

As discussed in detail in the Electric Utilities' Comments,<sup>10/</sup> in 1978, Congress enacted the Pole Attachments Act to provide the then nascent cable television industry with access to the distribution poles of utilities in an effort to foster the development of the cable television industry.<sup>11/</sup> Congress passed this law in response to assertions by cable providers that they required the ability to attach their facilities to utility poles in order to wire customer homes.<sup>12/</sup> While it did grant cable providers access to utility infrastructure, Congress limited the scope of such access to the components that comprise a utility's distribution infrastructure. Specifically, the 1978 legislation reflected this intent through the statutory language that provides a cable provider with access to "poles, ducts, conduits, and rights-of-way."<sup>13/</sup> The 1996 Act amendments to the Pole Attachments Act used this same statutory language in adopting new subsection (f)(1).<sup>14/</sup> These items constitute the distribution, but not the transmission, infrastructure of utility companies.

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<sup>10/</sup> See Comments of AEP *et al.* ¶¶ 11-17.

<sup>11/</sup> H.R. Rep. 1630, 94th Cong., 2d Sess. 4-6 (1976); S. Rep. No. 580 at 12-14, 1978 U.S.C.C.A.N. at 120-22; see also H.R. Rep. No. 204, 104th Cong., 1st Sess. Part I at 91 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 58.

<sup>12/</sup> S. Rep. No. 580 at 13, 1978 U.S.C.C.A.N. at 121.

<sup>13/</sup> 47 U.S.C. § 224(a)(1).

<sup>14/</sup> Congress adopted this language verbatim in § 224(f)(1) of the 1996 Act:

A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

47 U.S.C. § 224(f)(1) (emphasis added).

Nowhere does the 1996 Act mention transmission towers, which are separate and distinct from distribution systems. Under the legal doctrine of expressio unius est exclusio alterius — the expression of one thing excludes the other — it is impermissible to imply a term to a list of items where that term is not expressly included.<sup>15/</sup> Congress has never included the term "transmission towers" within the scope of the Pole Attachments Act. The 1978 legislation was focussed on making the distribution facilities of utilities available to cable television companies, and was limited thereto. If Congress meant to add transmission towers in its new version of the legislation in the 1996 Act, it could have done so. Because it did not, the Commission itself can not add this term to the statute.

During the past two decades of pole attachments regulation, the FCC, cable operators and utilities uniformly have understood that the term "poles" does not include transmission towers. Indeed, prior to the 1996 Act, no party had ever claimed before the FCC a right of access to such facilities under the Pole Attachments Act. Consistent with this interpretation of the Pole Attachments Act, in its Reconsideration Memorandum Opinion and Order revising the 1978 pole rate formula, the Commission stated that "[t]he cable television industry leases space on existing distribution poles owned by electric utilities and telephone

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<sup>15/</sup> 2A Sutherland Stat. Const. § 47.23-25 (5th ed. 1992). This doctrine is captured by the admonition in the Supreme Court's decision in West Virginia Univ. Hosps. v. Casey, 499 U.S. 83 (1991), in which the Court stated: "[The statute's] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." Id. at 101 (quoting Iselin v. United States, 270 U.S. 245, 250-51 (1926)).

companies to attach its coaxial cable and related equipment."<sup>16/</sup> Additionally, at least two other decisions addressing FCC rate calculations, the Commission states that "towers and extremely tall poles" are plant not normally used for attachments.<sup>17/</sup> These references are clear examples of the Commission's acknowledgement that, as the plain language of the statute suggests, the Pole Attachments Act does not apply to transmission towers and other transmission facilities. Equally important, this interpretation is consistent with the prevailing understanding within the electric utility industry that the term "poles" means distribution poles only.

Similarly, in a recent order by the New York Public Service Commission (NYPSC),<sup>18/</sup> the NYPSC rejected the argument that the pole attachment rate formula in New York should also apply to transmission towers. The NYPSC concluded that electric utilities and attaching entities should be allowed to negotiate a rate for access to transmission towers without the NYPSC establishing a regulated rate.<sup>19/</sup>

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<sup>16/</sup> See In the Matter of Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 4 F.C.C.R. 468 (1989) (emphasis added).

<sup>17/</sup> See In the Matter of Capital Cities Cable, Inc. v. Mountain States Tel. and Tel. Co., 56 Rad. Reg. 2d (P&F) 393, 399 n.10 (1984); In the Matter of Logan Cablevision, Inc. v. Chesapeake and Potomac Tel. Co. of West Virginia, 1984 FCC Lexis 2400 (1984).

<sup>18/</sup> In the Matter of Certain Pole Attachment Issues Which Arose in Case 94-C-0095, Op. 97-10 (June 17, 1997).

<sup>19/</sup> Id.

