DOCKET FILE COPY ORIGINAL

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED
AUG 11 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Rules and Policies Governing Pole Attachments	)	CS Docket No. 97-98
	)	
	)	

REPLY COMMENTS OF GTE SERVICE CORPORATION

Ward W. Wueste
Gail L. Polivy
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 463-5200

R. Michael Senkowski
Robert J. Butler
Bryan N. Tramont
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Its Attorneys

August 11, 1997

No. of Copies rec'd 0+9
List ABCDE

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

I. OVERVIEW 3

II. THE PROPOSED GROSS BOOK METHODOLOGY SHOULD BE USED TO SET POLE ATTACHMENT RATES 5

A. The Arguments Advanced by the Opponents of Reform Are Unavailing. 6

B. The Commission's Rate Formula Should Apply to All Attachments Regardless of the Identity of the Attachment's Owner. 9

C. Worldcom's Proposal For Publication of Pole Attachment Rates and "Most Favored Nation" Provisions Should Be Denied. 10

III. WHITEPAPER ISSUES 11

A. The Forty-Inch Safety Space Required by the NESC Should Be Counted as Unusable Space and the Costs Divided Among All Attachers. 11

B. The Commission Should Not Alter Its Other Presumptions Regarding Poles 12

IV. THE COMMISSION'S CONDUIT RATE FORMULA PRESUMPTIONS ARE GENERALLY REASONABLE, BUT INPUT VARIABLES SHOULD REFLECT GROSS BOOK COSTS. 13

V. THE SCOPE AND PURPOSES OF THE COMMISSION'S POLE ATTACHMENT RATE FORMULA 16

A. The Commission's Pole Attachment Rate Formula Should Not Apply to Wireless Telecommunications Providers. 16

B. The Commission's Pole Attachment Formula Applies Only to Poles, Ducts, Conduits and Rights-of-Way Used as Distribution Facilities. 18

C. The One Foot Usable Space Rate Presumption Does Not Create Property Rights For Attaching Parties 19

CONCLUSION 22

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Rules and Policies Governing Pole Attachments	)	CS Docket No. 97-98
	)	
	)	

To: The Commission

REPLY COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation ("GTE"), on behalf of its affiliated telephone operating companies, hereby submits its reply comments in response to the Notice of Proposed Rulemaking issued in the above-referenced docket.[1] In doing so, GTE must stress the importance of limiting the scope of this proceeding to those issues raised in the Notice. Although GTE recognizes that the record herein may be helpful in the soon-to-be-initiated rulemaking regarding pole attachment issues raised by the Telecommunications Act of 1996,[2] the Commission should reserve those issues for another day when they may be fully and properly addressed.

INTRODUCTION AND SUMMARY

GTE files these reply comments to clarify a number of misconceptions about the pole attachment rate formula and to reiterate its strong support, shared by many other commenters, for necessary modifications to the current formula and the establishment

---

[1] Amendment of Rules and Policies Governing Pole Attachments, FCC 97-94 (Mar. 14, 1997) ("NPRM"). See Amendment of Rules and Policies Governing Pole Attachments, DA 97-894 (Apr. 29, 1997) (Order).

[2] *See* 47 U.S.C. § 224(e) (1997).

of reasonable limitations on the filing of pole attachment complaints that will encourage the commercial negotiation of rates. GTE submits that the gross book methodology will provide the most reasonable and objective pole attachment rate calculation. Such a clear and verifiable methodology will aid private negotiations and facilitate resolution of pole attachment disputes without resorting to Commission intervention. The gross book method will also prevent irrational results such as negative depreciation balances.

Although various commenters assert that the pole attachment rate formula does not need reform and may lead to over-recovery, they misapprehend the facts and would permit the core problems raised by SWB's petition to continue unabated. First, the existence of a minimum rate in no way mitigates the problems associated with the current formula. Indeed, the fact that the minimum rate may ultimately exceed the maximum rate under the statute points out the urgency of reform. Second, the nature of the pole attachment formula itself prevents the type of over-recovery that some commenters suggest offsets any subsequent under-recovery. Third, MCI's proposals for offsets against pole attachment rates based on nonrecurring charges and future revenue from expanded pole capacity should be rejected as without basis and contrary to the pole attachment regulatory scheme. Finally, GTE strongly believes that incumbent local exchange carriers should be afforded nondiscriminatory rates for the use of poles, ducts, conduits, and rights-of-way of other utilities in order to level the playing field and enhance fair competition.

Other aspects of the current pole attachment rate formula should also be examined. With respect to the three issues raised in the Notice: (1) the forty-inch safety space should be considered unusable; (2) a half-duct convention should be adopted for purposes of setting conduit attachment rates; and (3) utilities should be permitted to reserve at least one duct for maintenance purposes.

