

electric utility attachments because Section 224 does not govern electric utility use of LEC poles, unless the electric utility is providing telecommunications services. Given that electric utilities' nontelecommunications use of LEC poles is beyond the reach of Section 224, it is proper to exclude their attachments from the regulatory allocation of non-usable space costs. Costs will be allocated between the LEC and electric utility in accordance with their joint use agreement.

While SBC agrees with the general approach of counting entities in one-foot increments and not counting electric utilities that do not provide telecommunications, SBC urges the Commission to change some aspects of its proposed method of counting attaching entities. For example, counting all attaching government agencies as attaching entities is inconsistent with the reason for excluding electric utilities. If electric utilities are excluded so long as they are not providing telecommunications, then government agencies, who generally do not provide telecommunications services for hire to the public, should not be counted at all. This proposal is also inconsistent with the competitively neutral and nondiscriminatory management and regulation of public rights-of-way required by Section 253.⁴⁰ Each attacher is sharing in the use of the public easement on which the pole is located. To allocate the burden of local regulation of the public rights-of-way in a competitively neutral

⁴⁰ 47 U.S.C. § 253.

and nondiscriminatory manner, the costs associated with attachments that cities require for public use should be allocated among all attachers. Provision of free pole space to the city is no less a cost associated with the pole than the installation cost. Unless the utility provides this space, it is not likely that the city would give the utility the right to use the public easement or it may do so on less favorable terms that impose other types of pole-related costs. Because the utility often is not compensated for such government attachments, it is only fair that such community service costs be allocated equitably among those benefitting from the use of the pole.

The NPRM's proposed method of counting attachments should be changed in a second respect. The incumbent LEC("ILEC") should not be counted as an attaching entity, as the NPRM proposes. In fact, noting that the definition of "telecommunications carrier" in Section 224 excludes ILECs and that "pole attachment" therefore does not include an ILEC attachment, the NPRM asks how these definitions should affect its tentative conclusion to count ILECs as attaching entities.⁴¹ As the electric utilities who authored the Whitepaper recognized, "The plain language of §224 precludes ILECs from being treated as attaching entities."⁴² If ILECs are not treated as attaching entities when they are

⁴¹ NPRM, ¶23.

⁴² Reply Comments of American Elec. Power Service Corp. et al. ("Electric Utilities"), CS Docket No. 97-98, at 18, filed August 11, 1997.

attached to other utilities' poles, neither should they be considered attaching entities for purposes of the allocation of the cost of non-usable space on their own poles.

Moreover, the language and legislative history of Section 224 support this conclusion. Only two-thirds of the non-usable space cost is allocated among the attaching entities. The other one-third is not allocated, and thus, it is retained by the utility. In effect, ILECs are already responsible for one-third of the non-usable space costs. It would be unfair to allocate an additional share to the ILEC on top of the one-third they already have been allocated.

Further, there is a correlation in the legislative history between the exclusion of ILECs from the definition of telecommunications carrier and the one-third allocation to utilities. While the Senate Bill included both provisions; the House Bill included neither of them.⁴³ In the House Bill, because the one-third was not set aside, 100% of the non-usable space costs were allocated among the attaching entities. But, under the House Bill, ILECs were considered attaching entities, and would have received their share through the allocation to all attaching entities. Ultimately, Congress selected the Senate version that contained both the exclusion of ILECs and the one-third allocation to utilities. Thus, the obvious intent was to assign

⁴³ Compare H.R.1555, 104th Cong., 1st Sess., §106 (October 12, 1995) with S.652, 104th Cong., 1st Sess., § 204 (June 15, 1995).

one-third of the costs to the ILEC, but not to consider the ILEC an attaching entity for purposes of receiving a share of the non-usable space allocation pursuant to Section 224(e)(2).

