

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

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

CS Docket No. 97-151

REPLY COMMENTS

Adelphia Communications Corp., the Arizona Cable Telecommunications Association, the Pennsylvania Cable & Telecommunications Association and Suburban Cable TV Co. Inc. ("Commenters"), by their attorneys, respectfully submit these reply comments in the above-captioned rulemaking proceeding.

In their initial set of comments, Commenters addressed questions raised by the Commission concerning the allowable use of the attachment space, the presumptions underlying the existing rate formula, issues surrounding the allocation of the cost of unusable space on a pole, and adjustments to the rate formula to reflect the allocation of the costs of the usable space on a pole. These reply comments address certain of the matters raised by other commenting parties as it relates to the issues raised by Commenters in their initial comments.

**A. Attachment Space Use.**

In its Notice the Commission tentatively concluded that telecommunications carriers should be permitted to overlash existing lines with additional cable. The Commission went on to ask whether this right should be extended to permit third parties to use the overlashed facility and whether a cable system or telecommunications carrier should be permitted to allow a third

*atg*

party to use dark fiber in its original line and/or in its overlashed line. Finally, the Commission asked whether a third party should be permitted to overlash its own facility to an existing cable system or telecommunications carrier attachment. Commenters took the position that the policy contained in Section 224 of the Act mandates an answer to these questions which puts the least amount of restrictions on an attaching party, the services it provides, or to whom these services are provided. The only caveat is the observation of safety requirements and ensuring that the proper pole attachment rental is remitted. Not surprisingly, the comments submitted by most utilities took a significantly contrary view.<sup>1</sup>

Although many of these utilities argue that policies on these issues should not be adopted other than through a case-by-case adjudicatory process, they generally seem to have no problem with an existing attacher overlashing additional lines on its own previous attachments.<sup>2</sup> As to third party use of an attacher's dark fiber, the utilities have come up with no real objection in the pole attachment context but many of them curiously suggest that the issue is somehow premature. This objection can almost always be made in a rulemaking context, but the issue of dark fiber use is a matter ripe for decision because the practice is now happening.

The utilities' most vigorous objection is reserved for the concept of permitting a third party to overlash to an existing cable system or telecommunications carrier attachment. In the case of an attacher overlashing additional lines on its own existing attachment, some grudgingly

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<sup>1</sup>See, e.g., *Comments of SBC Communications, Inc.*, pp. 7-14; *Ameritech*, pp. 3-8; *Duquesne Light Company*, pp. 21-30; *Edison Electric Institute*; pp. 9-15.

<sup>2</sup>The most notable exception is the set of comments filed by Texas Utilities Electric Company ("TUEC"), which has a history of disputing the Commission's authority under Section 224. TUEC argues that the provision of dark fiber to third parties and overlashing to permitted attachments are beyond the reach of Section 224. TUEC's reading of the 1996 amendments to Section 224 as somehow overruling the Heritage decision is absurd. Congress mandated access to poles and provided a new rate for attaching entities providing telecommunications services. These changes did not narrow the reach of Section 224, they broadened it.

admit utilities that this may be permissible so long as the attacher complies with the applicable safety, reliability and engineering standards for overlashing.<sup>3</sup> Even though the same conditions would apply to a third party, the utilities' objections seem to be that giving an attacher the right to "sublease" space to third parties suggests that attachers have an attribute of ownership. Section 224 does not authorize, that the utilities would not be able to collect any attachment fee from these third parties, and that the pole owner would not be able to retain control of its property. Since it is clear that safety and reliability considerations have to be observed no matter who is doing the overlashing, and that no additional physical attachment would be made to a utility's poles, it seems obvious to Commenters that the utilities' real interest in this regard is that a third party overlasher might not be paying any additional fees to the owner of the pole.

Indeed, Commenters note that some electric utilities have no problem with the idea of allowing third parties to overlash to an existing licensed attachment.<sup>4</sup> The reason given by these utilities for that position, with which Commenters wholeheartedly agree, is because overlashing promotes telecommunications competition. However, these and other utilities insist that a third party overlasher must not only enter into an attachment agreement with the utility to establish the rates, terms and conditions for overlashing, but must also pay a full attachment rate to the utility. The reason given for this argument is that the overlashing party receives all the benefits of an attachment and should not gain a competitive advantage by avoiding the attachment rate paid by other attachers. What the utilities are really objecting to is that they are not receiving the revenue which would otherwise accrue to them if the overlashers would contract with them for a separate physical attachment to the pole. The Commission must not lose sight of the

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<sup>3</sup>See, e.g., *Comments of New York State Investor Owned Electric Utilities*, pp. 7-8.

