PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

FILED
04/11/19
10:34 AM

April 11, 2019

TO PARTIES OF RECORD IN CASE 17-11-002

This proceeding was filed on November 6, 2017, and is assigned to Commissioner Rechtschaffen and Administrative Law Judge (ALJ) Yacknin. This is the decision of the Presiding Officer, ALJ Yacknin.

Any party to this adjudicatory proceeding may file and serve an Appeal of the Presiding Officer's Decision within 30 days of the date of issuance (i.e., the date of mailing) of this decision. In addition, any Commissioner may request review of the Presiding Officer's Decision by filing and serving a Request for Review within 30 days of the date of issuance.

Appeals and Requests for Review must set forth specifically the grounds on which the appellant or requestor believes the Presiding Officer's Decision to be unlawful or erroneous. The purpose of an Appeal or Request for Review is to alert the Commission to a potential error, so that the error may be corrected expeditiously by the Commission. Vague assertions as to the record or the law, without citation, may be accorded little weight.

Appeals and Requests for Review must be served on all parties and accompanied by a certificate of service. Any party may file and serve a Response to an Appeal or Request for Review no later than 15 days after the date the Appeal or Request for Review was filed. In cases of multiple Appeals or Requests for Review, the Response may be to all such filings and may be filed 15 days after the last such Appeal or Request for Review was filed. Replies to Responses are not permitted. (See, generally, Rule 14.4 of the Commission's Rules of Practice and Procedure at www.cpuc.ca.gov.)

If no Appeal or Request for Review is filed within 30 days of the date of issuance of the Presiding Officer's Decision, the decision shall become the decision of the Commission. In this event, the Commission will designate a decision number and advise the parties by letter that the Presiding Officer's Decision has become the Commission's decision.

/s/ MICHELLE COOKE for
Anne E. Simon
Chief Administrative Law Judge

AES:mph

Attachment

ALJ/POD-HSY/mph

Decision **PRESIDING OFFICER DECISION OF ALJ YACKNIN**
(Mailed 4/11/19)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

California Cable & Telecommunications Association, Complainant, vs. San Diego Gas & Electric Company (U902E), Defendant.	Case 17-11-002

California Cable & Telecommunications Association, Complainant
San Diego Gas & Electric Company (U902E), Defendant.

PRESIDING OFFICER'S DECISION DETERMINING POLE ATTACHMENT FEE

Summary

California Cable & Telecommunications Association brings this complaint against San Diego Gas & Electric Company seeking Commission resolution of their dispute regarding pole attachment fees. We adopt a pole attachment fee of $28.95 for billing year 2017 and $28.82 for billing year 2018. The proceeding is closed.

1. Procedural Background

California Cable & Telecommunications Association (CCTA) and San Diego Gas & Electric Company (SDG&E) previously entered into a settlement agreement that, among other things, established a pole attachment fee schedule for the years 2009 through 2016 that culminated in a 2016 attachment rate of $16.35. On September 16, 2016, SDG&E notified CCTA that its 2017 pole attachment rate would increase to $30.58.[1] The parties engaged in negotiations over the proposed 2017 rate but reached an impasse.

By this complaint filed November 6, 2017, CCTA charges that SDG&E is in violation of Pub. Util. Code § 767.52 for charging a pole attachment fee that does not comport with the formula set forth in the statute. CCTA charges that SDG&E must offer a separate attachment fee for wood poles and steel poles and challenges the accuracy of pole cost data contained in SDG&E's Federal Energy Regulatory Commission (FERC) Account 364 which serves as the basis for determining the utility's annual cost of ownership under the formula.

SDG&E filed an answer on December 20, 2017, refuting CCTA's charges and asserting, among other things, that this dispute should be resolved by arbitration pursuant to the Commission's "Rights of Way (ROW) Decision," Decision (D.) 98-10-058. On December 26, 2017, SDG&E filed a motion to dismiss the complaint on the same basis. CCTA filed its opposition to the motion on January 10, 2018.

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[1] In the course of this proceeding, SDG&E has revised its pole attachment fee calculation to include SCADA poles and stub poles in its pole count, yielding a pole attachment fee of $29.52 for billing year 2017 and $29.40 for billing year 2018. (Ex. 1, at 4 and 5.)

[2] All subsequent references are to the Pub. Util. Code.

A prehearing conference was held on February 15, 2018, to discuss the issues of law and fact and to determine the need for hearing and schedule for resolving the matter.

