

Therefore, a survey such as proposed in the Notice, if it is undertaken, should be done closer to 2001 when a more accurate count may be obtained for use in 2001.

**6. Parties Should Be Afforded An Opportunity to Rebut Presumptions**

The Commission proposes that where a presumptive number of attachers is developed for the purpose of determining rates, a utility, telecommunications carrier or cable operator should be given an opportunity to rebut the presumption.<sup>37</sup> Under the Commission's scheme, a challenging party must initially establish the inaccuracy of the presumption by providing what it believes to be the accurate average based upon the identification and calculation of the actual number of attachments. In cases of large numbers of attachments, statistically sound surveys may be substituted for actual counts. The challenged party will then be offered an opportunity to justify the presumption. If the challenger prevails, its proffered number of attachers would be used as that factor for purposes of calculating the rate.

The proposals put forth by the Commission for a due process procedure in which interested parties are able to rebut presumptions respecting the number of attachers are reasonable and necessary. They should be adopted.

**7. Poles Should Be Presumed Used For Telecommunications Based Upon the Number of Poles Used for Telecommunications Compared to the Number Used for Cable Service**

Sections 224(d) and (e) contemplate that the current rate will apply to cable systems providing cable services and that a different rate will apply to cable systems (and other telecommunications carriers) carrying telecommunications services. At present, pole attachment

---

<sup>37</sup> Id. at 12.

An interpretation of Section 224 which creates a structural bias in favor of older technology, and discourages the deployment of integrated broadband networks, would be contrary to Congress' express policy in Section 7 of the Communications Act, to "encourage the provision of new technologies and services to the public." 47 U.S.C §157(a). We believe that there is a better method of counting attachments which serves the purposes of both Section 7 and Section 224.

It might be theoretically possible to design a record keeping system that identifies the exact pole routes (and ownership of each pole) used to reach each customer; to track the customers who subscribe to telecommunications services offered over cable systems, and "count" the number of poles "used" to reach that customer; to keep track of the churn among customers, adding and removing pole counts into the database of poles "used" for telecommunications services, and averaging them properly throughout the pole billing year as customers add or remove telecommunications services; and to place those poles with the proper owners, as and when they transfer title among themselves. However, we know of no such system, and no reason to compel investment in such a system.

There is a far easier method to use when discrete runs of CAP-style conductors cannot reasonably be identified. Poles should be presumed to be used for telecommunications in proportion to the number of subscribers in a system who subscribe to telecommunications services over the cable system. For example, if 10,000 poles are used in a 20,000 subscriber system, and 5% of customers take telephony from cable, then 5% of the poles, or 500 poles should be charged at the telecommunications rate. The Commission should adopt this method as an administrative convenience of the sort long used in pole attachment cases.

#### IV. CONDUIT ATTACHMENT ISSUES

In CS Docket No. 97-98, NCTA demonstrated that the proper calculation of conduit rental rates warranted use of a quarter-duct convention. We also demonstrated that no duct should be set aside for maintenance, because such ducts are in fact used by conduit owners. We will not repeat that evidence here.

Quite apart from this empirical matter, however, we believe that the Commission's proposal for calculating conduit rentals for telecommunications purposes requires a change in the Commission's underlying premise. The proposal rests upon the assumption that whatever duct footage the Commission deems to be "set aside" for maintenance should be deemed unusable within the meaning of the pole attachment formula. This is inconsistent with the statute and all prior Commission interpretations. Section 224 defines "total duct or conduit capacity" to be the denominator of the conduit use ratio.<sup>38</sup> By contrast, "usable space" in Section 224(d) and 224(e) is a term defined specifically with respect to aerial attachments ("*space above minimum grade level*"). All discussions of reallocating "unusable" space for telecommunications leading to the 1996 Amendments were in the context of aerial attachments, and have no application to underground.

---

<sup>38</sup> The Notice in Amendment of Rules and Policies Governing Cable Pole Attachments, 12 FCC Rcd. 7449 at 7468 (1977) ("Cable Pole Attachments") states:

"Section 224 provides that total conduit space and conduit space occupied by cable systems is based on duct or conduit capacity. In addition, Section 224 states that a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment, by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way."

Likewise, the California statute modeled on Section 224 defines usable space in conduits as "all volume or capacity in which the public utility's line, plant, or system could legally be located, including the volume or capacity rendered unusable by the cable television corporation's equipment." Cal. Pub. Util. Code §767.5 (Deering 1996)

The Commission's most recent discussion illustrates this dichotomy. In the Notice in CS Docket 97-98,<sup>39</sup> the Commission specifically treated "reserved" ducts as usable by the conduit owner and (theoretically) by the attaching party:

The adjustment for reserved ducts element would be the number of reserved ducts that all attachers have the right to use in the event of a cable break or that they otherwise receive benefit from in any other way. If the attacher has no right to use that space or receives no benefit from that duct, we propose that the denominator should not be reduced.<sup>40</sup>

There has never been a suggestion that this duct is unusable; indeed, it could not be useful for maintenance if it was not usable and subject to occupation by wires. If anything, it is space held for use (and actually used) by the conduit owner. Its very purpose makes it part of the total capacity, and therefore "usable" within the context of the conduit formula.

One may take an analogy from poles. The occasional pole contract "reserves" part of aerial pole space for use by the government (for example, for traffic signaling); but the space has always been considered usable because it may be used for the attachment of wires. (The Commission carries forward this understanding in the Notice, at 11). One can make the same analogy to the neutral zone. The neutral zone is extra space used by the power company as separation space, for occasional streetlights, and to gain height, as has been detailed in our prior comments. It, too, is considered usable. Likewise, "spare" conduit is usable.

