

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

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

CS Docket No. 97-151

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**REPLY COMMENTS OF THE  
UNITED STATES TELEPHONE ASSOCIATION**

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## SUMMARY

In its Notice, the Commission affirmed Congressional and statutory intent that negotiations should continue to be the primary means by which pole attachment issues are resolved. Accordingly, the Commission should reject suggestions that would undermine negotiations, and thereby subvert Congressional intent. Requiring identical agreements with all attachers or mandating requirements that are ruinous to negotiations, e.g. “most favored nation” or “pick and choose,” would subvert Congressional intent and must be rejected.

All attachers, both pre-existing attachers and third party overlashers must have an agreement with the pole owner. This direct relationship is crucial in maintaining safety considerations, accurately assessing access requests, and coordinating repairs. This direct relationship will also facilitate the development of presumptive averages for numbers of attachers per pole and allocating pole costs. Consequently, the Commission should not adopt any rules that would obstruct direct relationships between pole owners and attachers.

The Commission must avoid adopting a process that over-counts attachments. USTA believes that a plain reading of the statute precludes the inclusion of incumbent local exchange carriers (“ILECs”) when determining the number of attaching entities. By creating the new pole attachment formula, Congress specifically intended to lessen pole owner subsidization of competing attachers by making attaching telecommunications carriers equally responsible for the other than usable space. Counting ILECs as attaching entities would tilt the formula back toward the rejected subsidization model. Consequently, the Commission must not count ILECs as attaching entities.

Government attachments should not be counted as an attaching entity. Most government

attachments are public interest requirements that would be required of any pole owner.

Consequently, the cost of this common public interest requirement should be distributed evenly among all attachers that benefit from use of the public right-of-way.

Section 224(e)(2) calls for the equal apportionment of two-thirds of the other than usable space costs among all attaching entities. The Commission cannot interpret this provision so that the costs are apportioned proportionately. It is evident that Congress did not intend for the other than usable space costs to be allocated evenly among attachments, but rather that they intended for such costs to be allocated evenly among the owners of the attachments. Consequently, the Commission should clarify that an attaching entity is the business entity that qualifies as a telecommunications carrier as defined by Section 224 and which owns, controls, or operates one or more attachments on a pole, duct, conduit, or right-of-way.

The assertion that there is no other than usable space in conduit systems is simply wrong. Based on the proposed conduit formula contained in the Notice, it is evident that even the Commission itself recognizes that at least one duct is reserved for maintenance purposes. Conduit systems do include ducts that are either reserved for maintenance for conduit occupants, are reserved for municipal use, or have deteriorated to the point of being impassable.

There is widespread agreement across all segments of the telecommunications industry that pole owners should develop their own presumptive averages regarding the number of attachers per pole, and that geographic factors should be also be included. So long as a pole owner is required to provide to attachers the methodology and information it used to develop its presumptive average, then the ability and incentive to develop misleading averages is eliminated.

Careful reading of the Conference Report clarifies the distinction Congress intended

between a cable operator that is also an information service provider (“ISP”) versus a cable operator that provides access to an ISP over its facilities. The Commission is very familiar with the long history surrounding the distinction between the actual *provision* of enhanced and information services versus the *transport* of enhanced and information services. Information and enhanced services that are not provided directly by the cable operator cannot qualify as a cable service, and therefore are not covered under Section 224(d)(3).

Some commenting parties make the argument that because enhanced and information services do not fall under the definition of telecommunications service, pole attachments providing the transport for these services are not covered under Section 224. USTA disagrees with this position. To the extent that any telecommunications service provider is providing for the transport of enhanced or information services over its facilities and does not actually provision the service directly itself, such transport is telecommunications and therefore properly falls under the rubric of Section 224(e).

USTA agrees with other commenting parties that Section 224(d)(3) has a very narrow application and applies only to pure cable service. The Commission should affirm that a cable operator abdicates its pure cable status and becomes a telecommunications carrier when telecommunications are transmitted over any part of its facilities within a specific cable system, regardless of the number of discrete users.