On March 19, 2018, the assigned Administrative Law Judge (ALJ) issued a Presiding Officer's Decision (POD) granting the motion to dismiss the complaint. CCTA appealed the POD, and the Commission issued D.18-09-016 denying the motion on September 13, 2018.

The assigned Commissioner subsequently issued a scoping memo and ruling on September 24, 2018, identifying the issues to be determined as follows:

1. Does Section 767.5 require the computation of a single fee for all pole attachments regardless of the physical attributes of the pole or, in the alternative, a separate fee for pole attachments to wood poles and steel poles?
2. What is SDG&E's annual cost of ownership under Section 767.5(a)(9)?
3. Inputting SDG&E's annual cost of ownership into the formula in Section 767.5(c), what is the annual recurring fee for pole attachments to SDG&E's poles, assuming (1) a single fee regardless of the pole type, and (2) a separate fee for wood poles and steel poles?

Evidentiary hearing was held on January 8 and 9, 2019, opening briefs were filed on January 30, 2019, and reply briefs were filed on February 11, 2019, upon which the matter was submitted.

2. Legal Background

Section 767.5(c) provides that, whenever a public utility and a cable television corporation or association are unable to agree upon the compensation for pole attachments, the Commission is to resolve the dispute and establish the compensation fees.

Section 767.5(c)(2)(A) sets forth the formula for computing the annual compensation fee, using the utility's annual cost of ownership for the pole and supporting anchor. Section 767.5(a)(9) defines "annual cost of ownership" as the average sum of historical annual capital costs (less depreciation) and operation costs for "all similar support structures owned by the utility." Section 767.5(a)(9) further provides that "annual cost of ownership" shall not include costs for "any property not necessary for a pole attachment."

The Commission's ROW Decision, D.98-10-058, which established rules for access to public utilities' poles by telecommunications carriers and cable television corporations and telecommunications carriers, provides in pertinent part, "Embedded cost data used to derive attachment rates shall be gathered from publicly filed documents, and pole attachment rates shall be calculated pursuant to the Commission's Decision in 97-03-019."[3] That decision, D.98-04-062, accounted for the costs of "property not necessary for a pole attachment" by applying "an established 15% deduction for non-pole items" to the average net cost of the pole.[4]

The presumptive source for this 15% deduction is the Federal Communications Commission (FCC)'s 1987 Pole Attachment Order, which established the formula for determining the net cost of a bare pole as follows:[5]

> Net Cost of a Bare Pole = FERC Account 364 Gross Pole Investment - Depreciation Reserve (Poles) - Accumulated Deferred Income Taxes (Poles) - .15 of Net Pole Investment / Number of Poles

[3] D.98-10-048, Conclusion of Law 34.

[4] D.98-04-062 at 3 and 6.

[5] 2 FCC Rcd 4387, 4390, 4400, 1987 FCC LEXIS 3447, *3-4, 63 Rad. Reg. 2d (P & F) 593.

Underlying the FCC's analysis was its recognition of the Congressional intent that we use public documents to determine attachment fees in order to avoid unnecessary litigation. As the FCC summarizes:

> Congress directed the Commission to "institute an expeditious program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation." S. Rep. No. 95-580, 95th Cong., 1st Sess. 21 (1977). To that end, Congress noted that although there may be some difficulty in determining the components of the operating expenses and actual capital costs of the utility, special accounting measures or studies should not be necessary since the majority of the cost and expense items attributable to the utility pole plant are already established and reported to various regulatory bodies and therefore the information is already a matter of public record. *Id.* at 19-20. Congress did not expect the Commission to reexamine the reasonableness of the cost methodology sanctioned by the various regulatory agencies, and it recognized that the Commission would have to "make its best estimate" of some of the less readily identifiable costs. *Id.* at 20.[6]

While the FCC affirmed the 15% appurtenance ratio for electric utilities, it also stated that "[t]hese ratios shall be rebuttable presumptions to be utilized in the event no party chooses to present probative, direct evidence on the actual investment in non-pole-related appurtenances."[7]

The present dispute revolves around (1) whether wood poles and steel poles are "similar support structures" allowing a single attachment fee or dissimilar requiring separate attachment fees; (2) whether the Commission should use the 15% appurtenance ratio for determining the annual cost of

[6] *Id.* at 4387-4388.

[7] *Id.* at 4390.

ownership or, alternatively, either apply a different factor or calculate it directly by recourse to cost data underlying SDG&E's FERC Account 364; and
(3) whether the Commission should include third-party poles, multi-use poles and/or push braces in the pole count for purposes of determining the average annual cost of ownership.

