

utilities to fabricate “alternatives” to their poles, it is a simple fact that in most of the country there are no viable alternatives. In this regard, wireless “alternatives” do not today threaten pole monopolies, and even when economically feasible most wireless solutions will themselves require pole attachments -- as the electric utilities recognize in their attempts to evade regulation of wireless attachments, see, infra. Nor does direct burial or trenching of cable and conduit seriously threaten utilities’ bottleneck control; in fact, an entrant seeking to bypass utility poles through burial currently faces many of the same economic, environmental, and legal hurdles that generally render replication of existing pole and conduit networks infeasible.

The electric utilities’ economic arguments are equally meritless. First, they claim, increased competition in downstream markets for telecommunications and cable services will somehow constrain pole attachment rates to market levels. Of course, precisely the opposite is true. Competition among downstream service providers, all of whom are dependent on a monopolist to provide an essential input, provides no check on the price the monopolist charges for that input. Rather, increased downstream competition heightens the importance of obtaining the monopoly input as quickly as possible and may thereby increase the vulnerability of the downstream service providers to excessive rates. Further, where the input provider competes in the downstream service market, both the input provider’s motivation to charge monopoly prices and the harm to competition and consumers caused by such anticompetitive conduct are increased. The Commission itself recently reiterated its concern over these “anti-competitive motive[s]” in striking down unreasonable restrictions imposed by an electric utility on a cable

company, both of whom are now directly or indirectly involved in the provision of telecommunications services. Marcus Cable ¶ 23.³

That utilities can and would abuse their monopoly power absent Commission oversight is only too clear. WorldCom, for example, pays “nearly twenty times” the rate for conduit paid by a local cable provider. WorldCom at 5. Aberdeen Cable, a small cable operator, apparently was bankrupted by twelve years of litigation challenging abuse by pole owners. See NCTA at 5. Such discrimination and anticompetitive conduct is widespread, see ALTS at 2 (“competitive carriers have found substantial intransigence by many utilities and blatant refusals to negotiate in a reasonable manner or in compliance with existing rules”),⁴ and would certainly increase if, as some commenters suggest, the Commission were to relax its rules and rely solely on negotiated

³ See also Marcus Cable; TCI at n.5 (“On several occasions, the Commission has characterized utility pole and conduit facilities as ‘bottlenecks’ or ‘essential facilities’”) (citing Teleport Communications - New York, File No. 13135-CF-TC-(3)-92, Memorandum Opinion and Order, 7 FCC Rcd 5986, 5987-88 at ¶ 16, and others); TCI at n.18 (“See ‘Common Carrier Bureau Cautions Owners of Utility Poles,’ DA 95-35, *Public Notice* (rel. Jan. 11, 1995) (observing that ‘[u]tility poles, ducts, and conduits are regarded as essential facilities’ and, after noting allegations of utilities’ anticompetitive acts, affirming the Bureau’s ‘commitment to ensuring that the growth and development of cable television is not hindered by unreasonable conduct on the part of utility pole owners’”).

⁴ See also ALTS at 3 (“there are a number of very significant nonrecurring charges that utilities recoup up-front from entities seeking pole or other attachments that are not included in the monthly fee. The largest of these tend to be fees for assessing the availability of space, make-ready fees and modification fees but some companies have attempted to extract additional excessive fees or to place conditions on the pole attachment agreements that result in large increases in the costs to attaching carriers”); NCTA at 44 (utilities “routinely include unjust and unreasonable provisions in their adhesive pole attachment boilerplate which they then demand be signed ‘as is’ without modification”); id. at 47 (noting Commission’s recent consideration of a utility “pole attachment agreement which sought to deprive the attaching party of any remedy outside those of the agreement, and to force the attaching party to renounce the jurisdiction of this Commission or any other tribunal with jurisdiction over the rates, term and conditions of attachments”).

rates. For that reason, even incumbent LECs -- typically pole and conduit owners themselves -- believe that they need the protections afforded by the Pole Attachment Act. See, e.g., GTE at 9 (“[t]he goal of the pole attachment formula has been, and continues to be, to prevent those with market power arising out of the ownership of pole infrastructure from using that power to hinder competition”); USTA at 11 (urging the Commission “to ensure that the rates utilities charge incumbent LECs to attach to poles [are] just and reasonable”).⁵

II. THE COMMISSION SHOULD REJECT ANTICOMPETITIVE ELECTRIC UTILITY PROPOSALS TO DOUBLE CHARGE FOR POLE SPACE AND TO EVADE REGULATION ALTOGETHER WITH RESPECT TO WIRELESS AND TRANSMISSION TOWER ATTACHMENTS.

The Commission’s current pole attachment formula and rules determine maximum charges for the use of vertical feet of pole space, and the Commission has consistently resisted utility efforts to double charge for the use of leased space or to discriminate based upon the types of attachments placed in that space or the types of services provided by the attaching parties. Nevertheless, the electric utilities ask the Commission to reverse course and approve each of those anticompetitive practices here. The Commission should again reject these utilities’ improper attempts to exercise their monopoly power by: (1) charging twice (or more) for the use of single foot of pole space notwithstanding that a single charge recovers the relevant costs, and (2) evading altogether regulation of wireless attachment rates and rates for attachments to electrical “transmission” structures.

⁵ See also TCI at 8; WorldCom at 3 (“the Commission must ensure that nascent local competition is not left vulnerable to onerous and discriminatory practices by [pole owners] for attaching to poles, occupying conduit, or using rights-of-way”).

