DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

RECEIVED

SEP 26 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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	)	

INITIAL COMMENTS OF AMERITECH

Gerald A. Friederichs
Attorney for Ameritech
30 South Wacker Drive, 39th Floor
Chicago, IL 60606

September 26, 1997

No. of Copies rec'd 0+9
List ABCDE

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY. 1

II. USE OF ATTACHMENT SPACE. 3

A. Heritage Cablevision has been implicitly overruled by Sections. 224(d)(3) and 224(e). 3

B. Overlashing by an entity with an existing attachment should be permitted; subleasing should not. 5

C. The acceptability of dark fiber arrangements on facilities attached to structure depends on the terms and conditions of the dark fiber offering. 7

III. PRESUMPTIONS UNDERLYING THE POLE ATTACHMENT FORMULA. 8

IV. UNUSABLE SPACE COST ALLOCATION FORMULA. 10

A. Who is to be counted as an attaching party. 10

B. Presumptions regarding average numbers of attaching parties. 12

V. USABLE SPACE COST ALLOCATION FORMULA. 13

VI. CONDUIT ISSUES 14

VII. RIGHTS-OF-WAY ISSUES. 15

VIII. CONCLUSION. 16

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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	)	

INITIAL COMMENTS OF AMERITECH

I. INTRODUCTION AND SUMMARY.

On August 12, 1997, the Commission released its Notice of Proposed Rule Making ("Notice") proposing new rules with respect to the implementation of Section 703(e) of the Telecommunications Act of 1996 (the "Act"). The Notice also requests comment on a variety of other issues relating to pole attachment practices, the conduit rate formula and regarding a formula for attachments to

rights-of-way. In response to the Notice, Ameritech respectfully submits the following comments.[1]

In summary, Ameritech supports Commission rulemaking that facilitates ease in negotiating attachment agreements by circumscribing permitted pole attachment practices. For purposes of Section 224, [2] "pure" cable television providers seeking attachment rates under Section 224(d) should be limited in the services which they can provide, while all other facility attachers should be treated as telecommunications carriers under Section 224(e). Ameritech believes that overlashing by existing attaching parties should be permitted, but that overlashing by affiliates of attaching parties, or unrelated parties, is not in the public interest. In addition, subleasing and dark fiber leasing that provide physical access to poles or conduit should be restricted because of safety and other concerns.

Ameritech takes the view that presumptions in the rate formulas for pole attachments should support ease of application and avoid unnecessary complexity. Moreover, presumptions used to count attaching parties for purposes of the

---

[1] As noted in Par. 8 of the Notice, some issues raised in this docket are the same as those for which comment was sought in the Commission's Notice of Proposed Rulemaking, Amendment of Rules and Policies Governing Pole Attachments, ("Pole Attachment Notice") CS Docket No. 97-98. Ameritech filed Initial and Reply Comments in that docket and will not repeat those comments here, other than to incorporate those comments by reference.

[2] Telecommunications Act of 1996, Public Law No. 104-104, 104 Stat 56, 149-151, signed Feb. 8, 1996 (to be codified at 47 U.S.C. § 224) ("Act").

allocation of costs of unusable space should be based on competitive neutrality and should allocate common burdens, such as municipal use, to all users of structure.[3]

Also, the principles underlying conduit rate formulas should not differ from those supporting cost allocation formulas for poles. Unusable space cost allocation is not, and need not be, an issue in conduit use.

Finally, in Ameritech's experience, use of rights-of-way has not yet established a pattern on which rules can be rationally based.

Accordingly, Ameritech urges the FCC to modify its proposed rules consistent with the comments provided herein.

II. USE OF ATTACHMENT SPACE.

Section IV of the Notice seeks comment on the continuing viability of the Heritage Cablevision[4] case, as well as on overlashing, subleasing and dark fiber use. Ameritech's comments regarding these issues follow.

A. Heritage Cablevision has been implicitly overruled by Sections. 224(d)(3) and 224(e).

Ameritech has always believed that the burden on a pole or in a conduit is related to the facility attached, not to the services provided over that facility. Therefore, pole attachment rates and practices should depend upon the facility rather than on the services the facility provides. Differentiating pole attachment

[3] Poles, ducts, conduits and rights-of-way are sometimes collectively referred to herein as "structure."

[4] Heritage Cablevision Assoc. of Dallas, L.P. v. Texas Utils. Elec. Co., 6 FCC Rcd. 7099 (1991).

requirements by service puts the structure owner in the position of policing the services provided on a facility, a difficult and contentious task, and one that runs contrary to the competitive intent of the Act, especially in this era of "convergence" of services offered by cable television providers and telecommunications services providers.