3. Single Versus Separate Attachment Fees

Section 767.5(a)(9) defines "annual cost of ownership" as the average costs "of all similar support structures owned by the utility." Wood distribution poles and steel distribution poles serve the same function of supporting the utility's distribution lines. There is no material difference between wood and steel distribution poles for purposes of determining attachment fees. Accordingly, we adopt a single fee for attachment to SDG&E's distribution poles without regard to whether the distribution pole is wood or steel.

CCTA asserts that steel poles are dissimilar from wood poles by virtue of their vastly greater average per unit cost, substantially longer average service life and greater strength and resiliency, and taller heights and wider spans.[8] As a preliminary matter, the cost of ownership differential between SDG&E's distribution poles is not a material basis upon which to deem them dissimilar support structures; indeed, the statutory formula accounts for cost differentials across pole types by basing the annual cost of ownership on average costs. As to CCTA's other assertions, the record does not support them.

Although SDG&E's average cost of steel poles is higher than that of its wood poles, the driving cost factor is not the composition of the pole. Rather, the

[8] CCTA opening brief, pp. 29-30.

driving factors are the engineering, design, permitting and construction costs that can be higher in SDG&E's "backcountry" areas where SDG&E has been focusing on installing new poles.[9]

As to CCTA's assertions that steel poles have a longer average service life, greater strength and resiliency than wood poles, and that steel poles have greater heights and spans than wood poles, these distinctions are not a material basis upon which to deem them dissimilar support structures for purposes of Section 767.5(a)(9).

CCTA argues that separate fees are required for wood and steel poles because Section 767.5(c)(2) provides that cable operators may only be charged for "each pole and supporting anchor actually used," and very few communications attachments are made to steel poles.[10] This argument is a illogical. Section 767.5(c)(2) does not require a separate fee calculation for "each pole and supporting anchor actually used." It merely provides that an attachment fee *may be charged* only for poles and anchors actually used and goes on to set forth the formula for the fee.[11] That formula is based on the public utility's "annual cost of ownership" which Section 767.5(a)(9) defines as the average costs of all similar support structures, not the average costs of the particular poles selected for use by the cable television industry.

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[9] Ex. 6 (SDG&E/Gentes), pp. 8:4-12; Ex. 7 (SDG&E/Thomas), 1:18-2:7.

[10] CCTA opening brief, p.30.

[11] Section 767.5(c) "[T]he commission shall establish and enforce the rates, terms, and conditions for pole attachments and rearrangements so as to assure a public utility the recovery of both of the following:

"(2) An annual recurring fee computed as follows:

"(A) For each pole and supporting anchor actually used by the cable television, … the annual fee shall be [computed as stated therein]."

CCTA argues that D.03-05-055,[12] wherein the Commission approved separate attachment fees for wood and steel poles, establishes the need for separate fees as a precedent.[13] To the contrary, D.03-05-055 did not decide the issue as the issue was not in dispute. Rather, SDG&E stipulated to separate fees. Our adoption of the stipulated matter does not constitute approval of or any precedent regarding the principle.[14]

There is no factual or legal basis upon which to deem wood and steel poles dissimilar support structures. Furthermore, it would be contrary to the public interest to create an economic disincentive for cable television operators to expand broadband deployment in rural areas where SDG&E is largely undertaking its fire-hardening efforts with the installation of steel poles.

4. Annual Cost of Ownership

4.1. 15% Appurtenance Ratio

As discussed above, the ROW Decision, D.98-10-048, provides for the calculation of pole attachment rates pursuant to D.98-04-062, where the Commission applied the FCC-established 15% appurtenance ratio to the utility's reported costs of pole ownership as a proxy for calculating and excluding the cost of "any property not necessary for a pole attachment" pursuant to Section 767.5(c)(2)(A). Nothing in the record of this proceeding presents a reasonable basis to deviate from it.

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[12] The parties sometimes refer to this as the *Daniels II* decision.

[13] CCTA opening brief, pp.32-33. CCTA also argues that, by clarifying that transmission poles, like distribution poles, are subject to the ROW rules, D.02-03-048 (which the parties sometimes refer to as the *Daniels I* decision) established precedent for requiring separate fees for wood and steel poles. (*Id.*, p.32.) That argument fails as a logical fallacy.

[14] See, *e.g.,* Rule 12.5.