A. Double Charging Proposals.

As AT&T explained in its initial comments, the Commission's current pole attachment formula determines the "maximum just, reasonable, and nondiscriminatory terms and conditions for the use of pole space" (AT&T at 5). Usable space is the vertical "space above the minimum grade level which can be used for the attachment of wires, cables and associated equipment" (47 U.S.C. § 224(d)(2)) and, accordingly, a pole owner is fully compensated -- if not overcompensated -- for the use of a vertical foot of pole space by the payment of a single attachment charge at the maximum permissible rate. For that reason, AT&T (at 7-8) urged the Commission to "clarify that pole owners may not prohibit or limit technically feasible multiple uses of pole space and may recover no more than one attachment charge for each vertical foot of pole space (and each inner duct in conduit)."

The comments confirm that this clarification is necessary. For example, the electric utilities propose attempting to extract an additional "full attachment rate" for overlashing. See American Electric Power Service Company, Commonwealth Edison Company, Duke Power Company, Florida Power and Light Company, Northern States Power Company ("Electric Utilities II") at 73. The electric utilities do not even attempt to demonstrate that overlashing somehow uses additional pole space. Nor do they deny that the Act and existing rate formula authorize charges for the use of space and space alone. Instead, in a radical departure from the ratemaking methodology that has been applied over two decades of pole attachment proceedings, these utilities claim that "the overlashing party takes up load capacity on the pole equal to or greater than a regular attachment." Id. To the contrary, overlashed cable, which is typically fiber optic cable, weighs much less than traditional copper cables or the power supply lines attached by

the electric utilities. Indeed, even under the worst case scenario, the typical pole configuration has sufficient load capacity to handle multiple overlashed cables, without compromising safety or operational procedures. In any event, if the electric utilities' load arguments were accepted -- indeed if they take their own position seriously -- then electric utility attachment of heavy electric cables to poles should bear a much greater share of the poles' total cost because they weigh much more than traditional communications cables. In short, the "load" argument is baseless, and the Commission should clarify that there can be only a single charge at the maximum permissible rate for a given foot of pole space.⁶

B. Wireless Attachments and Transmission Towers.

A number of electric utility commenters argue that the Commission does not have jurisdiction over wireless attachments and that the rates for such attachments should be determined by the private market.⁷ Both arguments must be rejected. First, attachments by wireless entities are covered by the express language of section 224. Under Section 224(a)(4), a "pole attachment" is "any attachment by a . . . provider of telecommunications service." 47 U.S.C. § 224(a)(4) (emphasis added). Section 224(f) likewise requires a utility to provide "any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-

⁶ See also Electric Utilities II at 74-75 ("Parties seeking to overlash must obtain the pole owner's prior approval before any overlashing is performed. Parties seeking to overlash, and entities that are currently overlashing, must have a pole attachment agreement with the utility pole owner before overlashing occurs. Parties seeking to overlash must calculate not only the incremental effect of their attachment on the pole, but also the total effect of all attachments, in order to maintain and ensure pole integrity. Overlashing attachers must also be required to comply with all other applicable safety, reliability and engineering standards and specifications. Parties seeking to overlash must separately identify their facilities").

⁷ See, e.g., PSCNM at 5.

way.”⁸ 47 U.S.C. § 224(f) (emphasis added). Commercial mobile services are telecommunications services, and providers of commercial mobile radio services are telecommunications carriers.⁹

Second, 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. NPRM ¶ 65. Indeed, Section 224(d)(3) explicitly states that the Federal formula for pole attachment rates applies to “any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.” § 224(d)(3) (emphasis added). If wireless attachments are not included within the scope of the Commission’s rate rules, reliance on “marketplace” negotiations will produce exorbitant 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 for their attachments.¹⁰ By contrast,

⁸ The Commission reiterated this view in the Local Competition Order, stating that “the rates, terms, and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access.” First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (released Aug. 8, 1996) ¶ 1156 (“Local Competition Order”).

⁹ See 47 U.S.C. § 153(46) (“telecommunications service” means “the offering of telecommunications for a fee directly to the public. . . , regardless of the facilities used”) (emphasis added). A “telecommunications carrier” is “any provider of telecommunications services.” § 153(44) (emphasis added). See also Local Competition Order ¶ 993 (CMRS providers are telecommunications carriers).

¹⁰ See, e.g., Central Hudson Gas & Elec. Corp., Schedule P.S.C. No. 14 – Electricity, 19th 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, 3rd Revised Leaf No. 139 (issued Apr. 15, 1996) (annual rental rate of \$13.79 per pole attachment).

utilities routinely charge wireless attachers \$5,000 or more per year per pole. By including all pole attachments by telecommunications carriers under a uniform formula, the Commission will also minimize pole attachment rate discrimination, removing one competitive barrier currently faced by wireless carriers.

Finally, the Commission should reject the electric utilities' argument that the Commission lacks the authority to regulate attachments to "transmission towers."¹¹ 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.¹² 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.

III. THE UTILITIES' BELATED ATTACKS ON THE HISTORIC COST BASIS OF THE INTERIM RATE FORMULA ARE BEYOND THE SCOPE OF THIS PROCEEDING AND OTHERWISE MERITLESS.

For nearly two decades, the Commission has consistently applied a historic cost approach to calculating pole attachment rates. That approach repeatedly has been re-validated by Congress,¹³ upheld by the courts, including the Supreme Court, see FCC v. Florida Power Corp.,

¹¹ See, e.g., PSCNM at 4.

¹² See Local Competition Order ¶ 1184.

