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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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 In the Matter of )  
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 Implementation of Section 703(e) )  
 of the Telecommunications Act )  
 of 1996 )  
 )  
 Amendment of Commission's Rules )  
 and Policies Governing Pole )  
 Attachments )  
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CS Docket No. 97-151

COMMENTS OF AT&T CORP.

David L. Lawson  
Scott M. Bohannon

Mark C. Rosenblum  
Roy E. Hoffinger  
Seth Gross  
Connie Forbes

1722 Eye Street N.W.  
Washington, D.C. 20006  
(202) 736-8034

Room 3245G1  
295 North Maple Avenue  
Basking Ridge, New Jersey 07920  
(908) 221-2631

September 26, 1997

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## SUMMARY

In passing the historic Telecommunications Act of 1996, Congress reaffirmed the need to regulate the rates that attachers pay to owners of poles, conduits, ducts, and rights-of-way. Utilities continue to exercise a stranglehold over these bottleneck facilities, a strategic position that absent effective Commission oversight could allow them to extract monopoly rents and discriminate against their competitors at this critical juncture in the telecommunications industry. This is especially true in light of the 1996 Act's required changes that, if improperly interpreted, could produce rates many times higher than those generated by the current formula.

In Section I, AT&T demonstrates that space-conserving practices such as overlashing and the third party use of an existing attacher's excess capacity should not be restricted or assessed an additional charge. Attachers are paying for the right to use space and such practices do not use additional pole space. Some pole owners have attempted to circumvent the Commission's rules and § 224 by suggesting that attachment rates should be based on the burden the attachments place on the pole. This approach should be rejected for several reasons including: (i) overlashing imposes a very small burden on the pole, and the use of excess capacity imposes none; (ii) the burden approach is administratively infeasible; and (iii) such charges would discourage these efficient, space saving practices.

AT&T demonstrates in Section II that the Commission has correctly defined as "attachers" incumbent LECs, utilities providing telecommunications services, competing telecommunications carriers, government agencies, and cable operators. This interpretation is consistent with the language of § 224 as amended and its legislative history. It also help prevent excessively high pole attachment rates. The Commission should also establish a rebuttable

presumption that each pole contains at least three attachers, a conservative assumption given the already large number of attachments placed on many poles as well as the increase in attachments that is likely to arise as competition ensues.

In Section III, AT&T endorses the Commission's unusable space formula with respect to poles with one modification. "Number of Attachers" should be replaced with "Attacher of Record for Each Foot of Space," a modification that will ensure that each attacher bears a share of the unusable space costs in proportion to the amount of space it uses on the pole.

As demonstrated in Section IV, no conduit space is "unused." The one-third-duct approach -- a conservative approach given current industry practices -- and, the half-duct proposal as well, already account for the cost of a maintenance duct. In this sense, the maintenance duct is actually used space because occupants are paying for the right to temporarily occupy that space if necessary. Allowing conduit owners to also recover the cost of maintenance ducts pursuant to the suggested formula, therefore, would actually permit double recovery.

Section V discusses the costs for access to rights-of-way. Utilities have usually long recovered the costs of their rights-of-way and they will have only limited expenses associated with an attacher's access to these areas. As a result, they should only be permitted to recover the incidental expenses associated with administering this occupancy and any other direct costs.

Finally, in Section VI, AT&T urges the Commission to reaffirm: (i) that rates may not discriminate between types of attachments; (ii) the current presumptions regarding usable space, pole height, and safety space; and (iii) the general approach to usable space calculations.

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**COMMENTS OF AT&T CORP.**

Pursuant to the Commission's Notice of Proposed Rulemaking,<sup>1</sup> AT&T Corp. ("AT&T") hereby submits its comments with respect to the designated issues concerning pole attachment rates.

**INTRODUCTORY STATEMENT**

Access to poles, ducts, conduits, and rights-of-way undeniably is critical for facilities-based competition. And, as AT&T explained in its comments in Docket No. 97-98,<sup>2</sup> competitive

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<sup>1</sup> Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Notice of Proposed Rulemaking (released August 12, 1997) ("NPRM").

<sup>2</sup> See Comments of AT&T Corp., Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98 (filed June 27, 1997) ("AT&T 97-98 Comments"); Reply Comments of AT&T Corp., Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98 (filed August 11, 1997) ("AT&T 97-98 Reply Comments"). Copies of  
(. . . continued)

forces can no more constrain pole owners from setting supracompetitive attachment rates today than they could in 1978 when Congress passed the Pole Attachment Act to prevent such monopoly abuses. Rather, the Commission must continue its vigilant oversight of structure rates and practices if it is to promote efficient competition. See AT&T 97-98 Comments at 3-4; AT&T 97-98 Reply Comments at 1-3.