<sup>4</sup>See, *Comments of the New York State Investor Owned Electric Utilities*, p. 8.

purpose of Section 224 which is to ensure that all parties desiring access to a utility's pole or conduit obtain that access on fair and reasonable rates, terms and conditions. It is not to ensure a level competitive playing field. A telecommunications carrier which utilizes microwave links and does not therefore require any pole attachments along the microwave path can be said to have avoided payments to a utility which owns poles along the route. The same is true if a telecommunications carrier decides to bury its facilities along the route. There is nothing in Section 224 or anywhere else which says that all competitors must pay the same price for the installation of their facilities. In other words, if an existing attacher does not have to pay an additional attachment fee if it overlashes its own facilities on a pre-existing attachment,<sup>5</sup> then there is no reason under Section 224 that the situation should be different if the overlasher is a third party.

This is an appropriate place for Commenters to address the constantly recurring theme of many utilities that attachments by cable operators (and presumably by telecommunications carriers) are somehow subsidized by the utilities' ratepayers.<sup>6</sup> Nothing could be further from the truth. If a utility must erect a pole in order to construct its plant, and no one else attaches to the pole, its ratepayers will pay the entire cost of installing and maintaining that pole in place. If a cable system comes along and desires to place an attachment on this pole, all make-ready costs must be paid by the cable operator. If a taller or stronger pole is needed, the cable operator will pay for the new pole. If additional guying and anchoring is needed because of the presence of the cable system's attachment, the cable operator will pay those costs. Thus, the only additional continuing costs to the utility and its ratepayers are the incremental costs of

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<sup>5</sup>Other than a cable system paying a higher attachment fee if it offers telecommunications services on the overlashed facility.

<sup>6</sup>See, e.g., *Comments of Duquesne Light Company*, p. 28.

having the cable operator on the pole. These include such things as additional maintenance and administrative costs which cannot possibly amount to more than \$1.00 per year. However, under the Commission's existing rate formula for cable systems, cable operators pay far more than this incremental cost. They pay a percentage of the total costs of the installation and maintenance of the pole along with the incremental costs of their presence on the pole. Thus, the ratepayers are enjoying a contribution from the cable operator to the cost of the pole, a contribution which they would not receive if the cable operator were not attached to the pole. This is a net plus for the utility's ratepayers. The new formula for telecommunications carriers will increase this contribution. No concept could be simpler, yet utilities, particularly electric utilities, persist in making the bogus argument that third party attachments to their poles somehow burden their ratepayers. Commenters suggest that the Commission should keep this in mind when it decides whether third party overlashers should be made to pay separate attachment fees.

**B. Attachment Charge.**

1. Presumptions.

The Commission in its Notice asked a number of questions relating to whether the presumptions underlying the existing rate formula should be changed. Commenters' general position was that the existing presumptions should remain unchanged. The most aggressive position taken by other commenters in this proceeding is that advanced by many electric utilities, namely, that the average pole height is increasing but that the presumptive amount of usable space on the average pole is decreasing. In support of this position, the most common and vigorous argument made by many of the electric utilities is that usable space should exclude the 40-inch safety space prescribed by the National Electrical Safety Code ("NESC") between a communications conductor and the first electrical conductor.

Commenters continue to strongly support the Commission's long held view that this so-called neutral zone is safety space which stems from an electric utility's requirement to comply with the NESC and therefore is properly assigned to the electric utility as part of its usable space. As Commenters pointed out in their initial comments, the only change in the use of the neutral zone since the Commission first adopted its rules for cable television attachments in 1979 is that power companies are now permitted to place communications cable in this space.<sup>7</sup> As other Commenters have pointed out,<sup>8</sup> the safety space is not required on any pole except those where electric utilities are attached. Moreover, electric utilities make use of this space for street lights, communications cables and other attachments. Comments filed by many electric utilities in Docket No. 97-98 admit that they make use of this space for such things as those listed above, transformer cases and capacitor racks, repeaters, amplifiers, supporting guide attachments and splinter boxes.<sup>9</sup>

Since electric utilities use the neutral zone for the installation of various facilities, now including revenue-producing fiber optic cable, it is disingenuous for them to attempt to characterize the neutral zone as unusable space, the cost of which should be shared by all attachers. The Commission was correct in 1979 when it assigned the neutral zone to usable space. Now that utilities can make even more use of the neutral zone than they could at that time, the Commission has every reason to reject the electric utilities' arguments to change that decision.

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<sup>7</sup>NESC (1997), Sections 224A and 230F.

<sup>8</sup>See, e.g., *Comments of AT&T Corp.*, pp. 22-23.

<sup>9</sup>See, Comments filed in Docket No. 97-98 by *Ohio Edison*, p. 19; *Union Electric*, p. 28; *The Electric Utilities Coalition*, pp. 38-39.

