG's methodology, the average depreciated value of a 35 foot pole is \$150.92, calculated as follows:

Replacement cost installed	\$172.00
Guying and anchoring ^{51/}	33.60
Total pole plant value	<u>\$205.60</u>

Less:

Allowance for expired life	\$ 54.68
(.266 of \$205.60) ^{52/}	
Depreciated value of pole plant	<u>\$150.92</u>

JCPL^{53/} and ACE advocate adoption of weighted average original installed pole costs, that being the method used in their joint-use agreements with NJBT. Under those agreements, a field survey is conducted to identify those portions of the average joint-use pole which were utilized by the attachments of the parties and those portions on the average pole which were common. The installed cost of poles, taken from the plant records of the two companies are used to establish the cost of the average pole, weighted according to the attachment ratios determined from the statistical sampling. The perceived advantages of this method are (1) it uses actual costs, (2) actual use is assessed and (3) it obviates the need for detailed pole attachment records and the cost of maintaining same.^{54/} Under this methodology, the total pole cost allocation on average ranged from \$69.62 (West Jersey Telco) to \$171.38 (N.J. Telco). An example of the calculations involved reveals the following:

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- 51/ Since it is felt guying is of benefit to CATV companies, it is included in the plant to avoid continuous billing for guying changes later. Thus, as it was estimated that CATV and power would together require a 35-foot pole to be guyed at least 30% of the time, \$33.60 was added in (.3 X \$112).
- 52/ For the purposes herein, PSEG uses a group method sinking fund by which they determine the equivalent of the plant used at any particular point based on the average life for a group of poles. Under this method, based on a hypothetical 29 year life, the allowance for the expired life by the use of those poles in place 15 years equals 26.6% of their value. PSEG maintains that this accounting method takes into account the time cost of money and the dispersion of pole life.
- 53/ JCPL uses bare pole costs, including hardware, for its sample rate calculations to demonstrate an appropriate formula.
- 54/ ACE balances the use of average length poles, rather than actual length, against the record-keeping costs necessary for even a small number of poles.

UNITED TELCO OF NEW JERSEY

(a) Pole Size	(b) Ave. cost/pole in Service	(c) % of total poles in Service ^{55/}	(d) % of Total usable space for CATV ^{56/}	(e)=(b)X(d) Ave. cost/pole Alloc. to CATV (Weighted)	(f)=(b)X(c) (-e) Ave. cost/pole Alloc. to Telco (Weighted)
25'	26.70	20.68	10.34	\$ 2.76	\$ 2.76
30'	123.96	13.31	2.08	2.58	14.17
35'	156.39	10.64	1.99	3.12	13.34
40' - 60'	171.57	55.17	10.32	17.71	79.95
				<u>\$26.17</u>	<u>\$107.42</u>
Total Allocation				<u>19.39%</u>	<u>30.41%</u>

After examination of all of the above methodologies we recommend that the Board allow the parties to negotiate the use of either (a) average original installed pole cost or (b) weighted average original installed pole cost. The first method, while something of a bookkeeping inconvenience, is preferable as it (1) is readily ascertainable from the accounts of the companies, (2) is based on actual cost to the utilities to purchase plant and (3) is based, by size, on actual poles attached to. The weighted average method, while not as exact due to the nature of surveys, has the advantage of minimal bookkeeping requirements. Either method, arrived at through negotiation of the parties, would seem to give a valid measure of pole plant used by CATV companies.^{57/}

As a starting point in the use of the nonweighted average costs, the value for gross pole plant per pole size, Gp, must be taken from the proper utility account. This amount will include various values for items not essential for cable television attachments such as cross arms, fixtures and other apparatus. We recommend that the parties be free to avail themselves of one of three options as to guying and anchoring costs. The first is to exclude an amount from gross plant (25% - 40%) representing all non-bare pole costs. All guying and anchoring necessary could be done by the utility and billed to the CATV company as done. An alternative to this would be, subject to our discussion of independent contractors above, for the CATV company to do all necessary guying and anchoring at its own expense, and pay a charge to the utility for such guying and

55/ Ratio of total poles by size to total company poles (12/31/76)

56/ Percentage of total poles in service by size, multiplied by the percentage of usable space per pole for CATV use as determined by survey: 25' = 50%; 30' = 13.38%; 35' = 13.71%; 40' - 60' = 13.71%.

57/ We note that the weighted average survey methodology of assigning common space would, of necessity, have to conform to the allocation herein.

anchoring attachment. The third alternative would be to include in the pole plant only such guying and anchoring necessary for CATV use. Such an inclusion, done on a percentage basis for gross pole plant, would be preferable from an administrative basis, but again, the parties should be free to choose.

