to count entities making such attachments when allocating the costs associated with unusable space.

Should the FCC find that overlashed cables are not additional attachments, overlashed cables must also be excluded from any determination of the number of attachers on a pole. Regulatory parity dictates that, if the FCC does not allow a utility to charge for overlashed attachments, the FCC would be establishing a double standard if entities making these same attachments are recognized for purposes of apportioning the costs of unusable space.

5. Entities Leasing Capacity On Existing Facilities Must Not Be Included In The Number Of Attaching Entities Used To Calculate The Rate For Unusable Space

Finally, entities leasing capacity from attaching entities with facilities attached to utility poles must not be counted as attaching entities. The Electric Utilities generally do not object to attaching entities leasing excess capacity to other companies on facilities already attached to their distribution infrastructure and do not presently intend to seek payment for such arrangements.[92] However, it would be administratively difficult for any utility to keep track of how an attaching entity is using its attachments on any given day. Furthermore, attaching entities themselves have shown great hesitancy over disclosing how their attachments are being used.[93] If the utility lacks the ability to accurately and easily

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[92] However, the Electric Utilities do urge the FCC to require "pure" cable companies to disclose whether they are leasing capacity for the delivery of other than one-way video services for purposes of calculating the rate that the attaching entity should be charged. See discussion supra at Section IV.C.

[93] See, e.g., In the Matter of Marcus Cable Assoc., L.P. v. Texas Util. Elec. Co., P.A. No. 96-002, ¶¶ 18, 27, 31.

determine the uses to which an attaching entity is putting is excess capacity, then the FCC cannot reasonably define such uses as "attachments" for purposes of apportioning the costs of unusable space.

B. The FCC Should Allow Utilities To Determine The Average Number Of Attachers On Their Poles

The Electric Utilities support the proposal of the FCC to allow utilities to calculate a presumptive average number of attachers on their poles.[94] This approach appears to be the most administratively efficient, and fair, method for calculating the average number of attachers. In return, utilities could disclose to telecommunications carriers the methodology and information relied on by the utility to derive such an average. Because the Electric Utilities cover large geographic territories comprised of small service areas, the Electric Utilities propose that they be given flexibility to determine the scope of the presumed average. For example, a utility may wish or need to determine averages for various service areas, such as by city or state. Other utilities may wish to calculate three averages — one for urban, one for suburban and one for rural areas — but these averages may vary for different states.[95] So long as the utility is willing to disclose the parameters it followed to calculate its average and applies the same methodology across its entire service area, the FCC should presume the average is fair.

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[94] Post-2001 NPRM ¶ 26. By this, the Electric Utilities reject the Commission's proposal that it determine the average number of attachments.

[95] The Commission must understand that there are significant differences in the number and nature of attachments throughout a given utility's service area, let alone the entire United States. For example, a tier 1 city will have different attachment statistics than a tier 3 city. An older, condensed city will differ from newer, more geographically expansive city in terms of attachments.

VI. The Commission's Proposal For Calculating The Costs Associated With Usable Space Must Be Applied Only To Rate Calculations Involving Telecommunications Carriers

After February 8, 2001, telecommunications carriers will pay an attachment fee that is based on their use of the usable and unusable space of a pole, duct, conduit or right-of-way. The FCC has proposed a modification to the usable space cost calculation that would be applicable to telecommunications carriers.[96] The new formula is as follows:

$$\frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \frac{\text{Usable Space}}{\text{Pole Height}} \times \text{Net Cost of a Bare Pole} \times \text{Carrying Charges}$$

To the extent that the agency is suggesting that the new usable space formula is also applicable to "pure" cable attachments post-2001, the Electric Utilities take exception. This formula must be confined to calculating the maximum rate for usable space post-2001 for telecommunications carriers. The FCC is statutorily precluded from applying the same formula when calculating the rate for "pure" cable attachments.

Section 224(d)(1) clearly identifies that cable television companies are responsible for the "percentage of total usable space ... attributable to the entire pole."[97] Section 224(d)(3) provides further that subsection (d)(1) shall be applied to attaching entities that are solely providing cable service.[98] These sections, when read together, make it clear that the usable space calculation proposed in this rulemaking cannot apply to "pure" cable entities post-2001. The rate formula developed in the Pre-2001 Rate Rulemaking will apply to cable and telecommunications attaching entities until February 8, 2001. After that date, the

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[96] Post-2001 NPRM ¶ 33.