**B. The Commission Does Not Have Jurisdiction To Regulate Buried Cable**

MCI argued that the Commission must ensure that there is a rate methodology that is appropriate for "each type of utility structure,"<sup>20/</sup> including buried cable and trenches. Because MCI blatantly ignores the jurisdictional limitations of the FCC's authority under the Pole Attachments Act, the Commission must reject any proposal that it develop a rate formula for buried cable.

MCI makes the bald assertion that Congress included buried cable in the Pole Attachment Act, but fails to provide any support for its claim. This lack of support is explained by the fact that Congress rejected the very idea that the Pole Attachments Act extends the Commission's jurisdiction to buried cable, reasoning that "there are no leasing agreements associated with the use of trenches."<sup>21/</sup>

If Congress intended that the definition of a "pole attachment" should include buried cable, then Congress would not have exempted cooperative utilities from the obligations of the Pole Attachments Act. In discussing the exemption of cooperative utilities from § 224, Congress reasoned that because the majority of a cooperative utility's plant is buried underground — mostly in trenches — there was no need to extend the Commission's jurisdiction to include such entities.<sup>22/</sup> Congress explicitly recognized that "CATV pole attachment arrangements are unnecessary [for buried cable] since there are no leasing

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<sup>20/</sup> Comments of MCI Telecommunications Corporation at 23.

<sup>21/</sup> S. Rep. No. 580, 95th Cong., 2d Sess. at 18, reprinted in 1978 U.S.C.C.A.N. 109.

<sup>22/</sup> Id.

agreements associated with the use of trenches.<sup>23/</sup> Therefore, any suggestion that the term "pole attachment" includes buried cable is fundamentally at odds with Congress' rationale for excluding cooperative utilities from § 224.<sup>24/</sup>

Furthermore, the arguments presented previously regarding the Commission's jurisdiction over transmission towers also apply to buried cable.<sup>25/</sup> If Congress had intended to include buried cable in the Pole Attachments Act, it would have added buried cable to the list of poles, ducts, conduit and rights-of-way.

**C. Even If The Commission Has Jurisdiction To Regulate Transmission Towers And Buried Cable, The Commission Did Not Notice Rate Methodologies For These Types Of Utility Property And, Therefore, Cannot Now Address Them In This Rulemaking**

Assuming arguendo that the Commission has jurisdiction to regulate transmission towers and buried cable, the Commission did not provide notice of its intention to address rate methodologies for these facilities in this rulemaking, nor did the FCC give notice that it intended to address rates for rights-of-way or trenches. Accordingly, the Administrative Procedures Act ("APA") precludes the Commission from considering these issues in this rulemaking at this time.<sup>26/</sup>

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<sup>23/</sup> Id.

<sup>24/</sup> Practically speaking, MCI's proposal also does not make sense. Buried cable is essentially electric conductors placed directly in a trench, instead of on a pole or in a conduit system. There is nothing on a buried cable to which a cable or telecommunications facility can attach.

<sup>25/</sup> See supra discussion at Section I.A.

<sup>26/</sup> Section 4 of the APA, 5 U.S.C. § 553(c) specifically provides:

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule

The U.S. Court of Appeals for the D.C. Circuit has recognized that "an agency proposing informal rule making has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible."<sup>27/</sup> This "notice" of proposed rulemaking must be adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process.<sup>28/</sup> The D.C. Circuit has repeatedly held that interested parties are not required to monitor the comments filed by all others in order to receive notice of an agency's proposal. As such, the comments received do not cure the inadequacy of the notice given.<sup>29/</sup>

In its NPRM, the Commission specifically announced its intention to adopt, for the first time, a "conduit methodology that will determine the maximum just and reasonable rates utilities may charge cable systems and telecommunications carriers for their use of conduit

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making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rule adopted a concise general statement of their basis and purpose.

<sup>27/</sup> Home Box Office v. Federal Communications Comm'n, 567 F.2d 9, 36 (D.C. Cir. 1977).

<sup>28/</sup> Florida Power & Light Co. v. United States, 846 F.2d 765, 777 (D.C. Cir. 1988). "This requirement serves both (1) 'to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies'; and (2) to assure that the 'agency will have before it the facts and information relevant to a particular administrative problem.'" MCI Telecommunications Corp. v. Federal Communications Commission, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (citing National Ass'n of Home Health Agencies v. Schweiker, 690 F.2d 932, 949 (D.C. Cir. 1982)).

<sup>29/</sup> MCI Telecommunications Corp., 57 F.3d at 1142; Horsehead Resource Development Co. v. Browner, 16 F.3d 1246, 1268 (D.C. Cir. 1994); American Fed'n of Labor v. Donovan, 757 F.2d 330, 340 (D.C. Cir. 1985).

systems."<sup>30/</sup> In this regard, the Commission specifically identified, and sought comment on, the FERC accounts that may apply to conduit occupancy. Significantly, however, the Commission did not likewise propose new formulas for transmission towers, rights-of-way and buried cable. Equally important, the Commission's current approach to rate regulation for poles and conduit is simply not relevant to the costs associated with transmission towers, rights-of-way, trenches and buried cable. As such, the Commission would have to consider an entirely different approach to rate regulation of transmission towers, rights-of-way and buried cable. Thus, the Commission cannot address these issues in this proceeding.