CCTA points to the FCC's statement that the 15% appurtenance ratio is a rebuttable presumption and asserts that, as such, CCTA is entitled to seek an attachment fee calculated based on the cost data underlying SDG&E's FERC Account 364.[15] To the contrary, the premise that the 15% appurtenance ratio is rebuttable does not entitle a party to dispense with it at will. That would render the FCC's establishment of the 15% appurtenance ratio meaningless and invite precisely the burdensome and protracted litigation that it is intended to avoid.

Rather, as we stated in D.03-05-055 wherein we determined an attachment fee for cable television corporation's attachment to SDG&E's transmission poles, the relevant inquiry is whether there is good cause to deviate from the presumption:

> Without better substantiation of the assumptions related to the 15% appurtenance adjustment and how SDG&E's poles specifically differ from those assumptions, we do not have a solid basis for adjusting the factor at this time. We recognize that the 15% adjustment factor was derived for distribution poles and that appurtenances on transmission poles may differ from those on distribution poles. However, there is no evidence in this proceeding to show whether the costs of appurtenances on transmission poles are a larger or smaller percentage of the total pole cost than that for distribution poles. There may be good cause to modify the value of this factor for transmission wood poles, but we will only do so with a fully developed record on the issue.[16]

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[15] CCTA opening brief, pp. 15-16.

[16] D.03-05-055 at 10. We note that D.03-05-055 concerned whether the 15% appurtenance ratio, which was derived for distribution poles, should apply to transmission poles. As such, we reject CCTA's argument that D.03-05-055 is precedent for the premise that the 15% appurtenance ratio is rebuttable with respect to distribution poles. (*See* CCTA opening brief, fn.60.)

CCTA argues that the following factors rebut the presumption that the 15% appurtenance ratio applies to SDG&E's distribution poles: First, CCTA points out that, over an 11-year period, SDG&E reported an 93% increase in capital costs recorded in its FERC Account 364 while its claimed pole count decreased by 1277 poles.[17] However, the fact that SDG&E's capital costs have been higher over the past 11 years than previously while its pole count has decreased does not raise the inference that the ratio of SDG&E's average appurtenance costs to the average cost of its bare poles has changed.[18]

Second, CCTA points to SDG&E's testimony in its general rate cases that its fire-hardening efforts have entailed substantial additional costs with replacing wooden appurtenances.[19] The fact that fire-hardened appurtenances are more expensive than the wooden appurtenances that they replace does not raise the inference that the appurtenance factor for fire-hardened poles is different for non-fire-hardened poles.

Third, CCTA points out that SDG&E includes the costs of appurtenances installed on third-party and multi-use poles in its FERC Account 364 but excludes those poles from the pole count used to determine the net cost of a bare pole.[20] Although this fact raises concern regarding the pole count used to

[17] CCTA opening brief, pp. 16-17.

[18] We note that this pole decrease is *de minimis* representing approximately 0.64% of SDG&E's 2016 year-end pole count of 198,583.

[19] CCTA opening brief, p.17.

[20] *Id.*

calculate the average annual cost of ownership, it does not rebut the presumption that appurtenances account for 15% of the cost of owning a pole.[21]

Fourth, CCTA asserts that, as confirmed by its expert witness Kravtin and by other state proceedings, the actual percentage of appurtenance investment has increased significantly over time.[22] Kravtin bases her testimony on the fact that the 15% appurtenance factor was developed decades ago based on the historic base of wood poles, the fact that utilities have undertaken wide-scale pole replacement and reinforcement programs, and the fact that a key component of fire-hardening is to fire-harden appurtenances.[23] As discussed previously, these facts do not raise the inference that the relative cost of appurtenances to bare poles has increased with the advent of fire-hardening.

Furthermore, we give no weight to CCTA's assertion that this proposition has been confirmed by the Louisiana Public Service Commission in its Docket No. U-34688 and by the Connecticut Public Utilities Regulatory Authority in its Docket No. 17-10-046. The state commissions made no such findings regarding CCTA's proposition. Rather, these proceedings were resolved by settlement or stipulation adopted by the state commissions and they did not reach the issue. In any event, as a matter of law, any such factual findings would not be a proper subject of our official notice.[24]

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[21] It does, however, merit adjustment to SDG&E's pole count as discussed in Section 4.b.1, below.

[22] CCTA opening brief, p.17.

[23] Ex. 1 (CCTA/Kravtin), p.14:8-17.