[97] 47 U.S.C. § 224(d)(1) (emphasis added).

[98] 47 U.S.C. § 224(d)(3).

formulas developed from § 224(e) in this proceeding will apply to telecommunications carriers and cable system operators delivering telecommunications services. However, the pre-2001 formula derived from § 224(d) must continue to apply to "pure" cable companies.

VII. Overlashed Cable Should Be Subject To A Separate and Full Attachment Fee

The Commission invited interested parties to provide comment on how overlashing and the leasing of capacity on attached facilities should be regulated under the Pole Attachments Act.[99] The Electric Utilities believe that facilities overlashed on existing cables must be treated as separate pole attachments for which a utility must have the right to assess a full attachment fee. As such, entities wishing to overlash must have an agreement with the utility that governs the terms and conditions of overlashing and must comply with the permitting and pre-approval procedures applied to other attaching entities.

In contrast, the leasing of excess capacity on existing facilities does not consume pole capacity. At this time, therefore, the Electric Utilities do not believe that such a use be treated as an "attachment" under § 224.

A. The Rate That A Utility May Charge For An Overlashed Attachment Must Be Based On The Nature Of The Traffic Carried By The Attaching Entity Over Its Attachments

In order to determine a fair attachment rate for facilities overlashed on existing cables, the FCC must defer to the statutory distinctions drawn between attachments by telecommunications carriers and cable system operators. All attaching entities must be

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[99] Id. ¶¶ 15, 35.

presumed to be telecommunications carriers and charged the associated attachment rate.[100] If the facilities overlashed are used to deliver "pure" cable, the attaching entity must comply with the proposed certification process[101] prior to being able to secure the attachment rate reserved for such entities. Finally, where the overlashed attachment is being used for two-way video or information services, which are neither cable nor telecommunications services covered by § 224,[102] the utility has the right to charge a fully negotiated rate that is not subject to FCC review.

B. Overlashed Facilities Must Be Found To Occupy The Same Amount Of Space As Attachments Placed Directly On A Pole And Should Be Subject To The Same Attachment Fee

The FCC sought comment on the amount of occupied space for which an overlashing attacher should be charged.[103] An overlashed attachment should be allocated the same amount of space for each attachment as would occur if the overlashing entity were to attach directly to a utility pole. Congress's mandate that the FCC adopt just and reasonable attachment rates dictates that the FCC treat overlashed attachments as separate attachments equivalent to other attachments and subject to a full attachment rate.

The FCC must consider the impact on entities that currently have attachments, and those that do not, when making any decisions about how to regulate overlashing. Assuming that the FCC were to adopt a discounted attachment rate for overlashing, then all attaching

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[100] See discussion supra at Section IV.A.

[101] See discussion supra at Section IV.C.

[102] See discussion supra at Section II.C.

[103] Post-2001 NPRM ¶ 35.

entities would be interested in reducing the cost of attaching by pursuing this option. Under the rules in existence today, if an entity wishes to overlash, it must have some relationship with an entity that already has an attachment on a pole. This is because, at the present time, the utility has no ability to mandate that an incumbent attacher allow another entity to overlash its facilities around the incumbent's facilities. Accordingly, the attaching entity would have to approach the incumbent and seek permission to overlash in order to receive the FCC's discounted attachment rate. From a policy perspective, this option is wrought with the potential for anticompetitive behavior.

Suppose that the incumbent attacher is a cable company and the second attacher is a new entrant. The incumbent is not likely to be willing to allow a new competitor to overlash on its facilities so that the new entrant can take advantage of the discounted overlashing rate.[104/] In fact, the cable company would have every incentive to require the new cable

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104/ The FCC itself has noted that cable companies will take advantage of opportunities to make it difficult for competitors to offer cable service. For example, in its Further Notice of Proposed Rulemaking regarding ownership of cable inside wire, the FCC stated that:

> where the property owner or subscriber seeks another video service provider, instead of responding to competition through varied and improved service offerings, the incumbent provider often invokes its alleged ownership interest in the home run wiring. Incumbents invoke written agreements providing for continued service, perpetual contracts entered into by the incumbent and previous owner, easements emanating from the incumbent's installation of the wiring, assertions that the wiring has not become a fixture and remains the personal property of the incumbent, or that the incumbent's investment in the wiring has not been recouped, and oral understandings regarding the ownership and continued provision of services. Written agreements are frequently unclear, often having been consummated in an era of an accepted monopoly, and state and

entity to attach directly to the pole so that the new entrant's attachment costs would be the same as that paid by the incumbent.