## **II. The Commission Should Be Regulating Pole Attachments Judiciously**

### **A. The Record Supports The Concept That Regulated Rates Should More Closely Approximate Negotiated Rates**

Many commenters endorsed the notion that the Commission should favor voluntary negotiation of pole attachment rates whenever possible.<sup>31/</sup> The U.S. Court of Appeals for the Eighth Circuit recently held in the interconnection context that the 1996 Act was designed to promote binding negotiated agreements.<sup>32/</sup> The Electric Utilities agree that negotiated pole attachment agreements are most consistent with the pro-competitive, deregulatory goals of the 1996 Act, as well as the specific amendments to the Pole Attachments Act. Indeed,

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<sup>30/</sup> NPRM ¶ 1.

<sup>31/</sup> See e.g., Comments of BellSouth Corporation at 3-4; Comments of the Edison Electric Institute and UTC, The Telecommunications Association at 7; Comments of GTE Service Corporation at 1; Comments of the United States Telephone Association at 2-4; Comments of U.S. WEST, Inc. at 7-8; Comments of the Electric Utilities Coalition passim.

<sup>32/</sup> Iowa Utilities Board, at 115.

post-2001, agreements between utilities and telecommunications carriers should largely be the result of negotiation, not regulation. However, given the statutory prescription of § 224(d)(1), the Electric Utilities believe that, in this proceeding, the Commission should adopt a rate methodology that brings the regulated rate more in a line with a market-negotiated rate. Accordingly, the Electric Utilities urge the Commission to establish a rate methodology under § 224(d)(1) that considers a utility's actual forward-looking economic costs.<sup>33/</sup>

**B. The Commission Should Not Review Rates Freely Negotiated By The Parties**

The Electric Utilities agree with BellSouth that if a pole owner and an attacher are able to reach an agreement on pole attachment rates, the Commission should accede to the attacher's judgment, as evidenced by its execution of the agreement, that the rates being charged are just and reasonable.<sup>34/</sup> General principles of contract law should dictate the circumstances under which the FCC will review freely negotiated agreements. The FCC should assume parties are sophisticated bargainers negotiating in the normal course of business and with an intent to be bound. Once an agreement has been entered into, the FCC should regulate the rates, terms and conditions of an attachment agreement only when presented with a good faith claim of duress, misrepresentation, fraud or unconscionability. There should be a presumption that the agreement was "freely negotiated" and, thus FCC authority to review the agreement should be exercised judiciously.

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<sup>33/</sup> See Comments of AEP et al. Section III.

<sup>34/</sup> See Comments of BellSouth Corporation at 3.

Tele-Communication, Inc. ("TCI") argued that freely negotiated rates cannot occur where one party has control over an "essential facility."<sup>35/</sup> Significantly, however, in its legal analysis, TCI failed to distinguish between telephone utilities and electric utilities for purposes of applying the essential facility doctrine. Courts have consistently rejected essential facilities claims where the company alleged to have an essential facility was not in the same relevant market as the company seeking access to the facility.<sup>36/</sup> Electric utilities generally are not competitors of telecommunications carriers and cable operators. TCI's erroneous application of essential facility analysis to electric utility poles and conduit illustrates the fundamental importance of distinguishing between incumbent local exchange companies ("ILECs") and electric utilities for purposes of cost-of-service rate making.

As the Electric Utilities demonstrated in their Comments,<sup>37/</sup> ILECs and electric utilities occupy fundamentally different positions in the economically relevant market for cost-of-service ratemaking. The Commission has recognized that ILECs have a clear motivation to restrict access in order to enhance their competitive position in the relevant market.<sup>38/</sup> In contrast, electric utilities generally do not and historically have not, competed head-to-head with cable operators and telecommunications carriers and, therefore, have less economic incentive to restrict access. To the extent that some electric utilities are beginning

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<sup>35/</sup> See Comments of Tele-Communications, Inc. at 2-9.

<sup>36/</sup> See Interface Group, Inc. v. Massachusetts Port. Auth., 816 F.2d 9 (1st Cir. 1987); Ferguson v. Greater Pocatello Chamber of Commerce, 848 F.2d 976 (9th Cir. 1988).

<sup>37/</sup> Comments of AEP et al. ¶¶ 18-22.

<sup>38/</sup> See, e.g., Local Competition Order at ¶ 10.

to participate in the telecommunications markets, they do so as new entrants that generally lack market power.

Assuming arguendo that electric utilities occupy the same relevant market in some circumstances, contrary to TCI's assertions, the essential facilities doctrine does not justify heavy-handed rate regulation of electric utility poles and conduit for two significant reasons: (1) there are alternative means by which cable and telecommunications services can be provided;<sup>39/</sup> and (2) other Commission regulations prohibit an electric utility from charging discriminatory rates.<sup>40/</sup> Thus, TCI's attempt to justify a high level of intervention by the Commission based on the notion that electric utility poles and conduit are "bottleneck" facilities must fail.