Dividing the gross price figure, adjusted as necessary, by the actual number of poles, N_p , of each size attached to, yields the average original installed pole cost on a per pole size basis. Assuming the parties were willing to sacrifice the accuracy of such calculations on a per pole size basis, a weighted average could be utilized by dividing the total number of all poles into the total gross plant and ignoring actual pole size. Thus, the average original pole cost may be calculated as follows:

$$\frac{G_p}{N_p}$$

where: G_p = gross investment per pole per size of pole
adjusted for guying as the parties indicate

N_p = number of poles of a particular size

Based on the space allocations discussed below, the weighted average original installed pole cost would be calculated as was done earlier for United Telco. of New Jersey. In such a case the same three choices as to the treatment of guys and anchors would apply.

While the positions of NJBT and PSEG were amply set forth in the record herein, we are not adopting same. Without belaboring an already exhaustive Report, it is felt that NJBT's forward-looking embedded cost is too speculative. As to PSEG's methodology, it is felt that allowing a return on the basis of replacement cost (or value) would overcompensate the utility for money not invested in pole plant.

BREAKDOWN OF UTILITY POLE PLANT

<u>Company</u>	<u>Solely Owned</u>	<u>Jointly Owned</u>	<u>Total Ownership</u>	<u>Nonowned Poles Attached To</u>	<u>Total Attachments</u>
NJBT (12/31/77)	405,000	490,000	895,000	354,000	1,249,000
REC (12/31/76)	23,905	509	24,414	14,324	38,738
JCPL (12/31/76)	281,931	29	281,960	180,670	462,630
PSEG (12/31/76)	163,269	495,887	659,156	-	659,156
ACE (12/31/76)	224,059	-	224,059	77,905	301,964

BREAKDOWN OF 30, 35 AND 40 FOOT UTILITY POLES

Company	30 Foot		35 Foot		40 Foot	
	No.	Ave. Original Cost	No.	Ave. Original Cost	No.	Ave. Original Cost
P						
/31/77)						
ole	79,601	-	121,388	-	148,232	-
oint	19,841	-	231,239	-	205,274	-
/31/76)						
ole	3,009	\$ 65.92	5,878	\$ 87.95	6,493	\$155.54
oint	26	40.23	218	34.76	185	67.21
L						
/31/76)						
ole	-	-	90,071	81.93	132,155	150.26
oint	-	-			25	79.92
CG						
2/31/76)						
ole	34,109	107.72	48,198	82.37	27,669	126.31
oint	18,440	35.48	222,500	37.88	197,182	49.32
E						
1/31/77)						
ole	22,852	78.58	64,982	81.38	93,429	132.55

2. Total yearly ownership expense on a per pole basis:
 Rather than examining each element separately, the chart below indicates the utilities' estimated yearly ownership expense on a percentage of gross plant basis:

	<u>JCPL</u>	<u>ACE</u>	<u>PSEG</u>	<u>REC</u>	<u>NJBT</u>
Return	9.7	8.88	10.46 ^{1/}	7.557 ^{62/}	-
Depreciation Exp.	3.63	6.396 ^{59/}	2.7	4.663 ^{63/}	11.1 ^{64/}
Misc. taxes (franchise, gross receipts, real estate)	3.95	-	1.9	-	7.6
Maintenance Exp.	1.36 ^{58/}	.536	\$ 3.00 ^{60/}	-	1.7
Administration Exp.	-	.271	\$ 3.00	4.863	1.1
Federal Income Tax	<u>4.16</u>	<u>5.274</u>	<u>2.2</u>	<u>3.623</u>	<u>4.4</u>
	<u>22.8%</u>	<u>21.357%</u>	<u>17.7%</u> <u>+ \$6.00</u>	<u>20.64%</u>	<u>25.1%</u>

- 58/ This 1.36%, derived on the basis of a 4 year review of actual accounts includes labor, materials and other direct and indirect expenses incurred for preserving the operating efficiency or physical condition of utility plant.
- 59/ This is based on a 25 year life with straight-line depreciation. This 4% per year is a component of ACE's composite rate of 3.47% for all distribution facilities. The 3.47% is determined by weighing the money, the average service life and the net salvage value of each account. These individual rates are then combined into the composite rate to be used for the functional plant.
- 60/ PSEG estimates maintenance and administration expenses to be \$6.00 per pole per year.
- 61/ Internal rate of return for account 364.
- 62/ Cost of money is the weighted average of embedded cost of the owner company's long term debt, preferred stocks, and return on common equity as determined by the Board in the utility's latest rate proceeding.
- 63/ Straight-line over 30 years with a negative salvage value of 40%.
- 64/ Amortization expense under NJBT methodology.