Congress confirmed the need to “strike[] a[n appropriate] balance between competition and regulation”<sup>3</sup> in enacting the Telecommunications Act of 1996 (“1996 Act”) amendments which the Commission seeks to implement in this proceeding. Although it was pressed by some structure owners to do so, Congress did not direct the Commission to turn a blind eye to anticompetitive pole and conduit rates and practices. To the contrary, Congress expanded the Commission’s jurisdiction over attachment rates to provide protection for telecommunications companies and not just cable operators. Moreover, the structure of the Commission’s existing attachment rules, which require an attacher first to negotiate with a pole owner before turning to the Commission’s complaint process to obtain access to bottleneck facilities at just and reasonable rates, NPRM ¶ 12, remain consistent with the mandate of the Pole Attachment Act, as amended by § 703 of the 1996 Act. Hence, the Commission has correctly determined that the current complaint procedure must remain in place. Id.

The 1996 Act amendments will require certain specific adjustments to the Commission’s attachment rate formula and rules, and AT&T generally supports the Commission’s proposed

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(. . . continued)

AT&T’s 97-98 Comments and Reply Comments are attached hereto as Appendices A and B, respectively.

<sup>3</sup> 142 Cong. Rec. S687-01, S688 (Feb. 1, 1996) (comments of Senator Hollings).

changes to its rules to conform them with § 703(e) of the Act. In particular, AT&T supports the Commission's tentative conclusions that: (i) structure owners must not be permitted to restrict efficient, space-conserving practices such as overlashing and the leasing by existing attachers of their excess capacity to new attachers (*id.* ¶ 15); and (ii) all attaching entities, including incumbent local exchange carriers, competing telecommunications carriers, utilities providing telecommunications services, cable operators and government agencies, should be counted in apportioning the costs of unusable space. *Id.* ¶¶ 22-24. As the Commission notes, those outcomes are the only ones consistent with the language and procompetitive purposes of the Pole Attachment Act and the 1996 Act amendments. On the other hand, there is no "unusable" space in conduit because the Commission's proposed "half-duct" approach, as well as the more realistic "one-third duct" approach sponsored by AT&T and others, already account for maintenance and spare ducts. Accordingly, the Commission's proposal to create a separate unusable space formula for conduit should not be adopted.

Further, it is important to recognize, that, even as proposed, the Commission's amended pole attachment rate formula is likely to produce rates that are significantly higher than those available under the current formula. Unlike the existing formula, the new approach would distinguish between costs for usable and unusable space. If the Commission's formula is adopted, an attacher would pay for the cost of the usable space that it occupies. At the same time, however, two-thirds of the unusable space costs would be allocated to the attachers equally. Hence, while an attacher would pay only for the usable space it occupies, it could bear as much as two-thirds of the unusable space costs. The Commission's proposed adjustments to the maximum permissible rate, then, could generate a rate more than 500% higher than the current formula if

the formula were applied with an (improper) assumption of a single attacher or 324% higher with two attachers.<sup>4</sup> Indeed, the two formulas will not generate the same rate until there are nine attachers. Given that the current rate methodology (coupled with the Commission's waiver process) already ensures that owners receive just compensation for the use of their property,<sup>5</sup> the Commission should carefully consider how the resolution of each of the outstanding issues may exacerbate this tremendous rate increase. The Commission should, in all events, adopt its proposal, consistent with amended § 224(e)(4), to delay implementation of any rate increases until 2001 and to add only one-fifth of the resulting increase "in each of the subsequent five years." NPRM ¶ 44.

In addition, the Commission should ensure that utilities do not collect more than the actual expenses that they incur in providing access to their rights-of-way. In most instances, rights-of-way were acquired long ago and their costs have already been recovered. Moreover, if an attacher determines that it needs access to a utility's right-of-way, the costs associated with using the right-of-way will be borne almost entirely by the attacher. Consequently, the owner of a right-of-way should be allowed only to recover the incidental costs associated with administering the right-of-way, supervising the initial occupancy, and other direct costs associated with such access.

Finally, the Commission should reject the self-serving adjustments to the current rate formula proposed by certain pole owners, including proposed decreases in the presumptive amount of usable space, the proposed use of gross book costs instead of net book costs, and the

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<sup>4</sup> The mark-up stemming from the proposed formula change is illustrated in Section II, *infra*, and derived algebraically in Appendix C.

<sup>5</sup> See generally AT&T 97-98 Comments at 6, 12-13.

proposed treatment of "safety space" as unusable. These electric utility proposals would allow those utilities unjustifiably to increase attachment rates at a critical juncture in telecommunications competition. AT&T reiterates its opposition to these proposals in Docket No. 97-98 and highlights a few of the more important issues in Section IV below.

