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FEDERAL COMMUNICATIONS COMMISSION  
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William F. Caton, Acting Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

**Re: CS Docket No. 97-98; Reply Comments of National Cable Television Association, et al.**

Dear Mr. Caton:

Enclosed please find an original and six (6) copies of the Reply Comments of the National Cable Television Association, et al., in the above-referenced proceeding. If you have any questions about this matter, please contact the undersigned.

Sincerely,



Mark S. Kristiansen

Enclosure

cc: Elizabeth Beaty

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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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  
THE NATIONAL CABLE TELEVISION ASSOCIATION, *ET AL.*

**National Cable Television Association**

**Cable Telecommunications Association  
Texas Cable & Telecommunications Association  
Cable Television Association of Georgia  
South Carolina Cable Television Association  
Cable Television Association of Maryland, Delaware and the  
District of Columbia**

**Mississippi Cable Telecommunications Association  
Mid-America Cable Telecommunications Association  
Kansas Cable Telecommunications Association**

**Jones Intercable, Inc.  
Charter Communications  
Greater Media, Inc.  
Prime Cable  
Rifkin & Associates  
TCA Cable TV, Inc.  
The Helicon Corporation**

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Their Attorneys

August 11, 1997

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## SUMMARY

The electric utilities' request to upend the FCC pole formula with "forward looking" costs, "marketplace" waivers, and other drastic changes is predicated on a fundamental error. There is no "market" in these support structures. Even the telephone industry now has joined the chorus of courts, Congress, and the FCC in recognizing these as monopoly bottlenecks for which there are no viable substitutes. The growth of the cable industry has not changed the fundamental relationship in which cable operators' use of these poles is mandated by local franchise as well as by economics. As a result, the utilities continue to abuse their monopoly power by denying access to the newcomers and freezing use by existing operators in order to extract unlawful concessions.

The utilities' request to "negotiate" must therefore be rejected as a request to contract *around* federal law: It takes but one unilateral contract termination notice, or one refusal to transfer a pole agreement to a new corporate system owner, to undo twenty years of successful pole regulation, unless the Commission remains vigilant against pole abuses. We submit that today's balance is the best: it requires parties to attempt negotiations, but does not require fruitless efforts. We specifically disagree with suggestions that complaints cannot be filed prior to exhaustive negotiations, or after 12 months of payment, or by small operators. Any of these revisions would overturn the procedures which have promoted settlements, rather than promoting delay.

Reproduction costing has no place under Section 224. Congress has reaffirmed the FCC's use of actual (embedded) costs. In poles in particular, there is no economic predicate for using reproduction costs. There is no market of alternatives: even if there were, the utilities have failed to account for a powerful externality—the wrecking out of cable's existing aerial plant

passing 90 million homes—before any form of efficient resource allocation could occur. Moreover, because cable operators pay makeready to attach to poles, the utility is never at risk of overconsumption, over-investment or under-investment. In addition, the utilities themselves use embedded costs for their telephone joint use agreements and for their deregulatory regimes, in which they continue to recover embedded (stranded) costs.

Finally, the current formula contains a panoply of forward looking elements: future salvage, generous depreciation, normalized taxes, returns which attract capital, and annual, simple updates which pick up all current costs.

The utilities appear to be unaware of other flexibility built into the current formula. Its presumptions are rebuttable when supplemented by utility-specific plant data (rather than the unsupported generalities in this docket). Rates may be adjusted without FCC prior approval, so no tariffing constraints apply. In practice, the formula's relative simplicity has promoted widespread cooperation and settlements without burdening the FCC or the parties respective rate analysts.

The utilities' proposals to reduce usable space assumptions are without merit. The evidence now shows that 30-foot poles are in wide joint use and meet applicable Codes. Removing them from ratebase would only exacerbate the current unfairness of having cable operators pay for the taller and more costly poles that utilities are setting for their own needs. Nothing has changed to justify removal of the neutral zone from usable space; indeed, the current Code allows utilities to place fiber in that zone. If anything should change, it would be to adopt a 40' height/16' useable space presumption for electric utility poles.

There is no justification for adding grounding systems or right of way costs to the pole asset. Cable operators pay for their own grounding and rights of way. Moreover, current presumptions (such as the 15% appurtenance factor) overcompensate utilities, more than offsetting any perceived inaccuracy elsewhere in the formula.

Southwestern Bell's encounter with negative net salvage now appears not to be an industry-wide or formula-wide problem. No blanket revisions are needed. Indeed, permitting such utilities to simply freeze rates at the last value during which the ratebase was positive may be the simplest solution. An "all gross" regime would fail to account for makeready and does not mechanically avoid the need to compute net figures.

USTA's suggested changes to accounting for accumulate deferred taxes ("ADT") should be rejected. It would create a rate which would be significantly greater than a rate which merely allowed a return on zero-cost capital, which is completely contrary to the purpose of removing ADT from ratebase. Nor should the carrying charges be inflated with the addition of other accounts. Makeready, and the loading factors in makeready and inspection bills, already cover the desired expenses.

No additional charges or restrictions on overlashing fiber to existing strand should be permitted. In reality, safety is not in issue: electric utilities are exploiting this issue to win the race for new telecom customers.