### **III. The Commission Will Exceed Its Statutory Authority If It Allows Pole Attachment Agreements To Be Subject To Pick and Choose And Most Favored Nation Treatment**

WorldCom suggests that pole attachment agreements should be subject to the same pick and choose and most favored nation rules applied to interconnection agreements<sup>41/</sup> pursuant to the Commission's Local Competition Order.<sup>42/</sup> Under pick and choose, attaching entities would have the ability to review pole attachment agreements involving a

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<sup>39/</sup> See Comments of AEP et al. ¶¶ 64-68.

<sup>40/</sup> See id. ¶¶ 69-72. If the electric utility has a telecommunications subsidiary or affiliate, § 224(f)(1) and (g) require that the electric utility provide non-discriminatory treatment to all attaching entities.

<sup>41/</sup> Comments of WorldCom, Inc. at 6-7.

<sup>42/</sup> Local Competition Order, ¶¶ 1309-1323 (interpreting 47 U.S.C. § 252(i)).

given utility and then choose terms and conditions in the previously executed agreements for inclusion in a new attachment agreement with that utility. Most favored nation treatment would allow a party to a previously executed agreement to retroactively update the terms and conditions of the original agreement with more favorable terms and conditions included in pole attachment agreements subsequently entered into by the same utility. WorldCom's proposal must be rejected.

**A. The U.S. Court Of Appeals For The 8th Circuit Has Held That Pick And Choose and Most Favored Nation Treatment Thwarts Voluntary Negotiations**

In the interconnection context, the Commission adopted its pick and choose and most favored nation rules based on § 252(i) of the 1996 Act. Section 252(i) states that

A local exchange carrier shall make available any interconnection, service, or network element provided under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.<sup>43/</sup>

The Court of Appeals held that the pick and choose and most favored nation rules adopted by the FCC do not comport with Congress' intent to promote negotiated, binding agreements and vacated these provisions of the Local Competition Order.<sup>44/</sup>

In support of its decision, the Court of Appeals stated that the pick and choose rule "would thwart the negotiation process and preclude the attainment of binding negotiated agreements" in contravention of the 1996 Act's design.<sup>45/</sup> The court recognized that the

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<sup>43/</sup> 47 U.S.C. § 252(i).

<sup>44/</sup> Iowa Utilities Board at 115.

<sup>45/</sup> Id. at 116.

process of negotiation involves a give-and-take process whereby the parties make concessions on some terms in return for securing benefits on others. Pick and choose eliminates this fair exchange by allowing one party to receive a concession without giving any consideration in return.<sup>46/</sup>

Encompassed in the discussion of pick and choose, the Court of Appeals also implied that most favored nation treatment is equally problematic because it eviscerates the binding nature of a previously executed agreement.<sup>47/</sup> This is because one party is given the unilateral ability to subsequently modify an existing agreement with additional or alternative terms.<sup>48/</sup> The court also stated that most favored nation treatment impedes the ability of later parties to enter into agreements that reflect their unique circumstances.<sup>49/</sup> This is because, in the case of interconnection, the ILEC will be hesitant to agree to different terms in subsequent agreements for fear that previously executed agreements will be unilaterally changed to include such different terms. Pick and choose and most favored nation treatment lead to agreements that are all the same, even when the attributes of the parties and the characteristics of the interconnection arrangement differ.

As noted by several parties to this rulemaking, including the Electric Utilities, and as acknowledged by the Court of Appeals, the values of competition, deregulation and negotiation were the overarching themes of the 1996 Act. These themes define Congress'

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<sup>46/</sup> Id.

<sup>47/</sup> Id. (referencing the Local Competition Order, ¶ 1316 that discusses the most favored nation rule).

<sup>48/</sup> Id.

<sup>49/</sup> Id.

intent regarding § 224, just as they were dispositive in the Court of Appeals' interpretation of § 252. Indeed, Congress intended that pole attachment agreements be negotiated.<sup>50/</sup>

Application of the pick and choose and most favored nation rules to pole attachment agreements would have the same detrimental impact on the negotiation process that caused the Court of Appeals to vacate these rules in the interconnection context.

In addition, there are no provisions in § 224 that can be interpreted as allowing attaching entities to unilaterally require a utility to include the terms and conditions from one pole attachment agreement into another, either as part of an initial agreement or subsequent to the execution of an agreement. If, therefore, the Commission were to adopt WorldCom's proposal, these rules would be subject to the same legal challenge and decision on appeal as occurred with the pick and choose and most favored nation rules adopted in the Local Competition Order.