**I. POLE OWNERS SHOULD NOT BE PERMITTED TO RESTRICT OR CHARGE FOR OVERLASHING, THIRD PARTY USE OF AN EXISTING ATTACHER'S DARK FIBER, OR OTHER EFFICIENT, SPACE-CONSERVING PRACTICES.**

The Commission seeks comment on "how best to promote the rapid deployment of competitive telecommunications services." NPRM ¶ 15. The best policy is one that promotes efficient use of existing facilities instead of unnecessary, undesirable, and often impossible duplication of poles, ducts, conduits, and rights-of-way. The Commission has taken an important step in this direction by tentatively concluding "that telecommunications carriers should be permitted to overlash their existing lines with additional fiber when building out their systems." NPRM ¶ 15.<sup>6</sup> Attachers already fully compensate pole owners for the use of the relevant space (and likely will pay even more under the amended formula), and, so long as the use of the rented space does not inhibit the use of other pole space, that use should be permitted without additional charge. See AT&T 97-98 Comments at 5-10; AT&T 97-98 Reply Comments at 8.

The NPRM seeks comment on what rule should apply when cable is overlashed for use by a party other than the existing attacher. Plainly, the same rule should apply. Payments by the existing attacher pay for the use of the entirety of the leased space and fully compensate the pole

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<sup>6</sup> See also NPRM ¶ 14 (the Commission is committed "to ensur[ing] that the growth and development of cable system facilities [are not] hindered by an unreasonable denial of overlashing by a utility pole owner") (citing Common Carrier Bureau Cautions Owners of Utility Poles, Public Notice, DA 95-35 (January 11, 1995)).

owner for that space. Accordingly, the ownership of the overlashed cable is simply irrelevant. The amount of space used does not increase. And, no additional costs are imposed on the pole owner, so long as the overlashes are engineered properly. Thus, attachers should be free to contract with third parties who want to overlash to the attachers' cables.<sup>7</sup>

For the same reasons, an attacher should be free to lease to third parties dark fiber that is attached to leased pole space or that exists in leased conduit space. The Commission has long held that an attacher should be free to allow whatever transmission across its fiber it wishes. Heritage Cablevision Assocs. & Texas Cable TV Ass'n v. Texas Utils. Elec. Co., 6 FCC Rcd 7099 ¶ 32 (1991) ("Heritage Cablevision"). And, again, there are no relevant impacts on used space, on the owners' costs or on the physical integrity of the conduit system.

Some pole owners nonetheless propose a radical shift in the Commission's approach that would, they allege, justify charging the same rate for overlashed cable as for existing attachments. See NPRM ¶ 18. This proposal would purport to set pole attachment rates according to the "burden" they place on the pole, and it should be rejected for several reasons. First, the utilities' central premise is false. Overlashing does not impose the same type of burden on a pole as the

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<sup>7</sup> Bell Atlantic and NYNEX oppose third party overlashing because, they claim, attachers have purchased the right to "access" the pole space. Bell Atlantic and NYNEX 97-98 Reply Comments at 12. Access includes the right to place attachments that do not inhibit the integrity of the pole or violate sound engineering practices (see § 224(f)(2)), including overlashing. If access incorrectly is to be construed more narrowly, then attachers should only have to pay for the limited access that they receive -- an amount much less than the cost of one foot of pole space. Bell Atlantic and NYNEX also maintain that third party overlashing would allow these parties to "evade paying their fair share." Bell Atlantic and NYNEX 97-98 Reply Comments at 12. But by their own admission, pole attachment rates must be based on the percentage of total usable space occupied by an attachment (id. at n.20) and no additional space is actually occupied by the overlasher. The attacher has already paid for access to the space.

original attachment. Overlashed fiber is much smaller and lighter than attachments already placed by telecommunications carriers and cable operators on poles.<sup>8</sup> Even under conditions of extreme ice and snow, the marginal increase in pole weight and stress attributable to the overlashed fiber is minimal, especially when compared with the much larger and heavier electric utility cables and equipment and traditional incumbent LEC copper cables. And plainly, third party use of already attached dark fiber or third party use of already leased ducts or inner ducts place no incremental burden on poles and conduit, respectively.

Second, the “burden” approach, which necessarily would require the Commission to ascertain different burdens for different attachment types, is administratively infeasible and would produce completely arbitrary results. To measure relative burdens, the Commission would have to account for, inter alia, different cable and fiber sizes, weights and characteristics, different pole sizes, types, and heights and climatic factors that vary from region to region. The Commission’s relatively simple presumptions, then, would become a huge table of “presumptions.” Even assuming such a table could be compiled at all, that approach is entirely inconsistent with Congress’ expressed intent that pole attachment regulation be straightforward and consume minimal Commission resources. See Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, Notice of Proposed Rulemaking ¶ 4 (released March 14, 1997) (citing legislative history).