Finally, although the issues are beyond the scope of this rulemaking, GTE does not support the extension of the pole attachment rate formula to wireless communications providers or the inclusion of facilities other than poles, ducts, conduits and rights-of-way within the ambit of pole attachment rate regulation. The Commission should further clarify that the presumptions involved in the pole attachment rate formula, such as one foot per attachment, do not confer ownership rights, but rather are merely a rate-setting convention, and should delineate the scope of attachers' rights to overlash or otherwise expand the capacity of poles.

I. OVERVIEW

As an initial matter, in addressing the issues presented, the Commission should be mindful of first principles: the Pole Attachment Act favors private negotiations as the primary tool of establishing rates, and a clear and fair rate formula will facilitate that central purpose.[3] Congress has expressed a clear preference for negotiated settlements of attachment issues. Section 224(e)(1) of the Act sets out the regulatory framework for telecommunications attachment rates, but only in cases where "the parties fail to resolve such a dispute over such charges."[4] Similarly, in its explanation of the amendments to the Pole Attachments Act, the Conference Committee stated:

The conference agreement amends section 224 of the Communications Act by adding new subsection (e)(1) *to allow parties to negotiate* the rates, terms and

---

[3] *Accord* NCTA Comments at 44; Electric Utilities Coalition Comments at 25; Con Edison Comments at 2; UE Comments at 4; EEI Comments at 15; EUC Comments at 22; BellSouth Comments at 3; U S WEST Comments at 8; USTA Comments at 2-3; SBC Comments at 41.

[4] While the issues raised by the 1996 Act will be addressed in a separate proceeding, the Congressional preference for negotiated agreements remains relevant.

conditions for attaching to poles, ducts, conduits and rights-of-way owned or controlled by utilities.[5]

This preference for privately negotiated agreements is also consistent with the overall purposes of the revised Act "to provide for a pro-competitive, de-regulatory national policy framework."[6]

The best method for encouraging such commercial transactions undeniably is to create a clear and readily available pole attachment rate formula that informs private negotiations and eliminates any perceived advantage a party may have in seeking Commission intervention in attachment disputes. To this end, GTE endorses the proposal of SBC that the Commission institute a "statute of limitations" of one year for pole attachment rate complaints and that the Commission create an "amount in controversy" requirement (perhaps $5000 a year) prior to permitting such cases to go forward.[7] These requirements would prevent parties from filing frivolously small complaints that consume excessive Commission and private party resources. Moreover, by giving parties one year to file a complaint after new rates go into effect, the system creates "safe harbors" for business planning and lends predictability to the process. SBC's proposed reforms, in concert with a continued Commission preference for private negotiations, will expedite the pole attachment process and facilitate rapid deployment of all facilities.

---

[5] H.R. Conf. Rep. No. 104-458 at 207 (1996) (emphasis added).

[6] H.R. Conf. Rep. No. 104-458 at 113 (1996); *see also Montana Cable Television Ass'n v. PacifiCorp*, 10 FCC Rcd. 11478, 11478 (CCB 1995) (negotiated settlement serves the public interest); 47 C.F.R. § § 1.1411, 1.1404(i). The *First Interconnection Order* echoed these sentiments: the Commission's proposed rules were "designed to give parties flexibility to reach agreements on access to utility-controlled poles, ducts, conduits, and rights-of-way, without the need for regulatory intervention." *First Interconnection Order*, ¶ 1122.

[7] *See* SBC Comments at 41.

II. THE PROPOSED GROSS BOOK METHODOLOGY SHOULD BE USED TO SET POLE ATTACHMENT RATES

GTE submits that it is incumbent upon the Commission to adopt a modified pole attachment rate formula soon in light of the extensive evidence that the negative net pole investment problem identified by SWB is not only potentially repeatable elsewhere, but inevitable in a number of GTE service areas as well as those of other carriers.[8] As discussed in its opening comments, GTE's accumulated depreciation balances in six states will exceed gross pole investment in the near future. GTE can thus confirm that SWB's Oklahoma experience is not an isolated incident and that a comprehensive solution is therefore required.

GTE urges the Commission to adopt its proposal to calculate pole attachment rates using gross book costs rather than net book costs.[9] This method has a number of advantages over both the modified net cost proposal in the NPRM and the current formula. First, the gross book cost method would wholly eliminate any problems associated with factoring in a negative net pole investment by removing the depreciation reserve from the rate calculation. Second, the gross book method circumvents the difficult logistical issues associated with calculating the net salvage amount as required by the Commission's modified net cost proposal.[10] Third, as the Commission points out, neither the Federal Energy Regulatory Commission ("FERC") nor the FCC require the net salvage amount (required for the modified net calculations)

---

[8] *See* U S WEST Comments at 5; SBC Comments at 2-6; Ameritech Comments at 2; Bell Atlantic Comments at 3.