¹³ See NCTA at 7 (Commission's rate formula was "considered and re-validated by Congress in 1983, when it lifted the formula's five-year sunset provision contained in the original version of Section 224; in 1984, when it amended Section 224 as part of the sweeping Cable Communications Policy Act of 1984 but left the formula intact; in 1992, when it passed the Cable Competition and Consumer Protection Act; and in 1996, when it passed the Telecommunications Act of 1996 and retained the formula").

480 U.S. 245, 253 (1987), and is followed by many states which regulate pole attachments.¹⁴ Certain electric utilities now claim that the Commission can and should simply ignore twenty years of consistent application of § 224 in favor of one or more “replacement cost” approaches -- which the electric utilities’ proposed formulas demonstrate are in fact “hybrid” mixes of historic and replacement cost principles designed only to maximize rates.¹⁵ But the electric utilities do not even attempt to demonstrate how their new approaches could be consistent with settled constructions of the Pole Attachment Act or even the economic principles upon which they purport to ground those proposals.

In any event, the Commission quite properly limited its Notice in this interim rate proceeding to proposed adjustments to its existing historic cost-based formula. The Commission did not address the possibility of abandoning its formula, and, indeed, did not contemplate any fundamental changes in the basic approach to determining pole attachment rates. Most commenters, including AT&T, therefore focused on the noticed issues involving, inter alia, application of the existing formula and proposed adjustments to the formula’s treatment of pole height and negative salvage values. A number of electric utility pole owners, however, improperly seek to transform this proceeding into a one-sided referendum on “replacement cost” pricing that

¹⁴ See NCTA at 6-7 (“California is certified, but adopts the FCC’s formula and usable space ratio. . . Ohio adopted the FCC formula intact after months of hearings. . . [T]he Michigan legislature adopted the FCC formula for all attachments on all poles owned by telecommunications competitors. . . [T]he Michigan PSC adopted the FCC formula for all electric utilities, whether or not they were currently diversified. . . New York adopted the FCC formula in 1997, explaining that using the FCC’s rate and access standards would promote competition and assist telecommunications providers in deploying telecommunications facilities seamlessly across state lines”).

¹⁵ See, e.g., Electric Utilities II at 44.

by virtue of its late introduction would deprive commenters of a full opportunity to address the unique and complex legal, regulatory and economic characteristics of poles and conduit that should foreclose that approach here. But this interim rate proceeding is not the appropriate forum for that debate. Rather, if the Commission determines that the historic cost basis of its pole attachment formula warrants reconsideration, it should notice that issue in the proceeding for permanent rates to be conducted later this year and allow all commenters a full opportunity to investigate and comment on the legality and appropriateness of alternative approaches.¹⁶

IV. NEGATIVE BOOK VALUE ISSUES ARE PROPERLY HANDLED THROUGH THE COMMISSION'S EXISTING WAIVER PROCESS, AND NOT THROUGH ACROSS-THE-BOARD CHANGES THAT ARE UNNECESSARY AND WOULD PRODUCE WINDFALLS IN THE VAST MAJORITY OF CASES.

The comments confirm that the negative salvage issues raised by SBC in Oklahoma are not a widespread concern. BellSouth (at 6) and Sprint (at 7-8), for example, note that they have not encountered any negative rate problems, and BellSouth (at 6-7) "does not anticipate that, in the near future" it will do so. The electric utilities similarly state that they are not experiencing any negative net book problems; nor are they likely to encounter them.¹⁷ Further, as Ameritech (at 2) points out, "pole plant investment might increase if, as a result of changes in the competitive

¹⁶ See 5 U.S.C. § 553(b)(3) (1988); see also United Steelworkers of America v. Marshall, 647 F.2d 1189, 1221 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981); Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 509, 549 (D.C. Cir. 1983) (the critical factor in determining whether or not there was sufficient notice is whether or not a party "should have anticipated that such a requirement might be imposed").

¹⁷ Electric Utilities II at 71 ("The Electric Utilities are not generally facing negative net investment problems"); Electric Utilities I at 58 ("Treatment of negative cost per bare pole due to cost of removal for pole investment exceeding salvage value for poles or the accumulated depreciation balances exceeding the gross pole investment is not a significant problem for the Electric Utilities").

landscape spurred by the 1996 Act, facility based competitors create demands for pole attachments necessitating pole replacements,” thereby allowing pole owners to “avoid” the negative rate problem “altogether.” And, in identifying the scope of the “negative rate” problem, most companies claiming that they are experiencing such difficulties concede that even in jurisdictions where they have a negative book value, attachment rates remain positive.¹⁸

In addition, the Commission should not lose sight of the fact that, whatever its frequency, the mere existence of a negative net book value does not alone support an underrecovery claim. Rather, a negative net book value may reflect the significant overrecovery that has occurred to date in anticipation of future expenditures on pole removal -- overrecovery that is exacerbated by the time value of the money the pole owner has recovered in advance.¹⁹ In such circumstances, so long as the rates collected by the pole owner do not fall below the statutory minimum of incremental cost, there is no “problem” to be corrected.²⁰

Even where some correction is warranted, as in the apparently rare situation of actual negative rates, the Commission’s existing rules and practice are more than adequate, as AT&T (at 14-15) demonstrated in its opening comments. By contrast, both of the across-the-board proposals identified in the Notice to revise the formula itself -- *i.e.*, removing net salvage when book value becomes negative or switching entirely to a “gross book” approach -- would cause far

¹⁸ *See, e.g.*, SWBT at 3. Indeed, no commenter claims that it has a negative maximum rate.

