

Decision 19-07-005

July 11, 2019

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

California Cable & Telecommunications
Association,

Complainant,

vs.

San Diego Gas & Electric Company
(U902E),

Defendant.

Complaint 17-11-002

DECISION REGARDING 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. This decision overrules some of the Administrative Law Judge’s ruling regarding discovery into SDG&E’s actual investment in pole appurtenances that are present on the pole, but that are not necessary to attach cable or telecommunications equipment to the pole. Thus, this proceeding is to remain open and the record is reopened to give the parties an opportunity to introduce evidence into SDG&E’s actual investment in appurtenances not necessary for its pole attachments. This decision also extends the deadline for resolution of this adjudication. The proceeding remains open.

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 § 767.5 for charging a pole attachment fee that does not comport with the formula set forth in the statute.² 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.

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 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.

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?

A law and motion hearing to consider motions to compel discovery was held on December 12, 2018. An 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." Such property is also referred to as "appurtenances."

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

$$\begin{aligned} \text{Net Cost of a Bare Pole} = & \text{FERC Account 364 Gross Pole} \\ & \text{Investment - Depreciation Reserve (Poles) - Accumulated} \\ & \text{Deferred Income Taxes (Poles) - .15 of Net Pole Investment} \\ & / \text{Number of Poles} \end{aligned}$$

While the FCC affirmed the 15% deduction for non-pole items – also referred to as 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."⁶

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 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 D.98-10-058, Conclusion of Law 34.

⁴ D.98-04-062 at 3 and 6.

⁵ See *In re Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles* ("1987 Pole Attachment Order"), 2 FCC Rcd 4387, 4390, 4400, 1987 FCC LEXIS 3447, *3-4, 63 Rad. Reg. 2d (P & F) 593.

⁶ *Id.* at 4390.

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.⁷ 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 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.⁸ This argument is 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

⁷ CCTA opening brief, pp. 29-30.

⁸ CCTA opening brief, p. 30.

the fee.⁹ 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.

CCTA argues that D.03-05-055,¹⁰ wherein the Commission approved separate attachment fees for wood and steel poles, establishes the need for separate fees as a precedent.¹¹ 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.¹²

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.98-10-058, 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

⁹ 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].”

¹⁰ The parties sometimes refer to this as the *Daniels II* decision.

¹¹ 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.

¹² See, *e.g.*, Rule 12.5.

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).

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 actual appurtenance costs.¹³

In applying the 15% appurtenance ratio to electric utilities, the FCC 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.”¹⁴ Thus, the FCC allowed that parties could seek to rebut the 15% appurtenance ratio presumption by presenting evidence to demonstrate the actual investment in appurtenances not necessary for the cable or telecommunications attachments.

The Commission in D.03-05-055 states a similar view regarding whether a party could rebut the 15% appurtenance ratio:

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.*¹⁵

The Commission stated that it could have adopted an appurtenance ratio other than 15%, if there was evidence in the record to support another ratio. Thus, parties in a pole

¹³ CCTA opening brief, pp. 15-16.

¹⁴ See 1987 Pole Attachment Order, 2 FCC Rcd 4387, 4390.

¹⁵ D.03-05-055 at 10 (emphasis added).

attachment fee dispute should be afforded the opportunity to rebut the 15% appurtenance factor with evidence on the actual investment in appurtenances not necessary for the cable or telecommunications attachments.

We acknowledge the statement in D.98-10-058 that “embedded cost data used to derive attachment rates shall be gathered from publicly filed documents...”¹⁶ Accordingly, SDGE has used cost data from its publicly filed FERC Account documents. However, we do not believe this provision should be interpreted to deny claimants the right to discovery to determine whether there is evidence that supports rebutting the 15% appurtenance ratio.

In this proceeding, CCTA sought discovery regarding SDG&E’s actual investment in appurtenances, including seeking such discovery through a motion to compel. However, the ALJ in this proceeding ruled against CCTA and denied CCTA access to such discovery. These rulings were in error. As discussed in Section 6 below, CCTA will be allowed discovery regarding SDG&E’s actual appurtenance costs and will have the opportunity to rebut the 15% appurtenance ratio and demonstrate that a different appurtenance ratio is applicable in this case.