In reality, ILECs are responsible for more than one-third of the non-usable space costs because, by default, they will also be responsible for the share attributable to cable operators that only provide cable service. In other words, while the carrier formula will assume that a cable operator is an attaching entity for purposes of the rate that carriers will pay, if that cable operator's attachments are only used to provide cable service, then, under Section 224(d), it will not pay a rate that includes the share of non-usable space costs theoretically allocated to the cable operator as an attaching entity.

In view of this history, including the lack of protection for ILECs as attachers (at least in the areas where they are the incumbents) and the greater than one-third share of costs they retain under Section 224(e)(2), it would be unfair and discriminatory for the Commission to treat ILECs as attaching entities for purposes of allocating non-usable space costs on their own poles. Only in this manner will the carrier formula achieve an equitable distribution of the non-usable space costs among all of the attaching entities.⁴⁴

⁴⁴ See Conference Rep. No. 104-458, 104th Cong., 2d Sess., February 1, 1996, at 206 ("[T]he Commission shall . . . recognize that the entire pole . . . other than the usable space is of equal benefit to all entities attaching to the pole . . .").

In summary, SBC urges the Commission to construe Section 224(e) to count any cable operator or telecommunications carrier (other than an ILEC) as a separate attaching entity for each foot, or part of a foot, such entity occupies. Further, an entity that overlashes on another entity's prior attachment should be counted separately. Finally, attachments by ILECs and attachments by government agencies and electric utilities other than for purposes of providing telecommunications services should not be counted.

VI. THE COST OF NON-USABLE SPACE SHOULD NOT BE ALLOCATED BASED ON THE PROPORTION OF SPACE OCCUPIED.

The NPRM inquires about other possible methods of allocating the cost of non-usable space, including "on a proportion of space occupied basis."⁴⁵ This suggested alternative would not be consistent with Section 224(e) because it would not apportion the entire two-thirds share of costs equally among the attaching entities. In fact, the existing formula already allocates non-usable space costs based on the attacher's share of the usable space, and thus, this suggested alternative would not change the formula at all. It would be improper to interpret Section 224(e) in a manner that requires no change to the formula and thus renders the statutory amendment meaningless.

However, the amount of space occupied can be considered in the equal allocation of the two-thirds share of costs because an

⁴⁵ NPRM, ¶23

attaching entity that occupies two spaces on the pole should be allocated twice as much costs as an attaching entity that only occupies one space.

VII. EACH UTILITY SHOULD DEVELOP ITS OWN COMPANY- OR STATE-WIDE AVERAGE NUMBER OF ATTACHING ENTITIES PER POLE.

The NPRM correctly observes that an exhaustive inventory of all of a utility's poles to determine the average number of attaching entities would impose an unjustifiable expense. This is especially true when one considers the less burdensome alternatives. SBC agrees with the NPRM's proposal to allow each utility to develop its own average number of attachers based on information it possesses.⁴⁶ The simplest method of determining the average number of attachers based on readily available data would be to divide the number of attaching entities on the utility's billing records by the total number of poles in the state. Both numbers are readily available and are easily verifiable. In fact, the total number of poles by state is reported to the Commission by those LECs subject to ARMIS reporting requirements. The Electric Utilities suggested substantially this same method in their Whitepaper.⁴⁷ While this would be the most expeditious method of determining the average number of attachments, another reasonable alternative would be to allow each utility to conduct a study of its poles to determine

⁴⁶ NPRM, ¶26.

⁴⁷ Whitepaper at 8-9.

the average number of attaching entities on a representative sample of poles selected on a random basis. The study would be documented and made available to any attacher that is paying fees based on the carrier formula.

In the alternative, the NPRM asks whether the Commission should initiate a survey to determine a presumptive average number of attachers.⁴⁸ SBC opposes this alternative. A Commission survey would not work well for this component of the carrier formula. Presumably, the NPRM is envisioning a single nationwide survey that would result in a single presumptive average to be used by all utilities. Compared to average pole heights and the other presumptions, the average number of attachers is more likely to vary significantly from one utility to the next and from one region to another.⁴⁹ In addition, the average number of attachers will change over time. For these and other reasons, a single nationwide Commission survey would not serve any useful purpose. Also, it would be wasteful of the Commission's resources for it to perform surveys on a state-by-state basis and to update these surveys periodically.

