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

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

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

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COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association ("NCTA"), by its attorneys, submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.

NCTA is the principal trade association of the cable television industry. Its members provide cable television services throughout the United States, using poles, conduits and rights-of-way owned and/or controlled by utilities and municipalities. NCTA's members also utilize poles, conduits and rights-of-way to deliver telecommunications services.

INTRODUCTION AND SUMMARY

The Commission should substantially adopt its proposals for implementing Section 224(e) of the Telecommunications Act of 1996, which concern the rates and procedures for pole attachments, conduits and rights of way used by telecommunications carriers to offer service. NCTA's comments support the fundamental precepts put forth in the Notice, subject to the following specifications and modifications:

- To avoid unnecessary waste of Commission resources, and consistent with the cable pole complaint procedure, a complainant should be required to show either that negotiations have failed, or are fruitless, as part of the showings submitted with the complaint;

- The Commission's telecommunications pole attachment policies should promote competition by encouraging the maximum number of attachers. Toward that end, the Commission:

  — should acknowledge the positive role played of overlashing by cable operators of existing lines that carry cable and other types of communication services;

  — should adopt a rule to permit overlashing to existing strand, so as to minimize construction delays and administrative costs, and to avoid superfluous "review processes" by a cable operator's or telecommunications carrier's pole owning competitors;

  — in recognition of finite pole space, should permit third parties to use dark fiber within a carrier's original lines, and should permit a telecommunications carrier to allow overlashing of conductors owned by third parties to the carrier's facilities so long as the carrier consents;

  — should find that there are no inherent differences between cable and telecommunications lines that warrant different treatment for purposes of overlashing; and

  — should explicitly limit contractual conditions that a utility may impose upon an overlasher to generally accepted engineering standards as provided for in the National Electric Safety Code.

- The presumptions regarding usable space and safety space, which are presently applied to cable attachments, should also be applied to telecommunications attachments. In particular:

  — There is no basis for applying different usable space and safety space presumptions to cable and telecommunications attachments.

  — The record supports a presumption that electric poles are 40 feet in height.

  — The Commission should reject the proposal of electric utilities to decrease the presumptive amount of usable space on electric poles from 13.5 feet to 11 feet because, as the record shows, at least 13.5 feet is usable on the average pole.

  — The Commission should reject Duquesne Light's proposal to adopt presumptions related to weight and wind loads.

  — Safety space used by cable operators and telecommunications carriers should be charged exclusively to utilities because, as the Commission states, this space emanates from the requirement that a utility comply with the NESC.

- The cost of unusable space should be allocated to attaching telecommunications entities consistent with the Act's requirements and the following specific requirements:

  — Where a utility provides telecommunications services, it should be counted as an attaching entity.

  — Separate ILEC attachments should be counted separately for purposes of apportioning space.

  — Telecommunications attachments by government agencies to utility poles should be counted as separate attachments and charged to the utility.

  — Each utility should develop a record that supports that utility's presumptive number of attachers. An attaching entity should have a right to inspect the pole plant, and to rebut the presumption.

  — Poles should be presumed used for telecommunications in proportion to the number of subscribers who subscribe to telecommunications services over the cable system.

- The rate of conduit rentals should be calculated based upon a quarter-duct methodology, with no set aside for unusable space.

- Right-of-way disputes should be resolved on a case-by-case basis in accordance with the Commission's guidelines.

- Pole rate increases should be imposed annually in accordance with the Act.

I. A COMPLAINT MUST DEMONSTRATE THAT NEGOTIATIONS HAVE FAILED

The Commission proposes to apply a procedure to attachments by telecommunications carriers to poles and conduits under which a complainant must show that negotiations have failed prior to the filing of a complaint. This proposal should be adopted.