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

¹⁶ D.98-10-058, Conclusion of Law 34.

poles should be included in the pole count for purposes of determining the net cost of a bare pole.¹⁷

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*,¹⁸ wherein the FCC first promulgated its methodology, in *Alabama Power Company v. FCC*,¹⁹ 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 accordingly²⁰ 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 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.

¹⁷ Net cost of a bare pole = (net pole investment X appurtenance factor)/number of poles.

¹⁸ *First Report and Order*, 68 FCC 2d 1585 (1978); *Second Report and Order*, 72 FCC 2d 59 (1979).

¹⁹ *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.

²⁰ *Pole Attachment Order*, 2 FCC Rcd 4387, 4389-4391, 1987 FCC LEXIS 3447, 63 Rad. Reg. 2d (P & F) 593.

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 transmission and third-party poles for its distribution, SDG&E's distribution pole investment would be \$203,000,000.²¹

Excluding those 20,000 multi-use and third-party poles from the attachment fee calculation would overstate SDG&E's per-pole cost by \$15,²² and overstate SDG&E's net bare pole cost by about \$12.75 or 1.5 percent.²³ Conversely, CCTA's approach of including those 20,000 poles would understate SDG&E's per-pole cost by over \$77,²⁴ and overstate SDG&E's net bare pole cost by over \$65 or 7.7 percent.²⁵

Neither approach is satisfactory. Instead, we can obtain the actual net cost of a bare pole in this illustration by including only 15% (or the percentage of an adopted alternative appurtenance ratio, should a party successfully rebut the 15% appurtenance ratio presumption) of the number of multi-use and third-party poles in the pole count.²⁶ 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 it uses 26,314 multi-use and third-party poles in its distribution system as of July 2017.²⁷ In the absence of record evidence of the number

²¹ $(200,000 \text{ poles} \times \$1000) + (20,000 \text{ poles} \times \$150) = \$203,000,000$

²² $\$203,000,000 / 200,000 = \1015 . For simplicity, these calculations assume zero depreciation and deferred taxes.

²³ $\$1015 \times 85\% = \862.75 ; $(\$862.75 - \$850) / \$850 = 1.5\%$

²⁴ $\$203,000,000 / 220,000 = \922.73

²⁵ $\$922.73 \times 85\% = \784.32 ; $(\$850 - \$784.32) / \$850 = 7.7\%$

²⁶ $(\$203,000,000 \times 85\%) / (200,000 + (20,000 \times 15\%)) = \850

²⁷ Ex. 6, p. 4.

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 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 198,583.²⁸

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.²⁹ 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.³⁰ SDG&E counters that there is no evidence that push braces "are anything like the 'H' pole structures at issue" in D.03-05-055.³¹

There is nothing in this record or in D.03-05-055 that reflects SDG&E's assertion that that proceeding's discussion 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 the pole count. On balance, we agree

²⁸ See Ex. 2, Table 1, Line 23, and Table 2, Line 23. Should a party successfully rebut the 15% appurtenance ratio presumption, the percentage of the appurtenance ratio that is adopted should be used in this formula, instead of 15%.

²⁹ SDG&E opening brief, at 21.

³⁰ 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, at 25.) We give no weight to this circular argument.

³¹ SDG&E reply brief, at 12.

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 \$28.82.³² Conducting this same calculation but including the 29 push braces in the count yields the same attachment rate.³³

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 \$28.95,³⁴ and the annual recurring fee for billing year 2018 is \$28.82.³⁵ This calculation assumes the use of the 15% appurtenance ratio presumption. If a party successfully rebuts this presumption, the calculation will be updated, using the appurtenance ratio that is adopted.

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.

6. ALJ Discovery Rulings

CCTA objects that the ALJ denied it 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.³⁶ Much of CCTA's discovery into this issue concerned the data

³² 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) \times 0.369873 \times 0.074 = \28.82 .

³³ Adding the 29 push braces to the calculation in footnote 43, the 2018 pole attachment rate would be $(\$213,282,423/202,559) \times 0.369873 \times 0.074 = \28.82 .

³⁴ 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) \times 0.376557 \times 0.074 = \28.95 .

³⁵ See fn. 43.