Third, any approach that produced significant charges for overlashing and third party use of existing excess capacity would discourage those efficient, space-conserving practices. It would

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<sup>8</sup> Even an overlashed copper cable is likely too be much smaller than the cable placed by electric utilities and historically by incumbent LECs.

also further encourage structure owners to claim that structures are “full” and that expensive modifications or new poles are required. Of course, the pole owners are expressly authorized to restrict attachments if there truly is “insufficient capacity and for reasons of . . . generally applicable engineering purposes.” § 224(f)(2).<sup>9</sup> And if a taller or larger pole size is actually required to accommodate the burden of an additional attachment, then the owner may recover reasonable associated expenses through make-ready charges. Further, if a pole owner can demonstrate that, even when pole modification or replacement is not required, it will incur additional expenses not covered by make-ready payments, it can always seek to recover this incremental cost through negotiation or pursuant to the Commission’s existing complaint process. Because there is no reason to believe that any additional cost generally is incurred by the pole owner from overloading or third party use of existing excess capacity, however, the presumptive incremental cost of these practices should be zero.

The anticompetitive motivation of this burden proposal is only too clear. Electric utilities impose a much greater burden per attachment -- particularly when non-cable electrical equipment is included -- than telecommunications carriers or cable companies. Yet, pole owners do not propose that they bear a higher percentage of pole costs than those attachers using much lighter

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<sup>9</sup> Bell Atlantic and NYNEX attack third party overloading in part on the basis that this practice could interfere with the pole’s integrity. Bell Atlantic and NYNEX 97-98 Reply Comments at 11-12. Section 224(f)(2) already permits the pole owner to prevent an attachment from being overlashed if this problem were to arise, just as it does when the attacher attempts to overlash to its own attachment -- a practice Bell Atlantic and NYNEX do not oppose. *Id.* at 12 (“It is common practice within the industry to permit an attaching entity to overlash on to its existing cables on a pole without imposing an additional fee so long as the overlashed cables are used by that same entity and the entity gives the pole owner notice of the proposed overloading arrangement”).

and smaller cables. They simply insist that an overlasher should be considered an attacher and pay for an additional foot of pole space even though no additional space is actually used. Accordingly, if the Commission chooses to use a "burden" methodology instead of an occupied space presumption in setting maximum rates, electric utility attachments should bear the largest share of pole costs because they impose by far the greatest burden. The better approach, however, is to continue the present methodology of allowing pole and conduit owners to collect compensatory fees for the use of space on their poles and in their conduit. Because overlashing and third party use of existing capacity do not use additional pole space, the owner should not be permitted to collect an additional charge.<sup>10</sup>

**II. ALL OF THE ENTITIES IDENTIFIED BY THE COMMISSION SHOULD BE CONSIDERED ATTACHERS FOR THE PURPOSE OF ALLOCATING THE COSTS OF UNUSABLE SPACE.**

AT&T supports the Commission's tentative conclusion that incumbent LECs (NPRM ¶ 23), utilities providing telecommunications services (id. ¶ 22), competing telecommunications carriers (id.), government agencies (id. ¶ 24) and cable operators (id. ¶ 22) should all be counted in apportioning the costs of unusable space. Indeed, any party on the pole except a utility not providing telecommunications services should be counted.

Under the amended attachment rate scheme for allocating the costs associated with unusable pole space, the rates that attachers pay will depend primarily upon the number of

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<sup>10</sup> The Commission has also sought comment on whether or not to presume that telecommunications attachments occupy one foot of pole space like cable television attachments. NPRM ¶ 19. Today's telecommunications attachments typically occupy much less than one foot of space which might support using a lower presumption, but certainly could not justify increasing the amount of occupied space.

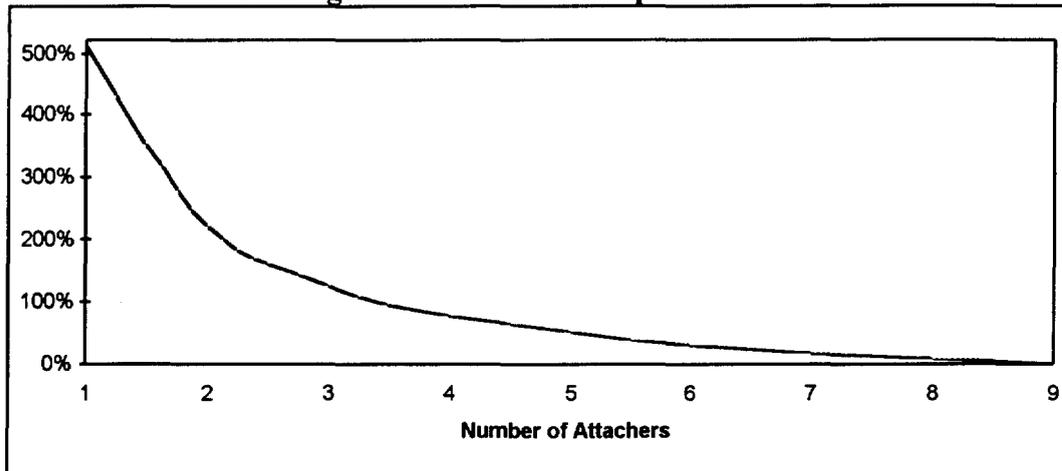
attachers counted in apportioning those costs. That is because the largest portion of pole costs will be assigned to unusable space (64%). Thus, for example, if the rate formula improperly presumed only a single attacher, that attacher could end up paying nearly half of the total pole costs, even though the attacher actually occupies less than 8% of the total usable space on the pole.<sup>11</sup> And as shown in the chart on the following page, use of a single attacher in the Commission's formula would produce rates over 500% higher than current rates. See also Appendix C. Obviously, then, it is imperative that the Commission include all parties that reasonably fall within the statutory definition of an attacher so that its amended rules do not create unnecessary barriers to efficient telecommunications competition.