The Commission notes correctly that its role in the implementation of Section 224(e) of the 1996 Act, which provides for regulation of attachments of a telecommunications carrier, is limited to situations "when the parties fail to resolve a dispute over such charges."[1] If the parties

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[1] Implementation of Section 703(e) of the Telecommunications Act of 1996, FCC 97-234, rel. Aug. 12, 1997, at 7, citing 47 U.S.C. §224 (e) (1) ("Notice").

are able to reach agreement without resorting to the Commission's processes, the agency does not become involved in the case.

The Commission's existing procedure for the adjudication of cable pole complaints incorporates a requirement that a complaint "... include a brief summary of all steps taken to resolve the problem prior to filing. If no such steps were taken, the complaint shall state the reason(s) why it believed such steps were fruitless."[2] Failure to include the required statement could result in dismissal of the complaint on grounds of incompleteness.

The Commission's proposal to apply this rule to complaints involving telecommunications attachments is reasonable and appropriate. The statute makes the complaint procedure applicable only when the parties fail to agree among themselves, while preserving all appropriate recourse to the Commission. The summary statement is an efficient means of ascertaining that agreement has not and cannot be reached. It requires a statement that "all steps" have been taken in private negotiations prior to resorting to the Commission, or an explanation as to why those steps would be "fruitless."

The Commission can achieve its objective of hearing only complaints where private negotiations have failed by applying the existing rule for cable attachments, contained at Section 1.1404(i), to telecommunications attachments. There are no identifiable differences between cable and telecommunications attachments, and no discernible distinctions in regulatory treatment, that justify a separate procedure to determine whether negotiations have been properly undertaken and then have subsequently failed. The Commission's proposed approach is entirely appropriate in these circumstances.

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2 47 C.F.R. §1.1404(i).

II. COMMISSION POLICIES SHOULD PROMOTE COMPETITION BY FACILITATING ATTACHMENT BY THE MAXIMUM NUMBER OF SERVICE PROVIDERS TO UTILITY POLES

The Commission recognizes that the pro-competitive intent of the 1996 Act should be reflected in its pole attachment policies. It bases the tentative conclusion that "telecommunications carriers should be permitted to overlash their existing lines with additional fiber when building out their system"[3] upon the Act's pro-competitive intent. It advances several proposals as part of its access to poles policies to "promote the rapid deployment of competitive telecommunications services."[4] The Commission should adopt its pro-access proposals for overlashing and third party use.

A. Overlashing Can Facilitate the Provision of Cable Video Services and New Services by Cable Operators

The Notice seeks comment on whether, and to what extent, "overlashing facilitates the provision of services, other than cable service by cable operators, such as Internet access and local telephone service."[5] The Notice also asks whether there are "inherent differences" between cable and telecommunications lines that warrant different treatment of the overlashing of the facilities of cable systems and telecommunications carriers.[6]

Overlashing is a central component of the cable industry's construction strategy and has been a critical part of that strategy for decades. Overlashing by a cable operator of its own

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3 Notice at 8.

4 Id.

5 Id.

6 Id.

conductors, without the need for advance approval by the utility, has been a key factor in the expansion of system capacity.[7]

Cable operators overlash new conductors to existing strand on a regular basis. It is common practice for cable operators to overlash existing transmission facilities with new facilities where new facilities are needed to reroute trunks, replace conductors, and upgrade cable transmission systems. Likewise, when cable companies decide to replace microwave or supertrunk with fiber, or to upgrade from coaxial to fiber/coaxial hybrid design, the general practice is to overlash existing strand (and the coaxial wires lashed to that strand) with fiber facilities.

Based upon the cable industry's long experience with the attachment of cable lines to utility poles, and more recent experience with the attachment of telecommunications lines, NCTA does not believe there are any differences that would justify the conclusion that different treatment is appropriate. Cable lines are either fiber or coaxial cable; telephone lines are either fiber or wire pairs. The addition of fiber to a strand that carries coaxial trunk and distribution will have a negligible impact on other lines and on the pole plant.[8]

Overlashing may be necessary to deliver video services and any other services offered by a cable operator.[9] While Internet access and telephone service may not be delivered over

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7 Claims of excessive loading should be regarded skeptically, given the utilities' long tolerance of the overlashing of trunk cable. The increasing use of lighter fiber in place of coaxial cable will tend to reduce the consequences of multiple attachments as a loading factor, to the extent it is a serious factor at all.