There is general agreement that the Commission should address rights-of-way issues on a case-by-case basis. However, USTA does not agree with the supposition put forth by some commenting parties that the rates developed for providing access to the rights-of-way will necessarily be *de minimis*. New and additional cost that would not have been incurred but for the

attacher should be included in any rate subsequently developed by the ILEC and charged to the attacher.

USTA would expect that ILECs would incur significant administrative and litigation costs in exercising eminent domain. These are costs incurred to make the right-of-way ready for the attacher and would not have been incurred but for the attacher insisting upon its specific access request. Consequently, those costs would properly be considered as make-ready fees or be included in rates developed by the ILEC to assess on that attacher.

Given the immense number of buildings and other structures available for the attachment of wireless facilities, the argument that ILEC rooftops are essential for the delivery of wireless service is grossly exaggerated. Because the building rooftop would be acting as if it were a large pole, it would have the significant costs embedded in the creation and maintenance of that rooftop associated with it. Consequently, rates developed for rooftop access would not necessarily be *de minimis*.

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Implementation of Section 703(e) of the Telecommunications Act of 1996	)	
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	)	CS Docket No. 97-151
Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	
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**REPLY COMMENTS OF THE  
UNITED STATES TELEPHONE ASSOCIATION**

The United States Telephone Association ("USTA") respectfully submits these reply comments in response to the Notice of Proposed Rulemaking issued in the above-referenced docket.<sup>1</sup> USTA is the principal trade association of the local exchange carrier ("LEC") industry, with over 1,000 members.

**I. The Commission Has Already Properly Recognized The Primacy Of Negotiations In Pole Attachment Agreements And Should Reject Suggestions That Would Undermine That Framework.**

In its Notice, the Commission affirmed Congressional and statutory intent when it stated that "negotiations between a utility and an attacher should continue to be the primary

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<sup>1</sup> Notice of Proposed Rulemaking, In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996 and Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket 97-151, FCC 97-234, released August 12, 1997 ("Notice").

means by which pole attachment issues are resolved.”<sup>2</sup> Accordingly, the Commission should reject suggestions that would undermine negotiations, and thereby subvert Congressional intent.

KMC mistakenly reads Section 224<sup>3</sup> to require *identical* agreements rather than non-discriminatory agreements.<sup>4</sup> Negotiated agreements need not be identical in order to be non-discriminatory. As other commenting parties note, different attachers have different needs.<sup>5</sup> An agreement is discriminatory only if it has the effect of placing the attacher at a competitive disadvantage *vis à vis* all other attachers. Requiring identical agreements with all attachers or mandating requirements that are ruinous to negotiations, e.g. “most favored nation” or “pick and choose,”<sup>6</sup> would subvert Congressional intent. Either all attachment agreements would be subject to constant re-negotiation every time another party attached, or all subsequent attachers would be bound to the same terms as pre-existing attachers without regard to their own needs.

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<sup>2</sup> Notice at ¶12.

<sup>3</sup> 47 U.S.C. §224.

<sup>4</sup> See, Comments of KMC Telecom Inc. (“KMC”) at p. 4 (filed September 26, 1997).

<sup>5</sup> See, e.g., Joint Comments of Edison Electric Institute and UTC, the Telecommunications Association (“EEI/UTC”) at p. 6 (filed September 26, 1997).

<sup>6</sup> As USTA stated previously in its Reply Comments in the related pole attachment proceeding in CS Docket No. 97-98, the corrosive effects of “pick and choose” requirements have already been recognized by the Eighth Circuit Court. See, Reply Comments of USTA at pp. 19-21 (filed August 11, 1997).

The Commission must reject the suggestion that all attachment agreements must be identical.

The Commission should also reject the suggestion by ICG to adopt rules that would permit attachers to install their facilities before a negotiated agreement has been reached.<sup>7</sup> As a practical matter, once an attacher is on a pole or in a conduit, it becomes immensely more difficult to reclaim that space if an agreement cannot be reached. The attacher would be far less inclined to negotiate in good faith. Even if the attacher were somehow to be removed, it would presumably be unwilling to cover the costs incurred by the pole owner in removing the attacher. Moreover, under ICG's proposal the attacher would be guaranteed to get the lowest rate without having to negotiate at all.<sup>8</sup> All an attacher would have to do is place its facilities on the pole or in the conduit, then refuse to negotiate in good faith for one year. This proposal renders all negotiations meaningless and cannot be reconciled with Congress' intent that negotiations be the primary means for reaching agreements. The Commission must similarly reject this proposal.