The utilities' resistance to the proposed conduit formula should be rejected, as it has been in the *Local Competition* docket. On this record, all conduit should be presumed usable, without set-aside or discount, and a quarter-duct convention should be adopted to reflect actual engineering practices.

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of

Amendment of Rules and Policies  
Governing Pole Attachments

CS Docket No. 97-98

**REPLY COMMENTS OF  
THE NATIONAL CABLE TELEVISION ASSOCIATION, *ET AL.***

The National Cable Television Association ("NCTA"), Cable Telecommunications Association, Texas Cable & Telecommunications Association, Cable Television Association of Georgia, South Carolina Cable Television Association, Cable Television Association of Maryland, Delaware and the District of Columbia, Mississippi Cable Telecommunications Association, Mid-America Cable Telecommunications Association, Kansas Cable Telecommunications Association, Jones Intercable, Inc., Charter Communications, Greater Media, Inc., Prime Cable, Rifkin & Associates, TCA Cable TV, Inc., and The Helicon Corporation respectfully submit these Reply Comments.

**I. INTRODUCTION & BACKGROUND**

To the extent that the Commission is considering any changes in the pole rate formula, it should avoid utility efforts to use this proceeding, once again, to eliminate the very pole attachment regulatory scheme which has allowed for the proliferation of multiple, independent communications networks. There is no need to modify the existing pole attachment formula, except in very limited respects.

Utility claims of the need to sacrifice the formula's simplicity for accounting "precision" by the inclusion of additional rate base items, and administrative and maintenance expense charges, are transparent attempts to increase rates when the utilities are already generously compensated under the current formula.<sup>1</sup> Utility efforts to demand an additional charge for overlashed attachments are likewise transparent attempts to collect windfall profits, which, because of utility demands that overlashed fiber requires adherence to standard first-time pole permitting procedures, carry the added "benefit" to the utility of slowing competing cable operator's deployment of fiber optic facilities in the race to market.

Each of the utility proposals to drive up pole rents, to delay the deployment of competitive facilities, to gain Commission approval on the reliance of hard-to-verify internal company records, and to leave cable operators and others to the mercies of unregulated "negotiations" with pole owners have a singular purpose: to neutralize the effective regulatory scheme that has been in effect for nearly 20 years. Their ultimate goal is to use—unhindered—their monopoly ownership and control of pole space to unlawful competitive advantage in the communications services marketplace.

## **II. CONSEQUENCES OF THE MONOPOLY STATUS OF UTILITY POLES**

There is a common denominator to the electric utilities' advocacy in this rulemaking which goes far beyond their predictable efforts to eviscerate pole rate regulation. The electric utilities' advocacy of reproduction cost, for example, is built on the premise that forward-looking price signalling is required to efficiently allocate the pole "resource" to its highest and best use. Likewise, the utilities' theory of congressional intent is that the express directive of

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<sup>1</sup> See, e.g., Time Warner Cable Comments at 1-5.

Section 224 has been supplanted by a "marketplace" regime for poles. To their credit, the telephone industry comments are more candid about the monopoly status of poles.<sup>2</sup> In fact, with the electric industry's acquisition of the majority of poles in service, the telephone industry is apparently now on the receiving end of the electric utilities' monopoly abuses, and asks the Commission for Section 224 protection.<sup>3</sup>

It is worth briefly dispelling the disinformation about competition by the electric utilities, because so many of the positions they espouse are based on the fanciful notion that there is a competitive market for poles.

**A. There Is No "Market" Or Marketplace For Access To Poles**

The electric utilities argue that poles are not essential facilities for the provision of cable and competitive telecommunications services because there are alternatives to attachments to utility poles. This position ignores decades of contrary precedent and the conclusions of every branch of government. Congress,<sup>4</sup> the U.S. Supreme Court,<sup>5</sup> federal district

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<sup>2</sup> See, e.g., United States Telephone Association ("USTA") Comments at 2.

<sup>3</sup> See, e.g., USTA Comments at 11.

<sup>4</sup> See, e.g., 123 Cong. Rec. 35006 (1977) (remarks of Rep. Wirth, sponsor of Pole Attachment Law) ("The cable television industry has traditionally relied on telephone and power companies to provide space on poles for the attachment of CATV cables. Primarily because of environmental concerns, local governments have prohibited cable operators from constructing their own poles. Accordingly, cable operators are virtually dependent on the telephone and power companies. . . ."); 123 Cong. Rec. 16697 (1977) (remarks of Rep. Wirth) ("Cable television operators are generally prohibited by local governments from constructing their own poles to bring cable service to consumers. This means they must rely on the excess space on poles owned by the power and telephone utilities."); S. Rep. No. 95-580, at 13 (1977) ("Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles."); H.R. Rep. No. 95-721, at 2 (1977) ("Use is made of existing poles rather than newly placed poles due to the reluctance of most communities, based on environmental considerations, to allow an additional duplicate set of poles to be placed").

<sup>5</sup> See, e.g., *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) ("In most instances underground installation of the necessary cables is impossible or impracticable. Utility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of television cables").

and circuit courts,<sup>6</sup> the FCC,<sup>7</sup> and the Department of Justice<sup>8</sup> all have classified utility poles and conduits as essential facilities. The supposed alternatives to poles and conduits they offer in their comments simply do not exist.

