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Decision 02-03-048 March 21, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Daniels Cablevision, Inc. and the California Cable Television Association, Complainants, vs. San Diego Gas & Electric Company, Defendant.	Case 00-09-025 (Filed September 18, 2000)

OPINION GRANTING COMPLAINT IN PART AND FINDING THAT SDG&E MAY CHARGE A COST-BASED FEE FOR USE OF ITS TRANSMISSION RIGHT-OF-WAY

Gardner F. Gillespie and Yaron Dori, Attorneys at Law, Hogan & Hartson LLP, for Complainant.
Lesla Lehtonen, Attorney at Law, for California Cable Television Association.
Celeste Easton, Attorney at Law, Sempra Energy, for Defendant.

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I. Summary

This decision resolves a complaint brought by Daniels Cablevision Inc. (Daniels) and the California Cable Television Association against San Diego Gas & Electric Company (SDG&E) regarding a $6,080 per mile fee that SDG&E attempted to charge Daniels for use of SDG&E's transmission rights-of-way (ROW). This decision finds that SDG&E may not impose upon Daniels a fee for use of transmission ROW as long as the 1986 Pole Attachment License Agreement (1986 Agreement) between the parties remains in effect. If either party terminates the 1986 Agreement, as allowed by its provisions, SDG&E may charge a fee for use of its transmission ROW based on its actual costs. SDG&E's proposed market-based fee of $6,080 per mile is rejected. The parties shall calculate a transmission ROW fee as an overhead component of SDG&E's pole attachment rate, using the formula proposed by Complainants and set forth in Attachment A to this decision. Within 45 days of the effective date of this order, SDG&E shall file a notice that the parties have agreed on a transmission ROW charge using this formula. Alternatively, if parties are unable to agree, SDG&E shall file its proposed transmission ROW charge for the Commission to examine in Phase II of this proceeding.

II. Complainants' Allegations

Daniels and the California Cable Television Association (CCTA) (jointly "Complainants") filed this complaint against SDG&E pursuant to Pub. Util. Code

§ 767.5(c).[1] That statute authorizes the Commission to determine pole attachment rates, terms, and conditions when cable operators are unable to reach agreement with investor-owned utilities.

Daniels is a mid-sized cable company providing cable services to approximately 64,800 customers in Northern San Diego County. In providing these services, Daniels attaches coaxial cable and fiber optic cable to poles owned by SDG&E.

CCTA is a trade association representing cable television operators (including Daniels) with over 400 cable television systems in California. Consistent with Section 767.5, CCTA negotiates on behalf of cable television companies for pole attachment rates, terms, and conditions for all investor-owned utility poles in California.

Generally, Complainants request that the Commission prohibit SDG&E from imposing additional charges for access to SDG&E poles and rights-of-way beyond (1) the pole attachment fee negotiated between Daniels and SDG&E in their 1986 Pole Attachment License Agreement (1986 Agreement); and (2) the actual engineering and make ready expenses reasonably incurred by SDG&E. In the event the Commission allows SDG&E to impose additional charges for access to SDG&E poles and rights-of-way, Complainants request specific rulings from the Commission on the calculation of those charges. In addition, Complainants request immediate access to the poles in dispute and a finding that SDG&E violated Commission Decision (D.) 98-10-058 (the "ROW Order") by failing to grant Daniels access to SDG&E rights-of-way in a timely fashion and otherwise according to the ROW Order.

[1] All statutory references are the Public Utilities Code unless otherwise noted.

Complainants state that in 1991 and 1992, Daniels attached its coaxial and fiber optic cable to both transmission and distribution poles owned by SDG&E pursuant to the 1986 Agreement.[2] According to Complainants, SDG&E did not previously require a separate agreement for Daniels' use of SDG&E easements and ROW[3] between transmission poles, and SDG&E billed for distribution and transmission pole attachments at the same rate. Complainants claim the 1986 Agreement gives Daniels the right to use SDG&E's rights-of-way to the extent required to attach to the poles.

According to Complainants, Daniels filed two applications in 1997 with SDG&E requesting permission to attach fiber optic cables to 65 transmission poles. SDG&E responded that it would permit these attachments only if Daniels entered into two new agreements -- a Transmission Pole Attachment Agreement and a License to Use Rights of Way (ROW License). The latter would obligate Daniels to pay a per mile fee in order to access transmission and distribution rights-of-way.[4] Complainants claim that the ROW License would have required Daniels to enter into a 20-year agreement to pay $6,080 per mile annually for

[2] In 1996, CCTA, on behalf of Daniels and other cable operators, negotiated a new rate of $16 for the use of SDG&E transmission poles.

[3] This case involves access and use of ROW that SDG&E has acquired either in fee simple or in easement. For simplicity, we will refer to both easements and ROW owned in fee simple as simply, "ROW."

[4] SDG&E distinguishes poles on private land from poles on public land. According to SDG&E, poles on private land are in "right of way position" and are situated on private ROW obtained by SDG&E through easement or in fee simple. Poles on public land are in a "franchise position" because they are on land owned by a municipality, city or county. (Hearing Transcript (Tr.) at 412.) During the hearing, SDG&E clarified that it only intends to charge for use of transmission ROWs on private land. It will not charge for use of distribution ROW on private land or for use of any ROW, either transmission or distribution, on public land. (Tr. at 414-415.)

transmission ROW and $580 per mile annually for distribution ROW, in addition to the regular pole attachment fee set forth in the 1986 and 1996 agreements. According to Complainants' witness Don Williams, this would result in payments to SDG&E of at least $24,320 per year to attach to poles along a four-mile transmission run. (See Exhibit 15, p. 9.) SDG&E would adjust the annual per mile fee by the CPI.

Faced with the new ROW License, Complainants state that Daniels constructed underground facilities in lieu of attaching to 29 of the 65 poles. For the remaining 36 poles, Daniels wrote to SDG&E demanding access under the Commission's ROW rules. On August 7, 2000, the parties entered into interim agreements under which SDG&E agreed to process Daniels' application to attach to the remaining 36 poles, with the reasonableness of the terms and conditions of attachment subject to this complaint proceeding. After filing the complaint, Daniels attached to the 36 transmission poles at issue.

III. SDG&E's Answer

SDG&E says the 1986 Pole Attachment Agreement covers only *distribution* poles and does not grant Daniels access to *transmission* poles or to any rights-of-way other than the distribution pole attachment itself.[5] SDG&E cites the 1996 agreement negotiated between CCTA and SDG&E, which sets a specific transmission pole attachment rate as proof that the earlier agreement did not extend to transmission poles. SDG&E contends it has not violated any statute or Commission order and that the only issue in this case is whether SDG&E's fees

[5] SDG&E defines a distribution pole as a single wood pole 35 to 45 feet tall carrying conductors having a voltage of 12KV or less. SDG&E defines a transmission pole as a single wood pole 65 to 85 feet tall carrying conductors having a voltage of 69KV or above.

for use of its transmission ROW are fair and reasonable.