[9] *See* NPRM ¶ 29. GTE believes the rationale for adopting the gross book method for poles applies with equal force in the conduit context. Many other commenting parties also support a move to the gross book methodology. Bell Atlantic Comments at 3; Bell South Comments at 7; Sprint Comments at 8; USTA Comments at 4; SBC Comments at 6.

[10] As the Commission anticipated, "the extraction of the net salvage effect from accumulated depreciation could prove to be difficult." NPRM ¶ 28.

to be provided in their accounting reports. Fourth, the gross book method would lend consistency and clarity to pole attachment rates.[11] The gross book method also most accurately provides for full recovery of the costs incurred in providing attachments.[12]

A. The Arguments Advanced by the Opponents of Reform Are Unavailing.

Rather than addressing the core of the problem and notwithstanding SWB's showing, certain commenters dispute the existence of any negative net pole investment problem. For example, ALTS argues that any rate problems associated with negative net investment are not logically possible because the statute provides for a minimum rate defined as "the additional costs of providing pole attachments."[13] ALTS argues that any distortion caused by negative net pole investment in calculating the maximum rate can be ameliorated by simply charging attachers the minimum rate set by the statute. However, the suggestion that the formula does not require modification because only the maximum rate allowed will be minute or even negative, while the minimum rate will be a larger positive figure, is patently ridiculous. Congress clearly did not contemplate a maximum rate that is lower than the minimum rate. Just as clearly, the Commission is

---

[11] Consistent with the assumption that a straight-forward pole attachment rate calculation is in the best interests of all parties, GTE opposes some commenters' suggestion that utilities be given an opportunity to chose whether to employ a gross book or modified net system. Electric Utilities Comments at 70; EUC Comments at 44. Such a proposal would add needless uncertainty and complexity to the pole attachment rate process.

[12] GTE continues to support the formula as a rebuttable presumption. If there are cases in which a utility can show that the formula fails to take into account real world expenses, it should be permitted to make such a showing.

[13] 47 U.S.C. § 224(d)(1) (1991) ("a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . by the sum of the operating expense and actual capital costs of the utility attributable to the entire pole . . ."). ALTS Comments at 6.

not fulfilling Congressional intent by establishing or perpetuating a formula that leads to such an absurd result.

It is similarly inaccurate to suggest that any shortfall in cost recovery from the inclusion of net salvage value in the rate formula is offset by over-recovery of maintenance expenses in the early years of pole life.[14] First, as explained in GTE's opening comments, this hypothesis wrongly assumes that a utility's original investment is at some point fully recovered.[15] In fact, the current formula, by incorporating future net salvage in the accumulated depreciation reserve, permanently subjects utilities to under-recovery by failing to provide for full recovery of the original investment and the disposal costs. Second, the use of average maintenance expenses in the calculation ensures that there will be no excess recovery over a utility's total pole inventory, which inevitably will reflect a mix of new and old pole plant. Third, many costs related to poles have virtually nothing to do with the age of a pole. For example, some poles may have higher costs due to their location near a busy highway or on a precarious mountain slope. Because there is simply no period of "over-recovery," the Commission's proposal to limit corrective action to those situations where the accumulated depreciation reserves have already become negative is insufficient.

Nor does the assessment of both recurring pole attachment rates and non-recurring make ready and other charges result in any type of "double recovery" as alleged by MCI.[16] The administrative and maintenance carrying charges included in the pole attachment formula represent recurring charges assessed against pole attaching parties. In contrast, additional one-time make-ready charges may also be assessed against attaching parties on a non-recurring basis in order to compensate a utility for

---

[14] *See* NPRM ¶ 25; AT&T Comments at 15.

[15] GTE Comments at 6.

[16] *See* MCI Comments at 7.

the costs of readying poles for attachments or for making other improvements to facilitate pole attachments. These latter costs are booked separately from the costs recovered through recurring charges and, thus, there is no possibility of double recovery for these expenses.