Obviously, these expenses vary widely on a company by company basis. This would appear to be due to different bookkeeping techniques, the assumptions necessary to the estimates made and the different contexts under which this data was compiled herein. Whatever the particular reason, yearly ownership expenses of between 20 to 25 percent would seem to be common. Thus, for the purposes of using the formula(s) proposed herein, we suggest that total expenses within this range be viewed as reasonable.

3. ALLOCATION OF ANNUAL COSTS:

There have been two allocation methodologies presented herein--NJBT's "share the benefits" methodology and numerous "space allocation" methodologies.

NJBT's methodology is based on the premise that no matter what portion of the pole is actually being used by any party, that party should be responsible for a percentage of the cost based on what new pole plant would have cost them had they installed it alone. The reasoning behind this methodology is that, if going alone, each party would have to go out and build a pole line of varying sizes and heights with approximately the same number of poles per mile. Thus, by joining together, both parties are able to share the savings realized together.

The key to this methodology is determining CATV sole plant costs, as utility sole plant costs are readily ascertainable. NJBT's estimate of CATV costs is based on three premises; (1) all parties require approximately 40 poles per mile;^{65/} (2) Sole CATV pole plant would cost 10% less than telco pole plant which would cost 10% less than power pole plant;^{66/} and (3) a jointly used pole line is less costly to each attendee than individual pole lines constructed in parallel.

With the foregoing assumptions and judgments in mind, the basis of a pole attachment fee could be developed as follows:

65/ NJBT maintains that based on a sampling of 20-30 municipalities, and the nature of the suburban and urban areas of New Jersey (as to lot sizes), the number of poles needed by CATV shouldn't differ significantly from that of Telco.

66/ Based on experience and estimates.

- (1) Estimated distribution of pole sizes
for use on a per mile basis:

	<u>25'</u>	<u>30'</u>	<u>35'</u>	<u>40'</u>	<u>TOTAL</u>
CATV	20	16	4	-	40
TELCO	8	28	4	-	40
POWER	-	21	12	7	40

- (2) Cost per bare pole by size:

	<u>25'</u>	<u>30'</u>	<u>35'</u>	<u>40'</u>
CATV	\$162	\$199	\$240	-
TELCO	\$180	\$221	\$267	\$293
POWER	-	\$243	\$294	\$322

- (3) Total Pole Costs:

	<u>25'</u>	<u>30'</u>	<u>35'</u>	<u>40'</u>	<u>TOTAL</u>	<u>AVE. PER MILE</u>
CATV	\$3240	\$3184	\$960	-	\$7384	\$185
TELCO	\$1440	\$6188	\$1068	-	\$8696	\$217
POWER	-	\$5103	\$3528	\$2554	\$10,385	\$272

- (4) Allocation percentage calculation (3 party):

$$\text{CATV} = \frac{185}{185+217+272} = 27.4\%$$

$$\text{TELCO} = \frac{217}{185+217+272} = 32.2\%$$

$$\text{POWER} = \frac{272}{185+217+272} = 40.4\%$$

The main problem with the NJBT approach, as perceived by the NJCTA, is the lack of empirical evidence to plug into the formula. In that regard NJBT and CATV differ on CATV construction costs. Since there has not been construction of a great deal of CATV plant, there is an inability to substantiate the estimate of CATV costs for building plant. It is felt that reconciling the different input assumptions on comparative costs of construction will require considerable engineering and cost analysis on hypothetical sole use plant, thus making this methodology relatively difficult to use.^{67/}

Additionally, the NJCTA points out that the NJBT methodology does not take into account the difference in status of the users of the poles. Rather, NJBT presumes an equality of status totally different than actually present. Therefore, while it may have logic in theory, in application under the types of agreements universally in effect, the NJCTA feels NJBT's methodology is inappropriate.

67/ Based on (1) 1975 costs, (2) 32 poles per mile, (3) class 5, 6, or 7 CATV poles, as opposed to class 2 or 3 utility poles and (4) a light loading area, a \$2,200 per mile construction cost figure for a CATV system was estimated.

We must agree with NJCTA that application of same would be a procedural nightmare. CATV construction costs are almost always hypothetical in nature or based on very limited construction experience. In either case the proportionate amounts would be unverifiable and constantly changing due to cost variances. Accordingly, we recommend that the NJBT "share the savings" methodology not be adopted to allocate annual pole costs.