[24] *Kilroy v. State* (App. 3 Dist. 2004) 14 Cal.Rptr.3d 109. ("Factual findings in a prior judicial opinion are not a proper subject of judicial notice. [And] While courts are free to take judicial notice of the existence of each document in a court file, including the truth of results reached,

Footnote continued on next page

4.2. Pole Count

The parties dispute whether the pole count used to calculate the average annual cost of ownership should include multi-use poles (*i.e.*, poles that are used to support both transmission and distribution lines), third-party poles (in this case, poles owned by Southern California Edison Company and AT&T, Inc.) used by SDG&E for distribution, and/or push braces (which CCTA refers to as "push brace poles"). We take these matters up in two parts.

4.2.1. Multi-Use and Third-Party Poles

It is undisputed that SDG&E includes the cost of appurtenances to its multi-use poles and third-party poles in its FERC Account 364. The parties dispute whether these poles should be included in the pole count for purposes of determining the net cost of a bare pole.[25]

SDG&E excludes these poles from its pole count on the asserted basis that their appurtenance costs are mathematically excluded by the 15% appurtenance ratio. SDG&E offers no evidence or citation for its assertion that the FCC's 15% appurtenance ratio takes account of utilities' costs of appurtenances on multi-use poles and third-party poles, and none is apparent. Nothing in the FCC's *First* or *Second Report and Order on the Adoption of Rules for the Regulation of Cable Television Pole Attachments*,[26] wherein the FCC first promulgated its methodology, in

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they may not take judicial notice of the truth of hearsay statements in decisions and court files.")

[25] Net cost of a bare pole = (net pole investment X appurtenance factor)/number of poles.

[26] *First Report and Order*, 68 FCC 2d 1585 (1978); *Second Report and Order*, 72 FCC 2d 59 (1979).

Alabama Power Company v. FCC,[27] wherein the United States Court of Appeals for the District of Columbia vacated and remanded the FCC's orders, or in the FCC's *Pole Attachment Order* amending its rules and methodology accordingly[28] makes mention of any assumptions made with respect to a utility's use of multi-use or third-party poles. A logical and contrary assumption is that the 15% appurtenance factor was based on the average costs of poles and their appurtenances without regard to their respective ownership. Absent any relevant citation or evidence utility beyond the conclusory statement of SDG&E's witness that the 15% appurtenance ratio accounts for utilities' use of multi-use and third-party poles, we do not accept SDG&E's assertion.

On its part, CCTA asserts that multi-use and third-party poles should be included in the pole count in order to avoid a mismatch between the costs reported in SDG&E's FERC Account 364 and the pole count associated with them. This approach, however, would also distort SDG&E's actual average cost of ownership of the poles.

The relative impact of each approach can be illustrated in the calculation of the net cost of a bare pole as follows: Using the 15% appurtenance ratio and assuming for illustrative purposes that the average cost of SDG&E's bare poles and their appurtenances is $850 and $150, respectively, that the cost of SDG&E's pole appurtenances is the same regardless of the pole to which they attach, and that SDG&E owns 200,000 distribution poles and uses an additional 20,000

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[27] *Alabama Power Co. v. FCC*, 773 F.2d 362, 367-369, 1985 U.S. App. LEXIS 21796, 249 U.S. App. D.C. 99, 60 Rad. Reg. 2d (P & F) 383.

[28] *Pole Attachment Order*, 2 FCC Rcd 4387, 4389-4391, 1987 FCC LEXIS 3447, 63 Rad. Reg. 2d (P & F) 593.

transmission and third-party poles for its distribution, SDG&E's distribution pole investment would be $203,000,000.[29]

Excluding those 20,000 multi-use and third-party poles from the attachment fee calculation would overstate SDG&E's per-pole cost by $15,[30] and overstate SDG&E's net bare pole cost by about $12.75 or 1.5 percent.[31] Conversely, CCTA's approach of including those 20,000 poles would understate SDG&E's per-pole cost by over $77,[32] and overstate SDG&E's net bare pole cost by over $65 or 7.7 percent.[33]

Neither approach is satisfactory. Instead, we can obtain the actual net cost of a bare pole in this illustration by including only 15% of the number of multi-use and third-party poles in the pole count.[34] Applying this same adjustment to SDG&E's pole count will allow us to match the reported FERC Account 364 costs to the relevant pole count.

In this case, SDG&E reports that uses 26,314 multi-use and third-party poles in its distribution system as of July 2017.[35] In the absence of record evidence of the number of SDG&E's multi-use and third-party poles at year-end 2015 and 2016, it is reasonable to use the July 2017 figure for purposes of

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[29] (200,000 poles x $1000) + (20,000 poles x $150) = $203,000,000

[30] $203,000,000/200,000 = $1015. For simplicity, these calculations assume zero depreciation and deferred taxes.