SDG&E denies that it knowingly permitted Daniels to attach coaxial cables to transmission poles in 1991 and 1992, and that any attachments Daniels previously made to transmission poles may have involved "transmission overbuilds" in franchise areas.[6] SDG&E states that prior to 1994, it limited pole attachments by cable companies to its distribution facilities because of the potential danger conductive copper lines could pose if attached to higher voltage transmission lines. SDG&E maintains that the 1986 Agreement is an example of the company's pre-1994 policy. Once Section 767.7 was enacted in 1994, SDG&E implemented a new policy to allow attachments to transmission poles as long as parties also signed a ROW License.

Finally, SDG&E claims that Section 767.7(b) clearly authorizes it to obtain fair and adequate compensation for use of rights-of-way and transmission easements for the installation of fiber optic cable, and that the only question before the Commission is what constitutes fair and adequate compensation for SDG&E's investment in transmission ROW. SDG&E alleges that its proposed fee for use of its exclusive transmission ROW compensates it for investments to acquire these property interests and it is entitled to a return on its investment separate and apart from the pole attachment rate. SDG&E claims that the ROW Order only provides for non-discriminatory access to transmission and distribution poles, and does not address access to private transmission easements.

[6] According to SDG&E, a "transmission overbuild" is the addition of transmission facilities to distribution easements. (Tr. at 412, Marsman.)

IV. Procedural History

The complaint in this proceeding was filed on September 18, 2000. SDG&E requested and was granted an extension until November 30, 2000, to respond to the complaint. A prehearing conference (PHC) was held on December 14, 2000. On March 29, 2001, the case was reassigned from Administrative Law Judge (ALJ) Prestidge to ALJ Duda. In a Scoping Memo dated April 9, 2001, Commissioner Wood named ALJ Duda as presiding officer for hearing. This is an adjudicatory proceeding as defined in Rule 5(b) of the Commission's Rules of Practice and Procedure.

In SDG&E's answer to the complaint, and at the PHC, SDG&E requested that CCTA be dismissed as a party from this action based on the claim that CCTA has neither privity of contract nor standing. In the Scoping Memo, Commissioner Wood and ALJ Duda denied this request because CCTA had negotiated the 1996 transmission pole attachment agreement cited by both Daniels and SDG&E, and because CCTA has standing under Section 767.5.

Evidentiary hearings were conducted on May 2, 3 and 7, 2001, at which time the Commission heard from eight witnesses and received 98 exhibits into evidence. The case was deemed submitted on June 15, 2001, following receipt of opening and reply briefs.

V. Applicable Statutes and Commission Orders

A. Section 767.5

Section 767.5, enacted in 1980, finds that public utilities have dedicated a portion of their support structures to cable television corporations for pole attachments over many years and that such provision is a public utility service. It also finds that it is in the public interest for this practice to continue. Section 767.5 (c) requires the Commission to establish and enforce the rates, terms, and conditions for pole attachments when public utilities and cable

television corporations or an association of cable television corporations are unable to agree on these items. The section requires the Commission to assure a public utility recovery of (1) any actual costs incurred for rearrangements performed at the request of the cable corporation, and (2) an annual recurring fee tied to the public utility's annual cost of ownership for the pole and supporting anchor.

Section 767.5(a)(3) defines "pole attachment" as:

> any attachment to surplus space, or use of excess capacity, by a cable television corporation for a wire communication system on or in any support structure located on or in any right-of-way or easement owned, controlled, or used by a public utility.

B. Section 767.7

Section 767.7(b), added by Chapter 623, Statutes of 1994, provides in pertinent part that:

> It is…the intent of the Legislature that public utilities and publicly owned utilities be fairly and adequately compensated for the use of their rights-of-way and easements for the installation of fiber optic cable,…

Section 767.7(c) provides that "nothing in this section shall be deemed to change existing law with respect to Section 767.5."

C. The ROW Order

In the ROW Order, issued in October 1998, the Commission adopted rules governing the nondiscriminatory access to poles, ducts, conduits, and other rights-of-way applicable to all competitive local carriers (CLCs) competing in the local exchange telephone market. The Commission made the rules applicable to

the major investor-owned electric utilities, namely PG&E, Edison, and SDG&E, as well as to the major incumbent local exchange carriers (ILECs).[7] The Commission's rules obligated the electric utilities and ILECs to provide nondiscriminatory access to CLCs and to cable companies. Thus, the rules apply uniformly to access by CLCs and cable companies, without the need to distinguish whether a given attachment is used to provide cable television or telecommunications services. (ROW Order, p. 2.)

Appendix A to the ROW Order contains the adopted rules. Part I.A of the rules states that:

> These rules govern access to public utility rights-of-way and support structures by telecommunications carriers and cable TV companies in California, and are issued pursuant to the Commission's jurisdiction over access to utility rights of way and support structures under the Federal Communications Act, 47 U.S.C. § 224(c)(1) and subject to California Public Utilities Code §§ 767, 767.5, 767.7, 768, 768.5 and 8001 through 8057. These rules are to be applied as guidelines by parties in negotiating rights of way access agreements. Parties may mutually agree on terms which deviate from these rules, but in the event of negotiating disputes submitted for Commission resolution, the adopted rules will be deemed presumptively reasonable. The burden of proof shall be on the party advocating a deviation from the rules to show the deviation is reasonable, and is not unduly discriminatory or anticompetitive. (Emphasis added.)

In Part II of the rules, the Commission defines the term "Right of way" as follows:

> "Right of way" means the right of competing providers to

[7] The ILECs include Pacific Bell and GTE California (now Verizon California), Roseville Telephone Company, and Citizens Telecommunications Company of California.

> obtain access to the distribution[8] poles, ducts, conduits, and other support structures of a utility which are necessary to reach customers for telecommunications purposes.

In Part VI.A, the rules require a utility to grant access to its rights-of-way and support structures to telecommunications carriers or cable TV companies on a nondiscriminatory basis. In Part VI.B, the rules set the manner in which the Commission sets the rates, terms, and conditions for pole attachments and rearrangements whenever a public utility and a telecommunications carrier, or cable TV company, or associations, are unable to agree on terms, conditions, or annual compensation for pole attachments. The language of Part VI.B mirrors the language of Section 767.5(c) by requiring recovery of both actual costs for any rearrangements performed and an annual recurring fee for the attachment.

Finally, the ROW Order concludes that parties to pre-existing arrangements for access to utility ROW and support structures shall be bound by the terms of such arrangements even though the terms may differ from the provisions of the ROW Order. An exception to this rule is granted only if the contract expressly provided for amendment or renegotiation to conform to subsequent commission orders. (ROW Order, Conclusion of Law 19, p. 122.)