¹⁹ In light of this overcompensation, pole owner claims that they are “subsidizing” attachers (*e.g.*, Electric Utilities I at 7) are entirely without merit.

²⁰ *See, e.g.*, AT&T at 12; ALTS at 6 (“The ‘problem’ that SWB has identified cannot occur because even if the maximum rate formula occasionally would result in a negative rate under the Commission’s formula, the statute contemplates a minimum rate that covers additional costs incurred by the utility”).

more problems than they would solve and would produce overrecovery and overcharges in the vast majority of cases.²¹

The first proposal -- removing net salvage from the formula whenever book value would otherwise be negative -- is so flawed that even its original proponents have now abandoned it. See SBC at 6. In particular, removing net salvage at this late stage has hopelessly complex implications for return, taxes and other components of the rate formula, and, as incumbent LECs themselves recognize, to carry out the net salvage adjustment alone "it might be necessary to restate as much as 40 years of depreciation reserve activity." GTE at 7; USTA at 9. Moreover, this approach would result in even greater overcompensation of pole owners. AT&T at 14-15.

The gross book approach now favored by SBC and others is equally defective. The proponents of this reconfiguration, including SWBT (at 6), claim that the gross book approach provides a superior solution to the Commission's proposed removal of net salvage. The real motivation for their desire to abandon the net book method, however, is transparent. Whereas the Commission's solution would substantially raise rates in negative book value situations -- and, as

²¹ The negative book problem that some pole owners may encounter is not unique to the telecommunications industry. In fact, the Financial Accounting Standards Board ("FASB") has recently issued a proposed statement of accounting standards that, at least in part, address this problem. See FASB Proposed Statement of Financial Accounting Standards No. 158-B, Accounting for Certain Liabilities Related to Closure or Removal of Long-Lived Assets (February 7, 1996). While these standards are not final, they would treat removal as an expense at the time it is incurred rather than as a charge to accumulated depreciation. This approach avoids the negative book problem inherent in the current formula. Rather than adopt the overcompensatory net salvage removal or gross book methodologies, the Commission should continue applying its net book approach until a range of alternative solutions such as that proposed by FASB have received further consideration.

AT&T (at 14-15) has shown, much more than necessary -- the gross book approach would significantly raise rates for all attachers immediately.²²

More specifically, in contrast to the net book approach, a gross book calculation generates lower rates in early years and higher rates in later years.²³ But pole owners want the best of both worlds. They have already collected overcompensatory rates under the current formula -- rates the Commission recognizes should be balanced by subsequently lower rates (NPRM ¶ 25) -- and now they wish to convert midstream to a methodology designed to produce substantially higher rates at an older average pole life. The pole owners' proposal to change the accounting method midstream would almost certainly allow them to overrecover. Under the accelerated depreciation schedule inherent in the net book approach, pole owners begin recovering immediately for the cost of replacing their poles.²⁴ In the meantime, they earn additional money on these replacement

²² One of the principal problems with even considering the proposal that the Commission adopt the gross book approach is that its proponents have provided virtually no evidence on the impacts of this different methodology. While they admit that rates will increase, they do not quantify the extent to which rates will rise today and in the future. They have provided no information on the level of contributions that have been made toward pole removal by attachers and by the pole owners themselves. And, possibly most important of all, they have not explained how pole removal costs will be treated under the gross book approach. Without more data and a much clearer picture of how the gross book approach would actually work in practice, the Commission cannot reasonably conclude that this method is a sound approach. If the Commission seriously wishes to consider this method, then it should demand empirical studies from its proponents in a future rulemaking.

²³ See, e.g., Sprint at 9.

²⁴ The Commission should also take into account that pole owners are assuming as much as 40 years in advance that replacement costs will be very high. Given the compounded earnings pole owners will earn on replacement contributions from attachers literally for decades ... and the distinct possibility that the replacement cost estimates may be too high, pole owners may be vastly overcompensated even without a change in accounting methods or other over-compensatory features of the Commission's current formula.

cost contributions. The gross book approach, on the other hand, collects contribution for replacement expenses as they are incurred. Hence, for every pole currently in the Commission's formula, pole owners have already begun collecting fees and interest toward their replacement. In many instances, much or even all of an attacher's proportionate share of the replacement cost has already been collected. Now attachers will have to incur this expense again if the Commission suddenly abandons its net book approach.

Supporters of the gross book method would have the Commission ignore the overrecovery that has already occurred under the present methodology and switch to a different approach that will provide even more. AT&T at 16. Thus, AT&T joins commenters like U S WEST (at 2) and Time Warner (at 24) in urging the Commission "to employ the use of net book costs in calculating pole attachment rates." U S WEST at 2.²⁵

Closely related to net book costs are accumulated deferred taxes ("ADT"). ADTs are necessary to account for the timing differences associated with the recording of income and expense items for "book" and tax purposes. In "rate base rate-of-return" proceedings the ADT balances are either deducted from rate base or treated as zero cost capital to recognize the fact that the utility has collected cash from its customers for taxes in advance of actual tax payments. Both treatments reduce the resulting service rates to recognize "up-front" payments. The inclusion of the estimated future cost of removal in the poles depreciation rate produces a book depreciation rate which recovers the original cost of poles far in advance of their actual

²⁵ If, however, the Commission does decide to make this change, AT&T would urge the Commission to phase in the resultant rate increases over a five-year period as Section 224(e)(4) will do for other inflationary modifications to the current formula. 47 U.S.C. § 224(e)(4).

retirement. In recognition of this significant early recovery, the Commission has insisted that the return component in the pole attachment formula be based on net book.

