

Second, with respect to the meaning of conduit space under, Section 224, the Commission has found that:

total conduit space and conduit space occupied by cable systems is based on duct or conduit capacity. In addition, Section 224 states that '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, or the percentage of the total duct or conduit capacity, 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, duct, conduit, or right-of-way.'³¹

By contrast, "usable space" in Section 224(d) and 224(e) refers specifically to aerial plant: "*space above minimum grade level.*" All discussions of reallocating "unusable" space for telecommunications leading to the 1996 Amendments were in the context of *aerial* attachments, and have no application to underground conduit and duct plant.

In short, while "unusable" space is a workable theory in the context of poles, it does not find sound application to conduit.

Reference to poles and aerial plant practices illustrates the Commission's apparent error in the Notice in this proceeding in attempting to apply unusable space concepts to conduit plant. Some pole agreements "reserve" part of aerial pole space for use by the government (for example, for traffic signalling). That space always has been considered usable because it may

³¹ CS Docket No. 97-98, Notice of Proposed Rulemaking ¶ 44. Similarly, we note that the California statute, which is based closely on Section 224, defines usable space in conduits as "all volume or capacity in which the public utility's line, plant, or system could legally be located, including the volume or capacity rendered unusable by the cable television corporation's equipment." Cal. Pub. Util. Code § 767.5 (Deering 1996).

be used for the attachment of wires.³² Similarly, the neutral zone is usable because it in fact is used by the power company as separation space, for occasional streetlights, and to gain height.³³ Just as the neutral zone (and the occasional set aside for municipal purpose) is used and usable space on the pole, so too is "spare" conduit.

For these reasons, we believe that the Commission's proposed treatment of "spare" duct as "unusable" (and thus subject to a 2/3 allocator for telecommunications services facilities) misapprehends the fundamental nature and use of conduit plant, the distinctions between conduits and poles relative to usable versus unusable space and substantially increases conduit rentals. Conduit rentals, therefore, should be calculated in an identical manner for both video and telecommunications as cable operators advocated previously in CS Docket 97-98.³⁴

V. RIGHTS OF WAY

With respect to rates and access to rights of ways, we believe that these kinds of questions present the Commission with a wide range of potential issues. Cable operators confront many varied right-of-way access issues, including access to bridge conduits, subdivisions, rear utility easements, undeveloped rights-of-way on public property, etc. In addition to the rate and access provisions of Section 224, there are many other sources of law potentially applicable to such cases such as state access-to-premises statutes, state apportionment of easement laws (both

³² See Notice ¶ 24.

³³ While some electric utilities have disputed whether the neutral zone should be assigned to them for the purposes of cost allocation, one utility (Boston Edison) in a submission before the Securities and Exchange Commission ("SEC"), has admitted that the neutral zone is part of the power space. See Construction and Indefensible Right of Use Agreement Between BecoCom, Inc. and RCN-BecoCom L.L.C. (dated June 17, 1997) at 3 (filed with RCN Corp's Amendment No. 2 (Exhibit 10.10) to SEC Form 10A filed with the SEC Sept. 5, 1997).

³⁴ CS Docket 97-98, NCTA Comments at 39-41.

statute and common law), Section 621 of the Cable Act,³⁵ and state and federal antitrust statutes.

The rights-of-way that utility pole owners control in a very real sense have been dedicated to the common weal for the provision of public utility and similar services of social importance. In order to provide for the efficient distribution of electrical and telephone service, state legislatures conferred upon utilities the power of eminent domain³⁶—which power can only be used for a public purpose.³⁷ Utilities often do not need to actually implement their eminent domain power; the mere existence of this power, and a utility declaration that it intends to use it should a property owner not "voluntarily" agree to grant an easement across private property, is often all the utility needs to secure a preferred route for its electric or telephone network.

In addition to the eminent domain power that utilities hold, municipal and local planning commissions typically condition residential subdivision approvals on the dedication of easements to the utilities. States, for their part, typically prohibit the issuance of occupancy permits to structures without working electrical service.³⁸ In a very real sense, utility control and management of rights-of-way ordain the utility with a public trusteeship, which utilities are reluctant to acknowledge or utilize for the public good, preferring instead to maximize this unique authority solely for private (*i.e.*, shareholder) gain.