8 Where a cable operator overlashes a second strand it should only be charged for a single attachment. See H.R. Rep. No. 560, 103d Cong., 2d Sess. at 73 (1994).

9 We do not believe that the Commission intended to classify Internet access as a telecommunications service by reference in ¶15 of the Notice. The 1996 Act defines "cable services" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." The Conference Report at 54

discrete facilities, they may be transmitted via overlashed facilities. The extent to which the overlashed facility will be used in the general case for telecommunications services, as opposed to cable services, is not certain.

B. Carriers Should Be Allowed to Overlash in the Course of System Construction

The Commission tentatively concludes that telecommunications carriers should be permitted to overlash their existing lines with additional fiber in the course of system buildouts.[10] Permitting overlashing in this manner will enable telecommunications carriers to add fiber capacity needed to transmit additional services without obtaining unnecessary prior approvals of the pole owner.

In recent years, pole owners have sought to frustrate the deployment of fiber optics by cable systems through the imposition of severe and pretextual engineering review procedures. These have been previously detailed, for example in the recent case of Marcus Cable Associates, L.P. vs. Texas Utilities Electric Co.[11] Adopting a general rule allowing the overlashing of fiber to existing strand will minimize construction delay, minimize administrative costs, and avoid the increasingly prevalent practice of subjecting fiber deployment to a superfluous "review process" by a telecommunications carrier's or cable operator's direct competitor.

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states: "the conferees intend the amendment to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services. This amendment is not intended to affect Federal or State regulation of telecommunications service offered through cable system facilities, or to cause dial-up access to information services over telephone lines to be classified as a cable service." 142 Cong. Rec. H1123 (daily ed. Jan. 31, 1996). High-speed Internet access over the cable is clearly treated as a cable service. To do otherwise will disserve the purposes of the amendment and erect a barrier -- in the form of higher pole rents -- to the deployment of such an enhanced cable service.

10 Notice at 8.

11 Marcus Cable Associates, L.P. v. Texas Utilities Electric Co., PA No. 96-002 (July 2, 1997).

C. The Proposals for Third-Party Use Should Be Adopted

The Commission raises several issues regarding the ability of third parties to use overlashed facilities. It asks first if a telecommunications carrier is allowed to overlash its own lines, whether the carrier should be permitted to allow third parties to use the overlashed facility.

The present right of cable systems to transport signals originated by third parties over the system should be retained. Cable services consist of a series of channels and services with a widely differing degree of control by the cable operator. Local origination is obviously produced by, owned by, and distributed by the cable operator. By contrast, must carry, public access and commercial leased access services are produced by third parties with virtually no editorial limits, and distributed by the cable operator. Carriage over systems of telecommunications signals for third parties is no different. That carriage is neither an "attachment" to the pole in need of a pole agreement, nor is it "use" of the pole liable for pole rental. If it were, every commercial leased access programmer sending signals over a cable system, and every reseller of an ILEC's telephone services, must contract with the utilities that own the poles. Thus, rental of "dark fiber" is not an attachment, and should not be restricted.[12]

Permitting third parties to use dark fiber within a carrier's original lines will enhance competition by increasing the number of entities able to offer service over limited capacity pole plant. Limitations on the amount of usable space and requirements for separation of electric, telephone, cable and other lines within the usable space, necessarily limit the number of separate entities that can be accommodated. Authorizing a carrier to allow a third party to use dark fiber

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12 Heritage Cablevision Associates of Dallas, L.P. and Texas Cable TV Association, Inc. v. Texas Utilities Electric Co., 6 FCC Rcd. 7099 (1991).

within the carriers' lines does not raise safety or security concerns that cannot be ameliorated by requiring appropriate standards.