Direct-buried cable is not an alternative in downtown streets nor is it preferred by franchising authorities when poles are available. Leasing back Municipal Electric Authority long haul fiber in Georgia<sup>9</sup> does nothing to replace local distribution lines—even if it made sense to dismantle an operating system in order to lease plant from another. Electing "wireless" transport is not an option: even if the cable industry were to dismantle wireline plant passing 90 million households and replace it with the technology which has led wireless operators such as CAI to ruin, it would still face the intractable opposition from the electric industry—voiced in this very

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<sup>6</sup> See, e.g., *United States v. Western Elec.*, 673 F. Supp. 525, 564 (D.D.C. 1987) (cable TV companies "do depend on permission from the Regional Companies for attachment of their cables to the telephone companies' poles and the sharing of their conduit space. . . . In short, there does not exist any meaningful, large-scale alternative to the facilities of the local exchange networks . . . ."); *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 462 F.2d 1256 (8th Cir. 1972); *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 617 F.2d 1302 (8th Cir. 1980); *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 49 R.R.2d 328, 1981-1 Trade Reg. Rep. (CCH) ¶ 63,944 (D.S.D. 1981). *General Telephone Co. of Southwest v. United States*, 449 F.2d 846, 851 (5th Cir. 1971) (construction of systems outside of utility poles and ducts is "generally unfeasible").

<sup>7</sup> See, e.g., *Twitel Technologies*, Letter from FCC Common Carrier Bureau, July 6, 1990 at 4 (basis of telco-cable crossownership rule is "the Commission's traditional concerns with carrier denial of access to essential poles and conduit"); *Section 214 Certificates*, 21 F.C.C.2d 307, 323-29 (1970) (CATV systems "have to rely on the telephone companies for either construction and lease of channel facilities or for the use of poles for the construction of their own facilities." Telco has monopoly and "effective control of the pole lines (or conduit space) required for the construction and operation of CATV systems"); *General Tel. Co. of California*, 13 F.C.C.2d 448, 463 (1968) (by control over poles, Telco is in a position to preclude an unaffiliated CATV system from commencing service); In reviewing the control of New York Telephone's poles, the FCC in 1971 concluded that "we know from experience that, as a practical matter, a CATV operator desiring to construct his own system must have access to those poles." *Better TV, Inc.*, 31 F.C.C.2d 939, 956 (1971).

<sup>8</sup> See, e.g., *United States v. AT&T*, Civ. No. 74-1698, Plaintiffs' First Statement of Contentions and Proof (D.D.C., filed Nov. 1, 1978) (Justice Department's cataloguing of BOC dominance of pole and conduit facilities. "The cost of building a separate pole system was prohibitive, and many municipalities simply forbade this alternative").

<sup>9</sup> Comments of AEP, *et al.* at 9.

proceeding—against placing wireless transmitters on poles.<sup>10</sup> The "alternative" that the utilities are really promoting is the leasing of capacity on *electric-owned* networks,<sup>11</sup> not the construction of independent networks. This is hardly what the drafters of the 1996 Act meant by facilities-based competition.<sup>12</sup>

The fact is that the cable industry is a captive of monopoly poles to which it is currently attached, and those poles are now predominately controlled by electric utilities which are in direct competition with cable.<sup>13</sup> Diversifying electric utilities' recent behavior corresponds exactly with their roll-out of commercial communications services,<sup>14</sup> and mirrors the early conduct of the telephone industry which sought to use control of pole space to hamper cable's early growth.

The poles and rights-of-way at issue are impressed with a very particular public purpose. Electric power has long been considered an essential service for citizens, and the public interest in universal availability of electric power led to policies and laws to promote the growth

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<sup>10</sup> EEI/UTC Comments at 6-7; *Ex Parte Memorandum of AEP, et al.*, submitted in CC Docket No. 96-98 (filed June 16, 1997).

<sup>11</sup> *See, e.g.*, Comments of AEP, *et al.* at 41; EEI/UTC Comments at 12.

<sup>12</sup> *See, e.g.*, *Implementation Of The Local Competition Provisions In The Telecommunications Act of 1996*, ("Local Competition Order"), 11 F.C.C.R. 15499 ¶ 164 (rejecting electric utility efforts to compel independent parties to exhaust lease back option prior to granting attachment rights).

<sup>13</sup> *See, e.g.*, *Marcus Cable Assocs., L.P. v. Texas Utils. Elec. Co.*, PA No. 96-004 (released July 21, 1997) (finding electric utility imposition of unreasonable terms and conditions of attachment "seem to exist only to interfere with, if not destroy, [the cable operator's] relationship with those customers").