[31] $1015 x 85% = $862.75; ($862.75 - $850)/$850 = 1.5%

[32] $203,000,000/220,000 = $922.73

[33] $922.73 x 85% = $784.32; ($850 - $784.32)/$850 = 7.7%

[34] ($203,000,000 X 85%)/ (200,000 + (20,000 x 15%)) = $850

[35] Ex. 6, p.4.

adjusting the pole counts for billing years 2017 and 2018, and add 3947 poles (26,319 X 15%) to the respective pole counts of 198,540 and 198,583.[36]

4.2.2. Push Braces

The parties dispute whether SDG&E's 29 push braces (as SDG&E terms them) or push brace poles (as CCTA terms them) should be included in the pole count.

SDG&E asserts that push braces are not "similar support structures" to poles, but rather serve the same function as down guys to reduce the structural loading on a distribution pole.[37] CCTA does not dispute the fact that push braces serve the same function as down guys, but nevertheless asserts that push braces are "non-attachable poles in multiple pole structures" such as the Commission in D.03-05-055 previously held must be included in the pole count.[38] SDG&E counters that there is no evidence that push braces "are anything like the 'H' pole structures at issue" in D.03-05-055.[39]

There is nothing in this record or in D.03-05-055 that reflects SDG&E's assertion that that matter concerned "H" pole structures as distinct from push braces, or CCTA's assertion that push braces are "non-attachable poles in multiple pole structures" as that term is intended in D.03-05-055. However, there is uncontroverted evidence that push braces serve the same function as down guys, and no suggestion from any party that down guys should be included in

[36] *See* Ex. 2, Table 1, Line 23, and Table 2, Line 23.

[37] SDG&E opening brief, p.21.

[38] CCTA opening brief, at 25, citing to D.03-05-055 at 7-8, 24-25. In its reply brief, CCTA further argues, essentially, that push braces (or push brace poles) must be included in the pole count because they are poles. (CCTA reply brief, p.25.) We give no weight to this circular argument.

[39] SDG&E reply brief, p.12.

the pole count. On balance, we agree with SDG&E that push braces should not be included in the pole count on this same basis.

Regardless, the impact of this matter is *de minimis*. Adjusting the pole count to include 15% of the number of multi-use and third-party poles as discussed above, SDG&E's pole attachment rate for 2018 is $28.82.[40] Conducting this same calculation but including the 29 push braces in the count yields the same attachment rate.[41]

5. Annual Attachment Fee

Inputting SDG&E's annual cost of ownership into the formula in Section 767.5(c), the annual recurring fee for pole attachments to SDG&E's poles, regardless of pole type, for billing year 2017 is $28.95,[42] and the annual recurring fee for billing year 2018 is $28.82.[43]

Because we conclude that a single fee is appropriate regardless of pole type, we do not reach the issue of determining separate fees for wood poles and steel poles.

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[40] *See* Ex. 2, Table 2. Dividing the net bare pole investment of $213,282,423 (Line 22) by the adjusted number of poles (198,583 plus 3947 as discussed in Part 4.b.i), and multiplying by the total carrying charges of 0.376557 (Line 62) and space use factor of 0.074 (Line 64), the 2018 pole attachment rate is ($213,282,423/202,530) X 0.369873 X 0.074 = $28.82.

[41] Adding the 29 push braces to the calculation in footnote 43, the 2018 pole attachment rate would be ($213,282,423/202,559) X 0.369873 X 0.074 = $28.82.

[42] *See* Ex. 2, Table 1. Dividing the net bare pole investment of $210,348,069 (Line 22) by the number of poles (198,540 as shown in Line 23 plus 3947 as discussed in Part 4.b.i), and multiplying by the total carrying charges of 0.376557 (Line 62) and space use factor of 0.074 (Line 64), (210,348,069/202,487) X 0.376557 X 0.074 = $28.95.

[43] *See* fn. 43, above.

6. ALJ Discovery Rulings

CCTA objects that the ALJ denied it discovery into the documentation underlying SDG&E's FERC Account 364, arguing that it is entitled to this discovery to establish SDG&E's annual cost of ownership based on SDG&E's actual costs and for purposes of rebutting the 15% appurtenance ratio.[44] We affirm the ALJ's discovery rulings.