Similar considerations warrant permitting an attaching entity to allow overlashing of conductors owned by third parties to the carrier's facilities, with that carrier's consent. Given the certainty of a finite amount of pole space, allowing third parties to overlash will enable additional providers of telecommunications services to reach customers, instead of incurring the substantially increased costs of financing taller poles or denial of access to poles. The potential new competitors will be able to offer service by accessing another's plant. Without that ability, where the existing pole plant will not accommodate additional separate attachments a new potential provider must either forego the offering of service or undertake onerous and burdensome new investment (e.g., purchase and installation of taller poles) that it may not be able to recoup within a reasonable time horizon.

Moreover, there are no countervailing considerations arguing against this proposal. It may be argued, for example, that safety and security concerns warrant limiting attachers to telecommunications carriers (and, of course, cable systems) that have a contractual relationship with the pole owner. But these concerns, to the extent they have legitimacy, can be ameliorated by the incorporation of appropriate engineering standards in pole attachment contracts, and reliance on the existing indemnity clauses which protect the pole owner from liability.[13] Permitting overlashing in the manner proposed will promote competition by accommodating additional telecommunications providers.

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[13] Notice at 8.

D. The Commission Should Explicitly Limit Contractual Conditions Related to Overlashing and Dark Fiber`

The Commission seeks comment "...on the contractual obligations that utilities should be permitted to require of attaching entities who lease excess dark fiber or permit overlashing."[14] The Commission presumably intends to supervise these contractual arrangements because it correctly perceives that, in the absence of strict limitations on the conditions which a utility can impose on an overlasher or user of dark fiber, serious anticompetitive consequences can result.

The only contractual condition imposed upon an overlasher should be the requirement to abide by generally accepted engineering standards as reflected in the National Electric Safety Code ("NESC"). For example, overlashing should not result in exceeding the load capacity of the existing strand and, if relevant, guy and anchor. These limited conditions are fully adequate to meet safety and security concerns that may arise as a consequence of overlashing or use of dark fiber.

* * * * *

For the foregoing reasons, the Commission should adopt each of its proposals to allow for overlashing and the use of dark fiber. As explained above, adoption of these proposals will promote competition by increasing the number of facilities-based providers who are able to serve customers. This can be achieved without any identifiable risks to either the security of pole plant or to the safety of employees.[15] The Commission should also safeguard competition by adopting

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14 Id.

15 The Commission also "...seeks information on how these situations [i.e., overlashing and dark fiber] should be treated for the purpose of counting entities in the process of establishing a just and reasonable rate. Id. These comments respond to this issue below in our response to issues raised in ¶¶22-28 (number of attaching entities for purposes of calculating other than usable space) and ¶35 (applicability of maximum rate formula when an entity either overlashes to an existing attachment of another pole user or where the user employs dark fiber located within the initial attachment of another entity).

within its rules the proposed procedure regarding contractual conditions for overlashing and dark fiber.

III. THE COMMISSION SHOULD ADOPT ITS PROPOSALS FOR DETERMINING ATTACHMENT CHARGES SUBJECT TO THE FOLLOWING MODIFICATIONS

The central purpose of this proceeding is to adopt a mechanism for ascertaining just and reasonable rates for attachments used by telecommunications carriers in cases in which states do not regulate attachments and parties are unable to settle disputes privately. Since the implementation of the 1978 Pole Attachment Act, the Commission has applied a formula to determine just and reasonable pole rates for cable attachments. This formula has been subject to repeated challenge over the years by utilities, and portions of it have been revised over time to more properly reflect the fully allocated costs of attachments. The formula has been applied by the Commission hundreds of times to resolve individual complaints.

