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

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OCT 21 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of Section 703(3)	)	
of the Telecommunications Act	)	CS Docket No. 97-151
of 1996	)	
	)	
Amendment of the Commission's Rules	)	
and Policies Governing Pole Attachments	)	

REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION

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October 21, 1997

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REPLY COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association ("NCTA"), by its attorneys, hereby submits the following reply comments in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

NCTA's comments generally endorsed the Commission's proposals for implementing Section 224(e) of the Telecommunications Act of 1996 which establishes a new mechanism for calculating charges for the use by telecommunications carries of utility poles, conduits and rights-of-way. The Notice of Proposed Rulemaking ("NPRM") proposes a generally straight-forward application of the statute that offers a clear roadmap for the adoption of implementing rules.

The comments of certain of the other parties, and in particular the comments of the electric utilities and local exchange carriers ("LECs"), do not see it that way. They misperceive Congress' intent and attempt to turn this proceeding into a vehicle for collecting excessive pole and conduit charges. If these parties are permitted to succeed, the result will be imposition upon competitors of greater pole rental costs than were intended by Congress. Competition will be

reduced as an inevitable consequence as new entrants are forced to devote scarce financial resources to pole rental fees instead of the rapid construction of new networks.

The Commission, consistent with the plain requirements of the Act and the goal of promoting the rapid deployment of facilities-based alternative networks, should reject these proposals. Specifically:

- The Commission's procedure for demonstrating that cable pole attachment negotiations have failed should be applied to telecommunications attachments. The utilities' call for near exclusive reliance on a "marketplace" resolution fails to acknowledge the dominant position of utilities in pole negotiations.
- Attachment rates should be based upon historic costs, not forward-looking costs. Utilities will reap unjustified windfalls if a forward-looking cost pricing standard is applied to utility poles, conduits and rights-of-way.
- Electric utility and ILEC proposals to restrict overlashing of telecommunications facilities to existing lines should be rejected. Compliance by cable and telecommunications providers with the National Electric Safety Code adequately protects all pole users against safety risks. Adoption of utility proposals will pose significant risks to competition.
- Carriers should be permitted to attach dark fiber as part of their existing lines without obtaining prior approval of the pole owner. The attachment of dark fiber to cable lines does not transform cable attachments into telecommunications attachments.
- Electric poles should be presumed 37.5 feet, if not 40 feet, in height. The usable space of electric poles should be presumed 13.5 feet, if not 16 feet. Utility arguments in favor of allocating a portion of "safety space" to telecommunications carriers should be rejected because this space is needed to protect other users from dangerous electric lines.
- With respect to "unusable" space
  - — Utility pole owners should be treated as attaching "entities" for purposes of assigning the cost of unusable space, whether or not they offer telecommunications services;
  - — Each separate attachment by an ILEC should be counted as a separate attachment for purposes of calculating the cost of unusable space. So, if an ILEC places one set of attachments for telephone service, and a separate set for cable service and telecommunications services, it should be counted as two attachments;
  - — Each utility should be allowed to determine a presumptive number of attachers for purposes of calculating the amount of unusable space, subject

to (1) a presumption that the number of attachers will be based upon a projection to 2001 of the Commission's Fiber Deployment Report; (2) the adoption of separate presumptions for urban and rural areas; and (3) the right of attaching entities to inspect the plant and to rebut the presumption in particular cases; and

— Poles should be presumed used for telecommunications in proportion to the number of system subscribers who take telecommunications services from a cable operator compared to the number of cable customers.

- With respect to conduit rates, the Commission should adjudicate complaints based upon an agreed upon formula when negotiated arrangements are not possible. A quarter-duct convention based upon historic costs will properly compensate utilities for the use of their plant. Sharing of ducts will not pose significant safety risks.
- The Commission should adopt guidelines for case-by-case resolution of right-of-way disputes.

I. THE CABLE PROCEDURE FOR DEMONSTRATING THAT "NEGOTIATIONS HAVE FAILED" IS SUFFICIENT TO TRIGGER THE COMMISSION'S PROCESSES

NCTA's comments support the proposal in the NPRM for determining when negotiations have failed. Under this proposal, a complainant is required as part of the complaint to include a brief summary statement setting forth all of the steps taken to resolve the dispute, or, in the absence of the statement, to include an explanation of why the complainant believes that negotiations are fruitless.