The second type of allocation formula is based on use of space on the pole. Space on utility poles may be broken into two components-(1) usable space and (2) common space. Usable space is that portion of the pole actually used by each party. Common space consists of those parts of the pole on which generally no attachments are made. Such common space is made up of setting depths of poles, ground clearances, the neutral space between power and communications lines and the top six inches on the pole. To the extent they agree as to what constitutes usable space, all parties agree that each attachee to a pole should be 100% responsible for such space. To the extent they agree as to what constitutes common space, ACE, PSEG, JCPL and REC feel responsibility for such space should be apportioned equally among all pole users. The NJCTA feels that responsibility for such common space should be in equal proportion to the party's proportionate use of usable space.

The NJCTA proposes to eliminate from consideration as common space (1) the top 6" of poles and (2) the neutral space. It is felt that, as the top 6" sometimes contains street light extensions, it should be the responsibility of the power company. Similarly, as the neutral space must be maintained from power facilities and, as it sometimes contains municipal alarms and street lights, it is felt that responsibility therefor should be with the power company.

Both JCPL and PSEG point out that, without the top 6" of the pole being left neutral, the poles will split. Thus, the top 6" should remain as part of the neutral space. Additionally, it is noted that while the NESC requires the neutral space to be maintained, it is the responsibility of no one party.

While there is some question about municipal alarms in the neutral space, generally we agree with the utility position that the common space should include the neutral space and the top six inches on the pole. Accordingly, pole plant is divided up as follows for a typical 35 foot pole:

	TWO PARTY USE		THREE PARTY USE	
	JCPL	PSEG	JCPL	PSEG
Common Space				
SETTING.	5'6"	5'6"	5'6"	5'6"
GROUND CL.	21'0"	20'6"	18'0"	18'0"
NEUTRAL SP.	4'0"	4'0"	4'0"	4'0"
TOP 6"	-	0'6"	-	0'6"
Usable Space				
ELECTRIC	4'0"	3'6"	4'0"	3'6"
CATV	0'6"	1'0"	0'6"	1'0"
TELCO	-	-	3'0"	2'6"

The above indicates that there is a difference of opinion as to the actual locations of parties on poles. Accordingly, we recommend that inputted into each utility's allocation of pole costs be the result of a survey to detect actual location of facilities on utility poles.

The utility position with regard to the allocation common space is that it should be apportioned equally. The reason for this is that the clearances and neutral spaces must be maintained regardless of the number of parties and that such clearances and neutral spaces are common to all.^{68/}

The NJCTA's position with regard to the allocation of common space is that it should be apportioned in a proportion equal to that by which the usable space is divided. The reasons for this are (1) the lack of contemplation of CATV attachments when originally sizing and constructing the pole; (2) the obligation of CATV companies under the rental agreement to provide additional pole space at CATV's expense for later utility attachments; and (3) the CATV company's status of licensee, which in the agreement reads like "tenant-at-will." Thus, the NJCTA advocates the imposition of incremental administrative and maintenance expenses. To the extent CATV's status becomes equal to that of other users, the NJCTA recommends that it be responsible for its usable space plus its proportionate share of common space.

In response to the above remark's, ACE notes that although poles are not specifically constructed for CATV use, CATV does use additional facilities meant for utility future use. Therefore, it is felt that CATV support of the capital investment is proper. REC would eliminate its right to evict CATV companies from poles provided it discharges its other responsibilities such as maintenance, liability for subsequent pole rearrangements and higher future rentals based on increased prices for changed out pole plant.

We feel the key to any allocation plan is to allocate responsibility for annual pole costs in a manner consistent with (1) CATV rights on the poles and (2) the desire to avoid cross-subsidization of CATV subscribers by utility subscribers or vice versa. A factor to be considered is that were CATV, power or telco to construct sole pole plant, the poles used would not be identical. While required pole clearances would remain virtually the same, the loading weight put on the poles varies with each party, necessitating poles of different thicknesses. The problems with trying to apportion common space on the basis of sole pole costs are twofold. Initially, it faces the same weaknesses as NJBT's "share the savings" methodology, i.e., lack of adequate construction experience by CATV companies. Assuming such an obstacle could be overcome, we are still not sure that relative independent pole needs should be used as the measure to divide responsibility for the common space. Clearly, the question of whether either party alone would need a smaller pole, is not relevant. They each must take the pole as it is. That, in essence, is part of the trade off made in exchange for the right to jointly use poles. Therefore, while the fact that the thickness and height of a sole CATV pole might cause it to cost less than a joint-use pole is interesting and causes us to lean toward allocation of common space on a use basis, it is not conclusive on that issue.