USTA would reiterate its comments previously filed in this proceeding that require

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<sup>7</sup> See, Comments of ICG Communications ("ICG") at pp. 14-16 (filed September 26, 1997).

<sup>8</sup> Id. at p. 15. ("In the absence of an express agreement, a telecommunications carrier that did not file a complaint within that time would be deemed to have agreed to the lowest rate offered by the utility, and a carrier that did file a complaint would be liable for the lowest rate offered by the utility from the time of attachment until the date of the complaint.")

both the attacher and the pole owner to negotiate in good faith.<sup>9</sup> The Commission's complaint process should be a matter of last resort. Like USTA, other parties also agree that requiring attachers to negotiate in good faith for a set minimum period of time before filing a complaint will further strengthen the framework of negotiations.<sup>10</sup> The Commission should require an aggrieved attacher to certify that it did in fact raise with the pole owner beforehand every issue contained in any subsequent complaint. The Commission should also require aggrieved attachers to file a Notice of Intent. Such a Notice would alert the pole owner that an attacher has concerns and would allow the parties time to attempt to reach resolution. Requiring such pre-complaint dispute resolution efforts would strengthen the framework of negotiations and save all parties -- attacher, pole owner, and FCC -- from unnecessarily expending time and resources on an otherwise resolvable dispute.

## **II. There Must Be A Direct Contractual Relationship Between The Pole Owner And Overlashers.**

Many commenting parties agree that all attachers, both pre-existing attachers and third party overlashers must have an agreement with the pole owner.<sup>11</sup> As USTA stated previously

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<sup>9</sup> See, Comments of USTA at pp. 2-3 (filed September 26, 1997).

<sup>10</sup> See, e.g., Comments of Ohio Edison at p. 17 and Comments of EEI/UTC at p. 7 (both filed September 26, 1997).

<sup>11</sup> See, e.g., Comments of ICG at p. 21, 23, Comments of Sprint at p. 2, Comments of EEI/UTC at p. 11, Comments of Ohio Edison at p. 25, Comments of American Electric Power *et*

in this proceeding, express agreements provide for a direct relationship between the pole owner and all attachers.<sup>12</sup> This direct relationship is crucial in maintaining safety considerations, accurately assessing access requests, and coordinating repairs. This direct relationship will also facilitate the development of presumptive averages for numbers of attachers per pole and allocating pole costs.<sup>13</sup> Consequently, the Commission should not adopt any rules that would obstruct such direct relationships between pole owner and attacher.

The Commission should also not adopt any rules that improperly constrain the pole owner's ownership interest in its facility. Poles are owned by pole owners. Section 224 grants attachers certain rights of access. It does not assign to them any ownership rights. The Commission has already recognized this in its Interconnection Order.<sup>14</sup> Just as a property

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*al.* ("AEP *et al.*") at p. 33, Comments of New York State Investor Owned Electric Utilities ("NYEU") at p. 8, 11 (all filed September 26, 1997).

<sup>12</sup> See, Comments of USTA at pp. 6-8 (filed September 26, 1997).

<sup>13</sup> In its previous comments in this proceeding, USTA had stated that third-party overlashers should be charged only for a portion of the other than usable space costs. USTA recognizes that this would give third party overlashers a competitive advantage versus pre-existing attachers which are charged for both the usable and other than usable space. Consequently, in the interests of creating and maintaining a level competitive playing field, the Commission should actively consider treating third-party overlashers as separate attachers liable for both the usable and other than usable space costs.