This procedure is consistent with the requirements of the Act. The Act authorizes the Commission to adjudicate pole attachment disputes only when private negotiations are not successful. The Commission needs some mechanism to ascertain that the parties have tried and failed in private negotiations. This objective will be efficiently accomplished by applying the "cable" procedure, contained at Section 1.1404(i) of the rules, to telecommunications attachments.

The utilities have a very different idea of how the process should work. They maintain that the Act mandates a sea change in pole attachment regulation that effectively removes the Commission's traditional role in the resolution of pole attachment disputes when parties are unable to privately agree. American Electric Power Service Corp. et al.("AEP") is part of the chorus of utilities that argue for the virtual elimination of recourse to the Commission in the name of competition and marketplace negotiation. Citing the pro-competitive goals of the 1996 Act, they argue that the marketplace will effectively regulate pole, conduit and right-of-way rates. Virtually assuming that this will be so, they contend that "... meaningful negotiation can occur only when the default pricing mechanism established by the Commission is somewhere close to the price on which the parties would agree absent such regulation."[1]

In advancing this proposition, the utilities misunderstand a central tenet of the 1996 Act. The Act did not deregulate telecommunications markets in advance of the arrival of competitive forces. Rather, the Act takes steps to encourage the development of competition by eliminating barriers to entry by potential entrants into telecommunications markets, and taking other steps that are intended to enhance competition. Until competitive forces are sufficiently strong, the Act presumes that regulation will remain in force.

This is apparent in the Act's treatment of local telephone regulation. The Act does not mandate deregulation of local exchange or exchange access services, either immediately or by some date certain. Instead, it eliminates state statutes and regulations that restrict competitive entry. It mandates an elaborate set of regulations intended to facilitate the development of

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[1] Comments of American Electric Power Service Corporation et al., CS Docket No. 97-151, Sept. 26, 1997, at 13 ("AEP"). See also Comments of the United States Telephone Association, CS Docket No. 97-151, Sept. 26, 1997, at 2-3.

competitive markets. And, most notably for this context, it sets forth guidelines for negotiation of interconnection agreements between incumbents and competitors. These agreements are subject to review by state regulators (and, in the exceptional case, the Commission) prior to their implementation. The utilities are simply wrong to suggest that the Act contemplated a marketplace result between parties of unequal bargaining power not subject to regulatory review.

Experience with interconnection agreements demonstrates that new entrants' ability to obtain regulatory review of interconnection agreements is critical to the negotiation process. Without the potential "stick" of regulatory review, the incumbent has little incentive to negotiate fairly with the new entrant. The extent of success in negotiated interconnection agreements would not have been achieved without the involvement of federal and state regulators.

Congress, like the Commission and the states, contemplates that competition will eventually justify increasing reductions in regulatory oversight. Indeed, in its ruling in Access Charge Reform, the Commission contemplates that increasing competition will carry with it lessened degrees of regulatory oversight.[2]

Against this backdrop, the utilities' argument that Congress intended for pole attachment arrangements to be left to the marketplace is absurd. Congress understood that poles, conduits and rights-of way under the utilities' control are essential facilities for the distribution of telecommunications services. In contrast to its hopes for reduced LEC dominance of local telecommunications over time, Congress had little expectation that construction of duplicative pole plant would prove financially viable. Congress understood, also, that no matter how advanced competition might become, localities would remain reluctant to sanction the disruption

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[2] Access Charge Reform, 7 C.R. 1209, 1278-1284 (1997).

to local communities that will arise from duplicative pole plant. There is no evidence Congress anticipated that the offering of poles, conduits and rights-of-way is about to become a competitive business.

Congress mandated the establishment of compensation mechanisms that will not become fully effective until ten years after the effective date of the Act. Congress expected that pole regulation will be necessary for the indefinite future. If Congress expected the offering of poles to be an effectively competitive business, it would not have adopted a procedure that will not be fully effective until well into the next decade, and will remain in effect indefinitely thereafter.

The Commission should adopt a simple procedure to determine the circumstances under which a party will have recourse to the agency's processes. Parties should be able to invoke these processes when they reasonably determine that negotiations have failed. In the exceptional circumstance in which the Commission finds a party has inappropriately invoked the process even though a private agreement is still possible, the agency can direct the parties to return to the bargaining table.