## 2. Allocating the Cost of Unusable Space.

In the Notice, the Commission sought comment on how to identify the entities which will be counted for purposes of allocating two-thirds of the costs of unusable space. The Commission proposed that any telecommunications carrier, cable operator or LEC attaching to a pole be counted as a separate entity for these purposes. Commenters agreed with the Commission's proposal. Various commenting parties disagreed with certain aspects of the Commission's proposal.

Perhaps the largest area of disagreement is whether a local exchange company ("LEC") should be counted as an attaching entity for purposes of apportioning the cost of unusable pole space. The problem arises because the definition of "telecommunications carrier" in Section 224(a)(5) excludes incumbent LECs and Section 224(e)(1) refers to "pole attachments used by telecommunications carriers to provide telecommunications services." Most of the commenting electric utilities therefore want incumbent LECs excluded from the number of attaching entities for the purpose of allocating the cost of unusable space. However, As Duquesne Light Company correctly points out in its comments, incumbent LECs have separate agreements with electric utilities under which they pay for their attachments.<sup>10</sup> In other words, the incumbent LECs do pay for their share of the unusable space and therefore it would not be unreasonable to include them as a separate attaching entity when apportioning the two-thirds of the cost of unusable pole space. Thus, the fact that they would be counted as an attaching entity for allocation of these costs is not inconsistent with their exemption from having to pay attachment rates under the formula in Section 224(e). Indeed, the reason that most utility commenters urge the exclusion of local governmental agencies from the category of attaching entities is because

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<sup>10</sup>*Comments of Duquesne Light Company*, p. 41.

they pay no attachment rate and to consider them as an attaching entity would require the utilities to absorb the portion of the costs of unusable space attributable to such attachments. This is not the case for incumbent LECs.

By the same token, Commenters urge, and most commenters agree,<sup>11</sup> that electric utilities must be counted as attaching entities when they provide telecommunications services. However, cable operators providing only cable service should not be excluded from being counted as an attaching entity. While it is true that cable systems providing only cable television service will not be subject to the new higher attachment rate to be paid by those entities providing telecommunications services, cable systems, unlike local government agencies, do in fact bear a portion of all of the cost (not just two-thirds) of the unusable space on a pole.<sup>12</sup> Again, this is a common misperception of the existing pole formula which applies to cable television systems.<sup>13</sup> The existing pole formula requires cable operators to pay attachment rates based on a percentage of the costs of the entire pole. The percentage is based on the amount of usable space which the cable operator occupies, but the rate calculation is not based on just the cost of usable space.

The question of whether an overlashed entity should be counted as an attaching entity for purposes of unusable space cost allocation depends completely on whether they are considered to have separate attachments. Commenters have suggested, and some utilities appear to agree,<sup>14</sup> that an overlashed facility by an existing attacher is not an additional attachment and

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<sup>11</sup>See, e.g., *Comments of New York State Investor Owned Electric Utilities*, p. 22; *Electric Utilities Coalition*, p. 5; *SBC Communications, Inc.*, pp. 19-20.

<sup>12</sup>Concur, *Comments of AT&T Corp.*, pp. 11-12.

<sup>13</sup>See, e.g., *Comments of Duquesne Light Company*, p. 40.

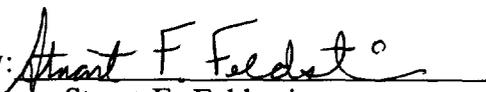
<sup>14</sup>See, e.g., *Comments of United State Telephone Association*, p. 6.

therefore should not count as an additional attaching entity. If, as Commenters urge, third party overlashers to an existing attacher's facilities are also not an additional attachment, then it follows that these third parties cannot be counted as an additional attaching entity. This is an even more compelling argument in the case of third party use of an attaching entity's dark fiber.

The overriding policy underlying Section 224(e) is that those attaching entities which are providing telecommunications services should bear their share of two-thirds of the cost of the unusable space on a pole. As noted above, cable systems already pay a portion of the total cost of the unusable portion of the pole,<sup>15</sup> incumbent LECs do so via negotiated agreements with electric utilities, and all other providers of telecommunications services will pay under the formula in Section 224(e). This is the group of attachers which describes the universe of "entities" which should be counted for purposes of Section 224(e)(2).

Respectfully submitted,

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<sup>15</sup>Cable systems would pay even more if an overlashing third party offered telecommunications services over its facilities.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Reply Comments were served this 21st day of October, 1997, via first-class mail, postage pre-paid, upon the following parties:

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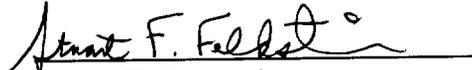
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