The inclusion of the estimated future cost of removal in the poles depreciation rate, however, has the reverse effect on ADT. Cost of removal must be expensed as incurred for tax purposes, i.e., it is not included in tax depreciation rates. Hence, book depreciation rates for poles are higher than tax depreciation rates. Furthermore, due to the Commission's procedures for estimating the future removal costs, the amount included in book depreciation rates almost always exceeds the actual cost of removal incurred on an annual basis. Consequently, the ADT associated with poles is, at a minimum, much less than the ADT associated with other plant. Indeed, SBC claims that its pole-specific ADTs are actually negative. In the case of a negative ADT, pole attachment rates would actually increase artificially due to the effect of up-front payments for the cost of removal.

The Commission's proration of total company ADT to the poles account, then, would mitigate the inflationary effect the inclusion of future removal costs produce under a solely pole-specific ADT calculation, as well as recognize that utilities use accelerated tax depreciation rates for poles that are the same as for other accounts.

V. THE COMMENTS CONFIRM THAT THE COMMISSION SHOULD REJECT THE ELECTRIC UTILITIES' PROPOSED REVISIONS TO THE RATE FORMULA'S TREATMENT OF POLE HEIGHT, SAFETY SPACE AND OTHER COMPONENTS OF USABLE SPACE.

Commenters universally agree that to be workable and to provide a level of certainty sufficient to encourage negotiated solutions the interim rate formula must continue to rely upon averages and rebuttable presumptions regarding the physical characteristics of poles. Most commenters support the Commission's existing presumptions, which reflect many years of

experience and whose continuing validity has been tested and confirmed in countless litigated proceedings. Certain electric utilities, however, predictably seek to revisit the same baseless usable space claims the Commission has previously rejected. But these utilities provide no support for their proposed changes to the formula's presumptions.

A. Pole Height. The comments overwhelmingly confirm that the Commission should reject the electric utility Whitepaper sponsors' unsupported proposal to increase the rate formula's presumptive pole height from 37.5 feet to 40 feet. Pole owners and attachers alike agree that the Whitepaper sponsors "have not presented any specific information to substantiate an increased average pole height." SWBT at 34.²⁶ Even other electric utilities recognize that "[t]he Whitepaper sponsors have made no showing that the use of 45 foot poles has increased nationwide." ConEd at 14.²⁷ Further, the "the spatial needs of individual cable operators and LECs have remained constant or even decreased slightly," and "demand for taller poles[,] if any, thus stems "solely from the increased spatial needs of the electric utilities." USTA at 25. See also NCTA at 10. Accordingly, although individual companies remain free to make a showing of greater than average height, "[t]here is simply no record or other basis for altering the current Commission presumptions regarding pole height." GTE at 12.

B. Thirty Foot Poles. The record similarly forecloses electric utility proposals to exclude poles measuring 30 feet or less (or to apply a separate formula to these shorter poles) on

²⁶ See, e.g., Bell Atlantic/NYNEX at 10-11; U S WEST at 3-4; Time Warner at 9; Ameritech at 3 ("A change in the presumption regarding average pole height from 37.5' to 40' is not warranted"); Sprint at 3 ("an increase in the presumptive pole height is. . .unwarranted"); GTE at 12.

²⁷ See also Edison Electric at 26 ("it is not necessary to alter the average height of poles").

the ground that such poles have no (or almost no) usable space.²⁸ As other pole owners, including other electric utilities, have demonstrated, 30 foot -- and even shorter -- poles can be and "are used for attachments by multiple parties." GTE at 13 ("a thirty foot telecommunications pole with the presumptive 6 feet below ground and 18 feet of ground clearance would still have six feet of usable space, thus permitting multiple attachments"). See also SWBT at 38 (even "a 25-foot pole with 18 feet of ground clearance and 5 feet underground would have about 2 feet of space available above the lowest attachment").²⁹ Indeed, as many as 50% of the poles in use by some pole owners measure 30 feet or less. See, e.g., GTE at 14.³⁰ And the electric utilities' proposals for a separate "short pole" formula ignore that: (1) the rate formula's usable space presumptions reflect averages of short and tall poles, and thus separate treatment of short poles would necessitate increasing the usable space presumption in the existing formula to reflect the

²⁸ See Electric Utilities II at 46; Electric Utilities I at 29.

²⁹ See also Ameritech at 4 (30 foot poles "can create 6' or more of usable space for attachment"); Sprint at 5 ("telecommunications carriers may have many poles that are only 30 feet and these poles adequately accommodate telecommunications facilities and cable facilities"); NCTA at 15 ("in areas of the country as diverse as New York and Texas, cable operators are still attached to significant numbers of 30' poles"); Bell Atlantic/NYNEX at 10 ("poles of 30 feet or less do provide sufficient usable space for multiple attachments"); USTA at 27 ("to the extent that electric utilities have chosen not to attach to such poles, such avoidance has been both conscious and volitional"); id. at 28 ("a thirty-foot pole has six feet of usable space"); Union Electric at 31 ("Multiple attachments can be made to service line poles of 30 feet or less (except for small service poles of 5 feet or less) and are made to such poles"); TCI at 12; Time Warner at 10.