However, by creating different rates for pole attachments for "pure" cable television services providers[5], that is, for cable television systems used solely to provide cable services, and telecommunications services providers[6], Congress has required categorization by service for pole attachments. That being so, it will be necessary to categorize pole attachments by services offered on the attachment to ensure that playing fields are level for attaching parties providing competing services. Hence, a cable television provider providing any services in addition to "cable services" as defined in Section 602(6) of the Act should be treated as a telecommunications services provider for the limited purposes of Section 224 rate application. This amendment in effect overrules Heritage Cablevision, and it could not be otherwise if competitive neutrality is to be preserved. Accordingly, utilities must be given the latitude to circumscribe the services offered by "pure" cable television systems to those described in Section 602(6) of the Act. Every other facility of a cable television system or telecommunications carrier providing

[5] 47 U.S.C. §224(d)(3).

[6] 47 U.S.C. § 224(e).

services other than, or in addition to, "cable services" as defined in Section 602(6) of the Act should be treated as a telecommunications service subject to the attachment rates under Section 224(e) for purposes of Section 224.[7]

B. Overlashing by an entity with an existing attachment should be permitted; subleasing should not.

A pole owner administers a pole not just for its own benefit and the benefit of those entitled to attach, but also for the safety of the public in general and for the interests of the community. To ensure these obligations can be met, it is Ameritech's practice, and common industry practice, to retain control over all attachments to poles it owns or controls. This is accomplished in several ways. First, the right to attach is not a property interest assignable by the attaching party, but rather is a service personal to the attaching party. Second, each attachment requires a separate occupancy permit, the purpose of which is to ensure that; space is available; safety, reliability and engineering criteria are met; necessary "make ready" work is identified, paid for and completed; and that NESC and municipal code compliance is examined. Third, physical access to the pole (or conduit) requires notice to, and coordination with, the pole owner, to ensure that the workers have the training and skill adequate for the job and to avoid conflicts between multiple users of the pole or conduit. These controls insure that poles are safely and effectively managed by the pole owner.

[7] Although Ameritech agrees that, for the purposes of § 224(e), such services should be classified as telecommunications services, Ameritech does not take any position regarding the classification of such services for any other purpose or under any other section of the Communications Act of 1934.

Consistent with the foregoing practice, overlashing can be appropriate where the facility to be overlashed is owned by the existing attaching party. In its interconnection agreements and state tariffs, Ameritech permits such overlashing without the payment of an additional attachment fee provided that the overlashed facility is subject to the issuance of a new occupancy permit.

Conversely, overlashing by third parties unrelated to an existing attachment should not be permitted. First, many attaching parties object to any overlashing of their facilities other than by themselves.[8] Overlashing does encumber the ability of each facility owner to manage its facility: cable splicing and replacement are greatly complicated when cables are lashed to each other. Further, municipalities object to the unsightliness of multiple overlashed cable facilities.

Similarly, an attached party should not be permitted to sublease or grant a right to overlash its attachment. As mentioned above, it is common industry practice that the right to attach is not an assignable property interest, so permitting such subleasing would be contrary to a host of existing agreements. Allowing subleasing would transfer part of the management and control function of the pole owner to an attaching party, who does not have the same incentives to ensure safe use of the pole as the owner. Finally, subleasing is unfair from a competitive point of view to parties, including ILECs, with individual attachments

[8] This was AT&T's position in interconnection arbitration's with Ameritech.

to poles, as it permits multiple competitors to divide the cost of a single attachment. Such a policy would drive all competitors to seek overlashers to share an attachment, which would lead to unsafe and unsightly cable plant on poles.

Accordingly, the Commission should not permit overlashing of facilities other than by a party with an existing attachment. Utilities owning or controlling poles should be free to restrict other overlashing practices. If the Commission extends the right to overlash to affiliates of parties with attachments, the obligation of a utility to impute charges to affiliates under Section 224(g) and the interests of competitive neutrality require that the utility be free to charge the affiliate for the overlashed facility.

C. The acceptability of dark fiber arrangements on facilities attached to structure depends on the terms and conditions of the dark fiber offering.

A utility owning or controlling poles or conduit should not have a need to inquire into the services being offered by an attaching party over such attachments. The utility's interest is in proper and safe management of the facility or the structure. Accordingly, the utility ought not have the ability to restrict the services provided over an attached facility. To permit a utility to do so frustrates the market opening, pro-competitive purposes of the Act. But a utility ought be able to control physical access to its structure.