<sup>14</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325 (released August 8, 1996) ("Interconnection Order") at ¶ 1216. ("The statute does not give [the attacher] any interest in the pole or conduit other than access.")

lessee is not free to do anything it wishes with the property it occupies without the consent of the lessor, neither are attachers allowed to do as they wish without first obtaining the consent of the pole owner. If the Commission were to accept the positions proffered by AT&T and RCN that attachers effectively own the space they occupy on a pole,<sup>15</sup> there would be no effective manner for reasonably restricting the type and manner of pole attachments. Adopting the argument of AT&T and RCN would place enormous stress on the entire pole network and place all aerial plant at an increased risk of failure. The Commission should reject this argument and not adopt any blanket statement regarding permissible attachments or use of pole space. The Commission has already recognized the uniquely different circumstances surrounding pole attachments, and accordingly has stated that such issues should be resolved on a case-by-case basis.<sup>16</sup>

Although USTA has already stated that pole owners retain the right to require would-be third party overlashers to first obtain the consent of the pole owner in the form of a licensing agreement,<sup>17</sup> USTA would further note that pre-existing attachers also have certain rights.

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<sup>15</sup> See, Comments of AT&T at p. 5, 20 and Comments of RCN Telecom ("RCN") at p. 8, 10 (both filed September 26, 1997).

<sup>16</sup> Interconnection Order at ¶ 1143. ("We conclude that the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis... The record makes clear that there are simply too many variable to permit any other approach with respect to access to the millions of utility poles and untold miles of conduit in the nation.") (footnote omitted). See also Interconnection Order at ¶ 1186.

<sup>17</sup> See, *supra* at p. 4 and Comments of USTA at p. 6 (filed September 26, 1997).

Although third party overlashing can reasonably be expected to facilitate the introduction of facilities-based competition, it does not come without drawbacks. When a third party overlashes onto a pre-existing attacher, it becomes much more difficult for the pre-existing attacher to modify and conduct maintenance on its own attachment. USTA does not believe that a pre-existing attacher, e.g., MCIMetro, should necessarily be forced to first obtain the cooperation of an overlashed competitor before it can modify its own attachments or conduct maintenance. Therefore, while pre-existing attachers should be free to permit third parties to overlash (again, only after pole owner consent), pre-existing attachers should also be free to deny the overlashing request on their own motion.

**III. The Commission Must Avoid Adopting A Process That Over-Counts Attachments, Thereby Distorting The Reasonable Burden Of Costs That Should Properly Be Borne By Both Pole Owners And Attachers.**

**A. The Plain Language Of Section 224 Dictates That ILECs Cannot Be Counted As Attaching Entities.**

Because the new formula contained in Section 224(e) allocates two-thirds of the cost of the other than usable space equally among all attaching entities, the determination of what constitutes an attaching entity is easily one of the most contentious issues in this proceeding. Specifically, the issue comes down to whether utilities -- including ILECs -- should be counted; whether government attachments should be counted; and, what unit of measurement should be used for assessing the number of attaching entities: usable space occupied by an

attachment, the number of attachments, or business entity. USTA believes that ILEC and government attachments should not be counted, and that the proper unit of measurement is the business entity that owns the attachment(s).

USTA believes that a plain reading of the statute precludes the inclusion of ILECs when determining the number of attaching entities. This view is echoed by numerous other commenting parties.<sup>18</sup> A primary reason motivating the amendment of Section 224 was to reduce the subsidization of competing telecommunications service by pole owners. Congress extended the right of access to include all telecommunications carriers. However, under the present pole attachment formula, attachers are responsible only for their proportionate share of the costs of usable space, forcing the pole owner to subsidize their service, in effect, by absorbing the remaining costs itself.

By creating the new pole attachment formula, Congress specifically intended to lessen this subsidization by making attaching telecommunications carriers equally responsible for the other than usable space. New market entrants would therefore not be receiving signals for market entry distorted by artificially low pole attachment rates. To ensure that pole owners did not inadvertently escape having to shoulder the burden of any of the costs of the other than usable space, Congress required them to absorb one-third of the costs of that space. Section

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<sup>18</sup> See, e.g., Comments of AEP *et al.*, at p. 41, Comments of EEI/UTC at p. 19, Comments of Ohio Edison at p. 39, Comments of NYEU at p. 22, Comments of SBC Communications at p. 21 (all filed September 26, 1997).

224 precluded ILECs from being counted as attaching entities because doing so would improperly lower the individual cost of the other than usable space allocated to the new market entrants, which in turn would force the pole owner to absorb an amount greater than the statutory limit of one-third of the other than usable space costs. Counting ILECs as attaching entities would tilt the formula back toward the rejected subsidization model. Consequently, the Commission must not count ILECs as attaching entities.