The Commission's proposed approach is consistent with the text, purposes and history of the 1996 Act amendments that require this explicit rate treatment of unusable space. The Commission approach is also the only way to prevent overrecovery and, specifically, to avoid allowing pole owners to recover from telecommunications attachers more than the two-thirds of such costs to which the statute limits them.

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<sup>11</sup> Under the Commission's pole height presumption of 37.5 feet and useable space presumption of 13.5 feet, 64% of the pole is unusable. With just one attacher, the two-thirds of the cost associated with the unusable space that the statute assigns to attachers is 42.66% of total pole costs. In addition, the attacher must pay for the used space it occupies -- one presumptive foot of used space divided by 13.5 feet of usable space multiplied times the 36% of pole costs associated with usable space, or 2.67% of total pole costs -- for a total of more than 45% of total pole costs.

**Pole Rate Percentage Increase Under Proposed Commission Formula**



In the Conference Report on what would become the Telecommunications Act of 1996, the committee explained that “[n]ew subsection 224(e)(2) establishes a new rate formula charged to telecommunications carriers for the non-useable space of each pole. Such rate shall be based upon the number of attaching entities.” 142 Cong. Rec. H1078, H1134 (January 31, 1996) (Conference Report on S. 652, Telecommunications Act of 1996) (emphasis added). Cable companies, telecommunications carriers, government agencies, and utilities providing telecommunications services all fit the description of an attacher for these purposes. Further, Congress clearly recognized that in some instances there may be a distinction between those attachers that will be charged according to the unusable space formula and the number of attachers that are counted in determining the amount of that charge.

**Cable operators.** It is clear that Congress intended to allow traditional cable operators to continue enjoying the lower rates generated by the Commission’s current rules rather than the higher rates they would otherwise face under the new § 224(e) of the Act. See § 224(d)(3); 141 Cong. Rec. H9954-05, H9989 (October 12, 1995). It is equally clear, however, that Congress did not intend separate treatment of cable attachment charges to cause non-cable attachers to bear a

disproportionate share of unusable space costs. Indeed, excluding cable operators from the number of attachers when allocating unusable space costs would lead to absurd results.<sup>12</sup> For example, on an electric utility pole with cable and competitive LEC attachments, failing to count the cable attachment in apportioning the costs of unusable space would require the competitive LEC to bear two-thirds of the total unusable space costs. But the utility would also recover unusable space costs from the cable company because the existing rate formula that will continue to apply to cable attachments assigns a portion (a little less than 8%)<sup>13</sup> of the total costs of the pole -- including unusable space -- to attachers. Thus, the electric utility would bear only about a quarter of the costs of unusable space, a result that is patently discriminatory and unreasonable and in direct violation of the statutory requirement that the apportionment among attachers “equal[] two-thirds” of the costs of unusable space. See 47 U.S.C. § 224(e)(2).

**Incumbent LECs and other utilities providing telecommunications services.** The clearest support for counting utilities providing telecommunications services in the number of attachers comes from the Act itself. Congress included an imputation rule providing that

[a] utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

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<sup>12</sup> See Green v. Bock Laundry Machine Co., 490 U.S. 504, 509-10 (1989) (courts should reject an interpretation of a statute if it would have irrational results); In re Chapman, 166 U.S. 661, 667 (1897) (“nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion”).

<sup>13</sup> Under the current methodology, the cable operator would pay 7.41% (1/13.5) of total pole expenses, or 7.41% of both usable and unusable space costs.

§ 224(g) (emphasis added). Obviously, then, Congress believed that a utility providing telecommunications services should be treated the same as a telecommunications carrier. Because a telecommunications carrier clearly satisfies the definition of an attacher, so should such a utility participating in this market. This conclusion applies with equal force to incumbent LECs. An incumbent local exchange carrier is a utility (§ 224(a)(1)) engaged in the provision of telecommunications services. In addition, excluding incumbent LECs from the class of attaching parties would produce certain windfalls for electric utilities, who plainly receive compensation from attaching incumbent LECs, whether in the form of explicit compensation arrangements or “bill-and-keep” reciprocal compensation arrangements under which the electric utility and incumbent each use the other’s poles without charge.