Although this is the sole argument that CCTA raises in its briefs for objecting to the ALJ's rulings, we note that many of the rulings to which CCTA cites deny discovery on the unrelated basis that SDG&E's responses had fully responded to the data requests, that CCTA did not identify what information was lacking and none was apparent; while the remaining rulings deny discovery on the additional bases that CCTA's November 21, 2018, motion to compel responses to which SDG&E had objected on February 2, 2018, was untimely because CCTA could have but did not raise them in its March 5, 2018, motion to compel; and that, by propounding data requests for the very first time in the November 21, 2018, motion to compel, CCTA violated Rule 11.3(a) by failing to meet and confer in good faith to resolve any disputes in advance of the motion.[45]

With respect to the argument that CCTA raises in its opening brief, as discussed previously, the ROW Decision, D.98-10-048, provides that SDG&E's annual cost of ownership is to be determined based on the reported FERC Account 364 costs. Accordingly, CCTA's inquiry into the documentation underlying SDG&E's FERC Account 364 is beyond the scope of this proceeding.

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[44] CCTA opening brief, pp. 39-41.

[45] *See* CCTA opening brief, fn. 154, citing broadly to RT pp.4 through 84.

In addition, even assuming *arguendo* that the 15% appurtenance ratio is rebuttable under the ROW Decision, D.98-10-048, it is not rebuttable by recourse to a calculation of the utility's ownership cost based on documentation of its costs reported in FERC Account 364. As discussed previously, that would render our directive in the ROW Decision and the FCC's 15% appurtenance ratio meaningless and invite precisely the burdensome and protracted litigation that they are intended to avoid. The 15% appurtenance ratio was presumably derived based on assumptions regarding industry-wide costs and practices. The question of whether those assumptions continue to apply today, whether generically across all utilities or specifically to SDG&E's recent fire-hardening activities, can be examined without resorting to the data underlying SDG&E's FERC Account 364. The ALJ properly denied CCTA's discovery requests seeking documentation of SDG&E's reported FERC account costs for this purpose as overbroad and unduly burdensome, and we agree.

Furthermore, CCTA's discovery into the applicability of the 15% appurtenance ratio was untimely. CCTA asserted that the 15% appurtenance ratio is a rebuttable presumption for the very first time in its November 21, 2018, second motion to compel, as a basis to obtain discovery into SDG&E's underlying FERC Account 364 data in order to calculate SDG&E's annual cost of ownership.[46] Indeed, CCTA had previously espoused the 15% appurtenance ratio in its March 5, 2018, first motion to compel,[47] and repeatedly framed its

[46] CCTA second motion to compel, pp. 16-17.

[47] "That component of the Commission's rate formula is calculated using investment in FERC Account 364, minus accumulated depreciation and deferred taxes for FERC Account 364, with a 15% reduction for certain pole appurtenances (collectively, "net pole investment"), and data

Footnote continued on next page

discovery demands in terms of verifying the accuracy of SDG&E's FERC accounting without any reference to the appurtenance ratio.[48] By so doing, CCTA precluded the parties' ability to engage in good-faith discussions that might direct CCTA to relevant and focused discovery regarding whether the assumptions underlying the 15% appurtenance ratio are applicable to SDG&E's operations, had that been CCTA's intent.

CCTA argues that the ALJ improperly imposed a new discovery standard of good faith at the evidentiary hearing, thereby depriving CCTA of due process because it had no prior notice of this standard and therefore could not have complied with it when discovery was on-going.[49] To the contrary, the requirement of good faith is embedded in the Commission's Rules of Practice and Procedure, just as it is in the California Code of Civil Procedure, and requires that parties abstain from unjustified discovery.[50] CCTA's assertion that it was denied due process for not having been apprised of its obligation to adhere to this standard is disingenuous.

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from Defendant's internal non-public records concerning its pole inventory." CCTA first motion to compel, March 5, 2018, p.8.

[48] *See, e.g., id.*, pp. 30-31 regarding discovery item nos. 17 and 18.

49 CCTA opening brief, pp. 40-41.

50 Rule 11.3(a) ("A motion to compel or limit discovery is not eligible for resolution unless the parties to the dispute have previously met and conferred in a good faith effort to informally resolve the dispute…."); CCP § 2023(a)(1), (3), (8) and (9) ("Misuses of the discovery process include, but are not limited to, the following: (1) Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery….(3) Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense…. (8) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery…. (9) Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery….")