<sup>14</sup> *See, e.g.*, Reply Comments of Continental Cablevision, *et al.*, CC Docket No. 96-98 at 3-7 (filed June 3, 1996). In one of the more prominent recent electric industry telecommunications ventures, it was announced that AT&T has joined EnergyOne, a venture of 2 electric utilities (UtiliCorp United of Kansas City and Peco Energy), to bundle electric, telephone and security services. AT&T plans to offer long distance, Internet access and local service to EnergyOne customers. *See* Benjamin A. Holden, *UtiliCorp and Peco, Aided by AT&T, To Launch One-Stop Utility Service*, Wall St. J., June 24, 1997, at A3.

and stability of the industry.<sup>15</sup> The public interest in universal service has moved state legislatures to cede part of their sovereign power of eminent domain to the utilities for use in achieving the most efficient and far-reaching routes for power poles and lines.<sup>16</sup> That power may only be used for a public purpose.<sup>17</sup>

Over time, the utilities have been able to use their eminent domain power to persuade property owners to grant easements "voluntarily," without the need to invoke the formal processes. Municipal and local planning commissions typically condition residential subdivision approvals on the dedication of easements to the utilities. State laws typically prohibit the issuance of occupancy permits to structures without working electrical service.<sup>18</sup> In a very real sense, utility poles and rights-of-way carry a public trusteeship, which forbids the utilities from using them solely for their private gain. This public trusteeship is especially appropriate today, when pole rents are increasingly being kept below the line, rather than reducing expenses of electric ratepayers.

**B. The Growth Of The Cable Television Industry Has Not Improved Its Bargaining Position Relative To Pole Attachment Negotiation**

Given the fundamental relationship between captive cable plant and monopoly pole owners, the growth of the cable industry over time is irrelevant. The electric utilities' own take-

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<sup>15</sup> 2 David J. Muchow & William A. Mogel, *Energy Law and Transactions* § 52.02 (1995).

<sup>16</sup> 1A Nichols', *The Law of Eminent Domain* § 3.232[2] (rev. 3d ed. 1993). *See, e.g.*, Fla. Stat. ch. 361.01 (1996); Ga. Code Ann. § 22-3-20 (1996).

<sup>17</sup> *Hawaii Housing Authority, et al. v. Midkiff et al.*, 467 U.S. 229, 241 (1984) ("[T]he Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.'"). *See also*, 1A Nichols', *The Law of Eminent Domain* § 4.7 (rev. 3d ed. 1993).

<sup>18</sup> *See, e.g.*, Fla. Stat. ch. 553.79(6) (1996).

it-or-leave-it behavior with large and small operators underscores the point. Smaller operators frequently find themselves absorbing the brunt of utility overreaching,<sup>19</sup> with a common utility tactic today being roll-out of new onerous attachment terms on smaller operators first for a kind of dress rehearsal before premiering the terms with larger operators. The behavior is unchanged when utilities face MSOs.

In our initial Comments, we showed how one investor-owned electric utility refused to modify a single term in its pole agreement despite a cable operator's repeated requests to do so and affirmative obligation to negotiate under current Commission rules.<sup>20</sup> More recent refusals by Entergy to negotiate in good faith with cable operators in Texas, Mississippi and Arkansas led to litigation now pending before this Commission.<sup>21</sup> Utilities generally now may be circumspect in cutting the cables of their competitors off the poles, but they *will* routinely freeze CLECs and cable operators in place by blocking conduit access to make improvements to facilities that they have already installed,<sup>22</sup> and prevent expansion of existing services by

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<sup>19</sup> See, e.g., *Cable Texas, Inc. v. Entergy Servs., Inc.*, PA No. 97-004 (complaint filed July 9, 1997) (independent cable operator seeking refund for unlawful survey charges paid in protest after utility refused to process additional cable operator pole permit applications until operator paid full amount of unlawful charges).

<sup>20</sup> See Initial Comments of NCTA, *et al.* at 44-48 (filed June 27, 1997); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387, 4399, n. 51 (July 23, 1987) ("all parties are under an obligation to make good faith efforts to settle disputes. Failures to negotiate in good faith may lead to Commission-imposed sanctions."). Since submission of our initial Comments, the FCC ruled these very terms unlawful. *Marcus Cable Assocs., L.P. v. Texas Utils. Elec. Co.*, PA No. 96-004 (July 21, 1997).

<sup>21</sup> *Texas Cable & Telecommunications Association, et al. v. Entergy Services, Inc., et al.*, PA No. 97-005 (Complaint filed July 9, 1997).

<sup>22</sup> See *TCG Dallas v. Texas Utils. Elec. Co., Inc.*, No. 4:97CV51 (E.D. Tx. Feb. 26, 1997) (CLEC denied ability to modify its telecommunications facilities installed in conduit owned by diversified electric utility unless CLEC acceded to utility demands to transfer title of certain CLEC fiber optic facilities to electric utility.)

denying access to both.<sup>23</sup> Indeed, as we pointed out in our initial Comments,<sup>24</sup> some utilities are forcing CLECs and others to waive their rights for access to this and other adjudicatory tribunals as a pre-condition to attachment rights,<sup>25</sup> a practice that the Commission has found "unreasonable *per se* and unenforceable as a matter of law."<sup>26</sup> Separate comments filed July 23, 1997 by NCTA in the Competition Inquiry illustrate how municipal utilities and cooperatives abuse their exemption by favoring their own competitive ventures.