MCI also argues that the Commission's regulations should entitle modifying parties to a rate offset for the monies generated by any additional revenue-producing capacity created on the pole or conduit.[17] The offset would be implemented through the exclusion of the asset value of the modification investment from the utility's net investment.[18] MCI fails to acknowledge, however, that this issue has already been resolved in the *Interconnection* proceeding, where the Commission held that, even if the party seeking modification paid for the changes, an owner need not "use those revenues [generated by subsequent attachers] to compensate the parties that did pay for the modification."[19] In any event, "[t]o protect the initiators of modifications from absorbing costs that should be shared by others, [the Commission] will allow the modifying party or parties to recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification."[20] This system reasonably addresses MCI's concerns while respecting the clear and unitary property interest that the pole owner, not the attacher, has in the poles.

---

17 *Id.*

18 *Id.*

19 *First Interconnection Order* at ¶ 1216.

20 *Id.* at ¶ 1214.

B. The Commission's Rate Formula Should Apply to All Attachments Regardless of the Identity of the Attachment's Owner.

In the interests of non-discrimination and fair competition, the pole attachment rates calculated under the new formula should apply with equal force to ILECs seeking attachments to the poles, ducts, conduits or rights-of-way of other utilities. As discussed in GTE's opening comments and echoed by USTA,[21] the Commission has a compelling interest in ensuring that where access has been granted, the rates charged to ILECs by utilities are just and reasonable in accordance with the formula.

This problem is far from speculative. GTE has long been charged exorbitant and discriminatory rates when attaching to other utility's poles.[22] At this time, the pole attachment rates GTE charges range from $0.74 to $9.05. In contrast, GTE is charged between $6.17 and $22.27 for access to other utilities' poles. This problem is even more clearly illustrated when pole attachment rates within the same state are compared. In Wisconsin, where the Commission's formula permits GTE to charge other companies $0.74 per attachment, GTE pays an average of $15.00 per pole to other utilities.[23] In Ohio, the state-regulated rate for cable television attachments is $2.00 and the Commission's formula would yield a rate of $7.56, yet the average rate that GTE pays to other utilities is $19.83.[24] This type of discriminatory treatment, while

---

[21] *See* GTE Comments at 9-10; USTA Comments at 11-16.

[22] *See also* USTA Appendix B, Table 2.

[23] The average rate that GTE pays other utilities was calculated by averaging the rates charged to GTE under the pole attachment agreements GTE has in place with other utilities in Wisconsin.

[24] The rate GTE is charged is based on the average of the pole attachment agreements that GTE has in place with other Ohio utilities.

supported by some commenters,[25] is contrary to the spirit of the Act, undermines competition, and contravenes basic notions of fairness.

C. Worldcom's Proposal For Publication of Pole Attachment Rates and "Most Favored Nation" Provisions Should Be Denied.

Worldcom proposes that utilities be required to file copies of their pole attachment agreements just as they must file their interconnection agreements under the *First Interconnection Order*.[26] In addition, Worldcom recommends that "most favored nation" treatment be afforded all attaching parties to "impose a self-policing nondiscrimination requirement that would help ensure that all carriers are treated the same...."[27] Because there is neither express authority nor any practical need for such requirements, Worldcom's requests should be rejected.

Initially, there is no basis in the Act or the *First Interconnection Order* for either of Worldcom's proposed regulatory requirements. While there is no question that pole attachments must be provided on a nondiscriminatory basis under Section 224(f), the absence of any express filing requirement – unlike in Section 252 – is telling. The imposition of these additional regulatory burdens would run counter to the Act's preference for private negotiations rather than administrative dictates. In fact, there is simply no need to add a publication provision because the Commission already provides the parties with a number of avenues to enforce the nondiscrimination requirement. As to Worldcom's "most favored nation" proposal, the Eighth Circuit has struck down the Commission's "pick and choose" regulation because it "conflicts with

---

25 *See* Electric Utilities Comments at 26.

26 *First Interconnection Order* at ¶ 171.

27 *See* Worldcom Comments at 7.

the Act's design to promote negotiated binding agreements."[28] Similarly, any effort to import a "most favored nation" process into the pole attachment proceeding would "thwart the negotiation process and preclude the attainment of binding negotiated agreements."[29]

III. WHITEPAPER ISSUES

In addition to the issues raised by SWB, a group of electrical utilities submitted a Whitepaper raising a number of questions regarding the treatment of and assumptions underlying various aspects of the rate formula. The commenters were remarkably united in generally rejecting the utilities' suggested modifications to the pole attachment rate formula's assumptions.

A. The Forty-Inch Safety Space Required by the NESC Should Be Counted as Unusable Space and the Costs Divided Among All Attachers.

GTE believes that the 40-inch safety space should be treated the same as other non-usable space on a given pole: the cost should be shared by all parties with pole attachments consistent with the requirements of the Telecommunications Act.[30] Other parties took extreme positions on this issue by attempting to assign the entire safety space to electric utilities[31] or to the attaching parties.[32] However, the fact remains that the mandatory nature of the 40-inch NESC safety space – which is designed to benefit

---

[28] *Iowa Utilities Board v. FCC,* Case No. 96-3321, 1997 WL 403401, at *10-12 (8th Cir. July 18, 1997).