D. Decision on Petition to Modify ROW Order

In April 2000, the Commission granted in part a joint petition by Daniels and CCTA for modification of the ROW Order. The petition questioned whether the Commission exempted transmission poles from the rules and requested that the Commission clarify that transmission poles are subject to the Commission's ROW rules, identical to the rules' application to distribution poles.

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[8] As discussed more fully below, D.00-04-061 clarified that the rules also include transmission poles, support structures, and ROW.

In responding to this request, D.00-04-061 states that the ROW Order was not intended to create any loophole, such as exempting transmission poles, which would threaten facilities-based competition. (D.00-04-061, pp. 6-7.) Thus, the Commission granted modification of the ROW Order to clarify that distribution and transmission poles, support structures, and rights of way are within the scope of the ROW rules. (*Id.*, Ordering Paragraph 2, p. 11.)

The decision also noted the dispute between Daniels and SDG&E regarding payment of an access fee for fiber optic lines attached to transmission poles, in addition to the pole attachment fee. On this topic, the order stated that:

> The record, however, does not support a finding of whether the rules concerning compensation for attachments to transmission poles would provide adequate compensation for the costs of transmission easements. (*Id.*, p. 8.)

Rather, the Commission stated that since the rulemaking that established the ROW rules was not the proper forum for a contractual dispute between the parties, Daniels could file a complaint against SDG&E to resolves its specific factual disputes. The order also suggested that further deliberations might be needed before the Commission could adopt generic rules related to compensation for transmission easements.

VI. Discussion

This case involves four disputed issues that we will address in turn below. Initially, Daniels requested that the Commission also resolve the amount that SDG&E may charge Daniels for engineering and make-ready work, and examine whether SDG&E violated the Commission's ROW Order by failing to grant timely access to its transmission poles. At the start of hearings, parties informed the ALJ that these issues were no longer in dispute. We shall now address the four remaining disputed issues.

A. SDG&E May Not Charge for Access to its Poles and Right-of-Way Beyond the Terms of the 1986 Agreement

Complainants claim that SDG&E is not entitled to charge for access to its poles and ROW beyond the charges set forth in the 1986 Agreement, which both parties agree remains in effect. Complainants argue that the 1986 Agreement makes no mention of a separate fee for use of ROW. Further, they contend that it defies logic to suggest that the November 1986 Agreement permits Daniels to attach to SDG&E's poles but not use the associated ROW between the poles, as the primary purpose of attaching to SDG&E's poles is to string cable between them. Further, Complainants maintain that the Agreement is not limited to distribution poles because it makes specific reference to poles with electric conductors "above and below 600 volts." (See Exh. 100, p. 2.)

Complainants' witnesses Odums and Williams testified that Daniels had previously attached to SDG&E poles, including transmission poles on private ROW, without signing the additional License to Use ROW Agreement or paying the additional fee that SDG&E now requires. Specifically, Complainants provide evidence of two occasions on which Daniels made such attachments and a third occasion where an application to attach to poles was accepted without mention of the need for a separate ROW payment.[9]

[9] Daniels states that in 1991-92, it attached to transmission poles in Fallbrook and San Marcos. (Exh. 15, pp. 2-4.) According to the testimony, Daniels is still attached to transmission poles in the Fallbrook area. (Tr. at 385-386). SDG&E witness Burton admitted that transmission poles in the Fallbrook area are on transmission easements on predominantly private ROW. (Tr. at 400.) The San Marcos attachments were later removed to make way for a state university. (Tr. at 305, 385). Daniels states that it applied to attach to transmission poles in Solana Beach in 1993, and that SDG&E did not mention a ROW payment with regard to Daniels' application. Daniels admits that it never actually attached to the poles that were the subject of the 1993 Solana Beach

Footnote continued on next page

In contrast, SDG&E claims that the 1986 Agreement is specifically limited to distribution poles on public ROW, also known as poles in "franchise position." To support this argument, SDG&E cites a portion of the 1986 Agreement which states:

> Whereas, incident to the distribution of electric energy the Licensor has erected poles and other structures within the territory in which said electric energy is distributed and used, the said poles and structures being located on roads, highways, and private and public places;... (Emphasis added.) (Exh. 100, p. 1.)

SDG&E contends that language in the agreement clearly limits cable companies to attachments to distribution poles on public land. SDG&E cites language that refers to poles on "public thoroughfares…in or upon any public streets, ways, alley and places…within the said franchise area or in or near any location upon other public or private property…." (*Id.*, p. 6.) SDG&E alleges that the 1986 Agreement is limited to distribution poles because Attachment B to the 1986 Agreement describes the formula for the pole attachment fee and specifically lists the lengths of the poles as 35, 40, and 45 feet, the lengths typically found with distribution, not transmission poles.

Further, SDG&E claims that the 1986 Agreement does not allow the use of SDG&E's transmission easements but instead requires Daniels to obtain necessary permits and rights of way. To support this claim, SDG&E cites again to portions of the 1986 Agreement that state:

> Nothing contained in this License Agreement shall be construed to obligate Licensor to grant Licensee permission to use any particular pole or poles. (*Id.*, p. 2.)

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application. (Exh. 15, p. 3.)

* * *

> Licensee shall obtain all necessary permits and rights of way for the erection, operation, and maintenance of Licensee's conductors and equipment over, along, across, on, through and under public streets, roads, highways and private property and this agreement shall not be construed as a grant of right of way or easement by Licensor except as to the use of Licensor's poles to support Licensee's conductors and equipment subject to the terms and conditions hereof, after the necessary permits and rights of way have been obtained by Licensee." (*Id.*, pp. 10-11.)

Moreover, SDG&E claims that it is clearly authorized by Section 767.7 to obtain fair and adequate compensation for use of its rights-of-way beyond the pole attachment fee. SDG&E argues that if the California State Legislature intended for ROW fees to be included in the pole attachment rates, then Section 767.5 would suffice and there would be no need for Section 767.7, which allows fair and adequate compensation for use of ROW and easements. SDG&E claims that nothing in Section 767.5 touches on the costs of ROW because the section addresses only support structures and pole attachments. Rather, SDG&E contends that in D.00-04-061, the Commission clearly states its intent to hold a generic rulemaking on the issue of the cost of transmission ROW and easements.

We find the Complainants have presented uncontroverted evidence that Daniels made prior attachments to SDG&E transmission poles without paying any additional fees beyond those set forth in the 1986 Agreement. Daniels made attachments to transmission poles on private land, or applied to make them, on three occasions and did not have to pay any fees or sign any additional agreements for the use of SDG&E transmission ROW. Although SDG&E may have changed its policy regarding use of transmission ROW based on legislation in 1994, the 1986 Agreement under which Daniels attached to

transmission poles and used transmission ROW in 1991-92 remains in effect.