### C. Negotiations Can Only Occur Against a Regulatory Backstop

The utilities seek here the express right to "negotiate" rates beyond the statutory maximum and to secure enforceable waivers of statutory rights. This has been properly denied for twenty years as contrary to public policy.<sup>27</sup> Why? Because these utilities are not disinterested custodians motivated only to protect safety and electric ratepayers. The utilities' aim is to end pole regulation as we know it, and to usher in a regime of preferential self-dealing with

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<sup>23</sup> See, e.g. *Fanch Cablevision et al. v. Public Serv. Co. of Colorado*, PA No. 97-004 (complaint filed Apr. 4, 1997) (pending complaint for utility refusal to process additional pole permit applications and power supply activation requests until cable operators paid approximately \$500,000 in fictitious "unauthorized attachment" penalties); *Multimedia Cablevision, Inc. v. Southwestern Bell Telephone*, 11 F.C.C.R. 11,202, Complaint ¶¶ 8-13 (Sept. 3, 1996) (utility refusal to process permit applications for cable service expansion upon learning that certain excess capacity could be used for two-way communications).

<sup>24</sup> Initial Comments of NCTA, *et al.* at 47-48.

<sup>25</sup> *Texas Cable & Telecommunications Association, et al. v. Entergy Services, Inc. et al.*, PA No. 97-005 (Complaint filed July 9, 1997).

<sup>26</sup> Letter to Danny E. Adams from Meredith Jones, Jan. 17, 1997.

<sup>27</sup> *Gulfstream Cablevision of Pinellas County, Inc. v. Florida Power Corp.*, Mimeo 1636 (Jan. 8, 1985), *rev. denied*, FCC 85-257 (May 17, 1985); *TeleCable Development Corp. d/b/a Wytheville TeleCable, et al. v. Appalachian Power Co.*, 48 RR 2d 684, File Nos. PA-79-0007, PA-79-0009, PA-79-0055, PA-80-0002 (Oct. 31, 1980).

their own telecommunications affiliates.<sup>28</sup> Their entire regulatory campaign is designed around this end.

They seek "transmission" pole rents far exceeding their actual costs.<sup>29</sup> They seek to exclude wireless attachments, except those of their affiliates.<sup>30</sup> While making conduit available for their own telecom ventures, they claim that use of conduit by third parties is too dangerous to permit—probably as dangerous to the electric grid as *Carterphone* was to telephone.<sup>31</sup> In the *Local Competition* docket, they claim that opening their telecommunications networks for use by their telecommunications affiliate does not trigger either interconnection or resale or nondiscrimination obligations to unaffiliated third parties.<sup>32</sup> In separate federal court litigation<sup>33</sup> and in this proceeding<sup>34</sup> they argue that the regulation of monopoly pole space is a taking.

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<sup>28</sup> See, e.g., Alan Breznick, *Charged Up, Electric Utilities Seeing Bright Prospect in Building Broadband Networks*, Cable World, May 20, 1996, at 8; Lane Cooper, *Utilities Open the Door on a New Market—Law Entices Gas and Electric Companies Into Telecommunications*, Communications Week, Oct. 28, 1996, T33 ("There are some utilities that are going to invest very aggressively in telecommunications, and they are going to surprise a lot of people with their speed and determination." Comments of UTC (electric utility telecommunications trade association) counsel, Sean Stokes); Joseph F. Schuler, Jr., *Diversification, Round Two: Telecom Act Has Electrics at it Again*, Public Utilities Fortnightly, Dec. 1996, at 33; Howard Rausch, *Supplementing the Field of Dreams*, Photonics Spectra, Oct. 1994, at 25; George Lawton, *Shocking Competition: Electric Companies Building a Piece of the Infrastructure*, Digital Media, Oct 5, 1994, at 3.

<sup>29</sup> For example, one electric utility has distributed to cable operators a rate card which contains an annual attachment rate for transmission poles as high as \$232.50.

<sup>30</sup> See, e.g., *Omnipoint v. PECO Energy Corp.*, PA No. 97-002 (Complaint filed April 1, 1997).

<sup>31</sup> See *TCG Dallas v. Texas Utils. Elec. Co., Inc.*, No. 4:97CV51 (E.D. Tx. Feb. 26, 1997).

<sup>32</sup> See, e.g., *Ex Parte* Submission of American Public Power Association (Feb. 7, 1997) (attaching comments filed in CC Docket No. 96-98); *Ex Parte* Submissions of UTC in CC Docket No. 96-98 and CCB Pol. 96-14 (filed March 11 and March 5, 1997).

<sup>33</sup> *Gulf Power Co. v. United States*, Civil Action No. 3: 96CV381/LAC (N.D. Fla. filed July 30, 1996).

<sup>34</sup> See, e.g., Joint Comments of Carolina Power & Light Co. ("CP&L"), *et al.* at 2-3; Comments of AEP, *et al.* at 2-3.

We share Congress' preference for negotiated resolutions of disputes. As USTA correctly points out, both the 1977 legislative history leading to the passage of the 1978 Pole Attachment Act, as well as the 1996 Conference Report to the Section 224 amendments effected by the 1996 Act articulate a congressional preference for negotiated agreements.<sup>35</sup> But the manner in which the Commission must encourage such negotiations has remained unchanged from the original Act: it must continue to serve as the regulatory backstop to which disputes may be brought. Permitting electricians to extract a signature on a waiver from a captive cable operator<sup>36</sup> will do nothing but vitiate the Act. What the utilities seek is the unrestrained right to abuse their power, without any regulatory recourse. It takes but one unilateral contract termination notice, or one refusal to transfer a pole agreement to a new corporate system owner, to undo twenty years of successful pole regulation, unless the Commission remains vigilant against pole abuses.