[29] *Id.*

[30] *See, e.g.*, 47 U.S.C.A. § 224(e)(2) (1997).

[31] *See* AT&T Comments at 18; Bell Atlantic & NYNEX Comments at 9; U S WEST Comments at 4-5; NCTA Comments at 12-15.

[32] *See* EEI Comments at 31; EUC Comments at 33.

all attaching parties by protecting their workers from the risks of contacting electrical attachments -- renders it essentially unusable.[33] Indeed, as set out in the comments of SBC, the original grounds for designating the safety space as usable "have dissolved or [been] substantially weakened;" cable operators no longer bear the costs of maintaining the 40-inch space and telecommunications providers are not free to utilize the safety space for their own purposes.[34] Accordingly, the cost of this space is most appropriately borne by all parties.

B. The Commission Should Not Alter Its Other Presumptions Regarding Poles.

The NPRM also sought comment on the electric utilities' proposal to increase the current presumptive pole height from 37.5 to 40 feet.[35] Not only do the vast majority of the commenters agree that there is no basis for increasing the presumptive height for poles, the record fully supports their position.[36] To the extent that individual companies have average pole heights in excess of the current 37.5 feet, they can rebut the presumption with actual data when employing the rate formula in individual cases.[37]

---

[33] Public Service Co. of NM Comments at 6; SBC Comments at 36-37; Sprint Comments at 4.

[34] *See* SBC Comments at 37.

[35] NPRM ¶ 18.

[36] *See* TW Comments at 9; Ameritech Comments at 3; Bell Atlantic Comments at 10; U S WEST Comments at 3-4; USTA Comments at 27; SBC Comments at 35; Sprint Comments at 3.

[37] Public Service Co. of NM suggests that the pole height presumption should be increased to 40 feet and offers as a preferred alternative the option of conducting studies to ascertain average pole height and related expenses. Public Service Co. of NM Comments at 6. The Commission's regulations currently permit such actual data to rebut these presumptions. Therefore, there is no need to modify the rules in this regard.

Similarly, no supportable grounds have been offered for excluding poles 30 feet or less in height from the calculation of the cost of a bare pole.[38] The initial round of comments overwhelmingly supported GTE's position that thirty foot poles should continue to be included in the rate calculations.[39] First, it would be extremely difficult for GTE and other parties to separate investments for poles by height from their voluminous pole databases.[40] Second, contrary to the Whitepaper's assertion, these smaller poles are used for attachments by multiple parties.[41] Finally, approximately 50% of GTE's poles are 30 feet or less in height and few of these are joint use with electric utilities, making the Whitepaper's proposal particularly inappropriate for GTE. For these reasons, GTE urges the Commission to continue to calculate the net cost of a bare pole using all poles regardless of height.[42]

IV. THE COMMISSION'S CONDUIT RATE FORMULA PRESUMPTIONS ARE GENERALLY REASONABLE, BUT INPUT VARIABLES SHOULD REFLECT GROSS BOOK COSTS.

GTE, like most other commenters, generally supports the Commission's efforts to develop a conduit rate formula that is clear and equitable using the gross book methodology. In light of the comments submitted, GTE believes the Commission

---

38 *See* NPRM ¶ 20.

39 *See* TW Comments at 10; MCI Comments at 12; Sprint Comments at 4; TCI Comments at 12; NCTA Comments at 18; Ameritech Comments at 4; Bell Atlantic & NYNEX Comments at 10; U S WEST Comments at 4; USTA Comments at 28-29; SBC Comments at 39.

40 *See* USTA Comments at 29; SBC Comments at 38-39.

41 *See* TW Comments at 17; U S WEST Comments at 4.

42 Some electric utilities have proposed the use of a separate formula for poles 30 feet and under. Electric Utilities Comments at 57; EUC Comments at 29. In keeping with GTE's goal of a pole attachment rate formula that is clear and straightforward in order to facilitate negotiated settlements, GTE urges the Commission to reject this proposal as administratively burdensome and unnecessary.

should adopt its proposed half-duct presumption and allow at least one duct to be reserved for maintenance purposes.

First, many commenters joined GTE in supporting the Commission's proposed half-duct methodology.[43] A presumptive space allotment is the most efficient method available to calculate rates due to the inordinately burdensome nature of conducting a conduit-by-conduit inspection in order to assess use. Indeed, on average, the half duct presumption best reflects the mixture of old and new conduit infrastructure currently in place.