We are not persuaded by SDG&E's argument that it may charge additional fees because language in the 1986 Agreement limits attachments to distribution poles on public land. First, the term "distribution" in the agreement is not used in conjunction with the word "pole"; the term merely describes SDG&E's services provided. Hence, it is not clear that the 1986 Agreement is limited to distribution poles.[10]

Second, SDG&E appears to rely on the use of the term "franchise" in the 1986 Agreement to refer to poles in "franchise position," or on public land, as it now defines that term. Yet, SDG&E's witness Marsman admits that the 1986 Agreement does not define the term "franchise position." (Tr. at 471.) The language in the 1986 Agreement could be interpreted to refer to SDG&E's "franchise area," or service territory. Further, SDG&E's view that attachments are limited to poles on public land cannot be squared with the allusion in paragraph 10 of the 1986 Agreement to "public and private property."

Both parties agree that the 1986 Agreement, as modified in 1996, is still in effect. Further, the ROW Rules adopted by the ROW Order contain a provision stating that parties remain bound by existing agreements. Thus, the $16 pole attachment fee for transmission poles governs attachments that Daniels now wants to make to SDG&E transmission poles and ROW, and we conclude that SDG&E may not condition attachment to transmission poles on the payment

[10] Although the agreement does refer to pole heights which SDG&E testifies are distribution pole heights, the agreement also refers to connections "above and below 600 volts." Since SDG&E's transmission service occurs at a voltage of 69 kv and above (which is above 600 volts), the agreement implies through this language that it covers attachments to transmission poles as well.

of additional fees for use of easements or ROW while the 1986 Agreement remains in effect.

Despite our conclusion that SDG&E cannot charge for use of its ROW under the terms of the 1986 Agreement, the parties agree that SDG&E can terminate the current agreement based on its cancellation provisions.[11] We conclude that if the agreement were terminated, SDG&E may charge for use of its ROW under the provisions of Section 767.7. We do not agree with Complainants that fees for ROW are not allowed because the Commission's ROW rules only specify a formula for a pole attachment fee. The rules are "guidelines" and discuss the ability of carriers to negotiate variations. Further, in D.00-04-061, the Commission noted that it had not addressed the costs of transmission easements in the proceeding that developed the ROW rules. Given the language of Section 767.7 that discusses fair and adequate compensation for ROW and easements, it is reasonable for SDG&E to attempt to negotiate payment for use of its ROW. Indeed, Complainants do not dispute that ROW costs are not included in the current pole attachment fee and that SDG&E should be entitled to recover them. Complainants even present a methodology for including easements in the pole attachment formula.

Therefore, we find that if SDG&E terminates the 1986 Agreement, as allowed by its provisions, SDG&E may charge a fee for use of its transmission ROW. We now turn to the issue of how much SDG&E may charge for such use and whether SDG&E needs prior Commission approval for any charge.

[11] Exh. 100, p. 19.

B. SDG&E Must Justify Any ROW Fees Under the ROW Rules

Before we turn to the question of how much SDG&E can charge for use of its ROW, we shall address Complainants' claim that SDG&E must obtain prior approval for a ROW charge.

Complainants contend that according to the ROW Order, utilities must provide access to their bottleneck facilities such as poles and ROW on just and reasonable terms. (ROW Order, pp. 50-51.) Complainants point out that the ROW order explicitly states the Commission has jurisdiction over use of utility ROWs.[12] They argue that given this authority, SDG&E must justify its proposed charges when asked. Complainants cite Section 454 as placing the burden on SDG&E of justifying its proposed ROW fee because state law requires the utility to justify the rate it seeks to charge for access to bottleneck services, and any doubts as to the reasonableness of a rate must be resolved against the utility.[13] Complainants charge that SDG&E has not met this requirement.

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[12] Section 224 of the Communications Act grants the FCC authority to "regulate the rates, terms and conditions for pole attachments" (defined to include "a . . . right-of-way owned or controlled by a utility") whenever a state does not. (See 47 U.S.C. § 224.) California asserted jurisdiction over in-state poles, ducts, conduits and ROWs in the ROW Order. Specifically, the ROW Order states at p. 9, "By virtue of the rules we issue pursuant to the instant decision, we hereby certify to the FCC that we regulate the rate[s], terms, and conditions of access to poles, ducts, conduits, and ROW in conformance with §§ 224(c)(2) and (3)."

[13] Section 454 of the California Public Utilities Code states in pertinent part: "No public utility shall charge any rate or so alter any classification, contract, practice or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified." The Commission has held that in attempting to justify a rate, the "ultimate burden of proof of reasonableness" falls squarely on the utility proposing the rate, and that the utility must meet this burden "by clear and convincing evidence [that has] the greatest probative force." (D.00-02-046, pp. 55-56.)

SDG&E counters that prior Commission approval of any ROW charge is not required because General Order 69-C allows SDG&E to grant conditional easements to third parties without Commission authorization. Further, SDG&E argues that Section 454 applies to electric rates and not to terms and conditions for pole attachments and use of ROW since these are negotiated between parties. SDG&E states that in managing its ROW assets, it negotiates with potential third party users, and primarily determines a fee based on market rates. Further, SDG&E contends that electric customers benefit from the miscellaneous revenues received from ROW leases because any revenues offset the regulated revenue requirement and could lower electric rates.

We find that because the ROW rules are "guidelines" for negotiation of agreements between utilities, telecommunications carriers, and cable companies, SDG&E does not need to obtain advance approval to demand fees for use of its ROW. On the other hand, the fees must be reasonable and are subject to negotiation. The rules clearly set forth what action parties should take if they cannot come to a mutual satisfactory agreement. According to the rules, parties are to use an informal process and file a complaint if needed. In Part II.L, the rules clearly articulate that ROW is defined as the right to obtain access to poles and other structures "necessary to reach customers." Complainants clearly dispute the terms of access to ROW as defined in our rules, and the dispute between Daniels and SDG&E has now appropriately risen to the level of a formal complaint in keeping with the process set forth in the ROW rules and in Section 767.5(c).

According to Rule 1.A of the ROW rules, SDG&E has the burden of proving a deviation from the guidelines set forth in the rules. While it is true that under GO 69-C, SDG&E may, in certain circumstances, license its property without prior Commission authorization, SDG&E must also comply with the

ROW order and provide access to its ROW. SDG&E cannot charge whatever fee it wants under GO 69-C without Commission approval because it must justify its fees under the ROW rules. Rule IX specifically provides for the Commission to resolve disputes over access to ROW such as this one. We shall now turn to the question of a reasonable rate for use of SDG&E transmission easements and ROW.