68/ It is acknowledged that the amount of both common and usable space may vary according to pole size and the number of parties attached.

As a mere licensee, the NJCTA assumption that it should pay incremental cost has some merit. We must agree with the NJCTA that, contrary to utility positions, CATV would not be cross-subsidized by the utility in such a situation. Rather, given such a contractual relationship, we feel there has been no capital construction made for the benefit of the CATV operator. Even without the right of eviction, we still feel the CATV companies should not be responsible for an equal share of the common space. In such a case, the CATV company is merely using presently vacant utility space until needed by the utility. When such use by the utility is necessary, the CATV company must bear all pole replacement or rearrangement costs. Again, we feel no capital contribution has been made by utilities for CATV use. Thus, we recommend that, in cases where the CATV company is responsible for all subsequent replacement or rearrangement costs due to a need for additional space, the CATV company should be responsible for only the proportionate part of the common space which it uses. If the parties agree that, in the case of later work on a pole, (1) each party is responsible for rearranging its own facilities at its own cost, (2) the party requiring additional space pays for the additional wood and setting of such pole and (3) the party requiring more space is responsible therefor in its usable space, then we recommend that the responsibility for the common space be borne equally by all pole users. In such a case, the CATV companies' rights on the pole are more or less equal to those of the utility and they should bear an equal responsibility for the cost of support structures.

Clearly, the choice of relative rights on the pole should be an issue during pole agreement negotiations. While no one method is superior to another from a cost viewpoint, should the parties fail to agree, we find that the situation wherein there is an equality of status and an equal division of the common space to be most consistent with the goals of providing adequate and efficient utility and CATV services.

THE RESOLUTION OF FUTURE DISPUTES

Based upon the testimony given herein, as well as the historically poor relationship between CATV companies and utility companies, we feel that there will be an ongoing need to resolve complaints, misunderstandings and disputes. Accordingly, we requested that all the parties hereto address the possibility of a possible forum to resolve such matters.

Most comments received referred to the Joint Utility/Cable Technical Committee (JUCTC). The JUCTC was formed to serve as a forum to facilitate the exchange of ideas and complaints between operator-type individuals involving present and future construction problems. As the JUCTC was formed to encourage the interaction of various interests "in the spirit of cooperation", the JUCTC has no power to enforce any of its decisions. Among the matters considered by the JUCTC were (1) make-ready scheduling problems; (2) the manner in which the CATV industry can obtain access to underground developments already occupied by power and/or telephone utilities; (3) the manner in which stranding can be done as to tensioning; (4) power supply locations; (5) amplifier supply locations; (6) the manner in which power is supplied and billed to CATV companies; (7) bonding and grounding with power facilities to assure that all NESC requirements are met; and (8) easements. Criticisms of the JUCTC include (1) its failure to accomplish much more than better rapport between the parties; (2) its disagreements over questions of legislative intent, tariffs and legal issues; (3) its failure to agree on less stringent CATV strand tension requirements (coupled with a size limitation on strand); (4) poor attendance; (5) poor dissemination of information; (6) lack of input from all CATV companies; and (7) too much work done at the subcommittee level where the membership is somewhat limited.

Generally, all suggestions as to a future forum include the right to ultimately appeal any such forum's decisions to the Board. The difference in the recommendations is in the forum from which appeal should be taken. Most utility companies feel that a strengthened JUCTC would be the appropriate place to initially commence all procedures. The NJCTA feels that the Office is the appropriate place to "informally" resolve disputes in the absence of Board hearings.

Initially, we again note that N.J.S.A. 48:5A-21 requires prior Board approval of all attachment agreements. While such agreements have been submitted for approval, none have been approved by the Board to date. An examination of such agreements reveals a substantial degree of noncompliance with the recommendations herein. However, whether such noncompliance exists or not, we feel that joint pole users should be free to renegotiate their agreements in light of this Report. Thus, we recommend that all present agreements be renegotiated in accordance with the guidelines herein. Those agreements successfully renegotiated should be submitted for approval by the CATV company, which is the party most benefited thereby. Those CATV companies finding a failure to agree on negotiable issues or those CATV companies finding a failure to negotiate, should file a petition for permission to attach pursuant to N.J.S.A. 48:5A-20. All such petitions should specifically list the areas of disagreement between the parties. In the case of petitions filed pursuant to N.J.S.A. 48:5A-20 or N.J.S.A. 48:5A-21 the standards by which the Board should review same are those recommended herein. It is anticipated that no further regulations will be necessary to implement this procedure. Rather, the Board's regulations governing petitions generally and subsequent Board decisions should govern the parties actions.