The existing cable procedure can accomplish all of this. The procedure will require a moving party to explain that negotiations have failed or are fruitless. The other side may attempt to rebut the movants claims regarding the likelihood of successful private negotiations. This approach, which has worked well hundreds of times in the context of cable pole disputes, should be applied to telecommunications attachment disputes.

II. ATTACHMENT RATES SHOULD BE BASED UPON HISTORIC COSTS, NOT FORWARD-LOOKING COSTS

Utilities seek to improperly inflate pole rents by arguing that rental rates should be based upon forward-looking cost. They argue that pricing of pole rentals on the basis of forward-looking cost is appropriate because utilities may not have access to accurate historical data, older

data does not account for the appreciation of certain pole plant assets, and calculations based upon forward-looking cost are more equitable to utility pole owners.[3]

The utilities' arguments were fully addressed in NCTA's reply comments in CS Docket No. 97-98.[4] In those comments, NCTA noted the Commission's previous rejection of forward-looking cost and reproduction cost as the standards for setting pole rates. NCTA's comments stated:

> There is no basis whatsoever for upending the formula to base rates on "reproduction" or "replacement" or "forward-looking" costs. The FCC rejected such theories when setting the current formula. No certified state calculates pole rate base on a reproduction-cost basis. Instead, reproduction costing has been affirmatively rejected in California, Michigan and New York, after the utilities proffered $30 pole rents based on reproduction costs.[5]

The comments of the utilities in this proceeding provide no justification for a different conclusion. There is simply no "market" for utility poles, and therefore no basis for relying upon market forces in the setting of pole rates.

The utilities themselves use embedded costs to determine pole rates (in the context of electric/telephone joint use agreements). They also employ embedded cost methodologies to secure higher rates and returns for certain stranded investment and for failed (primarily nuclear) construction projects.

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3 See Joint Comments of the Edison Electric Institute and UTC, the Telecommunications Association, CS Docket No. 97-151, Sept. 26, 1997, at 8-9 ("EEI/UTC").

4 Amendment of Rules and Policies Governing Pole Attachments, Reply Comments of the National Cable Television Association et al., CS Docket No. 97-98, Aug. 11, 1997, at 12-17 ("NCTA Reply, CS Docket No. 97-98").

5 Id. at 13-14.

Nevertheless the Commission's current pole formula does reflect a generous number of forward-looking elements. These include the future costs of the removal of the pole plant contained in the depreciation reserve, tax normalization, and a return set at a level to attract capital. In these circumstances, there is no basis for adoption of the utilities' additional proposals to apply forward-looking cost/reproduction cost to poles, conduits and rights-of-way.

III. THE MAXIMUM NUMBER OF ATTACHERS SHOULD BE ACCOMMODATED ON UTILITY POLES

NCTA's comments supported the general principle that the utility pole plant should accommodate the maximum number of attaching parties. By adhering to this principle in the adoption of its telecommunications attachment policies, the Commission will promote competition by allowing the greatest number of facilities-based providers to offer services. Toward that end, the Commission should adopt policies, in line with our comments, that permit overlashing and the use of dark fiber.

A. Overlashing

It has been standard practice in the cable industry for many years to overlash new conductors to existing strand. Overlashing of existing transmission facilities with new facilities is undertaken to reroute trunks, to replace conductor and to upgrade existing transmission systems. Cable companies also engage in overlashing when replacing microwave or supertrunk with fiber, and when upgrading a system from coaxial to fiber/coaxial hybrid operation. This is now a standard business practice accomplished without special intervention by the utilities. There is no basis for changing this practice just because poles are used to attach lines that carry telecommunications services.

