

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 703(e))
of the Telecommunications Act)
of 1996)
)
Amendment of the Commission's)
Rules and Policies Governing)
Pole Attachments)

CS Docket No. 97-151

COMMENTS OF RCN TELECOM SERVICES, INC.

Russell M. Blau
Grace R. Chiu

SWIDLER & BERLIN, CHTD.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500

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SUMMARY

The Commission has adopted the current *NPRM* to implement Section 703 of the Telecommunications Act of 1996 by proposing amendments to the Commission's rules relating to pole attachments. Specifically, the Commission seeks comment on implementation of a methodology to ensure just, reasonable, and nondiscriminatory pole attachment rates for telecommunications carriers. RCN does not oppose the Commission's proposed methodology for allocating the cost of usable space, which would apportion such cost in proportion to the space occupied by an entity's attachment. RCN, however, submits that the proposed methodology for allocating the cost of unusable space, wherein two-thirds of the cost of providing unusable space would be equally apportioned among all attaching entities, should be modified to take into account entities that occupy increments other than exact multiples of one foot of space.

In addition, RCN supports overlashing of facilities and leasing of dark fiber and states that the Commission should not permit pole owners to charge different rates or collect additional charges depending on the type of service provided by the attaching entity. RCN further states that a taller presumptive pole height is needed for non-rural areas; that the one foot space presumption does not apply when extension arms or boxing is used; and that an exception for a 30 inch clearance should be recognized by the Commission. RCN also asks the Commission to adopt a standardized form of communications bracket.

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COMMENTS OF RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), by its undersigned attorneys and pursuant to Section 1.415 of the Federal Communications Commission's ("Commission") Rules, 47 C.F.R. § 1.415, hereby submits its comments on certain of the issues raised in the *Notice of Proposed Rulemaking*, FCC 97-234, released August 12, 1997 ("*NPRM*"), in the above-captioned matter. RCN, through subsidiaries in Boston, New York, Pennsylvania and, in the near future, Washington, D.C., is a facilities-based provider of integrated video, local and long distance telephone, and Internet access services, primarily to residential consumers. The ability to secure just, reasonable, and nondiscriminatory rates for pole attachment space and rights of way is critical to RCN's ability to enter competitive telecommunications markets. As such, RCN supports the Commission's efforts to adopt an appropriate methodology that will ensure that such rates do not pose market entry barriers to competitive providers of telecommunications services.

RCN is pleased to offer the following comments in this proceeding.

1. The Cost of Unusable Pole Space Should, As With Usable Space, Be Allocated Proportionate to the Usable Space Occupied by the Attaching Entity

Pursuant to Section 224(e)(1) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (“1996 Act”),¹ the Commission tentatively proposes a new methodology for determining pole attachment rates for cable systems and telecommunications carriers providing telecommunications services. The proposed methodology differentially allocates the cost of the pole on the basis of usable and unusable space. While RCN does not oppose the proposed methodology for allocating the cost of usable space, which would apportion such cost in proportion to the space occupied by an entity's attachment, RCN submits that the proposed methodology for allocating the cost of unusable space, wherein two-thirds of the cost of providing unusable space would be equally apportioned among all attaching entities, should be modified to take into account entities that occupy increments other than exact multiples of one foot of space. As discussed below, RCN believes that apportioning the costs of unusable space among attaching entities may, in certain circumstances, unfairly burden such entities with costs that have no relationship to their use of pole space. The effect of applying such a methodology to the allocation of costs for providing unusable space will be to inhibit the growth of competition in provisioning telecommunications services through the use of utility pole attachments.

a. Apportionment of the Cost of Usable Space Should be Made on the Basis of Units of Space Occupied

The Commission proposes, at ¶ 33 of the *NPRM*, that telecommunications carriers be apportioned the cost of usable space in proportion to the amount of usable space occupied by the

¹ 47 U.S.C. § 224(e).