Nonetheless, some commenters suggest a full duct assumption,[44] while others support a third[45] or a fourth[46] of a duct presumption. The electric utilities point out that their facilities always require a full duct and that the existence of a single telecommunications line prevents their subsequent use of a duct.[47] In fact, older conduit systems do not contain innerduct capability, rendering subdividing a duct a difficult task. However, as other parties point out, newer conduit systems may contain three or four innerducts, which could support a presumption that an attachment uses only a third or fourth of a duct.[48] GTE submits that the half duct presumption best balances these legitimate but divergent points of view. Importantly, while the half-duct presumption will generally be accurate, it should be treated solely as a presumption.

---

[43] Ameritech Comments at 7; Bell Atlantic & NYNEX Comments at 12; USTA Comments at 21; SBC Comments at 25; *see also* NPRM ¶ 44. This methodology is based on *Greater Media, Inc. v. New England Telephone and Telegraph*, No. D.P.U. 91-218, 1992 WL 159931 (Mass. D.P.U. April 17, 1992), *aff'd,* 614 N.E.2d 632 (Mass. 1993).

[44] *See* Electric Utilities Comments at 85-86; Con Edison Comments at 5-6; UE Comments at 1, 15 ; EEI Comments at 20; EUC Comments at 64.

[45] *See* AT&T Comments at 5; TW Comments at 24.

[46] *See* TCI Comments at 16; NCTA Comments at 42.

[47] *See* Electronic Utilities Comments at 85 (communications and electric "can never co-exist in the same duct"); EEI Comments at 20.

Any party is free to incur the costs involved in rebutting the presumption with legitimate contrary evidence, such as when a particular attachment will occupy the entire duct.

Second, GTE continues to support the reservation of one duct for maintenance purposes. However, GTE believes the Commission should closely examine the proposal of some commenters that 1.5 ducts should be reserved for maintenance and, thereby, removed from the total number of usable ducts available.[49] Full ducts are used predominantly for copper and electric utility lines. Innerducts (or subdivided ducts), in contrast, are used predominantly for fiber optic cable placement. Reserving both a duct and an innerduct will permit efficient repair operations that keep fiber optic cables in innerducts and copper and electric facilities in full ducts. This will minimize splicing and limit the potential for service outages. These maintenance facilities will be made available to each and every occupant of the conduit for temporary emergency restoration of service. Because all parties will benefit from these facilities, their corresponding costs should be borne by all parties.

Time Warner asserts that ILECs do not actually maintain any maintenance ducts and, therefore, should not be permitted to reserve ducts for these purposes.[50] However, good engineering practices require that maintenance ducts be available in order to provide safe and efficient service repair and resumption. The need for these facilities will be particularly acute as an increasing number of companies attempt to provide facilities-based services and demand ever-increasing amounts of conduits and innerducts to house their plant. As time goes on, multiple providers with various types and quality of equipment and personnel will put network service at increasing levels of

---

[48] *See* NCTA Comments at 42.

[49] *See* Ameritech Comments at 6.

[50] *See* TW Comments at 28. Historically GTE has developed conduit based on the reservation of one duct for maintenance. *See* GTE Practices, Engineering-Plant Series § 8.01 (Duct Requirements) (setting aside "one maintenance duct").

risk and make maintenance facilities an even more essential part of the competitive telecommunications infrastructure.

V. THE SCOPE AND PURPOSES OF THE COMMISSION'S POLE ATTACHMENT RATE FORMULA

A number of parties raise issues relating to the scope of the Commission's pole attachment rules, including (1) their application to wireless service providers, (2) the role of utility facilities that are not poles, ducts, conduits, or rights-of-way, and (3) the other capacity expanding techniques.

A. The Commission's Pole Attachment Rate Formula Should Not Apply to Wireless Telecommunications Providers.

Some commenters raise the issue of whether the pole attachment rate formula applies to wireless telecommunications providers' attachments.[51] Although GTE believes that this issue would be more appropriately dealt with in the upcoming rulemaking regarding implementation of the 1996 Act, to the extent the Commission chooses to address these issues here, it is clear that the pole attachment rate formula does not apply to wireless telecommunications providers.