³⁶ CCTA opening brief, pp. 39-41.

reported in SDG&E's FERC Account 364. CCTA sought this discovery in data requests, and subsequently through two motions to compel,³⁷ and a Motion to Reconsider Discovery Rulings.³⁸

For example, Item 18 in CCTA's January 2018 data request seeks: "purchase orders, invoices, and other documents relating to costs for new poles, towers, and fixtures..."³⁹ SDG&E objected to Item 18, and other requests for cost data, as burdensome, but expressed some willingness to provide a sampling of the requested data. In the ALJ ruling on the first motion to compel (issued October 2, 2018), the parties were ordered to meet and confer and explore this option; the ruling noted that CCTA could renew its motion to compel a response, if necessary. After several meet and confer meetings, CCTA remained dissatisfied with SDG&E's responses. CCTA filed its Second Motion to Compel (November 21, 2018) seeking complete answers to its original data requests, including Item 18.

The ALJ denied this discovery, as well as additional discovery CCTA sought as a clarification of its previous data requests, in the Administrative Law Judge's Ruling Denying Motion to Compel Responses to Items A.21, A.22 And A.23, filed December 19, 2018 (the "December 19 ALJ Ruling") and in several rulings issued from the bench during the December 12, 2018 Law and Motion Hearing (the "December 12 Discovery Hearing")⁴⁰ and the Jan. 8 Evidentiary Hearing.

The December 19 ALJ Ruling stated a basis for the denial of discovery:

CCTA seeks this information for the purpose of rebutting the 15% pole appurtenance factor used in the Commission's pole attachment

³⁷ See CCTA Motion to Compel Defendant SDG&E to Respond to Data Request ("First Motion to Compel"), filed March 5, 2018; CCTA Second Motion to Compel Defendant SDG&E to Respond to Data Request ("Second Motion to Compel"), filed Nov. 21, 2018.

³⁸ See Motion to Reconsider Discovery Rulings, Filed Jan. 3, 2019.

³⁹ "Fixtures" attached to poles are synonymous with "appurtenances" as used in this decision.

⁴⁰ During this hearing, the ALJ denied the motion to compel with respect to cost documentation in Items 18 and 20 as overbroad and unduly burdensome. See Law and Motion Hearing Transcript at 18:27-10:12.

fee formula. That matter is beyond the scope of issues identified in the assigned Commissioner's scoping memo.⁴¹

However, at the Evidentiary Hearing, the ALJ modified this previous ruling, ruling that rebuttal of the appurtenance adjustment factor was within the scope of the proceeding.⁴²

The ALJ also introduced a "good faith basis" prerequisite for discovery seeking to rebut the 15% appurtenance ratio presumption, apparently offering another basis for denying discovery on this issue.⁴³

Both the FCC and the Commission have stated that the 15% appurtenance ratio is a rebuttable presumption and that a party may present probative, direct evidence on the actual investment in appurtenances not necessary for the cable or telecommunications pole attachments.⁴⁴ Neither the FCC nor the Commission stated that a party must establish a "good faith basis" before it could seek such discovery.⁴⁵

Rebuttal of the 15% appurtenance ratio presumption is within the scope of a complaint regarding pole attachment fees, and is relevant to question #2 in the scope of this proceeding: "What is SDG&E's annual cost of ownership under Section 767.5(a)(9)?" A complainant in a pole attachment fee dispute should have access to discovery regarding a utilities' actual investment in appurtenances not necessary for the pole attachments.

⁴¹ December 19 ALJ Ruling, pp. 1-2 (citations omitted).

⁴² See Evidentiary Hearing Transcript at 114:1-8.

⁴³ See *id.* at 101:16-19. ("Rather, the presumption places the burden on the parties seeking to rebut the presumption to present a good-faith basis for doing so."); see also *id.* at 100:11-20, 101:19-102:2; 114:9-10.

⁴⁴ See 1987 Pole Attachment Order, 2 FCC Rcd 4387, 4390; see also *Amendment of Rules and Policies Governing Pole Attachments, Consolidated Partial Order on Reconsideration*, 16 FCC Rcd. 12103, 12123 at n.138 (2001) ("These adjustment factors are rebuttable.")