Where these principles intersect is in the subleasing of an attached facility, of which a dark fiber offering is one example. Such an offering is not of concern to

a utility provided the offering does not grant or attempt to grant the sublessee the right of physical access to the pole or conduit to maintain the leased facility. As with overlashing by third parties, subleasing is contrary to the utility's bargained for rights and frustrates the utility's ability to safely manage the structure by opening access to a host of parties of unknown skill not subject to a direct contractual obligation with the utility. The Commission in this proceeding should affirm the right of a utility to control physical access to its structure.

III. PRESUMPTIONS UNDERLYING THE POLE ATTACHMENT FORMULA.

In section V.A. of the Notice, the Commission seeks comments on several issues relating to presumptions underlying the pole attachment formula.

Regarding the electric utility group Whitepaper on presumptions for average pole height and useable space[9], we will not repeat our comments made in Docket 97-98, but note that the proposal garnered little support from commenters.

Duquesne Light Company suggests adding factors regarding weight and wind loading to the presumption, presumably to vary attachment rates in consideration of those factors.[10] The Commission's formula is based upon attachments above required ground clearances for cable attachments to a standard class pole. Each class of pole is capable of bearing a maximum load of

---

[9] Notice, Par. 17.

[10] Notice, Par. 18.

attachments, depending upon the conditions. Thus, aggregate load is implicitly included in the formula presumptions, but is not allocated among attachments. The result is the current industry practice which requires the party whose attachment causes the maximum load bearing capacity of the pole to be exceeded to pay to replace the pole with one of a stronger class. While the costs are borne by the party causing the pole to exceed its load bearing capacity, the move does not benefit parties with existing attachments. Typically cable attachments of newly attaching parties are similar and so create a similar load on the pole. That being so, it does not seem useful to complicate the formula by adding a loading factor. Pole change-outs due to the need for extra strength are likely to be rare enough that the current method of cost allocation is not inappropriate in the majority of cases. Adding loading factors to the formula would unnecessarily complicate administration of pole attachments and is not needed to prevent an unfair allocation of the burden.

There are no differences between cable system cable facility attachments and telecommunications cable facility attachments to warrant different presumptions in the formula for the space required for each.

We would note that the Commission's formula is based solely on cable facility attachments with ground clearance and conductor separation requirements, as defined in the NESC. Every cable or telecommunications system includes non-cable attachments which vary widely depending upon the technology

deployed but are usually attached in what the formula characterizes as "unusable space" because the attachment does not have a clearance from ground requirement. Utilities must permit any proposed attachment that does not prohibit safety, reliability or engineering principles.[11] New technologies including wireless technologies may result in request for attachments very different than those which underlie the Commission's presumptions. The current formula does not in any way account for these types of attachments. Industry practice is evolving but there is no consistent practice as to the treatment of these attachments from a rate perspective.

IV. UNUSABLE SPACE COST ALLOCATION FORMULA.

Section V.B. requests comments on the Commission's formula for allocating the costs of unusable space under Section 224(e)(2). Ameritech concurs in the Commission's general formula. Our comments on how to count attaching parties and on presumptions for the number of attaching parties are set forth below.

[11] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at Par. 1186.

A. Who is to be counted as an attaching party.

Paragraphs 22 to 24 describe the Commission's proposal on counting the "number of attachers" for purposes of application of the unusable space cost allocation formula. In determining who should be counted as an attaching party for this purpose the Commission should endeavor to avoid subsidies and promote competitive neutrality.

"Pure" cable television companies subject to Section 224(d)(3) should not be counted as an attaching party unless the Commission seeks to impose the 224(e) unusable space costs on such "pure" cable television system attachments. In effect counting such "pure" cable systems requires the ILEC such a result is clearly not, but not the competitors of the ILEC to subsidize "pure" cable system attachments, competitively neutral.

Contrary to the FCC's proposal,[12] the ILEC who is a utility should not be counted as an attaching party. The plain language of Section 224(e)(1), coupled with the definition of "attachment" in Section 224(a)(4) and the exclusion of the ILEC from the definition of "telecommunications carrier" for purposes of Section 224[13] requires that ILECs should not be counted as attaching parties. Under Section 224(e) (2) only two-thirds (2/3rds) of the costs of the unusable space are allocated to other attaching parties, the ILEC must bear at least one-third (1/3rd)

[12] Notice, Par. 23.

[13] 47 U.S.C. § 224(a)(5)

of the costs in all cases. The two-thirds (2/3rds) allocation supports the exclusion of the ILEC, as Congress meant the ILEC to carry its share or more, of the costs in one-third (1/3rd) obligation the ILEC retains. Also, we note that the Commission does not propose to count the electric utility as an attaching party on a joint pole. If the electric utility is not included, there is no rational reason to include the ILEC. Either both are included or both are excluded. The better position is that both are excluded.