³⁵ 47 U.S.C. § 541.

³⁶ 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).

³⁷ *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).

³⁸ *See, e.g.*, Fla. Stat. ch. 553.79(6) (1996).

In the *Local Competition Order*,³⁹ the Commission has adopted numerous principles that expressly acknowledge the public utilities' obligation to facilitate development of competitive communications services in keeping with congressional intent to foster facilities-based competition.

To this end, the Commission requires that (1) a utility exercise its eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments;⁴⁰ (2) rights-of-way owned and controlled by telephone utilities may not be reserved by LECs for future use while space on electric utility support structures may only be reserved in furtherance of a "bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service;"⁴¹ (3) a utility take all reasonable steps to accommodate requests for access and that before denying access based on a lack of capacity, the utility must explore potential accommodations in good faith with the party seeking access;⁴² (4) utilities must make available to parties seeking access to rights of way "its maps, plats, and other relevant data available for inspection and copying . . . subject to reasonable conditions to

³⁹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, CC Docket No. 96-98 (released Aug. 8, 1996) ("*Local Competition Order*").

⁴⁰ *Id.* ¶ 1181.

⁴¹ *Id.* ¶ 1169. There is, however, no basis for such reservation permissible under the statute for basic rights of way, which must be made available to all comers without discrimination.

⁴² *Id.* ¶ 1163.

protect proprietary information" and within specific timeframes⁴³ (with decision on permit applications due within 45 days of the attaching party's application for access);⁴⁴ (5) costs applicable to access to, or improvement of, rights of way be borne by the party requesting such access or improvements.⁴⁵

We believe that the Commission should apply these same principles in addressing the right-of-way rate and access matters.

Moreover, state common law on the apportionability of easements and federal law concerning access to compatible easements under Section 621 provide supplemental rights of access, with which such principles are fully consistent. The electric utility industry, for example, has successfully argued that existing easements designated for electric service could be properly extended to include communications facilities.⁴⁶ The Commission should reiterate that conclusion in this proceeding to facilitate competitive access to rights of way.

Because of the complex mix both of the kinds of rights-of-way to which cable operators (and others) require access, and sources of law that affect the treatment of such issues, we submit that the best approach is to reaffirm the foregoing principles and then address each such situation on a case-by-case basis in a manner consistent with the open access principles enumerated in the 1996 amendments to Section 224, in the *Local Competition Order* and the

⁴³ *Id.* ¶ 1223.

⁴⁴ 47 C.F.R. § 1.403(b).

⁴⁵ 47 U.S.C. § 224(h)(i); 47 C.F.R. § 1.1416(b).

⁴⁶ For example, in *Cousins v. Alabama Power Co.*, 597 So.2d 683 (1992), the Alabama Supreme Court in a unanimous opinion concluded that Alabama Power Company had the right to apportion or share certain rights-of-way and private property easements for fiber optic cable which it owns and uses.

Commission's rules, and those contained elsewhere under the Communication Act and state statutory and common law.

VI. CONCLUSION

For the foregoing reasons, we respectfully request the Commission to adopt regulations consistent with the principles set forth in these comments.

Respectfully submitted,

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EXHIBIT 1

TOTAL ROUTE/SHEATH AND FIBER MILES							
	1990	1991	1992	1993	1994	1995	1996
SHEATH/ROUTE MILES							
ILECS	238,400	284,100	336,900	398,800	451,400	547,000	599,600
(Including RBOC plus GTE, Sprint and Rural Telcos)							
CAPS/CLECs	1,326	1,980	3,357	5,466	9,025	16,961	285,036
Total Sheath/Route Miles of Fiber	239,726	286,080	340,257	404,266	460,425	563,961	884,636
FIBER MILES							
ILECS	6,029,300	8,270,900	10,740,100	14,156,600	16,982,600	20,112,200	23,180,400
(Including RBOC plus GTE, Sprint and Rural Telcos)							
CAPS/CLECs	55,100	82,200	122,900	230,700	396,200	643,400	1,312,900
Total Fiber Miles	6,084,400	8,353,100	10,863,000	14,156,600	17,378,800	20,755,600	24,493,300
Source for ILECs and CLECs:							
FCC Fiber Deployment Update (1996)							