The Board has comprehensive jurisdiction over CATV and utility companies. The Act gives the Board and the Director the right to "... hear all complaints... and render all decisions necessary to enforce provisions of this Act..." N.J.S.A. 48:5A-9(C). Thus, the Act has set up a formal mechanism for the resolution of any dispute, not just those between CATV companies and utility companies.

We recommend that the JUCTC, in a modified form, be utilized as the initial forum for resolving future disputes among parties in the areas of (1) operational problems; (2) physical standards; (3) administrative procedures; (4) technical problems; and (5) restoration and maintenance of service. Any committee action while not binding on the parties if appealed, would have the advantage of input from those persons who deal with such agreements on a day-to-day basis. Rather than recommend a specific makeup of such a Committee or procedures to be used by it, we feel that the revised JUCTC should be free to formulate its own policies and procedures. It is anticipated that these procedures and policies, subject to review and approval by the Director and Board, would encompass (1) formalized internal mechanisms, (2) regularly scheduled meetings, (3) Board and/or Office representation at all meetings, (4) arbitration procedures to resolve disputes and (5) a membership and meeting attendance that is representative of the power, telephone and cable industries. The only formal requirement we would place on the Committee is that all Committee decisions, or failure to arrive at same, should be reported to the Office which could determine whether further action is necessary. In the absence of an appeal to or inquiry by the Board or Office, all Committee decisions should be final. To avoid a plethora of formal appeals to the Board, we recommend that representatives of the Board's and Office's engineering departments join together to act in an informal way, in a similar manner to that of the Service Inspection Section of the Board, to arbitrate disputes and urge terms and conditions for their settlement. Of course, the right to refer any dispute to the Board for a formal resolution still remains. We feel very strongly that, in the interest of the cooperation that must exist for the effective administration of the joint use of utility poles, the parties should be free to utilize any combination of the above dispute resolution mechanisms that is appropriate to their particular case. Such a choice of mechanisms ranging from the informal to the formal should foster better inter-industry relationships while keeping regulatory intervention to a minimum.

Based upon the foregoing, we HEREBY FIND that:

1. CATV relations with utilities are historically contractual in nature, with the prevalent agreement in force today being the NJBT 1970 agreement, or one of its earlier versions.
2. Under the NJBT joint use/joint ownership agreements with the electric utilities in the State, NJBT is responsible for all third party communications attachments.
3. There has been a reluctance on the part of NJBT to negotiate on most, if not all, provisions of the standard attachment agreement.
4. Make-ready surveys are done by electric utilities and NJBT in three different ways, but common to all three methods is that (a) bills always come from NJBT, (b) all estimates of make-ready work are presented to CATV companies on a "take it or leave it" basis, (c) plant is subject to re-inspections after completions of make-ready work at NJBT'S discretion and (d) plant subject to subsequent make-ready work, either pursuant to a reinspection of plant due to be arranged or replaced due to a joint user's requiring additional space, are both done at CATV expense.

5. Sporadic delays in CATV construction may be directly attributed to the temporary fluctuations in utility manpower availability. Such fluctuations are caused by a historic lack of understanding between the CATV and utility industries.
6. The NJCTA suggestion to allow premake-ready attachments, where non-hazardous conditions would result, while not specifically allowed by the NESC, is not prohibited if the utility pole owner allows it. Allowance of such attachments under controlled conditions may speed up construction of CATV facilities while exposing utility companies to no additional excessive liability or harm.
7. Despite possible higher direct costs for such work, a sole CATV survey walk done in accordance with technical codes can be beneficial to a CATV company due to earlier receipt of subscriber revenues.
8. JCEP's expedited make-ready procedure, while more costly due to utility overtime manpower needs, could save valuable time in the construction of small areas of CATV plant. However, due to different internal work order routing approval procedures, inventory controls and manpower availabilities, such a policy is impossible to uniformly implement.
9. There is a 10 to 16 month gap between utility manpower planning and CATV company make-ready lead-times. To whatever extent this gap could be closed, make-ready surveys and work should become more efficient from all perspectives.
10. Almost uniformly, the attachment agreements require that all survey and make-ready work be performed by utility company personnel.
11. The provision of CATV service through utility facilities is an area requiring regulation of conduct in the public interest. Thus, in the absence of a union collective bargaining agreement concerning same, the Board has complete jurisdiction over the issue of subcontracting.
12. There has been no indication of inconsistent applications of either billing or technical standards by utility companies.
13. The forms of utility billing for make-ready surveys and work leave much to be desired.
14. Both utility billing policy and rates seem reasonable. However, utility policy of billing CATV companies using subcontractors for all overhead charges is very questionable.
15. Utility unilateral rights to inspect plant is necessary to safely accommodate CATV plants on the poles.