The utilities see things differently. EEI/UTC argue that telecommunications carriers should not be permitted to overlash without having first obtained either a separate pole attachment agreement or other form of permission from the utility. They contend:

> Absent the grant of specific authority to overlash in the pole attachment agreement all parties seeking to overlash must be required to notify the utility and enter into a new/revised pole attachment agreement. The overlashing of existing facilities absent a valid agreement with a utility constitutes nothing less than trespass. Just as a landlord may contractually bar the subleasing of property, a pole owner continues to have the right to prevent unauthorized overlashing of existing attachments. The Act did not change this fundamental right.[6]

In support of its claims, EEI/UTC also offer two examples, without citation, in which allegedly "unauthorized overlashing" resulted in improper engineering or violation of codes or standards.[7]

Other utility parties similarly argue that a telecommunications carrier should obtain their approval prior to overlashing. American Electric Power ("AEP") contends attaching parties should not be permitted to overlash "... absent a permit and pre-authorization from the utility."[8] Ohio Edison Company calls for prior approval by the utility following notification and utility review that includes submission by the attacher of "... complete engineering and design information concerning the pole attachment as overlashed."[9] Union Electric Company asks the Commission to adopt similar requirements.[10]

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6 EEI/UTC at 11.

7 EEI/UTC at 12.

8 AEP at 51.

9 Comments of Ohio Edison Company, CS Docket No. 97-151, Sept. 26, 1997, at 25 ("Ohio Edison").

10 Comments of Union Electric Company, CS Docket No. 97-151, Sept. 26, 1997, at 23-24 ("Union Electric").

The Commission should reject these utility proposals. Cable companies and other attachers are required to comply with the National Electric Safety Code ("NESC"). Compliance with the NESC provides adequate protection against any safety risks arising from overlashing. It is superfluous and unnecessary for the Commission to sanction a second level of oversight where the NESC has worked so well for so many years. Adoption of the utilities' proposals will severely slow competition by requiring new entrants to obtain advanced approval of each new overlash.

The utilities' alleged safety concerns, and their newly found inadequacy in the NESC, should be evaluated in light of their increasing interest in entering telecommunications markets. Boston Edison, for example, is in a venture with RCN to provide video and telecommunications services in the Boston area. PEPCO recently announced plans to join with RCN to provide video and telecommunications services to the Washington, D.C. area. By using an overlash of facilities review process to gain access to the construction plans of cable companies and telecommunications carriers, utilities can gain an unfair competitive advantage that derives exclusively from their role as controllers of essential pole and conduit facilities.

The danger to competition from unnecessary restrictions on overlashing is particularly apparent when telephone company poles and conduits are considered. Incumbent local exchange carriers ("ILECs") compete directly with competitive local exchange carriers ("CLECs") and certain ILECs are competing directly with cable companies. By gaining access to these companies' construction plans prior to their implementation, ILECs will obtain a truly unfair

advantage that will seriously damage the possibilities of competition rather than foster it. The Commission should reject ILEC proposals to restrict overlashing.[11]

B. Dark Fiber

NCTA's comments supported allowing third parties to use dark fiber within a carrier's original lines. Use of dark fiber in this way will eventually increase the number of entities able to offer service over limited capacity plant, thereby enhancing competition. Furthermore, allowing an attaching entity to sanction third party use, subject to appropriate standards, does not raise safety or security concerns that cannot be ameliorated by adopting appropriate safeguards.

Certain utilities do not appear to disagree. EEI/UTC, for example, generally does not object to this practice.[12] They find such activity does not constitute an attachment for purposes of the Act. Utilities maintain, however, that when an attachment of a cable operator is used to provide "... anything other than the offering of cable services, whether by itself or others, the attachment falls outside of the cable-only rate. Accordingly, the provision of dark fiber disqualifies it for the cable-only rate of Section 224(d)."[13] Thus, utilities agree to permit the attachment of dark fiber to cable-only poles, but insist as a condition of agreement that cable-only poles are transformed into telecommunications poles for purposes of the attachment rate.

The Commission should reject this argument. Prior to the use of dark fiber to transmit communications services, there is no reason to classify it as being used for cable or

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11 See, e.g., Comments of Bell Atlantic, CS Docket No. 97-151, Sept. 26, 1997, at 2.

12 EEI/UTC at 14. But see Comments of the Electric Utilities Coalition, CS Docket No. 97-151, Sept. 26, 1997, at 10 ("At an absolute minimum, the Electric Utilities should be permitted to control and charge separately for overlashing by third parties or the subletting of the right to overlash.") ("EUC").

13 Id.

telecommunications. If it is eventually use to deliver cable, it should be priced at the cable rate. If it is ultimately used to transmit telecommunications, the utilities should be permitted to charge the telecommunications rate. So long as it retains its status as dark fiber, there is no basis for Section 224 reclassification as telecommunications.