Thus, the Commission's proposal to treat reserved duct as subject to the two-thirds allocator is incorrect. It would wrongly and substantially increase conduit rentals, as illustrated in Exhibit I.

---

<sup>39</sup> Cable Pole Attachments, 12 FCC Rcd. 7449 (1997).

<sup>40</sup> Id., 12 FCC Rcd. at 7469.

Conduit rentals should be calculated for both video and telecommunications as indicated in our prior comments.<sup>41</sup>

## V. RIGHT-OF-WAY ISSUES

The Commission asks how it might deal with right-of-way disputes. We recommend that the Commission reiterate basic guidelines which may be used in case-by-case decisions. Right-of-way issues are impressed with a very particular public purpose. To advance universal service, state legislatures ceded part of their sovereign power of eminent domain to the utilities for use in achieving the most efficient routes for poles and lines.<sup>42</sup> That power may only be used for a public purpose.

Over time the utilities have leveraged that eminent domain power to persuade property owners to grant easements "voluntarily." Municipal and local planning commissions typically condition residential subdivision approvals on the dedication of easements to the utilities. State laws typically prohibit the issuance of occupancy permits to structures without working electrical service.<sup>43</sup> In a very real sense, utility rights-of-way carry a public trusteeship, which forbids the utilities from using them solely for their private gain.

In this context, the Commission has rightly adopted principles of open access in the Local Competition Order.<sup>44</sup> These principals are specifically applied with respect to rights-of-way:<sup>45</sup>

---

<sup>41</sup> Comments of the National Cable Television Association, CS Docket No. 97-98, Jun. 27, 1997, at 39-41.

<sup>42</sup> 1A Nichols' The Law of Eminent Domain §3.232[2] (rev. 3d ed. 1993). *See e.g.*, Fla. Stat. Ch. 361.01 (1996); Ga. Code Ann. §22-3-20 (1996)

<sup>43</sup> See, e.g., Fla. Stat. Ch. 553.79(6)(1996).

<sup>44</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 12 FCC Rcd. 15499.

<sup>45</sup> Id., 12 FCC Rcd. at 16058-16107.

- A utility should take all reasonable steps to accommodate requests for access, and before denying access based on a lack of capacity the utility must explore potential accommodations in good faith with the party seeking access.
- Under the 1996 Act's non-discriminatory access provisions, rights-of-way owned and controlled by telephone utilities may not be reserved by utilities for future use. Electric utilities were permitted to reserve space on support structures for a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service. However, there is no basis for such reservation of the basic rights-of-way, which should be made available without discrimination.
- Congressional intent underlying the 1996 Act requires a utility to exercise its eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments.
- A utility must make available to parties seeking access to rights-of-way "its maps, plats, and other relevant data available for inspection and copying ... subject to reasonable conditions to protect proprietary information" and within the time frames adopted in the Local Competition Order.
- Costs applicable to access to, or improvement of, rights-of-way should be borne by the party requesting such access or improvements.
- The entity controlling access to such right-of-way should be required provide the party requesting access with a decision regarding such access request within 45 days of the attaching party's application for access.

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

---

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

**VI. UTILITIES SHOULD BE PERMITTED TO IMPOSE POLE RATE INCREASES  
IN ACCORDANCE WITH THE ACT**

---

Section 224(e)(4) directs that the methodology for determining telecommunications carrier rates will become effective by February 8, 2001. It further requires that any increase in pole rates arising from the new regulations "... shall be phased in equal annual increments over a period of 5 years beginning on the effective date of the regulations."<sup>47</sup> The Commission also seeks comment on other proposals to equitably phase in the telecommunications carrier rate within the five year period.<sup>48</sup>

NCTA supports an implementation procedure that complies with the requirements of the Act. The adopted procedure should provide for pole increases phased in equal annual increments over a period of five years.

**CONCLUSION**

For the foregoing reasons, the Commission should adopt regulations and policies consistent with the comments herein.

Paul Glist  
Cole, Raywid & Braverman  
1919 Pennsylvania Avenue, N.W.  
Suite 200  
Washington, D.C. 20006  
202-659-9750

Respectfully submitted,



Daniel L. Brenner  
David L. Nicoll  
1724 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
202-775-3664

Counsel for National Cable Television  
Association

September 26, 1997

---

<sup>47</sup> 47 U.S.C. §224(e)(1).

<sup>48</sup> Id.

EXHIBIT I

NCTA Comments

CS Docket 97-151

September 26, 1997

	Current	Proposed		Total
	Total	Useable	Nonuseable	
Cost	\$ 2,000	\$ 1,778	\$ 222	
Conduit Feet	100	100	100	
Ducts per Conduit	9	8	1	
Duct Feet	900	800	100	
Ducts Set Aside	1	0	0	
Duct Feet Set Aside	100	0	0	
Net Duct Feet	800	800	100	
Net Liner Cost per Chargeable Duct Foot	\$ 2.50	\$ 2.22	\$ 2.22	
Carrying Charge	30%	30%	30%	
Duct Convention	0.5	0.5	NA	
Nonuseable allocator	NA	NA	0.6667	
Number User	NA	NA	3	
Share	NA	NA	22%	
Rate	0.375	0.3333	0.1481	
				<u>0.4815</u>
Delta				<u>0.2840</u>

CERTIFICATE OF SERVICE

I, Tonya K. Bartley, do hereby certify that a copy of the foregoing **COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION** were delivered this 26th day of September, 1997 to:

Ms. Margaret Egler  
Assistant Division Chief  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W., Room 918  
Washington, D.C. 20554

  
Tonya K. Bartley