**Government agencies.** Government agencies are also attachers. As the Commission recognizes, pole owners frequently must “provide certain attachments for public use” in return for franchise or statutory authorization. NPRM ¶ 24. While this “compensation” arrangement may differ from those between cable operators or competitive LECs and pole owners, it is nevertheless clear that pole owners are being compensated for the use of their pole space by the government. The government agency, then, is simply another attacher.

AT&T also supports the Commission’s proposal to establish a presumption for the number of attachers on each pole. NPRM ¶ 26. More specifically, instead of conducting its own study (id. ¶ 27) or ordering pole owners to do so (id. ¶ 26), the Commission should presume that any pole with attachments<sup>14</sup> has at least three attachers -- an incumbent LEC, a competitive LEC,

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<sup>14</sup> All poles relevant for establishing this presumption already have a minimum of one attacher on them. Including poles with no attachments in any study would force attachers to pay for the unusable space on such poles which are used solely by pole owners.

and a cable televisions operator. Even before telecommunications competition, most poles today already support at least an electric utility, an incumbent LEC, and a cable operator. If the electric utility is itself providing telecommunications services, the pole already supports three attachers. Of course, many poles, particularly in urban areas, already support many more than three attachments, and the potential number of attachers is even larger, with several companies indicating their intention to engage in some form of facilities based competition, the possibility that other non-electric utilities may choose to provide telecommunications services, and the presence on many poles of attachments by government agencies. Furthermore, incumbent LECs, as well as electric utilities, frequently place multiple attachments on multiple units of pole space. Thus, the presumption of three attachers is already a conservative one and it will become even more so with the advent of local competition and the increased ability of cable companies and electric utilities to offer a broader range of services.

Of course, any pole owner that believes that the rebuttable presumption is too high is free, and will have ample incentive, to perform statistical studies in an effort to establish a more accurate average number of attachers in its service area, a step the Commission has already proposed that they undertake.<sup>15</sup> NPRM ¶ 26. The Commission should be aware, however, that even assuming that there are three attachers on the average “attached” pole, rates could still more than double under the new rate methodology. See Appendix C.<sup>16</sup>

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<sup>15</sup> It is critical, however, that any such study not include poles with no attachments in determining the average number of attachments per pole. See footnote 14.

<sup>16</sup> If the Commission adopts the untenable position that overlashers or users of existing dark fiber must pay attachment fees, then they also should be counted as attachers.

**III. AT&T GENERALLY SUPPORTS THE COMMISSION'S COST ALLOCATION FORMULA FOR UNUSABLE SPACE AS IT APPLIES TO POLES.**

AT&T supports the Commission's proposed formula for calculating the costs associated with unusable space. See NPRM ¶ 21. AT&T believes, however, that the formula should be modified so that "Number of Attachers" is replaced with "Attacher of Record for Each Foot of Space." This approach will make attachers bear a share of unusable space costs in proportion to the amount of space that they occupy on the pole. An attacher occupying four feet of pole space should pay more unusable space costs than an attacher occupying just one foot for the same reasons that the former bears more of the costs of usable space than the latter. Moreover, this cost allocation methodology will reduce pole owners' incentives to deploy additional cables unnecessarily using up any remaining pole space and thereby forcing an entrant to incur the much higher pole replacement cost that would be required before any attachment could take place.

Because the costs associated with unusable space are now apportioned directly among attachers and non-attachers according to the requirements of § 224(e), the Commission has also correctly determined that an adjustment is required in the usable space formula. NPRM ¶ 33.

Under the current formula, the maximum rate would equal

$$\frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate,}$$

whereas the appropriately adjusted maximum rate should equal

$$\frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \frac{\text{Usable Space}}{\text{Pole Height}} \times \text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate.}$$

This modification is necessary to prevent pole owners from double recovering the cost of any pole space.<sup>17</sup>

#### **IV. THE COMMISSION SHOULD CLARIFY THAT ALL CONDUIT SPACE IS USABLE.**

The adjustments required for conduit space present unique complications. As AT&T has previously demonstrated, it is clear that most conduit today can accommodate three, four, five, or even six cables. See AT&T 97-98 Reply Comments at 28 (citing NCTA 97-98 Comments at 40). The one-third-duct proposal, which is a conservative approach given current industry practices,<sup>18</sup> implicitly assumes, then, that at least one inner duct per conduit is reserved for maintenance and emergency purposes because the conduit occupant is paying for more space than physically occupied. Further, unlike unusable pole space, these reserved ducts can be used, are used at times, and serve an ongoing purpose. In short, there is no “unusable” space in conduit and thus there is no need for a separate formula to recover the costs of unusable space.