**B. The Commission Lacks Statutory Authority To Require Utilities To Routinely File Pole Attachment Agreements With The Commission**

WorldCom's proposal assumes that § 224 grants the Commission the authority to require electric utilities to routinely file pole attachment agreements with the Commission.<sup>51/</sup> Unlike in the interconnection context, there is no provision in § 224 that

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<sup>50/</sup> See supra discussion in Section II.A.

<sup>51/</sup> Id. at 6. The Electric Utilities understand that, in instances where the FCC has jurisdiction to hear pole attachment complaints, the pole attachment agreements that are the subject of the complaint may be filed with the Commission as part of the complaint process. However, WorldCom's suggestion would require that the Commission become a repository for, and reviewer of, all pole attachment agreements, with the exception of those entered into in states that have exercised jurisdiction over pole attachment agreements. This proposal would appear to create an administrative nightmare for the Commission. It would also be unduly

requires a utility to file attachment agreements with a regulating entity.<sup>52/</sup> While § 211(b) of the 1996 Act<sup>53/</sup> could arguably be relied upon to require telephone utilities to file pole attachment agreements with the Commission, electric utilities are not "carriers" for purposes of this provision. Finally, in instances where a state regulates pole attachment agreements, the Commission is precluded under § 224(c)(1) from exercising its jurisdiction to require any utility to routinely file pole attachment agreements with the Commission.<sup>54/</sup>

#### **IV. The Plain Language Of § 224 Precludes ILECs From Being Treated As Attaching Entities**

Because of the disparity between market-negotiated rates and the current regulated rate for cable operators and telecommunications carriers, the United States Telephone Association ("USTA") argued that ILECs should be entitled to the benefits of § 224 when they seek to attach to another utility's poles, ducts, conduit or rights-of-way.<sup>55/</sup> USTA advanced this argument even though § 224(a)(5) specifically exempts ILECs from the definition of telecommunications carriers and, therefore, the benefits of § 224. Accordingly, as the Commission recognized in its Local Competition Order, § 224 does not govern the

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burdensome for the utilities to have to track the terms of every pole attachment agreement to which it is a party in order to ensure compliance with the pick and choose or most favored nation rules proposed by WorldCom.

<sup>52/</sup> Compare 47 U.S.C. § 252 (e)(1).

<sup>53/</sup> 47 U.S.C. § 211(b).

<sup>54/</sup> See 47 U.S.C. § 224(c)(1).

<sup>55/</sup> Comments of the United States Telephone Association at 11-16.

rates, terms or conditions governing access by an ILEC to the poles, ducts, conduit or rights-of-way of another utility.<sup>56/</sup>

In spite of this plain statutory prohibition and the Commission's interpretation of this prohibition, USTA argued that without the benefit of the Pole Attachments Act, ILECs will be "severely disadvantaged in their ability to compete fairly."<sup>57/</sup> According to USTA, the median attachment rate paid by an ILEC to an electric utility ranges anywhere from 111% to nearly 400% greater than the median of what the ILEC charges non-utility telecommunications service providers to attach to its poles.<sup>58/</sup>

Although USTA has identified correctly the inefficiency, namely the disparity between market-negotiated rates available to some attachers and the current regulated rate available to others, it has suggested a solution that plainly violates § 224(a)(5). The Electric Utilities agree that the disparity between market-negotiated rates and the current regulated rate is problematic. However, as the Electric Utilities argued in their Comments, in light of the statutory language, the only way to resolve this disparity is for the Commission to adopt a rate methodology that brings the regulated rate more in line with a market-negotiated rate.<sup>59/</sup>

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<sup>56/</sup> Local Competition Order, ¶ 1231.

<sup>57/</sup> Comments of the United States Telephone Association at 13.

<sup>58/</sup> Id. at 13.

<sup>59/</sup> Comments of AEP, et. al. at Section IV.A.2.

**V. State And Municipal Laws Governing The Placement Of Telecommunications And Cable Facilities Are Irrelevant To The Determination Of Just And Reasonable Pole And Conduit Attachment Rate Formulas**

AT&T argues that because state and local regulations establish guidelines that govern when and where wireline telecommunications and cable facilities may be placed,<sup>60/</sup> the Commission must retain its current approach for calculating pole attachment rates.<sup>61/</sup> The existence of such regulations is irrelevant to the FCC's formulation of rate methodologies for access to a utility's distribution poles and conduit. To the extent that states or localities have enacted laws that dictate the terms and conditions for placing telecommunications or cable facilities in their jurisdictions, the Commission's consideration of the existence of such laws may be proper in matters involving access to a utility's poles or conduit, but not in matters involving pole attachment rates.

Furthermore, many state and local laws that establish the terms and conditions for placing telecommunications and cable facilities also apply to the placement of electric utility poles, ducts and conduit. For example, just as cable and telecommunications companies may face state and local limits on such activities as digging up streets or blocking traffic, the electric utilities may be subject to the same laws. Therefore, the Commission can not base its rate decision on a mistaken belief that attaching entities uniquely face certain

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<sup>60/</sup> AT&T appears to be discussing state and local laws that limit such activities as tower and antenna sitings or access to public rights-of-ways. If this is the case, the Commission must understand that utilities also must seek traffic, construction and other permits in order to construct conduit systems, place poles or run conductors.