The attachments of government agencies where mandated by ordinance or franchise should be excluded from the unusable space cost allocation. To include the municipality is to make the ILEC bear the entire burden of the municipality's attachment. The municipal attachment is condition of maintaining poles or conduit in the right-of-way, and so is a burden that benefits all users of a pole or conduit in the right-of-way. Thus, users should share in its cost.

Any other party which pays for an attachment or which is a telecommunications services providing affiliate of a utility to whom the imputation requirements of Section 224(g) apply should be counted as an attaching party for the application of the formula. Section 224(e)(2) requires apportionment by <u>entity</u> rather than by the amount of usable space occupied. This latter class of attaching parties will be competing in the market place and should equally bear costs in the interest of competitive neutrality.

B. Presumptions regarding average numbers of attaching parties.

Ameritech concurs with the Commission's proposal to permit utilities to develop presumptive average numbers of attachers.[14] Utilities should be given wide latitude to develop averages by geographic area. The appropriate number of attaching parties is dependent upon the development of facility based competition which is in its infancy. No survey, or over-all average developed today would likely reflect the actual competitive environment in the near term. It is better to let utilities tailor these averages to match the deployment of facility based providers, while at the same time giving attaching parties the necessary information and opportunity to rebut the utilities' proposed methodology.

V. USABLE SPACE COST ALLOCATION FORMULA.

In section V.C. of the Notice, the Commission seeks comment on a revised formula for allocation of costs of usable space. The Commission's proposed formula[15] follows from its proposal for the allocation of costs for unusable space as discussed above. The Commission should clarify, however, that the usable space allocation formula applies to the attachments of telecommunications carriers under Section 224(e)(3), but that the Commission's prior formula[16] will continue to apply to the attachments of "pure" cable television systems under

---

[14] Notice, Par. 26.

[15] Notice, Par. 33.

[16] Notice, Par. 29.

Section 224(d)(3). This clarification would ensure that the changes made to comply with Section 224(e) for telecommunications attachment are not meant to create a windfall for "pure" cable television attachments.

VI. CONDUIT ISSUES.

In section VI. of the Notice, the Commission seeks comment on a revised formula for allocation of costs of unusable space in conduit and also who to count as attaching parties for purposes of allocation of costs of unusable space.

Ameritech does not believe that there is "unusable" space in a conduit system. The only potential space which is unusable is space reserved for maintenance ducts and/or for use by the municipality. In the Pole Attachment Notice[17], the Commission proposed to exclude ducts used for maintenance purposes from the average number of ducts in the formula. For the reasons stated above in Section IV A, and in Ameritech's previous filings in the related dockets[18], it should be presumed that a duct is reserved for municipal use which should likewise reduce the average number of ducts. These presumptions, which Ameritech supports, recognize that maintenance ducts benefit all conduit users[19] and that municipal use should be borne equally by all users. Treated that way,

---

[17] Notice, Par 45.

[18] Initial Comments of the Ameritech Operating Companies, CS Docket No. 97-98, at 7; Reply Comments of Ameritech, at 3-4.

[19] At least where use of the maintenance ducts is available to all parties with attachments, as is the case with Ameritech attachments.

municipal and maintenance ducts are not "unusable space" for which the ILEC should bear the brunt of the cost and there is no need to modify the Commission's conduit rate formula proposed in the Pole Attachment Notice in order to comply with Section 224(e). Moreover, there is no need to discuss who to count as "attaching parties" for purposes of allocating costs for unusable space, though the logic for poles would apply equally to conduit.

Finally, the comments in section II, above, regarding use of assigned space and dark fiber apply equally to conduit as well as to poles, and also to right-of-way for that matter.

VII. RIGHTS-OF-WAY ISSUES.

In section VII. of the Notice, the Commission seeks comment on the access and reasonable rate provisions in Section 224 as applied to rights-of-way of utilities.

Ameritech has had few requests for access to rights-of-way. But Ameritech believes that the types of rights-of-way and potential uses thereof may vary so significantly that a common formula or methodology for attachment is impossible or impractical to develop. For instance, use of a narrow linear easement to bury a cable will differ from a request to use a particular part of that easement to place a controlled environment vault. That being so, and there not being sufficient actual requests to establish a pattern or common request, Ameritech believes access to

rights-of-way should be handled on a case-by-case basis, subject to the Commission's complaint jurisdiction.

VIII. CONCLUSION.

For the reasons stated above, Ameritech urges the Commission to adopt rules consistent with these comments.

Respectfully submitted,

Gerald A. Friederichs

Gerald A. Friederichs
Attorney for Ameritech
30 South Wacker Drive, 39th Floor
Chicago, IL 60606
312-750-5827

September 26, 1997