entity's attachment. RCN does not object to this methodology. RCN suggests, however, that it be modified such that the cost of usable space is allocated on a *per unit of space* basis rather than on the basis of the percentage of such space occupied. RCN further recommends that the unit of space be established as one foot, with partial increments of a foot rated proportionately. RCN's suggested modification will reach the same result as the Commission's formula (because the allocation of cost will be proportional to the amount of space occupied) but has the advantage of being easier to administer. Using a specified unit of space would speed the determination of the amount of space occupied by the attaching entity, simplify calculation of the amount due, and could reduce the number of potential disputes as to the percentage of usable space occupied. RCN believes that the Commission's formula, modified so that the apportionment would be based on units of space occupied, would fairly and logically allocate the costs of providing usable space among attaching entities.

b. Apportionment of the Cost of Unusable Space Should Be Based on Proportion of Space Occupied

The Commission seeks comment, at ¶ 22 of the *NPRM*, on its proposed methodology that would apportion two-thirds of the costs relating to unusable space equally among all attaching entities. In addition, at ¶ 23 of the *NPRM*, the Commission requests information on alternative methodologies to apportion costs, such as on a proportion of space occupied basis.

RCN would strongly support the adoption of an alternative methodology allocating these costs on a proportion of space occupied basis, to the extent this approach would be consistent with statutory requirements. The simple fact is that all attaching entities do not receive the same benefit from the unusable pole space.

The Commission also seeks comment, at ¶ 23 of the *NPRM*, on the premise that counts any telecommunications carrier as a separate attaching entity for each foot, or partial increment of a foot, it occupies on the pole, and on such a methodology's consistency with the statutory requirement of equal apportionment among all attaching entities. RCN does not find such a methodology inconsistent with the statutory requirement of Section 224(e)(2). RCN believes that the statutory requirement of equal apportionment among all attaching entities must be construed to mean that, for purposes of cost allocation, all attaching entities must be treated equally *regardless of the nature of the physical attachment installed*. As noted in the *NPRM* at ¶ 18, Duquense Light Company ("Duquense") argues that the number of physical attachments of an attaching entity is not necessarily reflective of the burden due to factors such as weight and wind loads, and asserts that any presumption should take these factors into account. RCN believes that the statute provides that physical differences between attaching entities will not be recognized for purposes of determining the methodology for allocating unusable space to attaching entities. In other words, the physical attributes and the nature of the physical impacts of an attaching entity is not relevant to determining the proportion of the cost that such entity should bear.

However, the Commission's "one attachment per foot" presumption does not take account of the fact that many attachments are not actually installed in precise one-foot increments. Instead, the Commission should determine the smallest usable increment of pole space, which is often less than one foot (as discussed in succeeding sections of these comments) and treat each multiple of this smallest usable increment as a separate attaching entity. In this manner, the Commission will avoid placing an unreasonable and disproportionate burden on competitive

entrants to the provision of telecommunications services through pole attachments, while ensuring that the pro-competitive policies of the 1996 Act are furthered.

2. Pole Owners Should Not Be Permitted to Charge Different Rates or Collect Additional Charges Depending on the Type of Service Provided by the Attaching Entity

At ¶13 of the *NPRM*, the Commission seeks comment on whether its holding in *Heritage*² should be applicable to situations where a pole owner imposes additional limits on the use of pole space by cable operators or telecommunications carriers. In *Heritage*, the Commission determined that a utility may not charge different pole attachment rates depending on the type of service provided by the cable operator. The Commission found that Section 224 protects the cable operator's pole attachments which support equipment used to provide nonvideo communications (and, therefore, "nontraditional" service).³ The Commission further found that the imposition of a separate charge for these nontraditional services violates Section 224's prohibition against unjust and unreasonable rates.⁴

RCN believes the Commission's finding in *Heritage* is equally applicable to situations where pole owners attempt to condition or limit the use of attachment space by cable operators or telecommunications carriers that provide nontraditional services. A telecommunications carrier's use of pole attachment space is analogous to a lease of real estate. A lessee ordinarily may elect to use real estate it has leased for one purpose to conduct activities that are different from that for

² *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Util. Elec. Co.*, 6 FCC Rcd 7099 (1991), *recon. dismissed*, 7 FCC Rcd 4192, *aff'd sub nom. Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

³ *Id.* at 7107.