While the electricians clearly seek to dismantle this regulatory backstop, the telephone industry appears ambivalent about pole negotiation. On the one hand, they argue that "negotiated" contracts should prevail,<sup>37</sup> while on the other hand they ask for protection from utility overreaching under Section 224.<sup>38</sup> We submit that today's balance is the best: it requires parties to attempt negotiations, but does not require fruitless efforts. We specifically disagree with BellSouth's suggestion that extensive negotiations are required prior to filing a complaint.

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<sup>35</sup> USTA Comments at 2.

<sup>36</sup> *See, e.g.*, Initial Comments of NCTA, *et al.* at 47-48.

<sup>37</sup> USTA Comments at 2.

<sup>38</sup> *Id.* at 11.

Because of the FCC's practice of awarding refunds from the date of complaint, it is often only the filing of a complaint which spurs the utility to serious negotiations. Parties routinely continue negotiation of rate matters after filing of the complaint, with rate disputes often settled after the first pleading or two, and, in the majority of cases, before a Bureau decision.

Likewise, today's process prefers negotiations, but it does not mistake coerced contracts for waivers, and remains ready to remedy competitive abuses whether or not a "contract" has been signed. We therefore disagree with SBC's position that a rate is presumed to be reasonable if the attaching party has been paying that rate, or a higher one, without filing a complaint for a 12-month period.<sup>39</sup> This rule would fail to account for such important considerations as payments made while new networks are being built out—when an attaching party is at its most vulnerable stage. It fails to account for annual decreases in the utility pole owner's costs and expense factors, which are supposed to be flowed through but often do not come to the attention of an operator until a separate concern arises. Likewise, SBC's claim that a complaint must meet a threshold minimum amount of attachments is without merit because it could preclude small cable companies from availing themselves of the Commission's complaint resolution procedures.

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<sup>39</sup> SBC Comments at 42.

## **D.     Reproduction Costs Have No Place in Implementing Section 224**

Notwithstanding Congress' repeated reaffirmation of the pole attachment regulatory scheme<sup>40</sup> and its extension in 1996 to CLECs, the electric utilities state, incredibly, that "Congress moved distinctly away from this model."<sup>41</sup>

### **1.     Congress Has Reaffirmed the FCC Formula**

Congress could have repealed the Act or the formula, as an earlier version of bill circulated in 1995 did.<sup>42</sup> Instead, Congress recognized that such repeal would doom deployment of independently-owned networks. It reconfirmed the formula and, rather than looking to the supposedly "free market" regime in which CLECs obtained pole attachments, placed CLECs under the same regulated regime as cable.<sup>43</sup> There cannot be a clearer reaffirmation of the present regime, and the utilities offer not a single citation of any intention to the contrary.

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<sup>40</sup> See Communications Amendment Act of 1982, Pub. L. No. 97-259 (1983); Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984); Cable Television Consumer Protection and Competition Act of 1992 Pub. L. No. 102-385, 106 Stat. 1460 (1992); and Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>41</sup> Comments of AEP, *et al.* at 27.

<sup>42</sup> H.R. Rep. No. 104-204, at 24, 92 (1995) (unenacted version of pole attachment provision of H.R. 1555 requiring new pole formula to "recognize that the entire pole, duct, conduit, or right-of-way other than the usable space is of equal benefit to all entities attaching to the pole and therefore apportion the cost of the space other than the usable space equally among all such attachments."); H.R. Rep. No. 104-223, at 15-16 (1995) (amendment offered by Mr. Bliley recognizing that "the pole, duct, conduit, or right-of-way has a value that exceeds costs and that value shall be reflected in any rate.").

<sup>43</sup> The electric utilities argue that so-called "market" attachment rates have not inhibited the CAP and the development of competitive access providers ("CAPs") and IXCs. It is one thing for Wiltel to deploy a nationwide IXC network and quite another to deliver local cable service to every home. It might even be understandable why certain CAPs or CLECs have acceded to outrageous demands when racing to wire dense downtown business districts. It is a very different story if the CAP or CLEC needs to access hundreds of poles to offer competing dial tone throughout a community, which is why Congress brought CLECs into the Section 224 fold. Contrary to the assertions of ILECs, they were excluded from the definition of attaching party because of the utilities' request that Congress preserve long-standing contractual arrangements between ILECs and electric companies.

Congress has neither invited nor authorized the kind of wholesale revisions sought by the utilities. The 1996 amendments to Section 224 changed only the method in which pole space was to be allocated to parties providing telecommunications services; it did not contemplate changes to the rate base or carrying charges associated with pole plant. In Senate Committee staff meetings at which undersigned counsel was present, the representatives of the electric utility industry themselves used annual pole carrying costs of \$60 for representative calculations.<sup>44</sup> The 1996 amendments do not mandate a "hard look" to inflate or redo the current formula. This proceeding was initiated only for the purpose of formally extending the applicability of a conduit rate formula and clarifying a handful of discrete accounting questions.