The 1996 Act changes the pole attachment formula as it applies to telecommunications attachments, most significantly by requiring attachers to pay a different portion of the cost of space on a pole described as "other than usable space." Under the current regime, plain cable pays for both usable and unusable space on a pole. The cost of the usable space is directly assigned in proportion to the usable space used. The cost of the unusable space is treated as an indirect cost which is assigned in the same manner as direct costs. Under the new regime, a telecommunications attacher will pay for unusable space by allocating two-thirds of the costs among attaching entities. The Commission seeks comment on the application to telecommunications attachments of three key components it proposes to apply to telecommunications attachments: presumptions, allocation of the cost of other than usable space (i.e., "unusable space"), and allocation of the cost of usable space. As explained below, the

Commission should: (1) apply the existing usable space and safety space presumptions to telecommunications attachments; (2) adopt the proposal for the allocation of cost of other than usable space, but limit its application to attachments for telecommunications; and (3) substantially adopt the proposed treatment of usable space for attachments by telecommunications carriers.

A. The Existing Presumptions Regarding Usable Space and Safety Space Should Be Applied to Attachments of Telecommunications Carriers

As the Commission states, presumptions respecting certain components of the cable pole attachment formula "were established because developing a data base for each utility is impractical. The costs relating to such an undertaking outweigh any benefit accruing to either the utility or the attaching entity."[16] It is equally clear that a presumption is necessary to adjudicate complaints brought by telecommunications carriers. As is the case with cable pole complaints, it is "impractical" to develop a separate data base for each utility, and the cost of developing such a data base would be prohibitive.

1. Identical Presumptions Should Apply to Cable and Telecommunications Attachments

The Notice asks whether "attachments by telecommunications carriers are sufficiently different or unique"[17] to justify different presumptions. Cable companies attaching telecommunications facilities to utility poles have not identified any basis upon which to conclude there are distinctions between cable and telecommunications attachments that warrant different presumptions. Lines which support telecommunications services are the same lines

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16 Id. at 9.

17 Id. at 10.

which support cable services. They are attached to the same support strand which takes up the same amount of physical space on a pole, which is significantly less than the one foot of "usable space" allocated by the rules to cable attachments. There are no other factors that would provide any basis for concluding that more or less than one foot of space should be assigned on a presumptive basis to an attachment whether it is used for cable or telecommunications.

2. Electric Poles Should Be Presumed 40 Feet in Height

The Commission has previously adopted the rebuttable presumption of an average pole height of 37.5 feet, an average usable space of 13.5 feet and an average of 24 feet of unusable space. These figures are based upon the NESC guideline that 18 feet of the pole is reserved for ground clearance and 6 feet is designated for setting the depth of the pole, leaving an average of 13.5 feet of usable space, if it is assumed that an average pole has a height of 37.5 feet.[18]

The Whitepaper submitted by electric utilities argues that the average height of utility poles is now 40 feet.[19] As fully discussed in NCTA's comments in CS Docket No. 97-98, the Commission should adhere to its previous usable space findings.[20] If any change is required, it would be to adjust upward the amount of usable space on electric poles to 16 feet from 13.5 feet, reflecting the acknowledged increase in pole height to 40 feet.

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18 Id. at 9.

19 See, Whitepaper filed by the law firm of McDermott, Will and Emery, Aug. 28, 1996, on behalf of American Electric Power Service Corp. and other utilities.

20 See, generally, NCTA Comments, Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, Jun. 27, 1997, at 2-9.

3. The Usable Space Presumption Should Not Be Decreased From 13.5 Feet to 11 Feet

NCTA strongly disputes the contention of the Whitepaper that the usable space presumption should be decreased from 13.5 feet to 11 feet. NCTA explained in its Cable Pole Attachments Proceeding comments that the utilities are arguing for a fundamental change in the usable space calculation to exclude the so-called "neutral zone," the 30 to 40 inches between a communications conductor and the first horizontal electrical conductor.[21] The Commission, the courts and the states have repeatedly rejected the exclusion of the neutral zone from usable space.[22]

NCTA demonstrated previously that the neutral zone exclusively benefits the electric utility because it is electric attachments that must maintain prescribed distances from all conductors of differing voltages and applications. In this sense, the neutral zone is "used" by the electric company for the purpose of providing its core services.[23]

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21 Id. at 12.