⁴ *Id.*

which the property was originally leased. While certain obvious restrictions will apply (such as zoning restrictions or safety, reliability, and engineering codes), to the extent that the lessee engages in an activity that has an impact on the premises no different from the activity for which the property was originally leased, the lessor has no justification for charging additional rent or imposing restrictions or conditions on the use of the space.

Similarly, where an attaching entity uses its allocated space to bundle services or to lease dark fiber, there is no basis for imposing additional charges. Applying the Commission's conclusions in *Heritage*, permitting pole owners to impose additional charges or restrict use of the attachment space would violate Section 224's prohibition on unjust and unreasonable pole attachment rates, terms and conditions. Therefore, the Commission should establish that rates for pole attachments must be based on the space allocated to the attaching entity irrespective of the purpose for which the allocated space is used.

RCN further notes that adopting such an approach has the added benefits of promoting efficient use of the pole space, reducing demand for pole space, and rewarding entities for entrepreneurial and innovative solutions to attachment space use.

3. Overlapping and Leasing of Dark Fiber Should Be Permitted

The Commission also asks whether it should permit overlapping and leasing of dark fiber, at ¶ 15 of the *NPRM*. Consistent with the preceding section of these comments and the pro-competitive intent of the 1996 Act, RCN believes that the Commission should permit telecommunications carriers to overlap their existing lines with additional fiber. The Commission should also permit (but not require) cable systems or telecommunications carriers to lease dark fiber in their original and/or overlapped lines. RCN believes that permitting overlapping of

existing lines and leasing of dark fiber will allow new entrants to share and spread the cost of pole attachments among many smaller users and services, stimulating innovation and furthering competition. In addition, overlashing existing lines and leasing of dark fiber will promote efficiencies among users and reduce demand for pole space.

4. A Taller Presumptive Pole Height is Needed for Poles Located in Non-rural Areas

At ¶¶ 16-17 of the *NPRM*, the Commission requests comment, on a presumptive average pole height of 37.5 feet. While RCN generally supports this presumption as applied to poles located in *rural* areas, RCN's construction crews have encountered pole heights in *non-rural* areas that are significantly taller than the presumptive average. "Non-rural" areas include both urban and densely populated suburban areas. RCN therefore recommends that the Commission distinguish between rural and non-rural areas, and establish a presumptive average pole height of 37.5 feet in rural areas, and a presumptive average pole height of between 40 and 45 feet in non-rural areas. Recognizing a difference in the average heights of poles located in rural areas and those located in non-rural areas will result in a more accurate allocation of the costs of providing space on utility poles that serve more populous communities and those that serve less populous areas.

5. The One Foot Presumption Does Not Apply When Extension Arms or Boxing is Used

The Commission seeks comment, at ¶ 19 of the *NPRM*, on whether its presumption of one foot as the amount of pole space occupied by a cable television attachment occupies is applicable to telecommunications carriers generally. Although RCN does not oppose the adoption of this presumption as applicable to telecommunications carriers, RCN observes that the presumption should not apply where extension arms or boxing is used by the attaching entity.

Where extension arms are used, the communications cable is located not on the pole itself but farther out on the extension arm. As a result, an entity's physical attachment may occupy as little as six inches of pole space. This configuration will still satisfy the 12 inch clearance required between communications attachments, provided that the cable is positioned sufficiently far out along the extension.

Where boxing or "b-bolting" is used, the attachment is bolted through the back of the pole, opposite from an existing attachment. In this situation, the attachment may occupy less than one foot of pole space and still be located at least 12 inches from the existing attachment because the diameter of the pole is counted toward the distance between the attachments.

To the extent that the Commission adopts the one foot presumption for telecommunications carriers, the Commission should recognize that the presumption does not apply when the attaching entity uses extension arms or boxing to install its facilities.

6. The Commission Should Recognize an Exception to the 40 Inch Safety Space Requirement

At ¶ 20 of the *NPRM*, the Commission proposes to apply to telecommunications carriers the National Electrical Safety Code ("NESC") requirement that a 40 inch safety space exist between electric lines and communications lines. The 40 inch clearance required under NESC Rule 235 is designed to minimize the opportunity for contact by employees working on cable television or telecommunications attachments with potentially lethal electric power lines.