In addition, the Commission must treat all conduit space as usable to prevent overrecovery. At most, one inner duct per conduit system would be required for maintenance and emergency purposes (AT&T 97-98 Comments at 23), leaving on average at least four or five inner ducts available for occupancy. Even with only four inner ducts, an occupant pays for 1.33 inner ducts under a one-third-duct approach although it only uses one.<sup>19</sup> If the Commission

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<sup>17</sup> AT&T calls to the Commission’s attention the fact that Appendix A of the Notice apparently contains the current formula, although it is labeled as the proposed formula.

<sup>18</sup> The same conclusion would apply with even greater force to the Commission’s proposed half-duct approach which underestimates the number of inner ducts available in conduit today and overestimates the number of maintenance ducts required in a conduit system.

<sup>19</sup> Under the half-duct approach, the occupant would pay for two inner ducts.

declared maintenance ducts as unusable, the occupant would not only pay for part of the reserved duct pursuant to the unusable space formula, the occupant would also bear the cost for part of the reserved duct's costs through the usable space formula.<sup>20</sup> This overrecovery is obvious when two of the four inner ducts are used by occupants. Under the one-third-duct approach, they each pay for one-third of the maintenance duct pursuant to the usable space formula and then together -- if the Commission's proposed methodology is adopted -- they would pay for two-thirds of the maintenance duct pursuant to the unusable space formula. In other words, the conduit owner would recover four-thirds or 133% of the maintenance duct costs. If three inner ducts were used by occupants, this excessive recovery would expand to 166%.<sup>21</sup> In both instances, the conduit owner will receive compensation from the occupants that exceeds the total conduit costs. Clearly, then, treatment of maintenance ducts as unusable space is inconsistent with its periodic use and with either a one-third-duct or half-duct approach.

**V. THE COMMISSION SHOULD ENSURE THAT RATES CHARGED FOR ACCESS TO RIGHTS-OF-WAY REFLECT THE OWNER'S ACTUAL COSTS.**

The Commission seeks comment on the degree to which rights-of-way issues will arise and whether it should adopt rules specifying a methodology to determine a just and reasonable rate for access to such rights-of-way. NPRM ¶¶ 42-43. Although the circumstances surrounding each right-of-way may be unique, AT&T believes that a consistent set of principles should apply

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<sup>20</sup> In fact, it is more likely that a one-fifth duct approach would be necessary to prevent overrecovery because only one maintenance duct is required per conduit system, not one per conduit, and many conduit today contain more than four inner ducts.

<sup>21</sup> Under the half-duct approach, two occupants would pay for 166% of the maintenance duct costs and three occupants would pay for almost 217%.

in evaluating the reasonableness of rates charged by utilities for access to their rights-of-way. The most important principle is that rates must be based on cost. In addition, the Commission should presume that a utility has already recovered the capital costs associated with obtaining the rights-of-way and, therefore, that occupants need only pay for direct and incremental costs.

In some instances, the most cost-efficient and less environmentally impacting way for AT&T, and other new entrants, to install their own facilities for the provision of telecommunications services will be by using existing utility rights-of-way. Such instances could arise, for example, where a utility has no available capacity in its existing conduit and a competitive LEC determines that its business needs justify installation of its own conduit on the utility's rights-of-way. In anticipation of such competitive LEC needs, and in order to promote facilities-based competition, Congress wisely required utilities to provide telecommunications carriers with access to their rights-of-way. § 224(f). Moreover, Congress required that any compensation to the utility for such access be based on cost. See §§ 224(e)(2), (3). Hence, the Commission must ensure that utilities base their rates on the actual costs associated with such access.

In most, if not all, instances where a utility is providing access to its right-of-way, the telecommunications carrier will be responsible for the actual installation of any telecommunications facilities, as well as restoration of the right-of-way. Thus, the significant costs associated with access to utility rights-of-way will be borne directly by the accessing carrier. This is particularly true given that most rights-of-way were obtained long ago and -- unlike poles or conduit -- rights-of-way do not wear out. Utilities will in most instances have already fully recovered the costs of these durable assets from their customers. For these reasons, then, AT&T

submits that the cost-based compensation to utilities should be limited to the out-of-pocket costs actually incurred by the utility in providing such access, for example, the costs incurred in providing physical egress to the right-of-way, clerical costs incurred in maintaining necessary records, and other costs directly associated with such access.<sup>22</sup>

## VI. ADDITIONAL ISSUES PREVIOUSLY ADDRESSED IN THE INTERIM POLE ATTACHMENT PROCEEDING.

The Commission raised a number of additional issues that AT&T has recently addressed in its Comments and Reply Comments in the Interim Proceeding. AT&T reiterates its positions and arguments in those documents and also incorporates them by reference.<sup>23</sup> Because of the importance of these issues for the future of telecommunications competition, the most critical issues are briefly addressed below.