22 NCTA pointed out in its comments in the Cable Pole Attachments Proceeding that

> The utilities' claim that the neutral zone is unusable has been rejected time and again. It was rejected first in CC Docket No. 78-144; then in the *Monongahela Power* case; then again before the Commission in a 1984 rulemaking; in subsequent litigated cases; in state pole attachment proceedings and in Congress' repeated reaffirmation of the pole attachment formula in 1983, 1984, 1992 and 1996.

Id. at 12-13.

23 Id. at 13. While some electric utilities have disputed whether the neutral zone should be assigned to them for the purposes of cost allocation, one utility (Boston Edison) in a submission before the Securities and Exchange Commission ("SEC"), has admitted that the neutral zone is the responsibility of the utility. See Construction and Indefeasible Right of Use Agreement Between BecoCom, Inc. and RCN-BecoCom L.L.C. (Dated June 17, 1997) at 3 (filed with RCN Corp's Amendment No. 2 (Exhibit 10.10) to SEC Form 10A filed with the SEC Sept. 5, 1997).

Furthermore, the neutral zone is space required by electric companies to maintain their own minimum clearances above grade. While under the NESC communications conductors may be placed to cross highways at 18 feet, electrical utilities must cross at 22 feet.[24] The extra space above the point of minimum communications attachments is the virtually identical space which the electric utilities are attempting to assign to cable companies and telecommunications carriers.

Finally, the neutral zone is not "dead space" unusable for any other purpose. The neutral zone can be, and is, used for electric services such as street light attachments. Electric companies derive added revenue from these street light attachments. There is no basis for decreasing the presumptive amount of usable pole space.

4. Duquesne Light's Proposal for Adopting Presumptions Based Upon Weight and Wind Loads Should Be Rejected

Duquesne Light Company, in comments submitted in the Local Competition Provisions Proceeding, asked the Commission to adopt pole attachment rule presumptions that "include weight and wind loads."[25] Duquesne appears to contend that unless weight and wind loads are considered, physical attachments by attaching entities will not properly reflect the burdens placed on the pole by particular attachers.

Neither weight nor windloading have a place in usable space calculations. These are concerns which utilities and attaching parties address region-by-region with due regard to the loading conditions in each part of the country. The Act focuses explicitly on usable space, and deals with other capacity issues solely as an engineering matter to determine whether or not a pole is suitable for attachment. In addition, factoring in weight or windload would make the

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24 Id. at 14 (citing NESC Table 232-1).

25 Notice at 9, citing Comments of Duquesne Light, CC Docket No. 96-98, Sept. 30, 1996 at 17-18.

regulatory regime far more complex than the simple and expeditious rate process envisioned by Congress.

5. Safety Space on Poles Used by Cable Operators and Telecommunications Carriers Should Be Assigned Exclusively to Utilities

The Commission has always applied to cable attachments the NESC requirement under which a 40 inch safety space exists between power and communications lines. The safety space is needed "to minimize the possibility of physical contact by employees working on cable television or telecommunications attachments with the potentially lethal electric power lines."[26] The Commission proposes to apply this practice to telecommunications attachments, and tentatively concludes that "the safety space emanates from a utility's requirement to comply with the NESC and should properly be assigned to the utility as part of its usable space."[27]

NCTA fully supports the tentative conclusion. Safety space is necessary to protect non-utility employees from the dangers posed by power lines. The Commission has properly assigned this space to the utilities in the past, and the practice should be continued.

B. The Cost of Unusable Space Should Be Allocated to Telecommunications Entities Consistent with the Act's Imputation Principles

The 1996 Telecommunications Act effects a change in pole attachment rate regulation by establishing a separate mechanism to determine pole rates for telecommunications attachers. Prior to the implementation of this modification, telecommunications carriers attaching to poles are subject to the "cable" formula.

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26 Notice at 9.