EXHIBIT 2

MSA (1990 Census)	NUMBER OF OFFICES 1993	TOTAL ATT PERSONS 1993	NUMBER OF OFFICES 1998	TOTAL ATT PERSONS 1998	NUMBER OF OFFICES 1999	TOTAL ATT PERSONS 1999
Source: FCC Fiber Deployment Updates (1998)						
1. New York, Northern New Jersey-Long Island, NY-NJ-CT CMSA	4	7	5	8	7	10
2. Los Angeles-Anaheim-Riverside, CA CMSA	2	5	4	7	6	9
3. Chicago-Gary-Lake County, IL-IN-WI CMSA	2	5	1	4	3	6
4. San Francisco-Oakland-San Jose, CA CMSA	3	6	5	8	6	9
5. Philadelphia-Wilmington-Trenton, PA-NJ-DE-MD CMSA	3	6	2	5	5	8
6. Detroit-Ann Arbor, MI CMSA	2	5	4	7	4	7
7. Boston-Lawrence-Salem, MA-NH CMSA	2	5	3	6	3	6
8. Washington, DC-MD-VA CMSA	1	4	2	5	2	5
9. Dallas-Fort Worth, TX CMSA	2	5	2	5	5	8
10. Houston-Galveston-Brazoria, TX CMSA	3	6	4	7	5	8
11. Miami-Fort Lauderdale, FL CMSA	2	5	2	5	3	6
12. Atlanta, GA MSA	4	7	2	5	3	6
13. Cleveland-Akron-Lorain, OH CMSA	2	5	3	6	5	8
14. Seattle-Tacoma, WA CMSA	3	6	4	7	4	7
15. San Diego, CA MSA	3	6	4	7	6	9
16. Minneapolis-St. Paul, MN-WI MSA	1	4	1	4	1	4
17. St. Louis, MO-IL MSA	2	5	3	6	3	6
18. Baltimore, MD MSA	2	5	3	6	3	6
19. Pittsburgh-Beaver Valley, PA CMSA	4	7	3	6	3	6
20. Phoenix, AZ MSA	1	4	4	7	3	6
21. Tampa-St. Petersburg-Clearwater, FL MSA	2	5	2	5	3	6
22. Denver-Boulder, CO CMSA	3	6	3	6	3	6
23. Cincinnati-Hamilton, OH-KY-IN CMSA	3	6	2	5	4	7
24. Milwaukee-Racine, WI CMSA	1	4	2	5	2	5
25. Kansas City, MO-KS MSA	0	3	1	4	1	4
26. Sacramento, CA MSA	2	5	2	5	4	7
27. Portland-Vancouver, OR-WA CMSA	2	5	3	6	4	7
28. Norfolk-Virginia Beach-Newport News, VA MSA	0	3	0	3	1	4
29. Columbus, OH MSA	1	4	2	5	2	5
30. San Antonio, TX MSA	0	3	1	4	2	5

MSA Name	NUMBER OF OPEN LINES 1997	TOTAL NUMBER OF LINES 1997	NUMBER OF OPEN LINES 1998	TOTAL NUMBER OF LINES 1998	NUMBER OF OPEN LINES 1999	TOTAL NUMBER OF LINES 1999
<i>Source: FCC Fiber Deployment Update (1999)</i>						
31. Indianapolis, IN MSA	5	8	4	7	5	8
32. New Orleans, LA MSA	0	3	0	3	1	4
33. Buffalo-Niagra Falls, NY CMSA	2	5	2	5	2	5
34. Charlotte-Gastonia-Rock Hill, NC-SC MSA	2	5	2	5	2	5
35. Providence-Pawtucket-Fall River, RI-MA CMSA	1	4	2	5	3	6
36. Hartford-New Britain-Middletown, CT CMSA	1	4	3	6	4	7
37. Orlando, FL MSA	2	5	2	5	4	7
38. Salt Lake City-Ogden, UT MSA	0	3	2	5	3	6
39. Rochester, NY MSA	2	5	2	5	2	5
AVERAGE	3	6	3.5	6.5	4.5	7.5