**Rates may not discriminate between types of attachments.** As the Commission itself has correctly noted, wireless carriers are fully entitled under the 1996 Act to access to utilities' poles at rates consistent with the rules adopted in this proceeding.<sup>24</sup> As AT&T emphasized in

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<sup>22</sup> As the Commission has made clear for public rights-of-way, compensation for access to such rights-of-way should be based on costs incurred by the right-of-way owner, rather than what the market will bear. See Classic Telephone Co., 11 FCC Rcd. 13082, [¶ 39] (1996) (fair and reasonable compensation for use of public rights-of-way consists of "an appropriate share of the increased street repair and paving costs that result from repeated excavation") (emphasis added). This requirement is even clearer with respect to private rights-of-way because the Act specifically requires that any compensation to utilities be an appropriate share of the utility's "cost" of providing such access. §§ 224(e)(2), (3).

<sup>23</sup> The Commission specifically provided that comments filed in the Interim Proceeding could be incorporated by reference. NPRM ¶ 8. AT&T has appended its previous filings to these Comments.

<sup>24</sup> NPRM at ¶ 61.

both its initial Comments (AT&T 97-98 Comments at 5-10) and Reply Comments (AT&T 97-98 Reply Comments at 8), pole attachment fees are assessed for the use of space. The rates pole owners charge cannot lawfully discriminate between different types of attachments that use the same amount of space, or between telecommunications companies based on the type of technology they deploy.

Nothing in § 224 limits a telecommunications carrier's attachments to a particular type of technology. In this regard, cable operators and other attaching entities have traditionally attached power packs as well as wires to utility poles. Wireless carriers' attachments could include fiber or coaxial cable linking cell sites, as well as microcell facilities<sup>25</sup> or antennas attached to the side or top of a pole and connected to coaxial lines routed vertically to the base of the pole. Of course, these attachments would comply with applicable National Electric Safety Code standards. To the extent that other utilities can place attachments horizontally on the pole, the utility should not be allowed to recover attachment fees twice for the use of the same space.<sup>26</sup>

The Commission's rate rules need to encompass wireless attachments because reliance on "marketplace" negotiations will produce exorbitant and discriminatory pole attachment rates. In New York, for example, which has some of the highest pole attachment rates in the country, utilities typically charge cable systems approximately \$10 per year per pole attachment.<sup>27</sup> By

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<sup>25</sup> A microcell establishes a coverage area smaller than a conventional cellular or PCS cell.

<sup>26</sup> See supra at Section I.

<sup>27</sup> See, e.g., Central Hudson Gas & Elec. Corp., Schedule P.S.C. No. 14 -- Electricity, 19<sup>th</sup> Revised Leaf No. 22M (issued Apr. 14, 1997) (annual rate of \$8.43 per equivalent pole); Consolidated Edison Co. of New York, Inc., Schedule P.S.C. No. 9 -- Electricity, 3<sup>rd</sup> Revised Leaf No. 139 (issued Apr. 15, 1996) (annual rental rate of \$13.79 per pole attachment).

contrast, utilities in New York routinely charge wireless attachers \$10,000 or more per year per pole attachment.<sup>28</sup> The Commission will minimize pole attachment rate discrimination by including all pole attachments by telecommunications carriers under a uniform formula, removing one competitive barrier currently faced by wireless carriers.

Finally, the Commission should reaffirm its holding that § 224 applies to attachments to transmission towers.<sup>29</sup> The Communications Act establishes the right of telecommunications carriers to attach to any pole, duct, conduit, or right-of way owned or controlled by a utility. Transmission towers fall within these broad parameters.<sup>30</sup> Consistent with Congress's determination to extend pole attachment rights to telecommunications carriers, moreover, the Commission was correct to construe the terms "pole, duct, conduit, or right-of-way" to include all pathway facilities used by carriers for their attachments. Indeed, electric utilities in several States have made space available on their transmission towers, demonstrating that attachments to transmission towers are technically feasible and can be accomplished consistently with the applicable safety codes.

Depriving wireless carriers of access to transmission towers would vitiate their pole attachment rights under § 224.<sup>31</sup> While AT&T Wireless has obtained access to transmission

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<sup>28</sup> Across the nation, the average cost is about \$5,000 per attachment.

<sup>29</sup> Transmission towers are subject to a right of access by attaching entities. See Local Competition Order at ¶¶ 1184-85.

<sup>30</sup> See Local Competition Order at ¶ 1184.

<sup>31</sup> As the Commission has previously recognized, Congress expanded the scope of the pole attachment statute to permit telecommunications carriers to "piggyback" along the utilities' distribution networks. Local Competition Order at ¶ 1185.