27 Id. at 10 (citation omitted).

2. Separate Incumbent LEC Attachments Should Be Counted Separately for Purposes of Apportionment of Space

The Commission seeks comment on how to count, for purposes of apportioning the costs of unusable space among attaching parties, attachments by an incumbent LEC. The Commission's tentative conclusion is correct: An ILEC's existing attachment should clearly count as (at least) one "entity" to which two-thirds of unusable pole costs should be directly allocated under Section 224. The Act's exclusion of ILECs from the definition of "telecommunications carrier" was for the purpose of leaving utility/ILEC joint use agreements to private contract. That is why the exclusion applies to "telecommunications carriers" which would otherwise be subject to the rate formula of Section 224(e), and why that formula speaks to an allocation among "entities," rather than among "telecommunications carriers."

When an ILEC installs facilities to distribute video programming, those facilities should be treated as an additional "entity." This treatment is required because, as a matter of practice, ILECs typically install separate strand, 12 inches apart from existing POTS conductors, to support broadband and video networks. It is our understanding that this is the way in which Ameritech New Media has installed its cable television plant in Michigan, Ohio, and Illinois. This is also how Bell South has installed video plant in Georgia. The Commission has long held that separate strand facilities that occupy an additional one-foot of space should be counted as an additional attachment.[31] This is consistent with the 1996 Act, which adopts very specific requirements that compel the attribution of additional pole costs to diversified utilities.

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31 See, e.g., Texas Cablevision Co. v. Southwestern Electric Power Co., PA-84-0007, Mimeo No. 2747 (February 26, 1985), review denied, PA-84-0007, Mimeo No. 36108 (August 22, 1985).

NCTA submits the following comments on the Commission's specific proposals for implementing this provision:

1. Where a Utility Provides Telecommunications Services, It Should Be Counted as an Attaching Entity

The Commission tentatively concludes that "where a utility is providing telecommunications services, such entity would also be counted as an attaching entity for the purposes of allocating the costs of unusable space."[28] This proposal is a straight application of the statute and should be incorporated in the Commission's rules.

As amended by the 1996 Act, Section 224(g) of the Communications Act states:

> 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.[29]

The Conference Report repeats the statutory language without further elaboration.[30]

The provision reflects Congress' understanding that when a utility offers telecommunications or cable services it will, as a general matter, conventionally install its communications facilities below existing electric lines, in separate space on utility poles. Since the utility's communications facilities will use (and burden) the pole plant in the same way as the attachments of other communications providers, it is entirely proper and necessary for the utility to contribute to the cost of the space, other than usable space, in amounts equal to that paid by other telecommunications attachers.

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28 Notice at 11.

29 47 U.S.C. §224(g).

30 Telecommunications Act of 1996, Joint Explanatory Statement of the Committee of Conference, Report 104-458, 104th Cong. 2d Sess., at 207.

3. Telecommunications Attachments by Government Agencies Should Be Counted as Separate Attachments and Charged to the Utility

The Commission proposes that attachments made by a government agency should be counted as an attachment for purposes of calculating the total number of attachers. The Commission points out that a utility may be required, as a condition of its franchise or pursuant to statute, to provide pole attachments for public use such as "... traffic signals, festoon lighting, or specific pedestrian lighting."[32]

The government agency generally does not pay the pole owner directly for the use of poles for these purposes. But these uses do burden the pole plant and they do impose costs upon the operation of the pole plant. NCTA agrees that attachments by government agencies should be counted for purposes of determining the number of attachers, and the cost of attachments used by government agencies should be borne by the pole owner since the provision of pole space to the government agencies "... relates to a responsibility under ... [the utilities'] ... franchise or statutory authorization."[33]

4. Counting Third Party Overlashers

As explained above, when transport services are provided over a cable system, no "attachment" is made by the customer at all. However, if a conductor wholly owned by a third party other than the cable system is overlashed to the strand, the third party should be counted as an "entity" making use of the support space. In such cases, the third party would not be making

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32 Notice at 11.

33 Id.

use of any usable space which has not already been paid for. Thus, if any rate is to be paid, it would be limited to a share of the support space.