The new entrant will also be concerned about receiving an equitable rate. If the FCC were to discount the attachment rate for overlashing, incumbent attachers would be given an advantage simply by virtue of their having been first in the market or first to attach. For example, if a new telecommunications carrier wishes to attach to the pole and the incumbent cable company does not allow the new entrant to overlash, the telecommunications carrier would be forced to attach to the pole at a full rate. However, the cable company could also be providing telecommunications services. Because the cable company controls who can overlash on its facilities, it can decide to overlash its own fiber for telecommunications services in lieu of overlashing the new entrant's telecommunications fiber. The end result is that the cable company is allowed to enter the telecommunications market at a lower cost than the new entrant because it can take advantage of the discounted rate for overlashing. The FCC's overarching goal is to adopt a regulatory scheme that is fair to all parties.

> local law as to their meaning is vague. Invoking any of these reasons, incumbents often refuse to sell the home run wiring to the new provider or to cooperate in any transition. The property owner or subscriber is frequently left with an unclear understanding of why another provider cannot commence service. The litigation alternative, an option rarely conducive to generating competition, while typically not pursued by the property owner or subscriber, can be employed aggressively by the incumbent. The result is to chill the competitive environment.

In the Matter of Telecommunications Services Inside Wiring, Customer Premises Equipment; In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, CS Docket No. 95-184; MM Docket No. 92-260, ¶ 31 (released Aug. 28, 1997).

Based on the two scenarios presented above, it is clear that a discounted overlashing rate has the propensity for creating an unlevel playing field between new entrants and incumbent service providers. Therefore, the FCC should allow a utility to charge an overlashing rate that is equivalent to a full attachment rate. In the alternative, the FCC must adopt a rule that mandates that incumbent attaching entities must allow, on a nondiscriminatory basis, any new attacher to overlash its facilities over the incumbent's existing facilities.

C. Entities Wishing To Overlash Must Secure A Permit And Pre-Approval From A Utility Prior To Overlashing

As was discussed in great detail in the comments and reply comments filed by the Electric Utilities in the Pre-2001 Rate Rulemaking, the Commission must take into account the fact that poles have limited capacity.[105] The Electric Utilities concur that, under certain conditions, overlashing may be an acceptable solution to a lack of sufficient space (although not pole loading capacity) to permit another attachment. However, overlashing is not appropriate in all circumstances.

The most critical issues raised by overlashing are related to safety and electric distribution reliability.[106] The increased diameter of the overlashed cables affects the resistance the overlashed cables have to wind and increases ice accumulation, both of which

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[105] Pre-2001 Comments of AEP, et al., at Section VIII.H; Pre-2001 Reply Comments of AEP, et al., at Section IX.

[106] The Common Carrier Bureau acknowledged that safety concerns could justify the precautions taken by a utility prior to allowing entities to overlash fiber. Common Carrier Bureau Cautions Owners of Utility Poles, 1995 FCC LEXIS 193, Public Notice, Release No. DA 95-35 (Jan. 11, 1995).

can affect the integrity of the pole. Therefore, the Commission must require that an attaching entity consult with the utility prior to attaching to the pole so as to ensure that the overlashing can be done safely.[107] More specifically, utilities must be given the explicit right to include terms in their pole attachment agreements to limit the ability of parties with existing attachments to allow themselves or others to overlash facilities over their existing attachments. Attaching entities also should be precluded from overlashing absent a permit and pre-authorization from the utility. Finally, the Electric Utilities urge the Commission to set appropriate penalties, including monetary forfeitures, for failure to comply with its overlashing rules.

VIII. The FCC Must Follow The Proposals Outlined Above When Implementing Procedures To Govern Conduit Attachments

In general, the arguments discussed above are applicable to poles and conduit systems. As such, under § 224(e), parties must be required to negotiate market rates for conduit access. In order to encourage negotiations and compliance with the terms and conditions of an executed agreement, the FCC should establish a default pricing formula for conduit that closely approximates a market rate for access to such facilities. Because the cost of installing conduit[108] varies widely depending on the state, the geographic area within a state and the proximity to population centers, the only way the default pricing formula for

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[107] Pre-2001 Comments of AEP, et al., at Section VIII.G.