The NPRM asks whether different presumptive averages should

⁴⁸ NPRM, ¶27.

⁴⁹ For example, in those states which are expediting competitive entry most rapidly and especially facilities-based entry, one would expect a higher average number of attachers in the early years of the carrier formula. Likewise, in largely rural states, one would expect a lower concentration of attachments.

be developed for urban, suburban and rural areas. Like the remaining components of the formula, the average number of attachments should be determined on a company- or state-wide basis. Among other reasons, use of state-wide numbers facilitates any transitions between state and Commission regulation of pole attachments under the "reverse preemption" and other provisions of Section 224(c). While a nationwide average is too far removed from the regional variation, multiple surveys of different parts of each state would cause the pole attachment process to be overly complex. While recognizing that a nationwide average would be too homogenous, a state-wide average for each utility or a company-wide average is most consistent with the Commission's objective that its "procedures and calculations should remain simple and expeditious and not modeled on ratemaking or complex tariff proceedings."⁵⁰ Another disadvantage of a single nationwide average is that it would provide a greater incentive for attachers to challenge the figure by presenting their own utility-specific study because of the greater variance between the nationwide average and the actual figures of any particular utility.

VIII. ALL COMMISSION POLE ATTACHMENT CALCULATIONS SHOULD USE THE GROSS BOOK COST METHOD DESCRIBED IN THE NPRM.

The NPRM inquires whether the same rate methodology should

⁵⁰ Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, CC Docket No. 86-212, 2 FCC Rcd 4387 ¶37(1987) ("1987 Report and Order").

be used for carrier and cable operator attachments and whether the carrier formula should use net book costs or gross book costs.⁵¹ Aside from the required difference in the allocation of non-usable space costs, SBC urges the Commission to use the same rate methodology for cable operator and carrier pole attachments. With that one exception, there is no reason to treat standard attachments by the two types of entities any differently. Of course, if the carrier or cable operator seeks to attach nonstandard equipment that interferes with other space on the pole, a different rate may apply.

In order to resolve the problem of artificially low pole attachment rates caused by the net salvage problem experienced by LECs in a number of jurisdictions,⁵² the method described in the NPRM that uses gross book costs to calculate most of the carrying charges should be applied to both cable operator and carrier pole attachment calculations. In its Comments and Reply Comments in CS Docket No. 97-98, SBC provided detailed analysis of the net salvage problem and explained why using gross book costs is the preferred method of avoiding the distortion caused by net

⁵¹ NPRM, ¶¶33-34.

⁵² This is indeed a widespread problem. Commenters in CS Docket No. 97-98 identified over 20 jurisdictions where net pole costs are negative or will be negative in the foreseeable future. See SBC Reply Comments, CS Docket No. 97-98, at 3; Bell Atlantic/NYNEX Reply Comments, CS Docket No. 97-98, at 3-4. In addition, even in those states where the net cost of a bare pole is positive, net salvage artificially reduces the pole attachment rate.

salvage. As explained in CS Docket No. 97-98, while SBC submits that the gross book method is much simpler than the adjusted net book method, the latter is also a workable alternative.⁵³ What is critical is that any solution be applied across-the-board in order to alleviate the problem in all jurisdictions and to avoid inconsistency and complexity in future proceedings.