C. SDG&E May Not Base a ROW Charge on Market Rates

Complainants and SDG&E agree that SDG&E is entitled to "just compensation" for the use of its ROW, pursuant to Section 767.7. Nevertheless, Complainants claim that SDG&E's proposed Transmission ROW fee of $6,080 per mile is unreasonable for two basic reasons. First, Complainants argue that several aspects of SDG&E's methodology to derive the fee are flawed. SDG&E arrived at its $6,080 transmission ROW License fee, wherein Daniels would pay what SDG&E believes is essentially one-half of today's value of the easement, as follows:

- SDG&E computed an average dollar value of $3 per square foot for land similar to the land at issue.
- SDG&E multiplied its $3 figure by a theoretical ROW width (12 feet) and the number of feet in a mile (5280) to derive a per mile value for transmission ROWs it owns in fee simple ($190,080).
- SDG&E reduced this amount by 20% to reflect the fact that actual ROW held in an easement is appraised at 80-90% of fee value.
- SDG&E then further reduced the amount by a percentage (50%) to account for its own use of the land.
- Finally, SDG&E added a rate of return (8%) for fiber optic leases.

In complainants' view, SDG&E fails to adequately support its $3 per square foot figure and its assumption regarding 12 foot ROW widths. In

addition, Complainants criticize the 50% factor because it assumes that every transmission ROW user should pay for half the company's estimated costs of acquiring and maintaining the ROW even though use by one party of a transmission ROW does not prevent its simultaneous use for the same purpose by others. According to Complainants, it is improper to charge Daniels a fee based on 50% of easement value when the ROW at issue in this proceeding is currently being used by three entities in addition to SDG&E.

Second, Complainants criticize the fee because it is based on market rates rather than the actual acquisition cost of the land. Complainants claim that SDG&E seeks to recover far more than what it paid for these ROW.[14] Complainants note that both the Commission and the FCC use historic costs as the proper measure for pole attachment fees.[15] Complainants note that the FCC recently reiterated the use of historic cost when it struck down an Alabama utility's proposed pole attachment rate stating that:

> "The rates, terms and conditions of pole attachments are regulated because of the bottleneck monopoly status of the utilities poles. Although utilities continue to argue that poles are no longer bottleneck facilities, no credible evidence of this has ever been presented to the Commission…" (*In re Alabama Cable Telecommunications Assoc. v. Alabama Power Co.*, File No. PA 00-003, FCC 01-181 (rel. May 25, 2001), para. 54.)

Based on this, Complainants maintain that SDG&E should calculate its

[14] SDG&E's witnesses Burton and Little testified that the company paid as little as $1 (plus other consideration, usually the furnishing of electric service) for some of its transmission ROWs. (See Exhibit D, pg. 2, and Tr. at 157, Little)

[15] For support, Complainants cite the ROW Order, p. 56, as well as *In re Amendment of Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Consolidated Partial Order on Reconsideration, FCC 01-170 (rel. May 25, 2001), para. 17.

transmission ROW fee using historic investment rather than market rates.

Third, Complainants claim that Section 767.7, which allows fair and adequate compensation for the use of rights of ways and easements, was intended to build on, rather than replace, Section 767.5. In Complainants' view, SDG&E's inflated ROW charge would thwart the Legislature's and this Commission's policy objectives to maintain access to utility bottleneck facilities as a public utility service at a reasonable cost**.**

Fourth, Complainants find a market-based price for use of transmission ROWs inappropriate since it assumes that those who pay the fee receive a value commensurate with the market price of land. Complainants explain that Daniels only receives a bare license to use the poles and related ROW. SDG&E retains all rights in its poles and ROW. The extremely limited rights acquired by Daniels through a license to use transmission ROW in no way correlates to the rights associated with ownership of the land or an easement purchased at market prices.

Finally, Complainants argue that established law supports the principle that in Daniels' situation, where an existing ROW, which is devoted to public use, is apportioned for a second, consistent public use, compensation for that second use should be "nominal." Complainants cite several eminent domain cases involving what they contend are analogous situations, where a utility was granted only nominal compensation for use of its ROW.[16]

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[16] Chicago B. & Q. R. Co. v. City of Chicago (Chicago B. & Q.), 166 U.S. 226 (1897), Oregon Short Line R. Co. v. Postal Tel. Cable Co. of Idaho (Oregon Short Line R.), 111 F. 842 (9th Cir. 1901), City of Oakland v. Schenck (City of Oakland), 197 Cal. 456 (1925), Loretto v. Teleprompter Manhattan CATV Corp. (Loretto), 58 N.Y. 2d 143, reh'g denied, 59 N.Y. 2d 761 (1983).

In opposition, SDG&E contends that in a perfect world, a ROW fee would be based on the market value of the real estate adjacent to the ROW used by Daniels. However, because of the high volume of requests in the mid-1990's to attach fiber optic cable to transmission poles, SDG&E developed a rate of $6,080 per mile per year as a negotiating starting point representing an estimate of the fair market value of easements of this type. SDG&E explains that if a company believed that this rate was not fair, it could obtain an appraisal of its individual project at its own expense. SDG&E explains that no company chose this option and all of the companies, other than Daniels, agreed to the $6,080 per mile fee to string fiber to transmission poles. SDG&E argues that its transmission ROW fee is supported by real estate data at the time of calculation and is consistent with the principles of market appraisal. SDG&E Witness Little explained that the $3 figure was derived from appraisal reports he examined at the time concerning comparable land. He admitted that he did not determine the actual acquisition cost of any of the ROW in question. (Tr. at 217.)

SDG&E presents legal support for its arguments on market-based compensation. First, SDG&E states that allowing cable companies such as Daniels to use SDG&E's transmission ROW without just compensation is an unconstitutional taking.[17] SDG&E also claims that a property owner has a fundamental property right to exclude others.[18] In a related argument, SDG&E insists that its ROW space is not dedicated for public use and that cable companies do not have the right to access such wholly private easements.[19]

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[17] Gulf Power Co. v. United States, 187 F.3D 1324 (1999)

[18] Lorretto, and Nollan v. California Coastal Commission, 483 U.S. 825 (1987)

[19] Cable Holdings of Georgia Inc. v. McNeil Real Estate Fund VI., Ltd., 953 F.2d 600

Footnote continued on next page

Second, SDG&E cites several legal precedents and Commission decisions which it claims support the use of market value to determine compensation.[20] For example, SDG&E cites D.89-06-056, wherein the City of Vallejo sought an exclusive easement from Southern Pacific Transportation Company and just compensation was based on market value for the easement. SDG&E also cites a number of Commission decisions regarding the leasing of fiber optic cable, and contends that these decisions provide proof that the Commission favors a market-based approach to pricing for utility-owned ROW space because revenues from the leases benefit ratepayers.[21]

Third, SDG&E refutes Daniels' claims that "nominal" compensation is appropriate by noting that in City of Oakland, cited by Complainants, the court concluded that a longitudinal taking was distinguishable from the mere right to cross utility property.