[108] The electric utility industry defines "conduit" as a combination of one or more ducts, where a "duct" is a single raceway through which conductors are placed.

conduit can accomplish this objective is to base such a formula on the replacement cost of the particular segment of the conduit system to which an attaching entity is seeking access.

A. Unusable Conduit System Space Must Be Defined As All The Elements Comprising A Conduit System Except The Actual Duct, Innerduct Or Conduit Space

The FCC has proposed in this rulemaking to define usable space in a conduit system to be the ducts in the conduit system.[109] As such, the FCC has proposed the following conduit rate formula for usable space:

$$\frac{1 \text{ Duct}}{\text{Avg. \# of Ducts less Adjustments for Maintenance Ducts}} \times \frac{1}{2} \times \text{Net Linear Cost of Usable Conduit Space} \times \text{Carrying Charges}$$

As the Electric Utilities argued extensively in their Pre-2001 Rate Rulemaking comments, this proposed formula must be rejected because: (1) the electric utilities do not have the detailed information necessary to apply the proposed formula; (2) electric utilities cannot share duct space with telecommunications providers; (3) the agency defines the asset too narrowly; and (4) the FCC treats reserve space improperly.[110] The Electric Utilities believe that the Commission should adopt the Individual Case Basis ("ICB") approach set forth in detail in the Electric Utilities Pre-2001 Rate Rulemaking comments.[111]

Regardless of whether the FCC adopts the approach advanced by the Electric Utilities in the Pre-2001 Rate Rulemaking or the approach outlined by the FCC above, by default, it

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[109] Post-2001 NPRM ¶ 39.

[110] See Pre-2001 Comments of AEP, et al., ¶¶ 154-81.

[111] Pre-2001 Comments of AEP, et al., at Section IX.C.2.

is logical to conclude that all other elements that comprise a "conduit system" should be included in any "unusable" space formula. This conclusion must be adopted by the FCC because the attacher has to access and use the entire conduit system, even though it requests access to a certain number of ducts or conduit. This unusable portion of the conduit system would include everything from the manhole cover, down into the underground space occupied by the ducts, and all the cement and other stabilizing and reinforcing materials keeping the ducts in place and intact.

A utility should be able to recover the costs of constructing its conduit systems, which include the cost of digging the trench, cutting rock and asphalt, shoring and backfill.[112] The costs associated with maintaining these conduit system elements must also be included in any formula seeking to allocate the costs associated with unusable conduit space. As such, the unusable space formula should be:

$$\frac{\text{Linear Replacement Cost of Conduit}}{\text{Number of Attachers}} \times \frac{2}{3} \times \text{Carrying Charges}$$

The Commission also seeks comment on a presumptive ratio of usable ducts to maintenance ducts to establish the amount of unusable space. The Electric Utilities believe that each utility should develop its own ratio using its own internal design standards and engineering requirements as driven by its business plans. A utility should also be able to

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[112] The costs of set-up, tear-down, drainage, well-pointing, framing, framing material, an restoration in order to meet local ordinances are other examples of the costs that must also be included.

adopt a ratio that reflects the differences in conduit systems constructed in different geographic areas.

B. The Commission Must Consider The Inherent Differences Between Telecommunications And Electric Conduit In Adopting Its Rate Methodology

In its Post-2001 Rate Rulemaking NPRM, the Commission recognized that there are "inherent differences" in the safety aspects between electric utility and telephone company conduit. The Commission requested that parties address how these differences affect just and reasonable rates. Most significantly, the half-duct methodology proposed by the Commission fails to consider that an electric utility cannot share space in a duct with a communications cable. Because the half-duct methodology proposed by the Commission assumes that the sharing of conduit or duct space is uniformly possible by all utilities, the application of this methodology would unfairly lead to under-recovery by an electric utility. Likewise, due to NESC clearance requirements, in some situations other ducts may also be forced to remain empty. Accordingly, the conduit formula for electric utilities must provide for attaching entities to also pay for any ducts that must remain empty as a result of the communications attachment.