Of those who have raised objections to a solution to the net salvage problem, those who are most adamantly opposed are AT&T and MCI. However, the variety of objections these two carriers raise are not well-founded. For example, AT&T claims the problem is not widespread, but it ignores that the most severe form of the problem affects or in the near future is going to affect over 20 jurisdictions.⁵⁴ MCI and AT&T both make opposing arguments that contradict the Commission's depreciation accounting practices.⁵⁵ Notwithstanding MCI's claims to the contrary, it is

⁵³ The fact that a gross book method is likely to result in lower rates than the adjusted net book method is another reason for preferring the gross book method of solving the net salvage problem. The NPRM continues to speculate that "gross book costs may produce a slightly higher rate." NPRM, ¶34. As SBC demonstrated in its Comments in CS Docket No. 97-98, at 8-9 & Exhibit B, rates based on the gross book method should be lower than rates using the adjusted net book method. Further, as far as the impact on carriers, all methods are likely to produce a rate that is lower than the market rate utilities have been allowed to charge prior to the 1996 Act.

⁵⁴ AT&T Reply Comments, CS Docket No. 97-98, at 13-14.

⁵⁵ Id. at 14-17; MCI Reply Comments, CS Docket No. 97-98, at 34-37; MCI Comments, CS Docket No. 97-98, at 15-19. MCI even appears to have the illusion that regulatory depreciation accounting is the basis for decisions regarding replacement of older poles. MCI Reply Comments, CS Docket No. 97-98, at

incontrovertible that SWBT has not fully recovered its investment in poles in the two states where net pole cost is already negative.⁵⁶ In those two states, Oklahoma and Kansas, SWBT had recovered 41% and 50%, respectively, of its original investment as of year-end 1993. MCI's contention to the contrary is built upon MCI's apparent belief that the Commission's depreciation practices have allowed SWBT to obtain an over-recovery of pole removal costs. It would not be proper to reject or limit the remedy to the net salvage problem based upon impeachment or mischaracterization of the Commission's depreciation practices or other flawed objections.

The Commission should reject the flawed objections to a solution to the net salvage problem and adopt the gross book method across-the-board for both carrier and cable operator pole attachments.

IX. THE HALF-DUCT METHOD SHOULD BE ADOPTED FOR BOTH CARRIER AND CABLE OPERATOR CONDUIT RATES.

SBC agrees with the NPRM's proposal to use the half-duct convention for calculating rates for conduit usage by carriers as well as cable operators.⁵⁷ While it is potentially more likely

37("giving the company an incentive to replace its poles once its investment has been fully recovered"); MCI Comments, CS Docket No. 97-98, at 18("This provides a mild incentive for the company to replace its pole plant once it is fully depreciated.").

⁵⁶ See SBC Comments, CS Docket No. 97-98, at 12-14 and Exhibit "A"; SBC Reply Comments, CS Docket No. 97-98, at 7.

⁵⁷ NPRM, ¶38.

that a carrier entering the local exchange business might use copper facilities that would occupy an entire duct, the half-duct convention described in the Pole Attachment Notice would assign an entire duct to a copper cable that "preclude[s] the use of the other half of the duct."⁵⁸ Therefore, despite the potential that carriers entering the local exchange business will have larger cables than cable operators, the half-duct convention is equally applicable to carriers and cable operators.

While the Commission continues to propose a half-duct convention, some commenters in CS Docket No. 97-98 urge the Commission to assign a smaller fraction of the duct to each conduit attachment, such as one-third or one-fourth.⁵⁹ In complete disregard of the fact that the Commission's pole attachment rules are based on actual figures and presumptions that attempt to approximate actual figures, those opposing the half-duct convention suggest methods that are based on a hypothetical future network constructed in the most efficient manner using state-of-the-art construction methods under ideal conditions. For example, NCTA contends that "a quarter-duct methodology most accurately reflects modern conduit network costs

⁵⁸ Pole Attachment Notice, ¶44.