⁴⁵ The April 11, 2019 Presiding Officer's Decision Determining Pole Attachment Fee ("POD") cites the Commission's Rule 11.3(a) and Code of Civil Procedure § 2023 for support of the "good-faith" prerequisite for discovery to rebut the 15% appurtenance ratio presumption. See POD, at 19 & n.50. However, Rule 11.3(a) merely requires a "good-faith effort" to meet and confer prior to filing a motion to compel. Code of Civil Procedure § 2023.010 (which replaced § 2023 in 2005) merely requires general "good-faith" behavior in dealing with discovery.

The ALJ also cited undue burden as a basis to deny CCTA's discovery regarding SDG&E's actual investment in appurtenances.⁴⁶ Much of the discovery CCTA sought is the data underlying the figures that SDG&E reported in its FERC accounts. FERC rules require that entities entering information into the accounts maintain "books and records so as to be able to furnish readily full information as to any item included in any account."⁴⁷ See 18 C.F.R. Part 101, General Instruction No. 2(A). Thus, SDG&E should possess the data underlying the figures in the FERC account, and it should not be an undue burden to produce the data.

The ALJ also ruled against granting discovery based on untimeliness of the data requests.⁴⁸ CCTA did not specifically contest the 15% appurtenance ratio initially. However, CCTA alleged inaccuracies in SDG&E's FERC Account 364 data and objected to SDG&E's refusal to provide the underlying data.⁴⁹ CCTA also alleged the FERC Account 364 data was flawed, thus leading to an inaccurate pole attachment rate formula, and alleged "inflated" costs related to fires.⁵⁰

CCTA's First Motion to Compel claimed that SDG&E's FERC Account 364 filing was inaccurate, and that the inaccurate data from this account was inputted into the 15% appurtenance reduction.⁵¹ This motion does not mention appurtenance costs or otherwise contest the inputs to the 15% appurtenance factor. However, some data requests sought the data underlying the FERC Account 364 figures, which would include appurtenance cost data.⁵² Moreover, Item 20 from CCTA's Jan. 2, 2018 data requests specifically asked for fire-hardening cost data reported in FERC accounts (which includes costs for

⁴⁶ See POD at 18.

⁴⁷ See 18 C.F.R. Part 101, General Instruction No. 2(A).

⁴⁸ See December 19 ALJ Ruling at 2-3 & n.4

⁴⁹ See Verified Complaint of CCTA ("Complaint"), ¶ 10.

⁵⁰ See *id.*, ¶ 10, 17, 22.

⁵¹ See First Motion to Compel at 8.

⁵² See *e.g.* First Motion to Compel, Appendix A, Data Request No. 1, Items 7, 16, 17 & 18.

hardening poles and pole appurtenances), and thus encompassed many of the later data requests.⁵³

The ALJ granted some of CCTA's discovery requests, but denied much of the discovery related to SDG&E's costs. CCTA then filed a Second Motion to Compel, modifying its requests for cost data, and specifically asking for appurtenance cost data. For example, A.21-23 asked for specific information about fire hardening procedures and costs. Although some of the data requests presented in the Second Motion to Compel are entirely new data requests and thus untimely, some data requests were encompassed in previous data requests and thus are timely.⁵⁴

The ALJ's rulings denying some of the discovery requests were in error and are overruled. Specifically, Item 18 from CCTA's January 2018 data requests as it relates to costs of appurtenances and CCTA's requests A.21, A.22 and A.23 from its Second Motion to Compel should have been granted.

7. Explanation of Changes to the POD and Next Steps in the Proceeding

Pursuant to Pub. Util. Code § 1701.2(e), this is the explanation of changes made by this decision to the POD.

The POD recognized that the 15% appurtenance ratio presumption was rebuttable but ruled that there is a "good-faith basis" prerequisite before a party could seek discovery into the evidence on the actual investment in appurtenances in order to rebut the presumption. This decision finds no support for such a "good-faith basis"

⁵³ This data request reads:

For each separate year from 2006 through 2016, describe fully how SDG&E accounts in its FERC Form 1 for the costs of system "hardening" its pole plant and reducing wildfire risks. Explain in detail how the various costs for "hardening" SDG&E's pole plant is allocated to various FERC accounts, including those for engineering, materials, labor, and equipment, and if such treatment has changed since 2006. Provide a copy of all records in support and identify the person or persons primarily responsible for creating and maintaining the records of such costs.