Finally, SDG&E claims that any rate other than market-based would force SDG&E's electric ratepayers to subsidize Daniels. SDG&E points to other recent examples of ROW leases, such as leases of public land by the Bureau of Land Management, where rates were based on market value.

We have already addressed the issue of market versus cost-based pricing of bottleneck facilities. In the ROW Order, which adopted rules for access to public utility rights-of-way, the Commission explicitly rejected arguments by electric utilities for market-based pricing of pole attachments. The order

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(1992).

[20] Group W Cable Inc. v. Santa Cruz (Group W), 679 F.Supp 977 (1988), Sacramento S. R. Co. v. Heilbron, 156 Cal. 408 (1909).

[21] See D.96-07-038, D.96-09-061, D.96-10-071.

concluded that local exchange carriers and electric utilities have "a significant bargaining advantage in comparison to the CLC with respect to ROW access" (ROW Order, pp. 50-51, emphasis added) and that "a truly competitive market for providing alternative means of access to support structures for CLCs does not yet exist." (*Id.*, p. 51.) The order concluded that pricing pole and support structure attachments based on a utility's historic or embedded costs should guard against this unbalanced bargaining position between incumbent utilities and other telecommunications providers. (Conclusions of Law 29, 31, pp. 123-124.) The ROW rules allow parties to negotiate pole attachment rates, but state that the Commission will apply a default rate based upon historical embedded costs if parties are unable to reach agreement.

We agree with Complainants that a market-based fee for use of SDG&E's easements and ROW eviscerates the careful formula for pole attachments set forth in the statute and our rules because a pole attachment is meaningless without the accompanying ability to string wire between the poles. We also agree with Complainants that in the absence of a negotiated rate between the parties, SDG&E should charge a cost-based rate for access to its transmission rights of way. We conclude that all of the statements in the ROW Order regarding access to rights-of-way and support structures apply equally to transmission rights of way. Specifically, the utility has significant bargaining advantage in comparison with the cable company for the easements at issue. Similar to the reasoning in the ROW Order, a truly competitive market for providing alternative means of access to rights-of-way and easements does not yet exist. There is no reason to deviate from the policy set forth in the ROW Order to apply historical embedded costs to pricing of access to rights of way, whether the rights of way are a support structure or an easement.

The licensing of utility poles and rights-of-way to telecommunications

carriers and cable companies can be differentiated from the licensing or leasing of rights-of-way for parking lots, storage, or plant nurseries, all of which have siting alternatives to utility ROW. The Commission set forth detailed rules governing access to rights-of-way and support structures when it adopted the ROW Order, and the current dispute over pricing of access to utility easements should be considered in light of the policies from that order. The ROW rules "govern access to public utility rights-of-way and support structures by telecommunications carriers and cable TV companies" and implement Sections 767.5 and 767.7. Since the current case involves access to rights-of-way by a cable TV company, we should apply the policies set forth in the ROW Rules.

Parties on both sides of this case have presented voluminous legal argument and citations regarding the appropriate means of calculating "just compensation." First, it is not clear that any of these legal precedents bind the Commission because the Commission's own ROW rules as set forth in the ROW Order set policy and govern access to utility poles and ROW by telecommunications and cable companies. The level of compensation when utility property is taken in other eminent domain actions has little bearing given the policies set forth in the Commission's current rules. Most of the parties' citations involve uses of railroad ROW, predate the Commission's ROW rules, or involve compensation for property that can be distinguished from Daniels' request to use SDG&E transmission ROW. Daniels' revocable license to use SDG&E's transmission ROW is distinguishable from most, if not all, of the compensation cases cited. In addition, Complainants' citations to FCC pole attachment cases further support the view that utility ROWs are bottleneck facilities.

We disagree with SDG&E that any compensation less than market value is a taking. Utility rates are regulated in large part because utilities traditionally faced little or no competition. Section 767.5 has conferred upon the Commission the ability to set compensation for utility pole attachments, and Section 767.7 states that public utilities shall be "fairly and adequately compensated" for the use of their ROW and easements for the installation of fiber optic cable. In our ROW rules, we stated that our rules implemented both of these code sections, and in our ROW Order, we stated that our rules preempted FCC rules. (ROW Order, p. 9.) Thus, this Commission has jurisdiction to set compensation for use of utility ROW and consistent with the cited statutes, our ROW Order envisions compensation for the utility's cost, not extraction of monopoly rents.

We also disagree with SDG&E's argument that it can prevent Daniels' use of the property in question because it is private property that has not been dedicated to the public use. SDG&E's own testimony explains that the cost of easements and ROW that Daniels wishes to use are included in SDG&E's regulated revenue requirement and recovered in electric rates**.** (Exh. B, Testimony of Keehn, p. 2.) The easements and ROW are utility assets and are clearly "dedicated" to SDG&E's regulated electric service. In addition, nothing in our ROW Rules allows a utility to exclude cable corporations' use of privately owned utility ROW.

Daniels is not seeking ownership of SDG&E's ROW, or any of the rights that traditionally accompany ownership. SDG&E will remain in possession of its property and empowered to remove Daniels should Daniels' presence interfere with SDG&E's responsibilities as a public utility. In contrast, the cases and Commission decisions cited by SDG&E in support of a market value approach can all be distinguished from the present case due to the critical factor that Daniels seeks only a license rather than full ownership or any of the rights traditionally associated with it. We also distinguish Commission orders involving leases of dark fiber because these leases were negotiated in a competitive market for dark fiber. We do not find that the market for access to utility transmission ROW is competitive.

As we have stated above, SDG&E is the only seller of the ROW space at issue and has significant bargaining advantage as the monopoly provider. Therefore, we find that forcing cable companies to pay SDG&E's proposed market prices runs counter to Section 767.5(b), which states that it is in the interests of the people of California for public utilities to make available surplus space and excess capacity for use by cable television corporations.

In summary, we reject SDG&E's proposal to charge a ROW fee based on

market rates. Thus, we will not address the individual criticisms of SDG&E's formula because the entire formula is based on market value. Instead, we find that SDG&E should charge a fee based on the actual cost of its transmission easements and ROW.

D. SDG&E Should Charge Any ROW Fee Through the Overhead Component of the Pole Attachment Fee.

Having found that SDG&E may charge a ROW fee based on actual cost, we turn to the issue of how to calculate the fee.

Complainants argue that the appropriate mechanism for recovering any cost of land is through the overhead component of the pole attachment fee. Complainants' witness Kahn alleges that a direct, per mile fee such as the one SDG&E proposes is inappropriate because easements and ROW do not directly vary with the amount of electricity provided. (Exh. 25, pp. 10-13.) To provide more electricity, SDG&E does not have to purchase more easements because it can simply string more wires on the easements it already owns, or string higher voltage wires. Instead, Kahn suggests that easements and ROW are more appropriately treated as "shared and common costs," which are considered overheads.