While communications facilities and electric conductors can theoretically co-exist in some instances in the same conduit system, they can never co-exist in the same duct. Consequently, there are limitations on the proximity that can be allowed between such electric conductors and fiber optic or copper cables without causing interference with communications transmissions or damage to the communications facility itself. Multiple copper cables usually can share duct space without the signal carried over any one piece of

cable suffering from signal degradation. If an electric conductor is placed into the same duct as copper cable, interference would likely occur. Furthermore, the NESC precludes the installation of supply, control and communications cables in the same duct "unless the cables are maintained or operated by the same utility."[113/]

In addition, in many instances the attacher requests its own duct(s). These requests are made because not all cable or telecommunications service providers want to invest in facilities that are heat resistant, or because the attacher has concerns that a cable cut can occur while a second cable or telecommunications facility is run through the same duct or while the second attacher makes repairs or modifications to their own facilities.[114/]

C. The Commission Must Exercise Its Authority To Adopt A Conduit Formula That Accurately Addresses The Unique Characteristics Of Electric Utility Conduit

The Commission must bear in mind that electric utility conduit systems differ fundamentally from other conduit systems. As a result, in contrast to poles, it is not possible for the Commission to develop a uniform conduit formula that is equally applicable to electric and telephone utility conduit systems. The Electric Utilities, therefore, recommend a customized approach, described below as an individual case basis conduit formula.

113/ 1997 NESC, Rule 341A6.

114/ These are realistic concerns that lead to a "capacity" constraint similar to that experienced on poles. While a cable or telecommunications facility may only occupy a quarter of a duct's space, the duct may actually be 100% occupied due to the inability of the utility to run any other utility or non-utility facilities into the same duct. In this circumstance, even where the attacher did not request its own duct, the Commission should find that the entire duct capacity is occupied and eliminate the need to apply the half-duct adjustment.

1. There Are No Definitive Standards Governing The Characteristics Of Conduit Systems

The lack of utility-wide standards for constructing conduit systems is one reason why a uniform conduit formula is not feasible. Conduit systems are constructed based on the unique requirements of each utility. While there are standards for ensuring the safety of workers or access to the conduit system, the characteristics of conduit systems are not uniform. Construction, size, design and standards are driven by such factors as the ease of installation and use of cables, electrical appurtenances and transformers. In addition, geographic location plays a large part in defining how a conduit system is constructed. For example, a conduit system constructed in a city with underground transportation systems will be built differently than a conduit system in a city without such a system. Conduit systems constructed in urban areas differ from those constructed in suburban areas. Finally, conduit systems constructed in different parts of the United States will be built to accommodate such factors as differences in weather, soil and water tables. All of these factors, and many more, cause each utility to construct conduit systems differently.

2. An Electric Utility Must Take Special Precautions Prior To Allowing Attachers To Have Access To Its Conduit Systems

Generally speaking, underground conduit is used by the electric utilities to hold conductors that carry high voltage electric current. This simple fact raises several issues on the implications for applying a uniform conduit formula to all parties seeking access to an electric utility's conduit system.[115/]

115/ The FCC in the Local Competition Order ruled that electric utilities must allow attachers to install their own facilities on utility infrastructure including conduit. For safety reasons, the Electric Utilities have sought reconsideration of this requirement.

For example, before an electric utility can allow an attacher to have access to a conduit system, the electric utility can be required to re-route electricity from the conductors active in the conduit system to other conductors. This is done both for the safety of the workers and to ensure that if careless employees of an attacher cause a conductor break, electric service will not be interrupted.

The addition of third party equipment in a conduit system increases the risk of accidents to a utility's employees, thus increasing worker's compensation premiums. The utility may also be subject to lawsuits filed by telecommunications and cable workers injured while working on conduit. Finally, the electric utility will absorb the costs associated with the greater risk of system failure caused by accidents resulting from telecommunications and cable occupation of conduit, thereby reducing revenues, service reliability and the goodwill of its customers. The first two costs may be captured in certain of the administrative accounts included in a general formula, however, because such losses generally have not yet been experienced with underground systems[116/] and are not reflected currently in these accounts, there will be a lag before the accounts include these expenses. The result is that the utility is placed in a position of being exposed to risk without the immediate ability to recover the associated costs of such risk.

Electric utilities will also incur additional expenses or "safety premiums" to mitigate these risks and to reduce their liability for the actions of third parties. For example, the

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See supra note 13.