As the Commission is well aware, since 1978 the FCC has regulated the rates charged to cable television providers for attachments to utility poles. With minor variations, these cable attachments took the form of wires strung between poles. With passage of the Telecommunications Act of 1996, Congress sought to encourage development of facilities-based competitive telecommunications services providers (much in the way Congress sought to encourage cable deployment). Congress perceived that one barrier to entry into wireline telecommunications services was

---

[51] *See* Public Service Co. of NM Comments at 5; Electric Utilities Comments at 7; EEI Comments at 6.

access to pole, duct, conduit and right-of-way infrastructure. Just as the cable companies could not afford (and localities were not likely to tolerate) construction of duplicative infrastructure networks, competitive wireline telecommunications providers may require similarly expansive access to every pole, duct, conduit and right-of-way in order to reach consumers. In the Act, Congress therefore extended the cable pole attachment rights to telecommunications providers. This sentiment is reflected in the revised 47 U.S.C. § 224.

Based on this regulatory history, and the nature of the formula itself, it is clear the pole attachment rate calculation can logically only apply to wireline attachments. Pole attachment rate calculations are predicated on the characteristics of a wireline attachment – an attachment that for rate setting purposes is reasonably assumed to occupy one foot of space on a given pole. In contrast, wireless attachments typically require vastly more space on a wide variety of facilities, including: clusters of antennae on poles, coaxial cables, concrete pads for equipment cabinets, ground wire and trenching, potentially a driveway for access, telephone and electric service for the site, placement of the equipment cabinet itself, potentially pole change outs, and modifications of lattice towers. The existing pole attachment rate fails to reflect the costs associated with such requirements, which likely will be substantially greater than for wireline attachments. Thus, if the current formula were applied, wireless providers would gain all of these resources at well below cost.[52]

---

[52] Consequently, if wireless providers were granted this panoply of rights for the price of a traditional pole attachment, it would constitute a taking in violation of the Fifth Amendment. GTE unquestionably has property rights in their rights-of-way and poles. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992); *see also GTE Northwest Inc. v. Public Utility Commission*, 900 P.2d 495, 501 (1995)(holding the collocation rules would effect a taking under *Loretto*), *cert. denied*, 116 S. Ct. 1541 (1996). By granting wireless providers access to all of GTE's non-pole facilities at less than compensatory rates, the Commission will have promulgated a charge that is "so 'unjust' as to be confiscatory." *Duquesne Light Co. et al. v. Barasch*, 488 U.S. 299, 307 (1989)*; accord Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942).

Important policy considerations also support the idea that wireless leases should not be subjected to the pole attachment rate formula. First, wireless providers need access to only a few select sites in order to operate effectively. In contrast, cable and wireline telecommunications require access to the entire infrastructure network in order to provide competitive service. Second, wireless providers have a number of competitive alternatives by which they can provide service. For example, the relatively small number of facilities required would permit wireless providers to construct their own transmission facilities. Alternatively, many wireless providers have sited their antenna clusters atop tall buildings or towers, thus completely avoiding utility infrastructure. These competitive options for wireless service undermine the idea that these rates must be subjected to the current wireline attachment rate formula.

B. The Commission's Pole Attachment Formula Applies Only to Poles, Ducts, Conduits and Rights-of-Way Used as Distribution Facilities.

Access to a utility's facilities under the statute is limited to "poles, ducts, conduits or rights of way." Accordingly, requests that the pole attachment regulatory scheme be extended to cover other facilities are beyond the scope of this proceeding and the Commission's authority.[53] The goal of pole attachment rate regulation is to provide the "essential" distribution facilities needed by new competitors and technologies. The Act was not designed to permit the expropriation of any or every piece of utility property in the field (such as buildings and towers).[54] In accordance with the plain meaning of the

---

[53] *See* ALTS Comments at 4 (suggesting access to transmission facilities).

[54] Any decision to lease space on these facilities should be purely voluntary and on an individual case basis. Moreover, it is obvious to the most casual observer that the pole attachment rate formula is woefully inadequate to calculate rates on these other types of facilities.

statute, the Commission should find that the pole attachment provisions of the Act should apply solely to a utility's distribution infrastructure.[55]

C. The One Foot Usable Space Rate Presumption Does Not Create Property Rights For Attaching Parties

The AT&T assertion that a single rental payment somehow entitles an attacher to ownership rights in one foot of vertical pole space is inherently flawed and does not comply with the intent of the Act.[56] Section 224(d) of the Act sets the maximum pole attachment rate at "an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole." The existing FCC rate formula uses a simplifying assumption that the rate for an attachment will be based on a ratio of a 1 "used" foot of space to 13.5 feet of total usable space on the pole. 47 C.F.R. § 1.1404 (1996). AT&T nevertheless attempts to bootstrap this accounting proxy into an ownership agreement that permits it to utilize the one foot of vertical space in whatever way it sees fit. The pole attachment rate formula has no such impact.