IV. THE COMMENTS DO NOTHING TO ALTER THE CONCLUSION THAT THE COMMISSION SHOULD ADOPT ITS PROPOSALS FOR DETERMINING ATTACHMENT CHARGES, SUBJECT TO LIMITED MODIFICATIONS

A. Presumptions-Height of Poles

NCTA's comments supported the NPRM's proposals to establish rebuttable presumptions concerning "usable space" and "safety space." The comments explained that there is no basis upon which to distinguish the presumptions that apply to cable and telecommunications attachments. They stated further that an increase in the presumed height of electric poles from 37.5 feet to 40 feet was fully justified on the record, and if the presumed height of electric poles was altered, it should be raised to that level. In addition, we stated that (1) there is no basis to decrease the amount of usable space on electric poles as some electric utilities propose; (2) no presumptions based upon weight or wind loads should be adopted; and (3) in recognition of the exclusive use of safety space by electric utilities for their own purposes, the safety space on poles used by telecommunications carriers, like the safety space on poles used by cable operators, should continue to be assigned exclusively to electric utilities.

Not surprisingly, except for agreement that the same presumptions should apply to poles used to attach cable and telecommunications facilities, electric utilities do not share these perspectives. For the following reasons, their proposals should be rejected.

1. All Electric Poles Should Be Presumed 37. 5 Feet, if Not 40 Feet

The Commission has adopted a rebuttable presumption that an average pole is 37.5 feet in height, of which 13.5 feet is usable space and 24 feet is unusable space. NCTA's comments called for the continuation of this presumption. The only possible change is the upward adjustment of the presumptive average height of an electric pole to 40 feet to take account of the general use by electric companies of taller poles.

EEI/UTC concede that "... there has been an increase in the average height of utility poles and it may be appropriate to increase the current presumptive pole height to 40 feet for the final pole attachment rules in 2001."[14] But utility representatives nevertheless argue that those particular poles which are 30 feet or less should be excluded from the calculations.[15] The electrics contend that even though these shorter poles contain usable space which may be used by cable and telecommunications companies to attach facilities, they are different from the average situation and should not be incorporated as part of the group of poles covered by the presumption.

The Commission should reject this proposal. At present, even though poles are of different height, there is a single presumption for all poles. It may be appropriate to create two categories -- one for the generally taller electric poles and another for the generally shorter telephone poles. But there is no justification for excluding 30 foot electric poles from the count. To do so unnecessarily complicates the already complex task of determining the number of poles. Moreover, the rates will not go into effect until 2001, and will not become fully effective

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[14] Id. at 15.

[15] Id. at 15-16.

until 2006. Electrics are likely to increasingly replace the shorter poles with poles longer in length to accommodate the increasing demand for attachments. The actual use of shorter poles will decline over time.

There may be justification, of course, for the incorporation of a shorter pole length in particular cases. In those instances, electric utilities may rebut the presumption adopted by the Commission.[16] As NCTA has stated previously, "... if the electrics believe that there are unique circumstances in their pole networks that justify departure from the Commission's presumptions, they are free to step forward with specific evidence in specific cases."[17] Unless they carry their burden through the appropriate process, however, the calculation of pole rates should be based upon the established presumptions.

2. Usable Space Should be Presumed 13. 5 Feet, if Not 16 Feet

NCTA's comments strongly disputed the suggestion of certain electric utilities, advanced in their comments in the Cable Pole Attachments proceeding, that the usable space presumption should be reduced from 13.5 feet to 11 feet. The electrics pursue this line of argument in this proceeding.

The electrics argue for a change in the existing practice of assigning the "neutral zone," or "safety space," the 30 to 40 inches between a communications conductor and the first horizontal electrical conductor, exclusively to the electric utilities. They assert that the neutral zone benefits all of the telecommunications and cable parties that attach to poles, and each of

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16 See 47 C.F.R. §1.1404 (g)(11) ("The average amount of usable space per pole for those poles used for pole attachments (13.5 feet may be used in lieu of actual measurement, but may be rebutted.").

17 NCTA Reply, CS Docket No. 97-98, at 23.

these parties should bear a portion of the cost of maintaining this space.[18] They contend that by reducing usable space from 13.5 feet to 11 feet, all attaching parties will bear a reasonable share of the neutral zone.