116/ It should be noted that while losses have not yet been experienced in significant numbers underground, the number of incidents occurring overhead have increased, and both are likely to grow in the future.

electric utilities will be required to review the design of proposed installations and may have to escort, inspect and monitor all installation and maintenance activities of the attacher. These functions would involve a variety of electric utility employees qualified in the areas of electrical safety codes, OSHA confined space requirements, asbestos regulations and electric equipment technologies. While the Electric Utilities are unable to quantify these expenses at this time, the agency should permit them to recover the additional "safety premiums" generated by a given attacher.[117/]

The nature and extent of such costs are dependent upon the identity of the attaching entity. Because the costs are attacher-specific, the Commission, utilities and attaching entities cannot predict the nature or extent of issues that might arise in any given conduit access arrangement. Therefore, a formula based on generalizations, such as the one proposed by the Commission, is a distorted and improper means for calculating a just and reasonable conduit rate.

IX. The FCC's Jurisdiction To Regulate Rights-Of-Way Is Limited Legally And Practically

The FCC states that the access and reasonable rate provisions of § 224 are applicable where a cable or telecommunications carrier seeks to install facilities in a right-of-way but

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117/ To the extent that a utility incurs a one-time charge, such as might be the case when reviewing a design for compliance with safety standards, the associated costs would be included in make-ready charges. However, it is foreseeable that certain safety premiums would be ongoing or recurring expenses. For example, if a cable entity would like to repair previously-laid fiber, its employee might need to be accompanied by a utility employee. The labor cost would need to be recovered as a carrying-charge.

does not make a physical attachment to any pole, duct or conduit.[118] The FCC requested comment on whether it should adopt a rate formula or methodology to calculate just and reasonable right-of-way attachment rates, or whether it should simply address right-of-way complaints on a case-by-case basis.[119] Because the rights-of-way that utilities own or control vary tremendously depending upon the size, width, soil conditions, access conditions, use restrictions, as well as state and local law, the FCC should refrain from any rate regulation of right-of-way.

A. The FCC Must Recognize That Its Jurisdiction Is Limited By § 224(a)(1) And (4) Of The Act

As an initial matter, the FCC must recognize that § 224 explicitly limits the FCC's jurisdiction to regulate distribution rights-of-way. More specifically, subsection (a)(1) states that the FCC may only regulate poles, ducts, conduit and rights-of-way that are <u>used for wire communications</u>.[120] Subsection (a)(4) further limits the FCC's jurisdiction to attachments made to utility poles, ducts, conduits and rights-of-way <u>owned or controlled by the utility.</u> Accordingly, if the right-of-way at issue is not owned or controlled by the utility <u>and</u> used for wire communications, the FCC has no authority to regulate such right-of-way under § 224.[121]

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[118] Post-2001 NPRM ¶ 42.

[119] <u>Id.</u> ¶ 42-43.

[120] 47 U.S.C. § 224(a)(1). Indeed, the FCC's jurisdiction is even further limited by the requirement that the communications use be interstate in nature.

[121] Similarly, the FCC has no jurisdiction under § 224 to regulate the costs of trenching. Trenching is the process by which utilities make space below ground to bury electric conductor. A "trenching" rate is not a "rental" or land use charge. Rather, trenching rates are either negotiated between the parties seeking access to the trench,

Significantly, in this regard, the FCC must recognize that only a minority of an electric utility's distribution facilities are on rights-of-way owned or controlled by the utility. A majority of an electric utility's distribution poles and wires are on public road rights-of-way, canal rights-of-way owned by a water management district, or on platted utility easements.[122] These rights-of-way are not owned or controlled by the electric utility. For this reason, the use of right-of-way under § 224 has never been an issue before the FCC.

B. Utility Rights-Of-Way Are Diverse And Do Not Lend Themselves To Rate Regulation

Rights-of-way used by most electric utilities are land rights acquired for the use of the linear electrical utility facilities (poles, wires and appurtenant equipment for or related to the provision of electric services), together with the right of ingress/egress to and from such facilities and the right to restrict the activities of others on that right-of-way. The land rights may be granted in fee simple ("in fee") or as easements. The rights granted may or may not be assignable.

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or established by state public service commissions. Accordingly, just as the FCC has no jurisdiction under § 224 to set service rates for the various utilities, it must ensure that it does not regulate in areas that are properly left to the free market or state and local authorities.