AT&T's claims are unsupported by logic and public policy. Simply put, no rationale exists to support AT&T's assertion that one foot of vertical pole space should

---

[55] For example, transmission facilities are separate and distinct from distribution systems and therefore beyond the scope of the Act. *Accord* Public Service Co. of NM Comments at 4; Electric Utilities Comments at 7; EEI Comments at 5. Even MCI concedes that the current formula is woefully inadequate to develop a rate for transmission tower attachments and recommends a new rulemaking to address this issue. MCI Comments at 21-22. Although the Commission found it had broad authority over such facilities in the *First Interconnection Order*, that determination is currently the subject of a Petition for Reconsideration. Petition of the American Public Power Association for Clarification or Reconsideration of the Commission's First Report and Order, CC Docket No. 96-98 (Sept. 30, 1996) (for a more detailed examination of the issues involving transmission towers and other utility property).

[56] *See* AT&T Comments at 4-5, 7-8.

be assigned, reserved, or dedicated to the exclusive use of a single attacher, nor should the attacher be granted any rights to sublease "their space." The *First Interconnection Order* rejected any ownership concept, explaining that Section 224 "does not give that [attaching] party any interest in the pole or conduit other than access."[57] The pole attachment formula simply cannot be used to bootstrap AT&T's ownership interest argument.

Indeed, the Act requires that usable pole attachment space be shared equitably by all utilities on a first-come-first-served basis. Reserving finite increments of space for one attacher could easily result in having to deny an application for space by a second attacher, even though there might be adequate physical space available at the time on the pole. The Act has no provision for either a pole owner or any attaching party to reserve pole space. Prioritizing subsequent attachment requests can only be accomplished equitably at the time an attacher makes a firm application for space. Usable space "warehousing" is not a permissible practice under terms of the Act.[58]

Further, when evaluating whether or not "overlashing," "double-sided," or "bracket" techniques may be permissible for subsequent attachments, there is a serious risk in tacitly assuming all such practices would be automatically acceptable. Every additional attachment to a pole -- no matter how seemingly innocuous it may appear to be -- imposes some finite degree of incremental stress on the support structure and, in the case of a bracket, may well introduce potential safety hazards by reducing available working space. GTE thus supports the proposal of the Electric Utilities that overlashing,

---

[57] *First Interconnection Order* at ¶ 1216.

[58] AT&T also states, "[I]f an attacher places two or more attachments on a pole in such a way that they do not occupy more than one vertical foot of usable space . . . then it should pay only a single attachment charge. . ." AT&T Comments at 8. To the extent that AT&T believes that multiple attachments can fit in a single foot of usable space, it is free to rebut the Commission's presumption with actual statistical evidence. If such evidence is produced, then perhaps the Commission should revisit its one foot assumption contained in its regulations.

and other capacity expanding techniques, should only be permitted (1) with the utility's informed consent, (2) when the overlashing party has an existing pole attachment agreement with the utility, and (3) if the overlashing complies with all safety standards.[59] These precautions will ensure that overlashing is done safely and efficiently. To the extent that attaching parties follow this procedure and overlash onto their own existing attachment, GTE believes that the single pole attachment rate is sufficient. In contrast, if attaching parties seek to deploy a second attachment in "their" one foot of space or utilize other capacity expanding devices such as "double-siding" or "bracketing," the attaching party should be charged an additional fee for such attachment.

The costs imposed on GTE by bracketing and other capacity-expanding devices are similar to, if not greater than, the costs imposed by additional attachments. Maintenance costs may actually increase based on additional load capacity caused by these practices. Maintaining accurate records of all aerial and underground structural attachments is a requirement of GTE's ongoing administrative process, and the associated administrative cost is always present, irrespective of whether it is a first or subsequent attachment. For the various reasons listed, each "pole attachment" can only be administered in a just and reasonable manner when it is charged and billed separately.[60]

---

[59] *See* Electric Utilities Comments at 74-75.

[60] The Commission should decline the invitation of some commenting parties to attempt to regulate other conditions of the pole attachment business relationship. *See* ALTS Comments at 2-3. Although the Commission currently regulates rates, it would be exceedingly ironic (and misguided) if on the heels of the "deregulatory" 1996 Act, the Commission also began to regulate, as ALTS proposes, the types of insurance utilities may require attaching parties to carry or other terms of the private contractual agreements that will be negotiated between the parties.

CONCLUSION

With the foregoing modifications, the Commission's proposed changes to the pole attachment rate should be adopted.

Respectfully submitted,

GTE SERVICE CORPORATION,
on behalf of its affiliated telephone
operating companies

R. Michael Senkowski
Robert J. Butler
Bryan N. Tramont
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006

Ward W. Wueste
Gail L. Polivy
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 463-5200

Its Attorneys

August 11, 1997