**B. Government Attachments Should Not Be Counted As An Attaching Entity.**

With respect to government attachments, many commenting parties' positions coincide with that of USTA. These commenting parties all agree that government attachments should not be counted as an attaching entity.<sup>19</sup> As noted by at least one commenting party, government attachments typically do not constitute wire communications.<sup>20</sup> These attachments are common public interest requirements that would be required of any pole owner, regardless of whether the pole owner were an ILEC, IXC, CLEC, CATV, or electric utility.

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<sup>19</sup> See, Comments of MCI at p. 14, Comments of ICG at p. 35, Comments of AEP *et al.*, at 42, Comments of EEI/UTC at p. 22, Comments of Ohio Edison at p. 40, and Comments of NYEU at p. 22 (all filed September 26, 1997). USTA would clarify the position it took in its previously filed comments in this proceeding (Comments of USTA at pp. 12-13, filed September 26, 1997) to state that government attachments should not be counted as an attaching entity unless such attachments are used to provide cable or telecommunications service, either directly by the government itself or indirectly through a third party.

<sup>20</sup> See, Comments of EEI/UTC at p. 22 (filed September 26, 1997).

Consequently, the cost of this common public interest requirement should be distributed evenly among all attachers that benefit from use of the public right-of-way. The easiest manner in which to accomplish this distribution is to exclude non-communications-related government attachments when counting the number of attaching entities on a pole.

**C. When Counting The Number Of Attaching Entities, The Proper Unit Of Measurement Should Be "Business Entity."**

Section 224(e)(2) calls for the equal apportionment of two-thirds of the other than usable space costs among all attaching entities.<sup>21</sup> As USTA stated in its initial comments in this proceeding, the Commission cannot interpret this provision so that the costs are apportioned proportionately.<sup>22</sup> Requiring allocation of the costs of the other than usable space based on the amount of usable space an attacher occupies<sup>23</sup> or on the number of attachments an attacher has placed on the pole (or in the conduit)<sup>24</sup> is not consonant with the plain language of the statute. Allocating those costs based on the amount of usable space occupied is a manifestly improper reading of the plain language of the statute, and should be rejected by the

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<sup>21</sup> 47 U.S.C. §224(e)(2).

<sup>22</sup> See, Comments of USTA at pp. 10-12 (filed September 26, 1997).

<sup>23</sup> See, e.g. Comments of AT&T at p. 15, Comments of RCN at p. 3, and Comments of KMC at p. 6 (all filed September 26, 1997).

<sup>24</sup> See, e.g., Comments of MCI at p. 12 and Comments of Adelpia *et al.*, at p. 6 (both filed September 26, 1997).

Commission. Congress is quite specific within Section 224 regarding when proportional apportionment is to be used and when equal apportionment is to be used. The Commission should not circumvent Congressional intent by attempting to read something into the statute that is plainly absent.

With respect to allocating the costs based on the number of attachments an attacher has placed on a pole, the confusion appears to stem from Congress' use of the term "attaching entity" and whether that means the physical attachment itself or whether it means the owner of the attachment. As already noted, Congress is quite specific in this section. Had Congress intended the other than usable space costs to be allocated based on the number of pole attachments an attacher possessed, it would have used the term "pole attachments" rather than "attaching entities."<sup>25</sup> Indeed, the Senate-passed version of the Telecommunications Act of 1996 used the phrase "all attachments" rather than "attaching entities."<sup>26</sup> The intent behind the change in statutory language contained in the final, enacted version of the Act could not be more apparent.

It is evident that Congress did not intend for the other than usable space costs to be

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<sup>25</sup> §224(e)(2) "A utility shall apportion the cost of providing space on a pole... so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all *attaching entities*." (emphasis added)

<sup>26</sup> S. 652, §204(4)"(e)(2)(A)".

allocated evenly among attachments, but rather that they intended for such costs to be allocated evenly (not proportionately) among the owners of the attachments. Consequently, the Commission should clarify that an attaching entity is the business entity that qualifies as a telecommunications carrier as defined by Section 224 and which owns, controls, or operates one or more attachments on a pole, duct, conduit, or right-of-way.