7. Assignment of Proceeding

Clifford Rechtschaffen is the assigned Commissioner and Hallie Yacknin is the assigned Administrative Law Judge and presiding officer in this proceeding.

Findings of Fact

1. Wood and steel distribution poles serve the same function of supporting the utility's distribution lines.

2. The driving factor for the cost difference between SDG&E's wood and steel poles is not the composition of the pole, but rather the engineering, design, permitting and construction costs that can be higher in SDG&E's "backcountry" areas where SDG&E has been focusing on installing new steel poles.

3. The fact that SDG&E reported a 93% increase in capital costs recorded in its FERC Account 364 over the past 11 years while its claimed pole count decreased by 1277 poles does not raise the inference that the 15% appurtenance ratio is no longer applicable to SDG&E's annual average cost of owning a distribution pole.

4. The fact that SDG&E's fire-hardening efforts have entailed substantial additional costs with replacing wooden appurtenances does not raise the inference that the 15% appurtenance ratio is no longer applicable to SDG&E's annual average cost of owning a distribution pole.

5. The fact that SDG&E's cost of appurtenances installed on third-party and multi-use poles is reported in FERC Account 364 does not raise the inference that the 15% appurtenance ratio no longer applies to SDG&E's annual average cost of owning a distribution pole.

6. The facts that the 15% appurtenance factor was developed decades ago based on the historic base of wood poles, that utilities have undertaken wide-scale pole replacement and reinforcement programs, and that a key component

of fire-hardening is to fire-harden appurtenances do not raise the inference that the 15% appurtenance ratio is no longer applicable to SDG&E's annual average cost of owning a distribution pole.

7. SDG&E's FERC Account 364 includes the cost of appurtenances to multi-use and third-party poles used in its distribution system.

8. The record does not support a finding that the 15% appurtenance ratio assumes that FERC Account 364 includes costs of appurtenances to multi-use and third-party poles.

9. Push braces serve the same function as down guys, which are not included in the pole count. Regardless, the impact of this matter is *de minimis*.

10. Inputting SDG&E's annual cost of ownership into the formula in Section 767.5(c), the annual recurring fee for pole attachments to SDG&E's poles for billing year 2017 is $28.95, and the annual recurring fee for billing year 2018 is $28.82.

Conclusions of Law

1. The cost of ownership differential between SDG&E's distribution poles is not a material basis upon which to deem them dissimilar support structures.

2. The attachment fee formula in Section 767.5(c)(2) is based on the average costs of all similar support structures, without regard to the particular poles selected for use by the cable television industry.

3. D.03-05-055's adoption of the parties' stipulation to separate attachment fees for wood and steel poles does not constitute approval of or any precedent regarding the principle.

4. It is not in the public interest to create an economic disincentive for cable television operators to expand broadband deployment in rural areas where

SDG&E is largely undertaking its fire-hardening efforts through the installation of steel poles.

5. Whether steel poles have a longer average service life and greater strength, resiliency, heights and spans than wood poles does not present a material basis upon which to deem them dissimilar support structures for purposes of Section 767.5(a)(9).

6. Wood and steel distribution poles are "similar support structures" as that term is used in Section 767.5(a)(9) for purposes of calculating a utility's annual cost of pole ownership.

7. The accuracy of SDG&E's reported FERC Account 364 costs is beyond the scope of the proceeding.

8. Even assuming *arguendo* that the 15% appurtenance ratio is rebuttable under the ROW Decision, D.98-10-048, it is not rebuttable by recourse to a calculation of the utility's ownership cost based on documentation of its costs reported in FERC Account 364.

9. The pole count used to determine SDG&E's average annual cost of ownership should include the number of multi-use and third-party poles multiplied by the 15% appurtenance factor.

10. Push braces (or push brace poles) should not be included in the pole count for purposes of determining SDG&E's pole attachment fees in this matter.

11. The Commission should adopt $28.95 as SDG&E's annual recurring pole attachment fee for billing year 2017, and $28.82 as the annual recurring pole attachment fee for billing year 2018.

11. The ALJ's discovery rulings should be affirmed.

12. The proceeding should be closed.

O R D E R

IT IS ORDERED that:

1. We adopt $28.95 as San Diego Gas & Electric Company's annual recurring distribution pole attachment fee for billing year 2017, and $28.82 as the annual recurring distribution pole attachment fee for billing year 2018.
2. We affirm the Administrative Law Judge's discovery rulings.

The proceeding is closed.

This order is effective immediately.

Dated _____, at San Francisco, California.