RCN supports the Commission's objective of minimizing the risk of serious injury through contact to such power lines and, therefore, generally supports the Commission's tentative proposal that the 40 inch safety rule be applied to telecommunications carriers. However, to the extent that

the Commission determines to adopt a rule requiring a minimum 40 inch safety zone, the Commission should recognize an exception to the 40 inch clearance requirement which is embedded in NESC Rule 235.

Specifically, subpoint 6 of Rule 235 provides that the 40 inch clearance may be reduced to 30 inches under defined circumstances: for supply neutrals meeting Rule 230E1 and cables meeting Rule 230C1, where the supply neutral or message is bonded to the communication messenger. To the extent that a cable operator or telecommunications carrier satisfies these specifications when installing its attachment, that entity should be permitted to use a clearance of 30 inches.

It has been RCN's experience that these specifications can be met by telecommunications carriers and cable operators. Indeed, RCN has satisfied the specifications at certain of its installations and, as a result, has used a safety clearance of 30 inches.

RCN submits that insofar as the Commission has always recognized the validity of the NESC 40 inch safety space requirement, and in view of the fact that Rule 235 itself contains an exception to the 40 inch clearance requirement, the Commission should also recognize the rule's exception that permits an attaching entity to use a 30 inch clearance provided that certain technical specifications and conditions are met.

7. The Commission Should Standardize the Communications Bracket

Although the *NPRM* does not raise an issue concerning standardization of communications brackets, RCN takes this opportunity to recommend that the Commission adopt an acceptable form of communications bracket with basic bracket standards, such as size and fittings. The use of a standardized bracket for communications attachments would greatly facilitate not only the installation of cable attachments but the rearrangement of facilities in order to accommodate additional facilities. In RCN's experience, a wide variety of communications brackets currently is employed for pole attachments. Differences in the form of bracket used can pose problems where facilities supported by such brackets must be rearranged to accommodate the additional facilities. Where such differences exist, the attaching entity may find, as has RCN, that the brackets it uses to install its own pole attachment will not match or are not suitable for the existing pole attachment facilities that must be rearranged. Such differences in communications brackets can lead to delays and increased costs if the attaching entity has no form of bracket that matches or is suitable for the facilities that must be rearranged.

If the Commission were to adopt a standardized communications bracket, RCN believes that installation and construction crew responsible for make-ready would find it significantly easier to engineer a necessary make-ready because the guys or anchors used to install additional facilities would meet uniform specifications for such brackets. Establishing a standardized form of communications bracket, therefore, would enable cable companies and telecommunications carriers to expedite the installation and make-ready process. Cable operators and telecommunications companies would be more efficient as a result of the savings in time gained

from reducing the amount of time needed to install facilities and from recovering time lost in locating and purchasing the appropriate form of brackets.

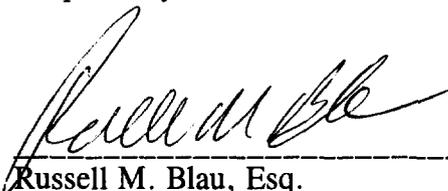
Conclusion

The intent of Congress in passing the Telecommunications Act of 1996 was to foster competition in all telecommunications markets. In the area of pole attachments, Congress directed the Commission to regulate the rates, terms, and conditions for such attachments to ensure that such rates, terms, and conditions are just and reasonable. RCN does not oppose the proposed methodology for allocating the cost of usable space, which would apportion such cost in proportion to the space occupied by an entity's attachment. RCN, however, submits that the proposed methodology for allocating the cost of unusable space, wherein two-thirds of the cost of providing unusable space would be equally apportioned among all attaching entities, should be modified to take into account entities that occupy increments other than exact multiples of one foot of space.

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Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Russell M. Blau", is written over a horizontal dashed line.

Russell M. Blau, Esq.

Grace R. Chiu, Esq.

SWIDLER & BERLIN, CHARTERED
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

(202) 424-7500

Attorneys for RCN Telecom Services, Inc.

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