**IV. The Argument That There Is No Other Than Usable Space In A Conduit Has Already Been Rejected By The Commission Itself.**

The assertion that there is no other than usable space in conduit systems is not only wrong, it makes no common sense.<sup>27</sup> Based on the proposed conduit formula contained in the Notice,<sup>28</sup> it is evident that even the Commission itself recognizes that at least one duct is reserved for maintenance purposes. Any cross-sectional diagram of a conduit system will plainly show that the usable space encompassed by the actual ducts is a fraction of the total conduit space, a point recognized by other commenting parties.<sup>29</sup> Conduit systems do include ducts that are either reserved for maintenance for conduit occupants, are reserved for municipal use, or have deteriorated to the point of being impassable. At the bare minimum, the

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<sup>27</sup> See, e.g., Comments of MCI at p. 17, Comments of AT&T at p. 16, and Comments of NCTA at p. 25 (all filed September 26, 1997).

<sup>28</sup> Notice at ¶139.

<sup>29</sup> See, Comments of EEI/UTC at p. 29, and Joint Comments of the Electric Utility Coalition at p. 16 (both filed September 26, 1997).

Commission should allow conduit owners to subtract these non-usable ducts from the average number of ducts in the usable space component of the Commission's proposed conduit formula.

However, these non-usable ducts represent only a portion of the other than usable space. Conduit systems consist of more than the ducting. Supporting structures, like manholes, are also required in order for the usable space to be accessible. Section 224 covers not only poles and ducts, but conduit, too. Ducts and the costs directly associated with them are a subset of conduit systems and their costs. The Commission should avoid focusing exclusively on the costs of the ducts while ignoring those of the supporting conduit system, the costs of which subsume those of the ducts. The costs associated with the support structures associated with conduit systems benefit all occupants. Accordingly, these costs should not be absorbed solely by the conduit owner, but should be allocated to attaching entities by including these costs in the unusable space component of the Commission's proposed conduit formula.

**V. There Is Widespread Consensus That Pole Owners Should Be Allowed To Develop Their Own Presumptive Averages.**

There is widespread agreement across all segments of the telecommunications industry that pole owners should develop their own presumptive averages regarding the number of

attachers per pole, and that geographic factors should be also be included.<sup>30</sup> Although some parties advocate the adoption of a nationwide presumption,<sup>31</sup> USTA would urge the Commission to reject adopting any such presumption. So long as a pole owner is required to provide to attachers the methodology and information it used to develop its presumptive average, then the ability and incentive to develop misleading averages is eliminated.

A chief disadvantage of the Commission adopting a presumptive average is the frequency with which such an average would be inapplicable. Because of the wide disparity of competitive entry into various local markets and their geographic diversity, it is very likely that a large number of pole and conduit systems would not fit the presumptive average. If a pole owner had fewer actual attachers than the Commission's presumptive average, each attacher would actually be liable to the pole owner for less than its properly allocated portion of the costs of the other than usable space. The pole owner would have to make a subsequent showing to the Commission just to collect all of the costs it should be permitted to recover in that instance. If the pole owner had more actual attachers than the Commission's presumptive average, then the attachers would be liable to the pole owner for more than their properly allocated portion of the costs of the other than usable space. The attachers would then have to

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<sup>30</sup> See, e.g., Comments of MCI at p. 6, Comments of Sprint at p. 3, Comments of AEP *et al.*, at p. 44, Comments of NCTA at p. 21, and Comments of KMC at p. 7 (all filed September 26, 1997).

<sup>31</sup> See, e.g. Comments of AT&T at p. 13 (filed September 26, 1997).

make a subsequent showing to the Commission just to avoid over-paying the costs they would otherwise be obligated to pay. The Commission should simply allow pole owners to develop their own presumptive averages, subject to sharing the information used to develop the presumptive average with the attachers.