There is no basis whatsoever for upending the formula to base rates on "reproduction" or "replacement" or "forward-looking" costs.<sup>45</sup> The FCC rejected such cost theories when setting the current formula.<sup>46</sup> No certified state calculates pole rate base on a reproduction-cost basis. Instead, reproduction costing has been affirmatively rejected in

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<sup>44</sup> A rate base of \$150 times a carrying charge of 40% produces a carrying cost of \$60. The authorized share to cable would be \$60 times 7.4%, or about \$4.50.

<sup>45</sup> The electric utilities are uniform in their advocacy that the rate base under the pole formula should be calculated on a reproduction-cost basis. Among telephone utilities, only Southwestern Bell and Sprint advocate this disfavored approach.

<sup>46</sup> *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C.2d 59, 65-66 (May 23, 1979) ("With regard to the argument advanced . . . that replacement costs should be taken into account in determining pole attachment rates, we do not consider such costs to be reflective of actual costs incurred. We believe historical costs most accurately reflect actual or embedded costs.").

California,<sup>47</sup> Michigan<sup>48</sup> and New York,<sup>49</sup> after the utilities proffered \$30 pole rents based on reproduction costs.

## 2. There Is No Economic Basis for Adopting Reproduction Costs

Moreover, any conceivable justification for setting prices on the basis of reproduction costs is entirely absent when dealing with pole attachments.

First, there is no market within which such pricing could operate. The premise of utility regulation is to extend the economies of joint use to all customers. To price services on the basis of what a customer would have had to pay in order to produce that service himself is a complete repudiation of the very basis of utility franchises and regulation.<sup>50</sup> The absolute predicate to an efficient, free-functioning economic market of the kind that the utilities speciously claim exists for pole attachments is the existence of multiple suppliers of the goods or services in question. There is no "market" in pole rents because there are not multiple suppliers of poles and there is no viable alternative to using pole space (and there are no viable alternatives for the placement of cable and CLEC facilities).<sup>51</sup> Cable television franchising authorities prohibit the

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<sup>47</sup> Cal. Pub. Util. Code §767.5 (Deering 1996) ("The basis for computation of annual capital costs shall be historical capital costs less depreciation.").

<sup>48</sup> See *Consumers Power Co., et al.*, Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831 at 20 (Feb. 11, 1997), *reh'g denied* (April 24, 1997), *appeal pending*, *Detroit Edison Co et al. v. Michigan Public Service Comm'n et al.*, Nos. 203480 & 203421 (Mich. Ct. App. filed May 22, 1997) (Ex. 1 to Initial Comments of NCTA, *et al.*).

<sup>49</sup> *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, N.Y. Pub. Serv. Comm'n. Case No. 95-C-0341 at 11 (Issued and effective June 17, 1997) (Ex. 2 to Initial Comments of NCTA, *et al.*).

<sup>50</sup> See *Consumers Power Co., et al.*, Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831 at 19-22 (Feb. 11, 1997), *reh'g denied* (April 24, 1997), *appeal pending*, *Detroit Edison Co et al. v. Michigan Public Service Comm'n et al.*, Nos. 203480 & 203421 (Mich. Ct. App. filed May 22, 1997) (Ex. 1 to Initial Comments of NCTA, *et al.*); see also, Charles F. Phillips, *The Regulation of Public Utilities*, 333-35 (1993) (Reproduction cost is an "imaginary cost," replete with substantive accounting flaws and procedural difficulties.).

<sup>51</sup> See Section II, above.

construction of duplicative pole runs and require that cable facilities be attached to existing pole plant.<sup>52</sup> Consider services like selling personal computers, placing a passenger in an airline seat, or providing a long distance call. These are not priced on reproduction costs. The likely reason that these industries do not price their products or services on a reproduction-cost basis is because such vendors are subject to market competition, which does not allow any vendor to extract 500% rate increases from their customers.

Second, such pricing will not properly allocate resources. The electric utilities argue here that the pricing of pole attachments will result in the more efficient allocation of resources to the construction of pole plant.<sup>53</sup> Price "signalling" is not required. Under current pricing regulations, where poles are priced at actual reproduction cost, cable operators do not overconsume pole space. They use only what they need for their particular service requirements, which in most cases is one foot or less of space. In the words of one electric utility official testifying under cross examination at a state-level pole-rate proceeding, cable operators would not overconsume such space "because it would not be in their best economic interest" to do so.<sup>54</sup>

Even if cable operators *were* to somehow overconsume pole space, utilities would not bear the cost of such overconsumption. Thus, the usual economic thesis for reproduction cost pricing—preventing uneconomic overinvestment by a utility—is completely absent with poles.

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<sup>52</sup> See, e.g., n. 4, above.

<sup>53</sup> See, e.g., Comments of AEP, *et al.* at 30-32; Report of Reed Consulting Group at 26-28 (Ex. 1 to Comments of AEP, *et al.*).

<sup>54</sup> *Consumers Power Co., et al.*, Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831 (Feb. 11, 1997) (cross examination of Detroit Edison Co. witness, Karl E. Roehrig, Tr. 839).

Utilities are never at risk to overinvest in pole plant because cable operators pay all the upfront modification and pole replacement costs associated with the attachment of their facilities.