⁵⁹ AT&T Reply Comments, CS Docket No. 97-98, at 28-29 ; MCI Reply Comments, CS Docket No. 97-98, at 25; NCTA Reply Comments, CS Docket No. 97-98, at 53-54.

and construction practices."⁶⁰ As SBC explained in CS Docket No. 97-98, the vast majority of the embedded base of conduit was not constructed using current construction practices.⁶¹ The other opponents likewise rely on the latest conduit construction practices for their arguments for using a fraction smaller than one-half.⁶²

To be valid, a formula that is based on actual, embedded costs and average state-wide figures must be based on actual, real-world conditions in all respects. Certainly, a valid formula should not be based on the hypothetical possibility that a utility could install three or four innerducts in each duct of its conduit system if it were rebuilding its entire conduit system from scratch today. Even if the conduit formula were based on such a hypothetical network(which it should not), it would also need to be based on the hypothetical costs of rebuilding the entire network at current costs. The Commission should avoid such a drastic departure from the long-standing method of calculating pole attachment rates.

SBC also agrees with the NPRM's proposal "that each entity

⁶⁰ NCTA Reply Comments, CS Docket No. 97-98, at 53(emphasis added).

⁶¹ SBC Comments, CS Docket No. 97-98, at 26-30; SBC Reply Comments, CS Docket No. 97-98, at 14-16.

⁶² See, e.g., AT&T Reply Comments, CS Docket No. 97-98, at 28-29 ([T]he utilities' arguments are 'based on out-of-date engineering. '); MCI Comments, CS Docket No. 97-98, at 25("[A] standard 4 inch duct is easily capable of being subdivided 3 to 4 times").

using one half-duct be counted as a separate attaching entity."⁶³ The method of counting entities should otherwise be the same as the method used for poles, as discussed above, including the meaning of "attaching entities." Likewise, the same method of determining the average number of attaching entities should also be used for conduit as for poles.

Finally, SBC agrees with the NPRM's proposal to adopt a "presumptive ratio of usable ducts to maintenance ducts . . . to establish the amount of unusable space."⁶⁴ However, as SBC explained in CS Docket No. 97-98, in addition to at least one full maintenance duct, this presumption should also include ducts that are non-usable as a result of municipal set-aside requirements.⁶⁵ Further, utilities should be allowed to deduct an estimate of the physically damaged ducts so that the quantity of usable ducts is accurate.⁶⁶

The parties who oppose the half-duct convention are also generally opposed to recognizing that one full duct needs to be set aside for maintenance, repair and emergency restoration activities. However, at least one of them, MCI, acknowledging the possible need to perform maintenance and repair work, concedes

⁶³ NPRM, ¶41.

⁶⁴ Id., ¶40.

⁶⁵ SBC Comments, CS Docket No. 97-98, at 30-33.

⁶⁶ Id. at 32-33.

that one innerduct may be non-usable.⁶⁷ Unfortunately, one innerduct is inadequate when the cable(s) being repaired will not fit in inner duct. The other principal objection is the contention by commenters such as the NCTA that the maintenance duct is only for the utility's own use and is not available to attachers.⁶⁸ The deduction of the maintenance spare could be made contingent upon the utility agreeing that the maintenance spare is available to attachers for the same maintenance purposes.⁶⁹ With this stipulation, the benefits to attachers that SBC and other commenters explained in CS Docket No. 97-98 justify the deduction of one full maintenance duct from the usable conduit space.⁷⁰

X. RIGHTS-OF-WAY SHOULD BE ADDRESSED ON A CASE-BY-CASE BASIS.

The NPRM inquires whether a formula should be developed for rights-of-way or whether they should be addressed on a case-by-case basis. It is not necessary to adopt a formula for rights-of-

⁶⁷ MCI Reply Comments, CS Docket No. 97-98, at 47-48. See also NCTA Reply Comments, CS Docket No. 97-98, at 52-54 ("At most, . . ., the maximum required reservation is one inner duct, rather than one full duct." "Even in instances where a LEC might maintain a spare . . ." "[I]f we are to account for such averages on this record, it would have to be half-duct with no set aside, or quarter duct with ILECs' requested set aside, but not both.").

⁶⁸ NCTA Reply Comments, CS Docket No. 97-98, at 53.

⁶⁹ See Time Warner Reply Comments, CS Docket No. 97-98, at 12.