⁵⁴ See also CCTA Motion to Reconsider Discovery Rulings, filed January 3, 2019, pp. 11-12 for a description of CCTA's attempt to seek cost information originally sought by earlier data requests, through data requests added in the Second Motion to Compel.

prerequisite. Rebuttal of the 15% appurtenance ratio presumption is within the scope of a complaint regarding pole attachment fees. A complainant in a pole attachment fee dispute should have access to discovery regarding a utilities' actual investment in appurtenances not necessary for the pole attachment.

The POD affirmed the ALJ rulings denying CCTA discovery into SDG&E's actual investment in appurtenances. This decision overrules the ALJ's rulings and allows CCTA discovery into the data underlying the figures in SDG&E's FERC Account 364. Specifically, this decision orders SDG&E to respond to Item 18 of CCTA's January 2018 data requests with respect to costs of appurtenances, and to answer CCTA's requests A.21, A.22 and A.23 from its Second Motion to Compel.

The POD entered the inputs into the statutory formula for computing pole attachment fees, calculated SDG&E's pole attachment fees for billing years 2017 and 2018 and closed the proceeding. This decision accepts all of the POD's calculations but recognizes that a party may be able to produce evidence regarding SDG&E's actual investment in appurtenances, that would rebut the 15% appurtenance ratio presumption. Thus, this proceeding is to remain open and the record is reopened to give the parties an opportunity to do so. This decision provides that the ALJ may issue rulings regarding the schedule and procedures to be used for this proceeding, allowing parties the opportunity to introduce evidence and arguments regarding SDG&E's actual investment in appurtenances, and the resulting pole attachment fee. The pole attachment fee will be determined pursuant to the findings of fact and conclusions of law in this decision.

Pursuant to Pub. Util. Code § 1701.2(i), this decision also extends the deadline for resolution of this adjudication to March 15, 2020. The extension of the deadline is necessary in order to provide parties opportunity for discovery regarding SDG&E's actual investment in appurtenances, and related testimony and briefing.

This decision also eliminated a finding from the POD that the driving factor contributing to the difference in average costs between steel and wood poles is not the composition of the poles. This finding was eliminated because it was not necessary to

support the decision's conclusion to not calculate separate attachment fees for wood and steel poles.

This proceeding remains open.

8. 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. SDG&E's FERC Account 364 includes the cost of appurtenances to multi-use and third-party poles used in its distribution system.
3. 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.
4. 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.
5. It is necessary to extend the deadline in this adjudication in order to provide parties opportunity for discovery regarding SDG&E's actual investment in appurtenances not necessary for pole attachments.

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 do 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 15% appurtenance ratio presumption adopted by the Commission in D.98-04-062 is a rebuttable presumption.
8. A complainant in a pole attachment fee dispute may seek discovery regarding a utilities’ actual investment in appurtenances not necessary for the pole attachments and may rebut the 15% appurtenance ratio presumption.
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, unless a party rebuts the 15% appurtenance factor ratio, in which case the appurtenance factor demonstrated by the evidence will be utilized.
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 ALJ’s rulings denying discovery into SDG&E’s actual investment in appurtenances should be overruled.
12. The proceeding should remain open.

THEREFORE, IT IS ORDERED that:

1. We overrule the Administrative Law Judge’s rulings denying discovery into SDG&E’s actual investment in appurtenances not necessary for pole attachments.
2. We order that SDG&E produce discovery regarding data underlying the figures in SDG&E’s FERC Account 364; specifically, we order SDG&E to answer CCTA’s Item 18 from its January 2018 data requests as it relates to cost of appurtenances and requests A.21, A.22 and A.23 from its Second Motion to Compel.
3. The record for this proceeding is reopened to give the parties an opportunity to introduce evidence into SDG&E’s actual investment in appurtenances.
4. The ALJ may issue rulings regarding the schedule and procedures to be used for this proceeding, allowing parties the opportunity to introduce evidence and arguments regarding SDG&E’s actual investment in appurtenances, and the resulting pole attachment fee. The pole attachment fee will be determined pursuant to the findings of fact and conclusions of law in this decision
5. The deadline for resolution of this adjudication is extended to March 15, 2020.

6. The proceeding remains open.

This order is effective immediately.

Dated July 11, 2019 at San Francisco, California.

MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
GENEVIEVE SHIROMA
Commissioners

President Michael Picker and Commissioner
Liane M. Randolph, being necessarily absent,
did not participate.