³⁰ See also Sprint at 4-5 ("Sprint operating companies have a significant number of 35 and even 30 foot jointly used poles in the field for purposes of service drops, where attacher separation issues and road clearance compliance requirements are not a problem"); Bell Atlantic/NYNEX at n.21 ("more than 25% of NYNEX's total base of poles are 30 feet or less"); USTA at 27 ("LECs have invested substantially in deploying thirty-foot poles to accommodate their own needs and the needs of other attaching telecommunications service providers"); U S WEST at 4 ("approximately 13 percent of U S WEST Communications, Inc.'s poles are 30 feet or less in height").

absence of those short poles;³¹ (2) pole owners generally “do[] not maintain records which would enable [them] to segregate. . . pole investment costs by pole height,” Ohio Edison at 23,³² and (3) even if theoretically feasible, “[a]ny proposal that would allow pole owners to extract 30’ poles from the rate base would be an invitation to contention and complexity where none has existed in the past, and would inject delay, expense and uncertainty into every case in the pole rate setting process,” NCTA at 18.³³

C. Safety Space. The Commission has consistently rejected electric utility pleas to classify electrical safety space as “unusable,”³⁴ and the comments in this proceeding again confirm both that safety space is necessary only because of the presence of the electric utility and that safety space is usable (and, indeed, actually and increasingly used by the electric utilities or offered by them for use by others). The electric utilities urge here the same tired argument that the Commission has rejected time and again -- *i.e.*, that safety space exists for the sole benefit of

³¹ See, e.g., NCTA at 11 (if, as the electric utilities claim, poles today are typically 40 feet tall, then “the most expedient and accurate way to account for this change -- in a manner which conforms with FCC practice -- is for the Commission to adopt a rebuttable presumption that there exists 16 feet of usable space on electric utility poles”).

³² See also Duquesne at 28.

³³ See also SWBT at 39 (“some type of study or assumptions would be required to estimate the investment associated with the shorter poles. This adjustment to the investment would complicate unduly the calculation of the gross or net cost of a bare pole”); GTE at 13 (“it is not a simple matter for GTE to cull out poles that are 30 feet and less in height from its voluminous pole database. GTE does not routinely track and report poles based on height, and generating such calculations would be administratively burdensome and ultimately of little value to the Commission or pole attaching parties”).

³⁴ See, e.g., NCTA at 12 (“The utilities’ claim that the neutral zone is unusable has been rejected, time and again”); Opinion and Order, Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC Docket No. 78-144 ¶ 10 (released March 10, 1980).

attachers. To the contrary, as many state Commissions have repeatedly held, "it is the electric utility's equipment that necessitates creation of the safety space and it is the electric utility's responsibility to comply with that provision of the NESC."³⁵ In this regard, history refutes the electric utilities' claims that but for attachers they would have installed shorter poles, see Electric Utilities I at 35 -- electric poles generally were installed first with attachments coming much later and only after great resistance from these utilities.

In any event, it cannot seriously be disputed that safety space is actually usable and used. Ironically, the best support for this statement comes from the electric utilities themselves. For example, Ohio Edison (at 19) admits that it places fiber optic cable in this region, Union Electric (at 28) discusses the transformer cases and capacitor racks it locates there, and Electric Utilities I (at 38-39) refer to the placement of "streetlights[,] "power supplies," "repeaters and amplifiers," "supporting guy attachments" and "splitter boxes" in the safety space. Many of these uses provide significant revenue opportunities for the electric utilities. In short, there is no conceivable legitimate basis for the Commission to abandon its long-standing treatment of electric safety space as usable space.³⁶

³⁵ Bell Atlantic/NYNEX at 9. See also In the Matter of Certain Pole Attachment Issues Which Arose in Case 94-C-0095, "Opinion and Order Setting Pole Attachment Rates," at 14-15 (New York PSC, June 17, 1997); Order, Re Pole Attachments by Cable Television Televisions Systems, 80-0249 (Ill. Commerce Comm'n, Dec. 23, 1993), aff'd Central Illinois Pub. Serv. Co. v Illinois Commerce Comm'n, 644 N.E.2d 817 (Ill. Dec. 1994).

³⁶ See also U S WEST at 4-5; Time Warner 15 -17; NCTA at 14 ("The neutral zone can be, and is, used for street light attachments, from which electric utilities derive additional revenues") (citing Consumers Power Co., et al., Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831, Tr. 409 (Feb. 11, 1997) (Cross examination of Glenn R. Spence, Detroit Edison outside plant engineering witness); Tr. 520 (Cross examination of John A. Zagancyk, Wisconsin Electric Power witness)); NCTA at 13 ("Pole space used by a power company to maintain prescribed clearances among conductors is 'used' by the power company for the unique attribute of *its* core services").

D. Minimum Clearance. The Whitepaper sponsors urged the Commission significantly to reduce the rate formula's usable space presumption in recognition of NESC "minimum clearance" guidelines of 18 feet of ground clearance, which, they claimed, required the lowest attachment to be at least 19.8 feet above the ground to account for approximately 20 inches of average line sag. See "Just and Reasonable Rates and Charges For Pole Attachments: The Utility Perspective," A Position Paper Presented By: American Electric Power Service Corp., Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Florida Power & Light Company, Northern States Power Company, The Southern Company, and Washington Water Power Company (filed Aug. 28, 1996). The comments conclusively demonstrate that the Whitepaper sponsors misrepresented the NESC requirements. As one electric utility explains: "[t]he NESC generally requires a minimum clearance of 15 feet 6 inches" for communications cables, not 18 feet. Ohio Edison at n.7.³⁷ Recognizing as much, several electric utilities here attempt to reach the same untenable result by increasing their average line sag estimates by 150% from the 20 inches claimed in the Whitepaper to 50 inches. See Electric Utilities II at n.117. But these new line sag claims are equally misleading. Taking the NESC 15 feet 6 inch minimum clearance guideline at face value, the Commission's existing clearance presumption of 18 feet allows for an average of 30 inches of line sag.³⁸ Even when a 13 Kilovolt power line lies immediately above the communications cable, the communications cable would

³⁷ See also Ameritech at 3; NESC at 78-79 (this figure may even fall to 15 feet).