The Commission should reject this shop-worn argument. The Commission, the courts and the states have each found that the neutral zone exclusively benefits the electric utilities. That is why this space has been and should continue to be assigned exclusively to electric utilities.[19] Electric attachments of differing voltages and applications pose a unique risk to employees of other pole users working on the poles. It follows that the entire neutral zone should be assigned to the electric utilities.

The electrics premise their call for a reduction in usable space upon the assignment of a portion of the neutral zone to other attachers. But if the entire neutral zone is assigned to the electrics, as it should be, there is no longer any basis for a determination that usable space, presently 13.5 feet, should be reduced.

Moreover, as NCTA explained in its comments, if the total amount of space on a pole is presumptively 37.5 feet, and 13.5 feet is usable, the remaining 24 feet is unusable. If the height of an average electric pole is actually 40 feet, and the amount of unusable space remains 24 feet, it follows that 16 feet is usable.[20] Increasing the presumptive amount of usable space on electric poles to 16 feet is fully justified on the record.

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18 See, e.g., Comments of EEI/UTC at 17-19.

19 See NCTA Comments, CS Docket No. 97-98, Jun. 27, 1997, at 12-13.

20 Comments of the National Cable Television Association, CS Docket No. 97-151, Sept. 26, 1997, at 14 ("NCTA Comments").

B. Allocation of Unusable Space

1. An Attachment by a Utility Should Be Counted As an "Entity" to Which Costs of Non-Usable Space Should Be Allocated

The Act is absolutely clear on the question of whether a utility that provides telecommunications services should be treated as an attaching entity. Section 224(g) directs that where a utility provides telecommunications or cable services, it "... shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section."[21]

The electrics appear to acknowledge this requirement. EEI/UTC "... agree that the statute would appear to require a utility or its subsidiary to be counted as an attaching entity for purposes of apportioning non-usable space, if it has attachments that are used to provide telecommunications services."[22] Other electrics similarly acknowledge the requirement.[23]

The Act is equally clear in requiring that utility pole owners be treated as "entities" to whom the costs of non-usable space are to be charged, whether or not they are offering telecommunications services. Allocating two-thirds of support costs to all entities on an equal basis was a legislative compromise between those who wanted allocation on the basis of equal shares and those who wanted costs allocated in proportion to the usable space used.

The Act provides, at Section 224 (e)(2):

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21 47 U.S.C. §224(g).

22 EEI/UTC at 20.

23 See, e.g., Union Electric at 37; Ohio Edison at 39; Comments of Duquesne Light Company, CS Docket No. 97-151, Sept. 26, 1997, at 41 ("Duquesne").

> A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.[24]

The provision does not say "some of" the entities or all entities excluding the entities that own poles.

Poles owners are clearly entities under Section 224 (i):

> An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).[25]

This statutory language specifically allocates pole costs among "entities," not among parties entitled to a regulated pole rate, telecommunications carriers, parties occupying the communications zone, or any other subset of entities.

Exclusion of utilities from the count of entities would, moreover, lead to anomalous results. For example, if an electric utility's lines do not count, a CLEC would pay all of the allocable costs of non-usable space (i.e., two-thirds) when the CLEC and the electric utility were the only users of a utility-owned pole. In this scenario, the CLEC would pay more for the pole than the utility. The Commission should reject the utilities' position.

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[24] 47 U.S.C. §224 (e)(2).

[25] 47 U.S.C. §224 (i).

2. Each Separate Attachment by an ILEC Should Be Counted As A Separate Attachment

NCTA's comments agreed with the Commission's proposal to count an ILEC's attachments for purposes of apportioning the cost of unusable space. An ILEC's existing telecommunications attachment should be counted as one entity. If an ILEC installs broadband video facilities 12 inches apart from the POTS conductors, which is apparently the way in which Ameritech is operating its cable facilities in Illinois, Michigan and Ohio, the video connections should be counted as separate attachments.[26]

Certain ILEC representatives argue they should not be included "... as attaching entities for purposes of allocating the costs of other than usable space."[27] But as U S WEST explains, the Commission correctly concludes

> incumbent LECs are attaching entities for purposes of assigning nonusable space under Section 224(e)(2) even though incumbent LECs are excluded from the term "telecommunications carrier" under Section 224. This is also a reasonable conclusion because Section 224(e)(2) refers to "attaching entities" not to telecommunications carriers. Furthermore, the "term pole attachment" includes any attachment by a "provider of telecommunications service," not just telecommunications carriers as defined in Section 224.[28]

Electrics similarly find that unusable space should be allocated to ILECs because "... they provide telecommunications service, even though they are not 'telecommunications carriers' for purposes of Section 224 jurisdiction and pricing."[29]

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26 NCTA Comments at 18.