<sup>61/</sup> Comments of AT&T Corporation at 3.

inconveniences or limitations in their ability to place their facilities.<sup>62/</sup> Because electric utilities are subject to many of the same state and local laws when building their own distribution infrastructure, it would be arbitrary and capricious for the Commission to implement a rate formula that favors attaching entities over electric utilities due to the existence of such laws. As such, AT&T's proposal must be rejected.

#### **VI. The Commission Is Not Bound By Past Pole Attachment Decisions At The State Or Federal Level**

NCTA argues that the Commission cannot change its current rate formula because the formula has been in use for 20 years, states have based their own laws on the federal program and the parties to pole attachment agreements have come to rely on the current approach.<sup>63/</sup> Retaining the status quo is not a valid justification for rejecting the modifications to the pole formula suggested by the Electric Utilities, especially when the proposed changes will lead to more accurate rate calculations with minimal change to current Commission procedures.<sup>64/</sup>

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<sup>62/</sup> The Commission must also bear in mind that utility infrastructure is limited. Therefore, it is critical that the Commission adopt a rate methodology that encourages the efficient use of this resource. See Comments of AEP, et. al. at V.B. The fact that states and municipalities are adopting laws that make it more difficult for all parties to use public rights-of-way provides additional evidence that the Commission must adopt a rate methodology that does not lead to a misallocation of pole and conduit capacity.

<sup>63/</sup> Comments of National Cable Television Association at 6-7.

<sup>64/</sup> The Commission has recognized as a fundamental proposition that greater accuracy in the attachment rate is both a desirable and an important goal. See e.g. Memorandum Opinion and Order on Reconsideration, 4 F.C.C. Rcd. 468 (1989) (stating that the pole attachment rate is to be as closely related to actual costs to the utility as is reasonable).

The Electric Utilities are not proposing sweeping changes to the current formula. Attaching entities and the utilities will not be inconvenienced or confused by changing 37'6" to 40 feet or by moving the 40 inch safety space to unusable space. States will have the choice of adopting similar changes themselves. In addition, because the approaches adopted by the Commission and states already vary, attaching entities cannot in good faith argue that any changes to the Commission's approach will adversely impact the states, utilities or the attaching entities. All three groups are already having to adapt their procedures to accommodate existing differences.

In fact, it is ludicrous to argue that the Commission's adoption of the proposed changes to the current formula will inconvenience states in the least. Many states are guided by the Commission's approach to calculating pole attachment rates, but these same states make their own factual determinations about the actual elements included in their individual rate formulas. For example, SBC Communications Inc. points out that California requires 72 inches of safety space between communications facilities and electric conductors.<sup>65/</sup> This indicates that the states do not feel bound by how the Commission implements its own pole attachment rate formula.

The Electric Utilities have proposed modifications to the current pole attachment formula and its underlying assumptions because the elements currently included in the formula do not completely or accurately allow electric utilities to recover the costs incurred by them to provide telecommunications carriers and cable system operators with access to

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<sup>65/</sup> Comments of SBC Communications Inc. at n.50; See also Comments of the Electric Utilities Coalition at n.42.

electric utility poles and conduit systems. Considering that some of the elements relied on currently by the Commission were adopted twenty years ago, it is not surprising that things have changed. The Commission, therefore, cannot reject the proposals of the Electric Utilities that would lead to more accurate rates based on the argument that the Commission, states, utilities and attaching entities are in the habit of using the current approach.

**VII. The Modifications To The Pole Attachment Rate Formula Proposed By The Electric Utilities Will Improve Pole Attachment Rate Parity**

NCTA has raised the argument that rural cable companies and their subscribers are particularly sensitive to pole attachment rates.<sup>66/</sup> As a result, NCTA states that it is critical

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<sup>66/</sup> Comments of National Cable Television Association at 5. For instance, NCTA claims that rural cable companies may need access to 30 poles in order to provide service to 10 rural subscribers. Industry statistics do not support this claim. Using the statistics reported in the 1997 Edition of the Television & Cable Factbook for a cross section of towns in Virginia with TV Market Ratings of under 100, it is clear that the number of poles per basic service subscriber in a rural community is not as significant as NCTA suggests. On average, an electric utility deploys 25 poles per mile. If this average is multiplied by the miles of coaxial cable and fiber deployed in a rural community and then divided by the number of basic service subscribers, it is possible to estimate the number of poles per subscriber.