³⁸ In fact, the difference in mid-span ground clearance for electric cables and communication cables (30 inches) corresponds to the safety space on the pole (40 inches) because separation at mid-span only needs to be 75% of the separation on the pole. Thus, the 15.5 foot clearance for communications attachments follows directly from the 18 foot clearance required for electric attachments.

have approximately 32 inches of sag at the mid-span of a 150 foot span, one of the most common span lengths in urban heavily loaded areas. And at this span length, coaxial, fiber optic, and telecommunications cable will typically sag much less under normal conditions. There would, of course, be spans that experience more sag, but the rate formula's presumptions reflect averages, not, as the electric utilities would have it, maximums or worst-case scenarios. Finally, the electric utilities again ignore that the NESC clearance requirements apply primarily to road crossings and that there are many areas in which much lower minimum clearances apply. "If anything," then, the current 18 foot presumption is "conservative." Time Warner at 14.³⁹ And, as one electric utility notes, "[t]o the extent that any Whitepaper sponsors believe that the weighted average of its poles presents a result significantly different from the 13.5 foot presumption, it may present that result to the Commission for use in its attachment rate." ConEd at 14.⁴⁰

VI. THERE IS WIDESPREAD CONSENSUS THAT THE ELECTRIC UTILITIES' PROPOSED ADDITIONS TO THE ACCOUNTS INCLUDED IN THE RATE FORMULA CONSTITUTE OVERREACHING AND WOULD PRODUCE OVERRECOVERY.

In its initial comments, AT&T (at 20) supported the Commission's proposals to map accounts from Part 31 to Part 32. As NCTA (at 26) notes, however, a "one-to-one mapping"

³⁹ TCI at 13.

⁴⁰ With respect to pole owners' arguments that the Commission should use a presumptive 11.25% rate of return when the state no longer makes a determination regarding the pole or conduit owner's cost of capital, AT&T notes that capital costs for many telecommunications utilities have recently been determined in state arbitrations around the country and that these rates should be used whenever they are available. Further, AT&T has submitted current estimates of utility rates of return. See Bradford Cornell, "Estimating the Cost of Capital of Local Telephone Companies for the Provision of Network Elements," (filed as an attachment to AT&T's Ex Parte Presentation -- Proxy Cost Model Questions in CC Docket No. 96-45, February 12, 1997).

cannot occur.⁴¹ The effect of this imperfect correspondence is to overcompensate pole owners through higher rates.⁴² Nevertheless, AT&T recognizes the difficulties the Commission faces in making the transition from Part 31 to Part 32 and continues to support its efforts in this context.

AT&T strongly opposes, however, the electric utilities' obvious ploy to vastly magnify current rates by including a myriad of new FERC accounts. Among the various comments submitted by the electric utilities in this proceeding, the Commission has been asked to include:

FERC Account 360 (Land and Land Rights),
FERC Account 365 (Overhead Conductors and Devices),
FERC Account 366 (Underground Conduit),
FERC Accounts 367 (Underground Conductors and Devices),
FERC Account 368 (Line Transformers),
FERC Account 369 (Services),
FERC Account 397 (Communication equipment),
FERC Account 580 (Operation Supervision and Engineering),
FERC Account 583 (Overhead Line Expenses),
FERC Account 584 (Underground Line Expenses),
FERC Account 588 (Miscellaneous Distribution Expenses),
FERC Account 590 (Maintenance Supervision and Engineering),
FERC Account 593 (Maintenance of Overhead Lines),
FERC Account 594 (Maintenance of Underground Lines),

⁴¹ See also Time Warner at 25.

⁴² Patricia Kravtin provides a detailed examination of how the Commission's proposals will overcompensate pole owners in her declaration submitted with NCTA's comments.

FERC Account 594.1 (Maintenance of lines (Nonmajor only)),
FERC Account 595 (Maintenance of line transformers), and
FERC Account 598 (Miscellaneous Distribution Expenses)

in its pole or conduit rate formulas.⁴³ With the exception of those accounts already identified for inclusion by the Commission, these accounts should not be included.⁴⁴ Many are unrelated to poles or conduit.⁴⁵ No part of accounts 365, 367 or 368 should be included in the formula. Grounding and lightning arrestor costs for electric lines, for example, are included in accounts 365, 367 and 368 and not pole account 364. For communications plant similar equipment is booked to the cable and wire accounts, not to the pole account. This continues to be appropriate as the issue has been addressed many times over the years and has been resolved as many times, as pointed out by NCTA (at 20). That it should arise again here is merely another attempt to complicate the pole attachment formula when, most simplistically, no case can be made that the poles themselves must be grounded; rather, it is the cables, conductors and other electrical devices which must be grounded to ensure proper protection.

⁴³ See generally Electric Utilities I at 45-60; Electric Utilities II at 62-68; Consolidated Edison at 11-12; Ohio Edison at 27-31; Duquesne Light at 30-32; Union Electric at 34.

⁴⁴ One of the most notable deficiencies in the electric utilities' arguments for the inclusion of additional accounts is their failure to demonstrate that these expenses are not already recovered through make-ready charges.