Kahn proposes a formula for calculating a ROW overhead charge that he suggests could be added to the current pole attachment fee. As shown in Attachment A, Kahn's formula identifies SDG&E's investment in transmission ROW for poles and divides that number by SDG&E's net electric plant, excluding land and buildings, to calculate SDG&E's ROW overhead**.** This overhead figure is then used to determine pole investment loaded with overhead. Ultimately, Kahn's proposed formula calculates an annual cost of ownership for an entire transmission pole, including ROW costs.

SDG&E counters that discussion of recovering ROW costs through an overhead charge is improper because the costs of transmission rights of way and easements are direct costs of the transmission system and vary with the level of transmission service required. Therefore, SDG&E maintains that any ROW charges should be treated as directly assigned charges.

SDG&E also contends that treating ROW costs as an overhead cost is improper because ROW charges are closer to "shared costs" than "common costs."[22] In essence, SDG&E maintains that ROW costs should be directly assigned to the elements that use transmission ROW, namely electric transmission service and other rights of way uses. SDG&E rebuts Kahn's proposal to treat rights of way as an overhead or common cost, arguing that transmission ROWs are not related to the entire operations of the company. Kahn replies that even a shared cost should be treated as an overhead charge rather than a direct charge. Finally, SDG&E contends that if the Commission wants to regulate the fees charged for transmission rights-of-way, the proper vehicle is through a generic rulemaking.

We agree with Complainants that it is reasonable to treat transmission rights of way charges as an overhead component of the pole attachment fee rather than a direct charge. For each additional kilowatt served, SDG&E does not necessarily have to purchase additional transmission rights of way. SDG&E has the ability to string more lines on the current right of way, or upgrade the lines on existing rights of way to transmit higher capacity. Certainly, there are times

[22] According to D.95-12-016, shared costs are "costs that are attributable to a group of outputs but not specific to any one within the group, which are avoidable only if all outputs with the group are not provided." Common costs are "costs that are common to all outputs offered by the firm." (D.95-12-016, Appendix C, p. 6.)

when growth in service volumes requires purchase of additional rights of way, but this is not directly proportional to growth.

We agree with witness Kahn and SDG&E that transmission rights of way costs are closer to shared costs than common costs. A shared cost is still treated as an overhead charge similar to a common cost. A shared cost should not translate into a direct charge. As a shared overhead cost, it is reasonable to allocate transmission rights of way costs to all aspects of electric service that share the costs. Therefore, we agree with Complainants that it is more appropriate to include transmission ROW costs as an overhead component when calculating the annual cost of ownership of transmission poles.

We disagree that the Commission must open a generic rulemaking to consider transmission ROW fees charged by electric utilities. Complainants already raised this dispute in the rulemaking and we directed them to bring their specific factual dispute to us in a complaint. Our resolution of this dispute is not intended to apply beyond the facts of this case and we reserve the option of opening a generic rulemaking to consider transmission ROW fees if we later deem it necessary.

Since we do not agree with SDG&E that a ROW charge should be collected as a direct charge, and since SDG&E has not proposed any modifications to Complainants' formula, we will direct the parties to calculate a transmission pole ROW overhead component using Complainants' formula (see Attachment A). If parties mutually agree on a ROW overhead component and a resulting annual transmission pole attachment fee, SDG&E must so notify the Commission through a letter to ALJ Duda filed and served in this proceeding within 45 days of the effective date of this order. If the parties are unable to reach agreement, SDG&E must instead file and serve its proposed ROW overhead component and annual transmission pole attachment fee using the formula in

Attachment A within 45 days of the effective date of this order. Complainants may file and serve comments on SDG&E's proposal 30 days after SDG&E's filing. The Commission will then consider SDG&E's proposed annual transmission ROW charge in Phase II of this proceeding.

VII. Conclusion

SDG&E may not impose upon Daniels a fee for use of transmission ROW as long as the 1986 Pole Attachment Agreement between the parties remains in effect. If the 1986 Agreement is terminated, SDG&E may charge a fee for use of its transmission ROW on private land based on its actual costs. SDG&E may not charge its proposed market-based fee of $6,080 per mile. Instead, SDG&E may calculate a transmission ROW charge as an overhead component of its transmission pole attachment fee according to the formula proposed by Complainants.

VIII. Appeal of the Presiding Officer's Decision (POD)

On November 26, 2001, SDG&E filed an appeal of the POD stating that it was not appealing the overall decision, but merely seeking a minor correction in the formula for calculating an overhead charge for transmission ROW. SDG&E bases its appeal on the grounds that the POD either contains an ambiguity or it erroneously misinterprets previous Commission decisions defining shared and common costs.

Specifically, SDG&E claims the formula set forth in the POD to establish a ROW overhead charge is unclear. SDG&E is uncertain whether the denominator for the formula should be "net transmission plant" or "total net electric plant" based on statements in the POD that transmission ROW costs should be treated as "shared" costs. SDG&E claims that common costs are typically spread to all aspects of service, but a shared cost is allocated only to those outputs for which the shared cost is incurred. SDG&E maintains that the only outputs that use

transmission ROW are transmission service, pole attachments, and other ROW users. Therefore, the formula in the POD allocates ROW as a common cost and should be corrected to allocate ROW as a shared cost. This correction entails dividing by net transmission plant rather than total net electric plant.

SDG&E further states that if the Commission disagrees with this correction, and believes that the costs of transmission ROW should be spread to all electric functions, then the formula for a distribution pole charge must also be changed to include a charge for transmission ROW. SDG&E doubts the Commission wants to pursue this change. Therefore, it recommends the Commission modify the formula to allocate transmission ROW only to net transmission plant.

In addition to the clarification to the overhead formula, SDG&E proposes some additional sentences to be added to the POD. The proposed language is as follows:

> "As a shared overhead cost, it is reasonable to allocate transmission rights of way costs to those aspects of electric service which share the costs. This is only electric transmission service and those functions that make use of the transmission ROW. These costs will reach all electric customers through the FERC approved transmission rates included in their rates."

In response to the appeal, Complainants state that they do not object to SDG&E's proposed modification of the overhead formula. They accept the change to Attachment A and to the first sentence of the text proposed by SDG&E. Complainants do not agree, however, with the other two sentences proposed by SDG&E because they contend the additional verbiage proposed by SDG&E would create further ambiguity. In addition, Complainants state that if the Commission modifies the POD, the Commission must affirm that SDG&E's investment in ROW for transmission towers is excluded from the ROW overhead

formula and that the proposed overhead applies only to transmission poles in private ROWs.