122/ A platted utility easement or right-of-way is created by a dedication of land from a landowner for use by public utilities as a condition of receiving a development permit. All utilities — and under § 621(a)(2) of the Cable Act and some state statutes, cable television companies as well — have a general right of access to these types of easements. The developer or subsequent property owner owns the underlying fee. These easements are regulated or overseen by the local government. Some local governments require the utility to apply for a permit, similar to the application used for road right-of-way, before installing utility facilities on these easements.

Rights-of-way are diverse, not only in the terms and conditions of the right of use, but in size, width, location, soil conditions or ground conditions, current and future planned uses, access, etc. As such, some space is less costly to use than other. Equally important, easement uses are strictly defined and limited. The use to which a utility may put its right-of way is determined by the landowner in its grant of the easement or by the state or local government in its permitting terms and conditions. The utility is not free to do whatever it wishes.

A utility may have thousands of easements, some of which may have been given under grants that are more than fifty years-old. The terms of the easements will reflect both the needs of the parties and the time in which the easements were granted. Each easement, therefore, must be read to determine the rights granted. Some easements may not allow underground installations. Others may not allow overhead installations. Some easements may allow use for telecommunications purposes, while some may not. In addition, the physical characteristics of a particular easement — whether public or private — may preclude additional installation or construction on the land. Some utility easements may not be wide enough to allow a third party to install overhead facilities that are not attached to an existing pole. Installing a separate facility on the right-of-way itself, unlike attaching a

telecommunications or cable wire to a pole or using a duct,[123] therefore, will not be permitted under the easement unless the easement expressly provides for such use.

The party wishing to attach must acquire the consent of both the easement holder and the landowner.[124] Obtaining the landowner's consent can be a major difficulty. The landowner may demand extra compensation for the additional use, which requires the

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[123] In many instances, even the right of a telecommunications or cable company to attach additional wires to the electric utility pole may be prohibited under the terms of the easement or may be "unclear" and result in litigation with the landowner. Where the attachment has been of another wire to a utility pole, courts have generally found such additional use permissible under the existing easement and that no additional compensation was due the landowner. See, e.g., Salvaty v. Falcon Cable Television, 212 Cal. Rptr. 31 (Cal. App. 1985) (stating that, in an instance of a cable attachment to a telephone pole, a landowner's consent is not required where such an attachment was within the scope of the easement originally granted to the telephone company); Centel Cable Television Co. of Ohio, Inc. v. Cook, 567 N.E.2d 1010 (Ohio 1991) (stating that an attachment of cable wire to an electric pole did not constitute an additional burden on the land and was permissible under the easement for electric services); Jolliff v. Hardin Cable Television Co., 269 N.E.2d 588 (Ohio 1971). Where the issue is use other than attachment to a utility pole, however, the courts have been very strict about permitting use under existing easements. Direct attachment to the right-of-way by installing underground facilities was not allowed in Consolidated Cable Utilities, Inc. v City of Aurora, 439 N.E.2d 1272 (Ill. App. 1982) (holding that an easement for underground installation of gas, electric and telephone service did not allow for underground installation of cable). Attachment for a telecommunications antenna was not allowed in Bell Atlantic Mobile Systems, Inc. v. Zoning Hearing Board, 676 A.2d 1255 (Pa Commw. Ct. 1996) (stating that Bell Atlantic Mobile was not a "public utility"; an antenna cannot be attached to the top of a water tower. The court rejected a theory of "accommodating modern technological developments" in holding that the use for the antenna was not a necessary use in relation to the original purpose of the grant, nor within the intention of the parties to the grant; an easement granted to the water authority can be used by the authority for the operation of a water system and for no other purpose or use).

[124] A person wishing to attach to such an easement must obtain consent of the easement owner to ensure that its use is not inconsistent with the safe, reliable and sound engineering practices of the easement owner, and must also obtain the consent of the landowner if such additional use is not permitted under the terms and conditions of the easement.

expenditure of time and resources to negotiate.[125] Similarly, the attaching party may also be required to obtain environmental approvals from federal, state or local governments for digging or excavating in the right-of-way in order to install the additional facilities. These matters are not controlled by the electric utility.

Accordingly, the Electric Utilities do not believe that the FCC should rate regulate right-of-way where the utility only has an easement interest. Doing so will involve the underlying fee owner and the owner's claim for compensation. These compensation issues are matters of state and local law, and better suited to resolution in state and local fora.