⁴⁵ Account 360 includes costs for land and land rights for all distribution assets, including station equipment (switching equipment, transformer banks, *et. al.*), storage battery equipment, overhead and underground conductors and devices, and underground conduit.

As for initial tree trimming, Part 32 classifies this expense with the pole account, while the FERC classifies it with Account 365, overhead conductors and devices. These superficially disparate treatments are not inconsistent given the fundamental differences in cost causation between the two industries. Initial tree trimming costs for electricians are extensive by any comparison with that required for communications plant. Because relatively high voltage, bare wire conductors are used generally in electric distribution plant, prudence and safety require extensive tree trimming to maintain the integrity of the electric system. In contrast, communications cables and wires are at relatively low voltages, and are protected by outer sheaths and insulation around the individual metallic conductors. Thus, tree trimming for communications plant installations is associated mainly with the placement of the poles, not with the area between poles over which the cables will hang. The different plant accounting rules are fully appropriate, and a proposal to include 20-30% of Account 365 in the pole attachment rate is patently unnecessary.

Some electric utilities propose to include portions of the Services (drop wires) and Communications Equipment accounts in the formula, but advance no support. Clearly, as applied to poles, any portion of the Services and Communications Equipment accounts is incidental in nature and should not be included. All the operational and expense account proposals have similar deficiencies and the minimal evidence introduced in this proceeding is wholly inadequate to justify adding them to the Commission's formula.

The inappropriateness of including these accounts is further underscored by the electric utilities' inability to agree as to what percentage of these accounts should be included. For example, with respect to FERC Account 365, Electric Utilities I (at 47) urge 20%, Electric

Utilities II (at 61) suggest 11%, and Union Electric (at 32-34) says that it does not have enough information to even recommend a percentage. Indeed, the only statement that can be made with any clarity about the inclusion of these accounts is that it would unnecessarily increase rates, increase the complexity of the Commission's formula, and allow pole owners to double recover for expenses they may have already collected through make-ready and inspection charges.⁴⁶

VII. THE COMMISSION SHOULD ADOPT A ONE-THIRD-DUCT APPROACH TO CONDUIT PRICING.

Conduit owners cite "spare duct" requirements (Ohio Edison at 35), "emergency" and "maintenance" needs (Bell Atlantic/NYNEX at 13) and "franchise agreements and ordinances" (Ameritech at 7) in support of the proposed half-duct approach to conduit pricing. However, the comments submitted in this proceeding confirm that the utilities' arguments are "based on out-of-date engineering" (ALTS at 7) and information, and that a one-third duct approach more than accounts for reserved ducts to meet all of these requirements. Today, "[c]onduit runs may contain as many as 12 or more ducts, with each such duct subdivided still further by four-, five-, or even six-compartment innerduct." NCTA at 40.⁴⁷ Thus, even if utilities typically reserved a single inner-duct in each conduit for maintenance or emergency purposes -- and they do not (see

⁴⁶ The Commission's formula only produces a presumptive maximum rate. If an electric utility believes that this level is insufficient to meet the statutory standard, it is always free to rebut this presumption and demonstrate that a higher rate is necessary.

⁴⁷ See also ALTS at 7 ("With the deployment of fiber and the engineering of smaller innerducts the space available in the average duct has increased to at least three or four in the past several years and appears to continue to increase with time"); NCTA at Exhibit 16 (displaying "an advertisement from a leading manufacturer of inner-duct devices showing that certain of its products subdivide primary four-inch duct as small as two inches in diameter into as a (sic) many as 6 inner ducts"); id. at 42 ("as long ago as 1981, the Bell System provided for the placement of four-compartment innerduct in 3-1/2 square and 4 inch ducts").

AT&T at 23) -- three or more cables could still occupy the remaining conduit space in many instances.⁴⁸ In light of the historic inability of cable operators “to use the maintenance duct and municipal duct (where there is such a municipal set-aside) even in cases of emergency” (NCTA at 43) and the fact that the municipal set aside duct is often “put to commercial use” (*id.* at 43-44),⁴⁹ it is clear that AT&T’s one-third-duct proposal is conservative,⁵⁰ and, indeed, that requests for a one-quarter-duct approach (*see* TCI at 16) are entirely reasonable.⁵¹

The electric utilities attempt to avoid this analysis altogether, claiming that their conduits can never be shared (and thus that a whole duct method should be used for their conduit). *See, e.g.,* Electric Utilities II at 86. That is false -- indeed, the electric utilities themselves concede that communications cables, including communications cables owned by the electric utility itself, can and do share a single electric utility-owned duct. In those circumstances, the ownership of the duct is irrelevant, and a one-third duct approach is appropriate for the same reasons it is appropriate for a telecommunications company-owned duct. In fact, the electric utilities have overstated their case even with respect to ducts actually occupied by electric cables. Contrary, to the electric utilities’ claims, the NESC does permit duct sharing between electric and telecommunications cables under certain circumstances. In particular, the NESC merely provides

⁴⁸ Moreover, if an inner-duct or conduit is reserved for maintenance purposes, any party subsequently occupying that space on a more permanent basis should be required to expand the conduit run’s capacity in order to assure that the same amount of maintenance space remains available.

⁴⁹ *See also* Time Warner at 18 (“so called ‘maintenance ducts’ . . . should be considered usable”).

⁵⁰ *See also* Time Warner at 18.

⁵¹ *See also* NCTA at 42 (“the Commission should adopt a quarter-duct convention”).