We agree with SDG&E that the language in the original POD may have been unclear. We have modified the POD to clarify that transmission ROW costs are shared costs and should be allocated to those aspects of service which share the costs. The formula in line 2 of Attachment A has been corrected. ROW overhead is calculated by dividing investment in transmission ROW for poles by total net transmission plant, excluding land and buildings. Land and buildings are excluded from the denominator in this formula because these are the costs being assigned as an overhead and because this is the generally accepted method of calculating an overhead rate. (Tr. at 342 and 352-353.)

We have not incorporated the additional sentences that SDG&E suggests (and that Complainants dispute) because the sentences are not necessary. We note that line 2 of the formula specifically describes "investment in transmission ROW for *poles*" (emphasis added), so it is clear that the formula for calculation of ROW overhead should not include investment in transmission towers. In addition, SDG&E has already stated that it will not charge a fee for attachment to transmission poles on public land. (Tr. at 414-415.) Therefore, it is only logical that the formula adopted by this order derives a fee for poles on private land. The POD has been clarified in this regard.

Findings of Fact

1. Complainants request that the Commission prohibit SDG&E from imposing additional charges for access to SDG&E poles and rights-of-way (ROW) beyond the pole attachment fee negotiated between Daniels and SDG&E in their 1986 Pole Attachment License Agreement (1986 Agreement).

2. Pursuant to the 1986 Agreement, Daniels has attached its coaxial and fiber optic cable to transmission poles on private ROW and did not have to pay any

fees or sign any additional agreements for the use of SDG&E transmission easements and ROW.

3. SDG&E now requests that Daniels enter into two new agreements, a Transmission Pole Attachment Agreement and a License to Use Rights of Way, in order to gain permission for attachments to transmission poles.

4. SDG&E will not charge for use of distribution or transmission ROWs on public land.

5. Part VI.A of the Commission's ROW rules require a utility to grant access to its ROW and support structures on a nondiscriminatory basis.

6. According to the ROW Order, parties to pre-existing arrangements for access to utility ROW and support structures are bound by the terms of such arrangements.

7. The 1986 Agreement does not directly refer to "distribution poles" and refers to connections "above and below 600 volts."

8. The Commission's ROW Rules are "guidelines" for negotiation of agreements between utilities, telecommunications carriers, and cable companies.

9. According to Rule 1.A of the ROW Rules, SDG&E has the burden of proving a deviation from the guidelines.

10. The ROW Order concluded that electric utilities have a significant bargaining advantage with respect to ROW access and a truly competitive market for alternative means of access does not yet exist.

11. Daniels is seeking a revocable license for access to SDG&E's transmission ROW, rather than any of the rights that traditionally accompany ownership.

12. SDG&E retains ownership of its ROW and may remove Daniels should Daniels' presence interfere with SDG&E's responsibilities as a public utility.

13. The Commission's ROW rules preempt FCC rules and implement Sections 767.5 and 767.7.

14. The costs of SDG&E's transmission easements and ROW are included in SDG&E's regulated revenue requirement and recovered in electric rates.

15. The Commission's ROW rules do not allow a utility to exclude cable corporations from use of a utility's ROW if the property is privately owned by the utility.

16. SDG&E has significant bargaining advantage as the monopoly provider of the ROW and easements at issue in this case, and a competitive market for alternative means of access to ROW does not yet exist.

17. The costs of transmission ROW do not vary directly with output because for each additional kilowatt served, SDG&E does not necessarily have to purchase additional transmission ROW.

18. Transmission ROW costs are closer to shared costs than common costs, and a shared cost should not translate into a direct charge.

19. Transmission ROW charges should be treated as an overhead component of the pole attachment fee.

20. In order to provide immediate guidance to the parties in this long-standing dispute, this order should be effective immediately.

Conclusions of Law

1. This is a complaint case filed pursuant to Section 767.5.

2. CCTA has standing as a party to this action under Section 767.5.

3. SDG&E may not condition attachment to transmission poles on the payment of additional fees for use of easements or ROW while the 1986 Agreement remains in effect.

4. If parties exercise their right to terminate the 1986 Agreement, SDG&E may charge for use of its ROW under the provisions of Section 767.7.

5. This case involves access to ROW by a cable TV company and the Commission should apply the policies set forth in the its ROW Rules.

6. The Commission's conclusions in the ROW order regarding access to ROW and support structures apply to the transmission ROW at issue in this case.

7. The Commission is authorized to ensure just compensation for utility pole attachments and use of ROW and easements for the installation of fiber optic cable under Sections 767.5 and 767.7.

8. The Commission should not deviate from the policies set forth in the ROW Order and should use historical embedded costs to price access to transmission ROW and easements.

9. It is not appropriate to use a market-based formula for pricing access to assets linked to bottleneck facilities when the Commission has crafted explicit rules for access to these facilities and ROW.

10. A market-based formula for pricing SDG&E's transmission ROW is inappropriate given the language of Section 767.5(b) which states that it is in the public interest to make surplus space and excess capacity available to cable corporations.

O R D E R

IT IS ORDERED that:

1. The complaint in this proceeding is granted in part. San Diego Gas & Electric Company (SDG&E) may not charge Daniels Cablevision, Inc. (Daniels) a License to Use Rights of Way (ROW) fee of $6,080 per mile as long as the 1986 Pole Attachment License Agreement (1986 Agreement) remains in effect.

2. Should the parties exercise their right to terminate the 1986 Agreement, SDG&E may impose upon Daniels a cost-based fee for use of its transmission ROW on private land. Any fee for use of transmission ROW on private land shall be calculated as an overhead component of the transmission pole attachment fee, as set forth in the formula in Attachment A of this decision.

3. Within 45 days of the effective date of this order, SDG&E and Complainants shall either:

   a. File and serve a letter to the assigned Administrative Law Judge that they have reached agreement on a transmission ROW charge; or

   b. SDG&E shall file its proposed transmission ROW charge using the formula in Attachment A.

4. The assigned Administrative Law Judge shall set a schedule to consider SDG&E's proposed transmission ROW charge in a second phase of this proceeding, if necessary.

This order is effective today.

Dated March 21, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners

ATTACHMENT A

POLE ATTACHMENT AND ROW FEE WORKSHEET

Annual Fee per Pole

Line No.	Item	Amount per pole
1	Net Pole Investment	
2	ROW Overhead (investment in transmission ROW for poles divided by total net electric transmission plant excluding land and buildings)	
3	Net Loaded Pole Investment (L1x[1+L2])	
4	Maintenance Expenses (%)	
5	General & Administrative Expenses (%)	
6	Depreciation Expenses (%)	
7	Taxes (%)	
8	Return (%)	
9	Cost of Ownership Factor (L4+L5+L6+L7+L8)	
10	Annual Cost of Ownership (L3xL9)	
11	Space Allocation Factor (%)	
12	Annual Charge for Poles in Transmission ROW	

(END OF ATTACHMENT A)