Poles Per Subscriber	<u>Miles of Conduit and Fiber X 25 Poles Per Mile</u> Number of Basic Service Subscribers
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Applying this formula to the statistics for small markets reported in the 1997 Factbook, Bland County, VA has .44 poles per subscriber, Harrisburg, VA has .55 poles per subscriber and Richlands, VA has .65 poles per subscriber. By comparison, Fairfax County, VA has .46 poles per subscriber, Manassas, VA has .46 poles per subscriber and Loudon County, VA has .60 poles per subscriber. Even if the Commission assumes that ten percent of the cable in these communities is underground (a generous assumption for rural communities), the poles per basic service subscriber remains fairly low.

that the rates charged for such attachments be kept to a minimum. This argument is a red herring for the reasons cited by the Small Cable Business Association.<sup>67/</sup> To the extent that a cable company is serving a rural area, it is likely that the cable company is dealing with a utility that is not subject to § 224. If NCTA is truly concerned about the treatment of small cable companies, a fair solution is to adopt the modifications proposed by the Electric Utilities that will bring the pole attachment rates of utilities subject to § 224 closer to the rates charged by pole owners that are not subject to the Pole Attachments Act.

### **VIII. Attaching Entities Do Not Have Any Ownership Rights To A Utility Pole**

AT&T claims that attaching entities pay for the use of vertical space on a pole and, therefore, are free to use that space as they wish.<sup>68/</sup> This theory is without merit, as AT&T's proposal is akin to asserting ownership rights in the pole.

When Congress enacted the Pole Attachments Act, it intended that pole attachments include only wire attachments on utility distribution poles.<sup>69/</sup> It also intended that utilities be compensated by attaching entities for the use of a pole. In return, the attaching entity is given the limited ability to attach cables to the pole only with the permission of the pole

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The Electric Utilities do not doubt that some communities experience greater efficiencies than others with respect to the average number of poles to which they must attach to deliver service. However, the information provided above demonstrates that rural communities are not being burdened at a level to justify an artificially low pole attachment rate.

<sup>67/</sup> See Comments of Small Cable Business Association.

<sup>68/</sup> Comments of AT&T Corporation at 5.

<sup>69/</sup> See infra discussion at Section XVIII.

owner and subject to safety and engineering guidelines. There is no property right granted in the space occupied on the pole.

To allow an attaching entity to indiscriminately attach wires or other equipment to a pole poses several problems. For example, the integrity of the pole can be jeopardized because the attacher may not take into account capacity limits on the pole.<sup>70/</sup> Unfettered access can also lead to the placement of facilities in violation of the NESC or in a manner that would limit safe and easy access to pole attachments.

Furthermore, if the Commission grants attaching entities unlimited discretion to attach multiple facilities or equipment to a pole without the permission of, or compensation to, the utility, the next attaching entity that wishes to attach to the pole may believe that there is usable space available, but there may not be pole capacity available. As a result, due to current engineering standards, the utility would be required to have the new attaching entity replace the existing pole with a larger pole. This is because every attachment takes up pole capacity and thus limits the amount of pole space available to other attaching entities.<sup>71/</sup>

**IX. The Costs Associated With Attaching To A Utility Pole Should Be Allocated Based On The Pole Capacity Utilized By The Attaching Entity**

In their Comments, the Electric Utilities provided the Commission with a detailed explanation of how poles have limited capacity.<sup>72/</sup> This discussion was included because

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<sup>70/</sup> The effects of ice, wind and other environmental factors on the capacity of a pole were discussed in detail in the comments filed by the Electric Utilities. Comments of AEP et. al. at Section VIII.H.

<sup>71/</sup> Id.

<sup>72/</sup> Comments of AEP et. al. at Section VIII.H.

the Electric Utilities believe that the Commission's current approach to regulating pole attachments does not take adequate notice of the safety and engineering issues that will arise as more attaching entities seek access to utility poles. Now that the Electric Utilities have had an opportunity to review the comments of other parties to this rulemaking, they would like to point out to the Commission that many of the issues regarding the allocation of space on a pole discussed in the comments filed in this proceeding could be easily resolved with a pole formula that allocates costs based on the pole capacity utilized by an attaching entity. The Electric Utilities believe that such an approach is superior to the current allocation method for two reasons.

First, capacity-based cost allocation rewards the efficient use of the pole and may actually lead to a greater number of attaching entities being accommodated on a pole. All parties will be given an incentive to deploy practices and technologies that reduce the amount of capacity used on a given pole. They will also be given the incentive to take obsolete facilities off of poles.

These behavioral changes will help to eliminate a problem that disproportionately affects new entrants. More specifically, new entrants seeking space on a pole will more likely be the parties that will be forced to incur make-ready charges to place a taller pole due to the inefficient use of the existing pole by prior attaching entities. As demonstrated by AT&T, this is because attaching entities already on the pole believe that they have complete freedom to add facilities, through such practices as overlashing, without being required to

pay the pole owner for the use of the additional capacity and with little accountability for safety or the integrity of the pole.<sup>73/</sup>

Second, the use of occupied capacity to determine the percentage of cost that a given attaching entity should bear is competitively neutral. The Commission is no longer making allocation distinctions based on the nature of the attacher. Instead, each attaching entity would pay an attachment fee based on the amount of the pole's capacity actually used by the attacher. Thus, if a telecommunications attacher is using less than 7.41% of the pole's capacity, then it would pay for what it is actually using.