27 Comments of Bell Atlantic, CS Docket No. 97-151, Sept. 26, 1997, at 6 ("Bell Atlantic"). See also Comments of the United States Telephone Association, CS Docket No. 97-151, Sept. 26, 1997, at 10-12; Comments of SBC Communications Inc., CS Docket No. 97-151, Sept. 26, 1997, at 21-24; Comments of GTE , CS Docket No. 97-151, Sept. 26, 1997, at 10-11.

28 Comments of U S WEST, Inc., CS Docket No. 97-151, Sept. 26, 1997, at 7 (citations omitted).

29 EUC at 5 (citation omitted) ("EUC"). See also Duquesne at 40-41; Union Electric at 36.

3. Presumptive Number of Attachers

NCTA supports the adoption of a procedure under which each utility is permitted to determine a presumptive number of attachers, subject to three conditions. First, the presumption should be based upon a projection to 2001 of the FCC's Fiber Deployment Report. Second, there should be separate presumptions for urban and rural areas. And third, attaching entities should be entitled to inspect the pole plant and to rebut the presumption in particular cases.

Utilities, unsurprisingly, agree that they should be permitted to establish a presumptive number of attachers.[30] But they oppose recognition of the different conditions that apply in urban and rural areas to take account of the greater number of attachers in urban jurisdictions. The Commission should require separate presumptions in urban and rural areas. And, as explained in our prior comments and the Comments of Comcast Corp., the determination of the number of attachers should be based upon a projection to 2001.[31]

4. Determination of Status of Attachments: Cable v. Telecommunications

Under the 1996 Act, the current Section 224(d) rate procedure will continue to apply to attachments that are used to provide cable services. The new rate will apply to attachments by cable operators to deliver telecommunications services.

The comments generally recognize that some procedure will be needed to determine the proportion of cable attachments that are also used for telecommunications. In its comments, we recommended:

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30 See Comments of the New York State Investor Owned Electric Utilities, CS Docket No. 97-151, Sept. 26, 1997, at 24; EUC at 7; EEI/UTC at 24.

31 See Comments of Comcast Corp., CS Docket No. 97-151, Sept. 26, 1997, at 7-11; NCTA Comments at 20-22.

> Poles should be presumed to be used for telecommunications in proportion to the number of subscribers in a system who subscribe to telecommunications services over the cable system. For example, if 10,000 poles are used in a 20,000 subscriber system, and 5% of customers take telephony from cable, then 5% of the poles, or 500 poles, should be charged at the telecommunications rate.[32]

This approach is preferable to requiring an actual counting of a cable operator's cable-only and cable/telecommunications attachments.

Certain utilities advance proposals that would effectively require payment of the telecommunications rate for far too many poles than can be justified by actual circumstances. AEP, for example, citing plans by the cable industry to diversify into other areas, urges the Commission "to adopt a rebuttable presumption that cable operators have become, at a minimum, telecommunications carriers."[33] AEP argues that plans by cable operators for installation of two-way video capability transform cable systems into telecommunications systems.[34] AEP maintains that where cable operators offer something beyond "pure cable" -- the one-way delivery of video transmission service -- they are no longer entitled to the cable pole rate.

AEP's interpretation is demonstrably contrary to the Communications Act. The Act does not divide cable service between "pure cable" and some other type of cable service. Rather, it defines only one classification of cable service. The term "cable service" means

> (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and
>
> (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.[35]

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32 NCTA Comments at 24.

33 AEP at 21-22 (citations omitted).

34 AEP at 22-32.

35 47 U.S.C. §522 (6).

The related term "'cable system' means a facility . . . that is designed to provide cable service."[36] The Commission should apply these statutory definitions, not AEP's version of "pure cable," and in the process reject AEP's effort to rewrite the law.