**VI. The Commission Should Treat Information And Enhanced Services In A Manner That Is Consistent With Both The Language And Intent Of Section 224.**

**A. The Commission Should Reject The Argument That Information Services Are In Fact Cable Services.**

Comcast *et al.*, argue that Congress intended that information services and enhanced services provided by the cable operator specifically be included under the definition of cable service.<sup>32</sup> In support, they cite the Conference Report that accompanied the Telecommunications Act of 1996.<sup>33</sup> However, the materiality of the assertion made by Comcast *et al.* depends wholly on the cable operator actually being the information service provider ("ISP"). Comcast *et al.*, state that "the activities of a high-speed ISP *utilizing the facilities of a cable system* to provide services, fall squarely within the definition of 'cable services' under the 1996 Act, and, therefore, are subject to the cable services pole attachment

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<sup>32</sup> See, Comments of Comcast *et al.*, at pp. 18-20 (filed September 26, 1997).

<sup>33</sup> H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. (1996) ("Conference Report").

rates.”<sup>34</sup> (emphasis added). This statement is an admission that it is another entity, and *not* the cable operator itself, that is providing the information service.

Careful reading of the Conference Report itself further clarifies the distinction Congress intended between a cable operator that is also an ISP versus a cable operator that provides transmission service used to access to ISPs over its facilities. Specifically, the Conference Report states that “[t]he conferees intend the amendment to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers *by the cable operator*, as well as enhanced services.”<sup>35</sup> (emphasis added). Congress clearly intended that the service be directly provided by the cable operator itself to qualify as a cable service. Furthermore, the Conference Report clearly indicates its intent that such services are limited to those provided by the cable operator to its own *subscribers*. An end-user accessing a third-party ISP via cable facilities pays subscription fees to the third-party ISP, not the cable operator. The subscriber referred to in the definition of cable service<sup>36</sup> is clearly limited to an end-user that subscribes to the cable service, not third-party-provided services. The Conference Report language cannot be construed to mean that information or enhanced services not provided directly by the cable operator itself qualify as

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<sup>34</sup> See, Comments of Comcast *et al.*, at p. 20 (filed September 26, 1997).

<sup>35</sup> Conference Report at p. 169.

<sup>36</sup> 47 U.S.C. §522(6).

cable service.

More than any other party, the Commission should be familiar with the long history and deliberations surrounding the distinction between the actual *provision* of enhanced and information services versus the *transport* of enhanced and information services.<sup>37</sup> By statute:

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.<sup>38</sup>

The mere fact that a cable operator may provide cable modem service to end-users to allow them to access third party ISPs of the end-users' choice cannot be construed to mean that the cable operator is actually providing the enhanced or information service. The cable operator is not acting upon the information flowing to and from the end user.<sup>39</sup> The cable operator is merely providing transport for the end-user to the information service. This transport is provided via telecommunications. Consequently, information and enhanced services that are

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<sup>37</sup> See, e.g., generally In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 10 FCC Rcd 8360, and In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing Usage of the Public Switched Network by Information Service and Internet Access Providers, First Report and Order, CC Docket No. 96-262, FCC 97-158 (released May 16, 1997) at ¶341, and also footnote 498.

<sup>38</sup> 47 U.S.C. §153 (20).

<sup>39</sup> At the very most, a cable operator is providing nothing more than low-level protocol conversion service.

not provided directly by the cable operator cannot qualify as a cable service, and therefore are not covered under Section 224(d)(3).

Although the proliferation of the Internet to consumers is a laudable goal, the Commission must take care not to facilitate that goal in such a manner that discriminates against certain segments of the telecommunications industry. There is simply no common sense in the notion that cable operators should be granted a competitive advantage over IXC's, ILECs, CLECs, and electric utilities in providing transport to information and enhanced services. The Commission must reject the argument of Comcast *et al.*, and those similar to it.

**B. The Commission Should Reject The Argument That Information Services Are Never Covered By Section 224(e).**

Some commenting parties make the argument that because enhanced and information services do not fall under the definition of telecommunications service, pole attachments providing the transport for these services are not covered under Section 224.<sup>40</sup> They therefore argue that the rates and terms developed for such pole attachments are not subject to the strictures of Section 224. USTA disagrees with this position for the same reason that it rejects the argument put forth by the cable operators above. To the extent that any telecommunications service provider -- be it a Section 224-defined utility or

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<sup>40</sup> See, Comments of AEP at pp. 8-10, and Comments of Ohio Edison at p. 22 (both filed September 26, 1997).