16. As it is the responsibility of all pole occupants to maintain plant in conformance with applicable codes and standard construction practices, reinspections benefit all parties.
17. The easement rights granted to the various utilities are broad enough to include the attachment of CATV facilities. The past actions of the utilities connote a similar interpretation as they have, as a matter of course, allowed the attachment of CATV plant to their poles.
18. Pursuant to N.J.S.A. 48:5A-20 and 48:5A-21, the Board has the authority to allow CATV operators to construct and maintain their own facilities necessary for their business or to use the existing equipment of another CATV company or public utility;
19. In order to exercise its authority under the Cable Television Act, the Board, of necessity, must be able to make findings of fact as to the applicability of the easements involved. By such action, however, the Board does not assume its determinations to be an adjudication of any property rights.
20. The attachment agreements between utilities and CATV companies require the posting of a surety bond to guarantee the payment of all monies due for make-ready work and pole attachment fees as well as the estimated cost of removal. This requirement is directed to all CATV companies and covers all ongoing work and all poles to which they are attached.
21. While several of the utilities have some problems in the collection of monies due for make-ready work and pole attachment fees, no utility has ever exercised any rights which it might have pursuant to the surety bond.
22. Historically, the problems concerning payment by CATV companies have been due, in part, to poor billing form policies and, in part, to bad payment practices by certain CATV operators.
23. As the provisions of N.J.S.A. 48:5A-28(d) and 48:5A-37 provide adequate protection, the cost of removal of CATV plant should not be considered as an element of any required surety bond.
24. A surety bond or deposit to guarantee construction work or pole attachment fees required from a CATV company which has established its credit and which has a good payment record, places an undue burden on the CATV company and its subscribers.

25. The proposal by NJBT of a two-tiered system of surety bonds for construction and pole rental fees, as modified herein, is a practical one.
26. The attachment agreements between utilities and CATV companies generally hold the CATV company liable for all damages resulting from its presence on the pole regardless of negligence.
27. The extensive growth in the installation of CATV construction necessitates that CATV companies provide 24 hour emergency service to work in conjunction with utility crews in order that decisions as to the treatment of the various attachments can be properly made.
28. Section 21 of the Act is a broad delegation of authority to the Board over the terms and conditions of pole attachment agreements, including rental rates. While in conjunction with Title 48, this requires the Board to determine if a proposed rental fee is unreasonable, unduly preferential or discriminatory, it does not require that a particular rate methodology be utilized in such review of rental rates for pole attachments.
29. All proposed rental formulas, while differing significantly in details, are similar in approach in that they (a) value investment in pole plant on a per pole basis, (b) determine annual ownership expenses on a per pole basis expressed as a percentage of investment per pole, and (c) allocate a portion of those expenses to CATV attachees.
30. Due to different bookkeeping techniques, the arbitrariness of estimates made, and the different contexts under which this data was compiled, the calculation of individual annual ownership expense items differs greatly. However, a total yearly ownership expense of between 20 to 25 percent of gross pole plant is common.
31. NJBT's "share the savings" methodology would be procedurally impossible to enact and monitor.
32. There is a difference of opinion as to the actual locations of parties on poles.
33. The key to any allocation plan is to allocate responsibility for annual pole costs in a manner consistent with (a) CATV rights on the poles and (b) the desire to avoid cross-subsidization of CATV subscribers by utility subscribers or vice versa.
34. There will be an ongoing need to resolve complaints, misunderstandings and disputes.
35. While no pole attachment agreements previously submitted to the Board have been approved to date, an examination of such agreements reveals a substantial degree of noncompliance with the recommendations herein.