Third, the utilities' reproduction cost ignores the essential point that cable operators already are attached to the poles. In their theories of price signalling, the utilities have failed to account for the economic costs (externalities) of dismantling installed plant on existing poles, prior to incurring the costs of a more "economic" alternative.

Fourth, current pricing has not distorted utility investment patterns. The utilities argue that pricing on the basis of the utility's fully allocated embedded investment could discourage the utility from deploying pole plant. But the utilities set poles for their own use, or they would not be included in the core business rate base. These same utilities have invested in taller and taller poles because—as their telephone joint owners have attested—"the demand for taller poles is derived solely from the increased spatial needs of the electric utilities."<sup>55</sup> The electric utilities say that under the Commission's embedded cost approach they have no incentive to invest in taller poles.<sup>56</sup> But they also say that their poles *have* "grown" taller during the very period that rate base calculated on net-book investment supposedly was discouraging them from investing in taller poles.<sup>57</sup> But then they say, that taller poles should not be installed because of esthetic concerns.<sup>58</sup> How can all these assertions be true? When a new pole is needed for their own purposes, they replace it. When one is needed for a third-party attachment, that party pays

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<sup>55</sup> USTA Comments 25.

<sup>56</sup> *See, e.g.*, Comments of AEP, *et al.* at 30-32; Report of Reed Consulting Group at 26-28 (Ex. 1 to Comments of AEP, *et al.*).

<sup>57</sup> White Paper at 10.

<sup>58</sup> *See, e.g.*, Comments of AEP, *et al.* at 32.

for the replacement. As to aesthetics, our experience has been that the electric utilities have consistently resisted local laws seeking to compel underground installation.

Fifth, the utilities themselves use embedded costs for pole attachments and for competitive markets. Embedded costs provide the basis for how they set financial arrangements with telephone utilities under joint-use agreements. They also insist on using embedded costs to secure higher rates and returns on their investment, particularly for stranded investment and for failed (primarily nuclear) construction projects.<sup>59</sup> Given the pro-competitive success fostered by the current formula, pole rates should continue to be calculated on an embedded-cost basis.

The utilities' real concern is raising rents and costs to drive facilities-based competitors off the poles so that the utilities can monopolize the broadband communications platform.<sup>60</sup> Ultimately, they claim that poles should be reserved for "higher value" attachments. But "higher value" to the diversifying electric industry means facilities in which they possess an ownership stake; this is why they are fighting tooth and nail to keep unaffiliated wireless communications facilities off their support structures.<sup>61</sup>

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<sup>59</sup> Indeed, one recent report explained that all states but one passing electric service de-regulation legislation allow electric utilities to prepare for anticipated competition by recovering substantially all of their (embedded) stranded costs (principally from failed nuclear investments and unprofitable long-term power contracts) from existing ratepayers. Benjamin A. Holden, *Electric-Deregulation Machine Starts To Pick Up Steam*, Wall Street Journal, July 14, 1997, at B.4.

<sup>60</sup> See, e.g., Comments of AEP, *et al.* at 41; EEI/UTC Comments at 12; *Local Competition Order* ¶ 164 (rejecting electric utility efforts to compel independent parties to exhaust lease back option prior to granting attachment rights).

<sup>61</sup> EEI/UTC Comments at 6-7; *Ex Parte Memorandum of AEP, et al.*, submitted in CC Docket No. 96-98 (filed June 16, 1997); *Omnipoint v. PECO Electric Co.*, PA No. 97-002 (Complaint filed April 1, 1997) (wireless telecommunications provider seeking access to poles and other support structures of large electric utility with equity interest in a competing wireless provider).

**E. The Commission's Present Pole Rate Formula Is Sufficiently 'Forward Looking'**

The utilities advocate the adoption of reproduction or replacement costs, in part, because they claim them to be "forward-looking."<sup>62</sup> The utilities fail to acknowledge that costs reflected in the Commission's current pole attachment rate formula, contain a generous supply of forward-looking elements.

First, under the utility depreciation accounting practices for pole plant, utilities are entitled to recover their *future* costs of removal of the pole plant in the depreciation reserve for those accounts. This means the utilities are recovering on a current-year basis over the entire life of the pole asset the costs that they might later incur for removal of the pole. Getting credit today for charges that might not actually be made for decades into the future is very obviously forward-looking.

Second, as AT&T reminds us, even the basic depreciation itself is known to be overstated to accelerate recovery and cash flow.<sup>63</sup>

Third, through tax normalization, the pole formula allows utility pole owners to collect, *in advance, future* tax payments not made on a current basis.

Fourth, under the formula, the utilities are permitted to earn an overall return on their pole investment, the rate of which is set at a level to *attract* capital, not merely retain it.

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<sup>62</sup> See, e.g., Comments of AEP, *et al.* at 14-21. Among the telephone companies, only SBC and Sprint advocate forward-looking costs, with the rest properly supporting the embedded cost approach the Commission has followed since the inception of pole-rate regulation. SBC Comments at 23; Sprint Comments at 5-6. USTA and the rest of the industry supports use of embedded costs. See, e.g., U S West Comments at 2.

<sup>63</sup> AT&T Comments at 12.