The Commission needs to assure that the rate formula adopted does not lend itself to over recovery. For example, without certain precautions, a utility might seek to charge the telecommunications rate twice to a single entity, if that entity attached a second separate strand in the usable space. In order to avoid that result, the Commission should make clear that if an entity occupies an additional one foot of usable space by attaching two strands 12 inches apart, that entity may be charged an additional rate, but it may not be charged twice for the same support space. For example, if a CLEC attached two strands 12 inches apart, it could be charged for 2/13.5 of the cost of the usable space plus 2/3 times 1/N of the cost of the nonusable space, where N is the number of entities. It could not be charged twice the telecommunications rate because that would charge twice for the nonusable space.

5. Each Utility Should Develop a Record to Support a Presumptive Number of Attachers, Subject to an Attacher's Right to Inspect

Finding that a pole-by-pole inventory of the number of parties attaching to each pole would be too costly, the Commission advances several proposals for determining the number of entities attaching to the pole plant. Of these proposals, NCTA supports a presumption based on a projection to 2001 of the FCC's fiber deployment report. As has been demonstrated in the Comments of Comcast Corp., it may be presumed that poles located outside of rural areas will have attachments by six entities, and poles in rural areas will have attachments by at least three.[34] We agree that each party should be permitted to rebut that presumption.

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[34] Comments of Comcast Corp., CS Docket No. 97-151, Sept. 26, 1997, at 8-10.

This would include the right of a utility to develop "a presumptive average number of attachers on one of its poles,"[35] as of 2001, so long as attachers are given the ability to confirm the utility's presumption. The utility would provide to each attacher upon request "the methodology and information"[36] that formed the basis for its presumption. In addition to adopting this proposal, the Commission should adopt an additional safeguard of according to an attaching entity a right to inspect the pole plant and the underlying information. Under this procedure, the attaching entity could "confirm" the number of attachers by invoking a right to inspect, visiting the pole plant and verifying the underlying data.

A party operating in both urban and rural areas should be permitted to develop different presumptions to more accurately reflect the number of attaching entities in each type of area. The Commission's proposal to classify poles as "urban" or "rural" represents a positive step in the direction of more effective classification of poles based upon the actual characteristics of pole plant. NCTA suggests that poles should be classified as "urban," unless they are offered in an area that would have qualified as "rural" for purposes of the so-called "rural exemption" to the telephone company/cable television cross-ownership rules, which was in effect prior to the passage of the 1996 Telecommunications Act.

The Commission also seeks comment on an alternative under which the agency would conduct a survey and determine the average number of attachments, presumably on a nation-wide basis. While in time a national survey might prove useful, the deployment of electric company telecommunications facilities ILEC video facilities, and other uses is only beginning.

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35 Notice at 11.

36 Id.

rates are billed based upon pole count. That is, each pole physically contacted is counted and billed periodically at the lawful rate.

Under technology prevailing in the first half of this decade, application of the new rule to existing billing systems is not particularly difficult. A competitive access provider ("CAP"), for example, might have had a defined path, for example from an IXC POP to an institutional customer, and the number of poles contacted could be counted. But as new technology is deployed, counting poles becomes more problematic. For example, a cable system is designed to propagate signals from a headend downstream throughout the system. If that system is upgraded to deliver telecommunications services as well as cable services, the point to multipoint architecture may cause such telecommunications signals to propagate throughout the network, even if they are digitized, coded, or otherwise processed to be unusable to all but the discrete customers to whom they are directed.

Cable systems have been informed by certain utilities that such an integrated design, in which video, telecommunications, and other signals are physically propagated throughout a subscriber network, will trigger payment of the telecommunications pole rate on all poles throughout the subscriber network -- even if the non-cable signals are directed to only a few customers. This creates a barrier (in the form of a dramatic, system-wide pole cost increase) which strongly disfavors the introduction of new services on an integrated basis.

On the other hand, if the system were designed as a stand-alone CAP, with discrete conductors along discrete routes to discrete customers, rather than being integrated into the subscriber network, only those poles contacted by those discrete conductors would be treated as telecommunications attachments.