Moreover, adoption of the AEP approach would mire the Commission in unnecessary adjudications. The procedure would apply even where a cable system offers no telecommunications services and would force nearly every cable operator to rebut the presumption that all attachments are used for telecommunications. This requirement would be particularly foolish because, in the vast majority of instances, attachments will be used to deliver cable services exclusively. The Commission will maximize administrative efficiency while according utilities appropriate compensation by implementing NCTA's recommendation.

V. CONDUIT ATTACHMENT ISSUES

NCTA's comments in this proceeding and the Cable Pole Attachments[37] proceeding supported the use of a quarter-duct convention as central to the appropriate calculation of conduit rates. The comments also showed that, because ducts are in fact used by conduit owners, no duct should be set aside for maintenance.

The electric utilities rehash arguments that they advanced in Cable Pole Attachments. In that proceeding, NCTA stated with respect to conduits, and specifically regarding electric conducts:

> The Commission has proposed a reasonable regulatory model, complete with appropriate use of presumptions analogous to that used for setting reasonable pole rates, to bring the same combination of certainty and flexibility to conduit rates.

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36 47 U.S.C. §522 (7).

37 Amendment of Rules and Policies Governing Cable Pole Attachments, 12 FCC Rcd. 7449 (1997).

> The electric utilities try to convince the Commission that *any* conduit regulatory structure cannot apply to them. They argue that their conduit records are not accurate or are lacking altogether, and their conduit assets are fully depreciated. They claim that accessing electric utility conduit poses unique dangers in many cases foreclosing third-party access. They argue that to the extent that access is possible, conduits should be priced on the basis of replacement or reproduction costs.[38]

The electrics make essentially the same arguments in their comments in this proceeding.

Ohio Edison, for example, argues that conduits should be charged at the cost of installing entirely new facilities, even though many of these facilities are old and have been fully depreciated.[39] Similar arguments are made by other utilities.[40] EEI/UTC contend that conduit/ducts rates should be based upon forward-looking cost because "... ducts and conduits actually appreciate in value and therefore an historical cost approach would result in a dramatic undervaluation which translates into a massive subsidization of telecommunications companies by electric utility consumers and shareholders."[41] Electrics also argue for a "full-duct" methodology to calculate rates because "... in the electric utility context ... sharing is practically impossible because of the incompatibility of electric cables and telecommunications cables within the same duct."[42]

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38 Id. at 46-47 (citation omitted). The Commission stated in the NPRM in this proceeding that to the extent comments submitted in CS Docket No. 97-98 are relevant to the instant proceeding, they will be incorporated by reference within this proceeding. See NPRM at 5.

39 Ohio Edison at 44-49;

40 See Union Electric at 41-46; Duquesne Light at 46-52;

41 EEI/UTC at 27 (citation omitted).

42 Id. at 28.

NCTA continues to believe that the use of a quarter-duct convention premised upon historic costs will properly compensate utilities for the use of their conduits by telecommunications carriers. Further, the utilities have not demonstrated that sharing of conduits between telecommunications and electric parties poses significant safety risks. Nor have they justified the elimination of regulatory review of conduits on a case-by-case basis when parties are unable to reach negotiated agreements. The electric utilities' proposal for treatment of conduits should be rejected.

VI. RIGHT-OF-WAY ISSUES

NCTA's comments recommended that the Commission adopt basic guidelines for the case-by-case resolution of right-of-way disputes.[43] This approach is consistent with the Commission's conclusion in the Local Competition Order that "... the reasonableness of particular conditions of access imposed by a utility [for use of poles, ducts, conduits and rights-of-way] should be resolved on a case-by-case basis."[44]

Case-by-case resolution of right-of-way disputes is widely supported. Bell Atlantic contends that the Commission and the industry have insufficient experience upon which to base a general rule.[45] SBC Communications supports the case-by-case approach when negotiations fail.[46] U S WEST also favors case-by-case resolution, observing that "Given the wide variety of state statutes and local ordinances governing the use of both public and private rights-of-way, it

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43 See NCTA Comments at 27-28.

44 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 12 FCC Rcd. 15499, 16067 (1996).

45 Bell Atlantic at 9.

46 Comments of SBC Communications, CS Docket No. 97-151, Sept. 26, 1997, at 34-35.