If the FCC finds that § 224 does apply to right-of-way that the utilities own in fee simple, any regulation of utility right-of-way owned in fee must be confined to distribution right-of-way only. The plain language of the Pole Attachments Act, as well as its legislative history clearly indicate that Congress was concerned exclusively with distribution infrastructure. Accordingly, the Commission must confine its regulation to distribution right-of-way.

Notwithstanding these jurisdictional limitations, because easements owned by the utilities in fee are so diverse, both as to physical characteristics and as to access terms and conditions, any rate other than a rate negotiated based on square footage used is unworkable. It would be impossible to draw enough generalizations to adequately reflect the diversity of the rights-of-way and still derive a rate formula that is even remotely accurate.

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[125] Florida, for example, has adopted laws which are extremely protective of the right of the landowner, including the Bert J. Harris, Jr., Private Property Rights Protection Act, Fla. Stat. ch. 70.001 (1996).

C. The FCC's Usable/Non-Usable Space Allocation Formula Is Incompatible With Rate Regulation Of Right-Of-Way

Even if it were possible for the Commission to rate regulate right-of-way, which the Electric Utilities believe it is not, subsections (d) and (e) of the Pole Attachments Act direct the Commission to regulate rates based on notions of "usable" and "other than usable" space. These concepts simply do not apply to right-of-way. As discussed above, right-of-way is so physically and contractually distinctive as to render the notion of usable and non-usable space meaningless when applied to such right-of-way. Thus, the concepts of usable and unusable space can not be identified or universally applied to the infinite variety of facilities and right-of-way conditions involved. For this reason, a case-by-case determination by the FCC also is unworkable.

D. The FCC Should Adopt A Policy That Rates For Right-Of-Way Be Based On Fair Market Value Established By Individual Negotiations

Any compensation for distribution right-of-way owned by the utility in fee should be based on fair market value of the land based on negotiations between the parties. If negotiations between the parties fail, the compensation should be determined in the same manner as the eminent domain compensation standard used in the particular state. The FCC should follow the established approach used by the railroads when charging cable or telecommunications companies for use of railroad rights-of-way. This approach considers standard appraisal methodology in determining fair market value of the land, including across the fence values and assemblage value. Adopting a principle of free negotiation or an

eminent domain compensation methodology is the only way to deal with the huge diversity of site conditions, value, and local and state laws.[126]

E. The Electric Utilities Have Had Few Requests For Attachments To Their Rights-Of-Ways

The Electric Utilities have received very few requests by cable or telecommunications companies to directly install a cable or conduit longitudinally in their easements. For example, FPL estimates that it has had only three inquiries — none of which has yet resulted in a firm request for use. "Attachment" rates, therefore, have neither been an issue nor the determining factor as to use.

The FCC has inquired whether the utilities expect that the demand for access to rights-of-way will increase. In light of the low level of historic demand, the Electric Utilities do not believe such requests for longitudinal use will increase. The property right issues, the costs of installing the facilities (which is separate from the lease or license amount — the "attachment fee") and the physical and operational constraints on direct attachment to the rights-of-way are factors weighing against any increase in such demand. Cable and telecommunications companies will likely find that the extent and location of the public right-of-way make it more feasible for such companies to install their facilities in the public rather than in private rights-of-way.[127]

126/ Attaching entities should also be familiar and comfortable with this approach because they are likely to have encountered it in negotiating with the railroads for use of railroad right-of-way.

127/ The need for environmental permitting that can be expensive and time consuming may not be as frequent on some public rights-of-way.

X. Conclusion

The 1996 Act effected the most sweeping change in this Nation's telecommunications laws in sixty years. The change is premised on the notion that a deregulated, competitive market results in efficiency and innovation and produces the greatest benefits for the American public. The Electric Utilities urge the Commission to adopt such a deregulated, competitive approach with respect to the rates charged for attachments to poles, ducts, conduit and rights-of-way. Where regulation is needed, that regulation should be minimal and designed to achieve a specific goal.

The Electric Utilities suggest that the recommendations presented in these Comments are consistent with the overall deregulation and pro-competition themes of the 1996 Act. They urge the Commission to adopt a regulatory scheme, and specific regulations where necessary, consistent with their proposals.

WHEREFORE, THE PREMISES CONSIDERED, the Electric Utilities respectfully request that the Commission act upon the pole, duct, conduit and right-of-way attachment rate issues raised in this rulemaking in a manner consistent with the views expressed herein.

Respectfully submitted,

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