⁷⁰ See Ameritech Reply Comments, CS Docket No. 97-98, at 4-5 & n. 7; GTE Reply Comments, CS Docket No. 97-98, at 15; SBC Comments, CS Docket No. 97-98, at 30-32.

way at this time. Issues such as the rates for access to rights-of-way should be addressed initially through private negotiation between the parties. Although disputes concerning rates for access to rights-of-way, if any, should be rare, the Commission could resolve them on a case-by-case basis. Even if right-of-way disputes do arise, it would be preferable for the Commission to address right-of-way issues as a general matter only after it has gained some experience based on the factual record in specific cases.

Utilities and attachers have managed without a formula for conduit for the last 20 years. Likewise, they should be able to handle right-of-way access without the need for any specific Commission rules on the subject.

XI. THE INITIAL INCREASE CAUSED BY THE CARRIER FORMULA SHOULD BE PHASED-IN OVER FIVE YEARS USING DATA AVAILABLE PRIOR TO YEAR ONE.

SBC agrees with the NPRM's proposal to phase-in the increase in rates caused by implementation of the carrier formula by adding one-fifth of the increase to the rate in each of the five years beginning with the year 2001. The Commission should provide explicit procedures for this phase-in. First, the amount of the increase should be calculated based on data available in the previous year (2000). Second, the increase should not be re-calculated during the five years of the phase-in. Third, during the phase-in period, the utility should be able to re-calculate the base rate to which the one-fifth of the increase is added

each year. Fourth, a full one-fifth share should be added in 2001, even though the carrier rate is not effective until February 8, 2001. Fifth, after the fifth year, i.e. for the year 2006, rates should be calculated in accordance with the carrier formula, including any changes in data through the end of the five-year phase-in period. By clarifying the procedures to be used in the phase-in, the Commission will help carriers avoid any disputes over interpretation of Section 224(e)(4)'s requirement. For example, absent this clarification, if the average number of attachments per pole changes during the phase-in period, it would not be clear whether this change should affect the amount being phased in.

XII. CONCLUSION.

For the foregoing reasons, the Commission should adopt a carrier formula that applies only when the parties are unable to reach an agreement and the Commission should honor, rather than ignore, negotiated agreements even when a complaint is filed.

The carrier formula should use the same presumptions and procedures as the cable operator formula, except for the allocation of the cost of non-usable space. To allocate non-usable space based on the number of attaching entities, the carrier formula should count all entities that have pole attachments governed by Section 224. Thus, each cable operator or telecommunications carrier (as defined in Section 224 to exclude ILECs) should be counted as a separate attaching entity for each

foot, or part of a foot, it occupies. Given that Section 224(e) assigns at least a one-third share of the non-usable space to the ILEC pole-owner and that ILECs generally are not considered "telecommunications carriers" capable of having "pole attachments" for purposes of Section 224, the ILEC should not be double-counted as a separate attaching entity. Neither should the electric utility be counted as an attaching entity unless its attachments are used to provide telecommunications services. Likewise, local government agencies, which do not provide telecommunications services, should not be counted as attaching entities, especially considering that the costs associated with local right-of-way regulation should be shared equitably by all benefitting service providers. However, in the event a utility chooses to permit attachers to share space with third party carriers or cable operators that overlash their lines on the attacher's pre-existing attachments, these overlashing entities should be counted as separate attaching entities.

Finally, the Commission should adopt the simplest and most expeditious method for each utility to determine its presumptive state- or company-wide average number of attaching entities as discussed in these Comments. Adoption of these and SBC's other suggestions here and in CS Docket No. 97-98 will assure a smooth transition to the carrier formula after the turn of the millennium.

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CERTIFICATE OF SERVICE

I, Brenda K. Dinan, hereby certify that the Comments of SBC Communications, Inc., on CS Docket No. 97-151, has been served September 26, 1997, to the Parties of Record.

A handwritten signature in cursive script that reads "Brenda K. Dinan". The signature is written in black ink and is positioned above a horizontal line.

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