Therefore, we HEREBY RECOMMEND that:

1. All issues discussed herein be viewed in light of the "negotiated" posture of the standard attachment agreements and the utility company mandates as to service.
2. Removal of CATV facilities not be considered a viable alternative to enact any pole attachment changes necessary after CATV attachment to the pole.
3. Premake-ready nonhazardous attachments in violation of the NESC be allowed only at the utility pole owner's option.
4. Premake-ready nonhazardous attachments in violation of the NJBT/ utility joint agreements, but not the NESC, should be allowed at the CATV company's option subject to such attachments being surveyed initially and corrected to the extent necessary with all additional costs therefor being the responsibility of the CATV company.
5. In the case of a dispute as to the hazardous nature of a premake-ready attachment, utility personnel determinations should control.
6. Sole CATV make-ready surveys should be allowed subject to electric and telephone utility (a) spot checks to determine accuracy and (b) possible resurveys by utility companies if numerous violations are found. The choice to utilize such sole walk procedure should be solely at the CATV company's option.
7. Utilities presently doing make-ready work investigate the possibility of a JCPL-type early make-ready procedure.
8. When a CATV company applies to a municipality, a copy of all construction commitments be sent to the involved power and telephone utilities. Further, all municipal consent applications should specifically state that cable will generally be attached to poles only after utility make-ready work is completed and that all construction commitments run from that date. Additionally, we would hope that for forecasting purposes utilities would attempt to annualize the nine month advance notices given by CATV companies so as to minimize shortages in manpower available for CATV make-ready.
9. To the extent not prohibited by the presence of a collective bargaining agreement provision concerning same, the Board should order, subject to the qualifications set forth above, utility use of sub-contractors for make-ready surveys and work if so requested by a CATV company.

10. The form of all bills for make-ready survey and work, should be modified in accordance with our suggestions above.
11. Any future CATV allegations as to improper allocation of overhead expenses when using subcontractors be viewed seriously.
12. All reinspection costs be shared by all users in proportion to the allocation of annual costs used to calculate their pole rentals.
13. Utilities notify CATV companies of reinspections ahead of time.
14. Costs to correct violations in utility plant be assignable to the party causing same. If fault cannot be properly allocated, the cost to correct all violations should be borne by all parties in proportion to their division of reinspection costs.
15. Pursuant to N.J.S.A. 48:5A-20 and 48:5A-21, the Board should continue to allow CATV facilities to be attached to utility poles. If it is later determined by a court that a particular easement does not cover the attachment of CATV plant, the CATV company should indemnify the utility for all costs and damages resulting from an action by the property owner. If it is determined that a valid easement had never been obtained by the utility, the eventual cost, to be negotiated by all users of the pole, should be apportioned in the same percentages as allocated for the pole rentals set out herein;
16. Utilities require a construction bond or a continuing surety bond only where a CATV company has not established credit or where it is in default of payments. The construction bond should be in an amount that equals the total projected construction costs. The continuing surety bond, to secure payment for pole attachment fees, should be related to the charge for pole attachments during a yearly rental period providing that such sum does not amount to more than one-half of the annual pole rentals due to the utility. The choice of providing a bond or a deposit should be left to the parties.
17. The Board order the apportionment of liability between the parties in accordance with our suggestions set forth above.
18. The Board order all CATV companies to provide sufficient 24-hour emergency crews to adequately serve their service areas. These crews may be made up of CATV company employees, independent contractors or utility company personnel. All pertinent telephone numbers and procedural materials affecting these emergency crews should be exchanged between the CATV companies and the utilities.

19. The Board review rental fees in pole attachment agreements consistent with the methodology recommended herein.
20. The Board allow the parties to negotiate the use of either (a) average original installed pole cost or (b) weighted average original installed pole cost, with the first method being preferable.
21. The Board, consistent with our discussion above, allow the parties to negotiate the inclusion or exclusion of guying and anchoring costs within the investment in pole plant for rental purposes.
22. The Board view total yearly ownership expenses, as defined above, of between 20 to 25 percent of gross pole plant, as reasonable for the calculation of rental rates.
23. The Board reject NJBT's "share the savings" methodology to allocate annual pole costs.
24. Imputed into each utilities allocation of pole costs be the results of a survey to detect actual location of facilities on utility poles.
25. The Board allow the parties to negotiate the choice of relative rights on the poles with the allocation of annual costs being dependant on the relative equality of status afforded to the CATV company.
26. The Board encourages, through utility/CATV negotiated ownership plans, the ultimate buy-in of CATV companies into utility pole plant, as an alternative to attachment rentals.
27. The mechanism for the resolution of complaints, misunderstandings and disputes be, as indicated above, a combination of (1) the Joint Utility Cable Technical Committee, (2) informal Board and Office arbitration efforts and (3) formal Board determinations.
28. All present agreements be renegotiated in accordance with the guidelines herein and subsequently resubmitted to the Board for approval.

DATED: June 6, 1979

RESPECTFULLY SUBMITTED,


Joseph J. Fischer

Edward D. Beslow