Considering that a pole has limits on how much load it can bear, if the Commission intends to facilitate competition, it must adopt pole attachment rates and policies that will contribute to pole space being available to all interested parties. This will only be possible if all parties are required to share in the cost of attaching to the pole based on the proportion of pole capacity actually occupied.

**X. The Regulatory Treatment Of Thirty Foot Poles Owned And Used By Electric Utilities May Need To Differ From The Treatment Of Thirty Foot Poles Owned Or Used Solely By Non-Electric Utilities**

Sprint and other commentators suggest that 30-foot poles must not be excluded from the calculation of a pole attachment rate because there are numerous 30-foot poles in place that can, and currently do, accommodate multiple attachments.<sup>74/</sup> While telephone utility

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<sup>73/</sup> Comments of AT&T Corporation at 8.

<sup>74/</sup> See, e.g., Comments of MCI Telecommunications Corporation at 12; Comments of SBC Communications Inc. at 38; Comments of Sprint Corporation at 4; Comments of United States Telephone Association at 27.

poles may be able to accommodate multiple attachments, this is generally not the case for 30-foot poles used by electric utilities. As a result, the Electric Utilities urge the Commission to allow pole owners with the ability to identify information about the costs associated with their 30-foot distribution poles to have the option of relying on the separate rate formula proposed by the Electric Utilities in their Comments, to be allowed to separate 30-foot poles from FERC Account 364 and to recalculate the amount of usable space on 30-foot poles.<sup>75/</sup>

**A. The Electric Utilities Bear A Disproportionate Amount Of The Costs Associated With The Use Of 30-Foot Poles By Attaching Entities**

There is a difference in the amount of space available on 30-foot poles with an electric conductor attachment and those that only have telecommunications and cable attachments.<sup>76/</sup> A 30-foot pole with an electric conductor only has two feet of usable space.<sup>77/</sup> However, attaching entities pay 7.41% of the costs associated with a 30-foot pole, instead of 50%, based on the incorrect assumption that such poles have 13'6" of usable space and that the attaching entity occupies 1 foot of space. As a result, an electric utility disproportionately bears 92.59% of the cost of a 30-foot pole.

In addition, 30-foot telephone poles without an electric conductor attachment have 5'4" of usable space.<sup>78/</sup> Again, by paying the telephone utility only 7.41%, instead of

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<sup>75/</sup> Comments of AEP *et. al.* at Section VIII.C.3. The Electric Utilities believe that any utility should be allowed to utilize this alternative formula so long as the utility is able to separate its pole data.

<sup>76/</sup> See Exhibit 1.

<sup>77/</sup> This is calculated as follows: 30' - 5' below ground - 19'8" ground clearance - 40" safety space = 24" or 2'.

<sup>78/</sup> See Exhibit 1. This is calculated as follows: 30' - 5' below ground - 19'8" ground clearance = 64" or 5'4".

18.75%, of the costs associated with a 30-foot pole, the attaching entities are paying less than their fair share as required by the fact that the attaching entity is using one foot out of 5'4" of usable space. However, the telephone utility is losing less money than an electric utility based on the proportion of usable space actually occupied by the attacher.<sup>79/</sup> As is obvious, the current formula leads to disparate treatment between electric and telephone utilities that must be addressed by the Commission in this rate rulemaking.

**B. The Electric Utilities Have The Ability To Identify And Separate Information About Their 30-Foot Poles**

GTE states that telephone utilities generally lack the ability to provide separate information about 30-foot poles, therefore, such utilities would have difficulty implementing the proposals set forth in the Whitepaper regarding the rate treatment of such poles.<sup>80/</sup> However, the Electric Utilities' proposal is that any adjustments to the pole attachment formula regarding 30-foot poles should be applied at the option of utilities with the ability to identify and separate information about 30-foot poles.<sup>81/</sup> The fact that some utilities cannot separate the information does not provide an adequate basis for the Commission to deny the request of the Electric Utilities, especially when the Electric Utilities are harmed under the current rate scheme.

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<sup>79/</sup> Telephone utilities should be allowed to recover 18.75% of the cost of a 30-foot pole from an attaching entity, but they are recovering only 7.41%, for a loss of 11.34%. Electric utilities should be allowed to recover 50% of the cost of a 30-foot pole from an attaching entity, but are only recovering 7.41%, for a loss of 42.59%.

<sup>80/</sup> Comments of GTE Service Corporation at 13. It should be noted that US WEST seems to suggest that it does have the ability to identify information about its 30-foot pole population. Comments of US WEST, Inc. at 4. See also Comments of United States Telephone Association at 29.

<sup>81/</sup> Comments of AEP et. al. at Section VIII.C.3.a.