

telecommunications carrier -- 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).

There may be situations where an attacher is a dedicated ISP providing no telecommunications service. In these cases, USTA agrees that Section 224 does not apply. If it turns out that the ISP offers telecommunications in addition to its directly provisioned enhanced or information service, USTA believes that Section 224(e) should apply. Separating out which pole attachments carry the information service versus the telecommunications would be too administratively complex. Applying Section 224(e) would be consonant with Congressional intent, facilitate administrative ease, and would provide a level competitive playing field among all mixed-service providers.

C. 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.

USTA agrees with other commenting parties that Section 224(d)(3) has a very narrow application and applies only to pure cable service.⁴¹ USTA further agrees with the suggestion that in light of the continuing proliferation of non-cable services and the transport of enhanced

⁴¹ See, e.g., Comments of MCI at p. 3, Comments of AEP *et al.*, at pp. 29-31, Comments of EEI/UTC at p. 9, Comments of Ohio Edison at p. 20, and Comments of ICG at p. 27 (all filed September 26, 1997).

and information services within cable systems, cable operators seeking application of the old formula should be required to certify that all of their pole attachments are used to provide traditional cable service only and do not provide for the transport of non-cable services, i.e. enhanced or information services not provisioned directly by the cable operator.⁴²

NCTA asserts that the propagation of telecommunications signals to discrete end-users throughout a cable system should not trigger the application of Section 224(e) to all cable operator attachments.⁴³ Instead, NCTA proposes that the Commission adopt a proportional representation process for determining what percentage of attachments shall continue to be covered by Section 224(d)(3) and which shall be covered by Section 224(e). The Commission should reject this proposal for reasons similar to those with which it rejected similar arguments by the electric utilities objecting to being required to provide access to all of their poles and conduits the moment they utilized any one pole for the provision of wire communications.⁴⁴

Section 224(e) governs “the charges for pole attachments used by telecommunications carriers to provide telecommunications services...”⁴⁵ The statute makes no distinction for

⁴² See, Comments of AEP at pp. 29-30 (filed September 26, 1997).

⁴³ See, Comments of NCTA at pp. 23-24 (filed September 26, 1997).

⁴⁴ See, Interconnection Order at ¶¶1173-1174. (“We further conclude that use of any utility pole, duct, conduit, or right-of-way for wire communications triggers access to all poles, ducts, conduits, and rights-of-way owned or controlled by the utility, including those not currently used for wire communications.”)

⁴⁵ 47 U.S.C. §224(e)(1).

telecommunications services subscribed to by a group of discrete end-users. By NCTA's own admission, the present architecture of cable systems facilitates the propagation of telecommunications throughout the network downstream from the head-end. Presumably, every end-user could subscribe to such services if they wished. The fact that only some end-users avail themselves of the telecommunications services supported by the cable system while others do not is immaterial. Even if the cable operator were able to channel its telecommunications directly to end-users rather than propagating them throughout its system, NCTA's proposal would still require rejection because the cable operator would cease to be a cable operator and become a telecommunications carrier for purposes of Section 224.

Telecommunications service is the "offering of telecommunications for a fee directly to the public, *or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.*"⁴⁶ (emphasis added). NCTA's argument states that even though telecommunications signals are available throughout the cable system, because only a small portion of the public may subscribe to such services, the Commission should not treat them as telecommunications services *per se*. If the Commission were to accept this argument, it would again discriminate against IXCs, ILECs, CLECs, and electric utilities offering similar services to discrete end users. For this reason alone, the Commission should reject NCTA's argument. The Commission should affirm that a cable operator abdicates its pure cable status

⁴⁶ 47 U.S.C. §153(46).

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.

VII. Rights-of-Way Issues

A. The Costs Incurred By ILECs In Accommodating Rights-Of-Way Access Requests Will Not Necessarily Be *De Minimis*.

There is general agreement that the Commission should address rights-of-way issues on a case-by-case basis.⁴⁷ 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*.⁴⁸ Although USTA does not dispute AT&T's contention that many of these rights-of-way were obtained long ago, many of these rights-of-way do not have assignable rights.⁴⁹ The conditions of access granted to ILECs by property owners were often conditioned on the understanding that only the ILEC pole owner would have a physical presence in the right of way.⁵⁰ Moreover, this conditional access also often specifies the type

⁴⁷ See, e.g., Comments of MCI at p. 22, Comments of Ohio Edison at p. 49, Comments of US West at p. 11, and Comments of NCTA at p. 27 (all filed September 26, 1997).

⁴⁸ See, e.g., Comments of AT&T at p. 18 (filed September 26, 1997).

⁴⁹ As has been noted by several commenting parties (See, e.g., Comments of AEP *et al.*, at p. 59 and Comments of EEI/UTC at p. 30., filed September 26, 1997), Section 224 explicitly applies only to those rights of way owned or controlled by the utility.

⁵⁰ By physical presence, USTA is referring to the pole or conduit itself.

of facility the property owner will tolerate, i.e. aerial or buried. The subsequent presence of additional facilities placed on the right-of-way by an attacher -- assuming the property owner even grants them access -- may cause the property owner to impose a new and higher occupancy charge on the pre-existing pole owner. This is a new and additional cost that would not have been incurred but for the attacher. These costs should be included in any rate subsequently developed by the ILEC and charged to the attacher.

B. The Costs Incurred By ILECs Forced To Exercise Eminent Domain Are Make-Ready Costs That Must Be Covered By The Would-Be Attacher.

USTA believes that the matter of requiring ILECs to exercise eminent domain to accommodate access requests made by attachers is beyond the scope of this proceeding.⁵¹

USTA does not agree with the determination made by the Commission in its Interconnection Order⁵² and hopes that the Commission will properly adjust those findings when it issues its determination on the Petition for Reconsideration pending before it.⁵³

If, however, the Commission's Order on Reconsideration does not alter its original findings and requires pole owners to exercise eminent domain to accommodate access requests

⁵¹ See, e.g., Comments of MCI at p. 23 (filed September 26, 1997).

⁵² Interconnection Order at ¶1181.

⁵³ See, Joint Petition for Reconsideration and/or Clarification of EEI/UTC in CC Docket No. 96-98 (filed September 30, 1996).

from attachers,⁵⁴ then 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.

USTA similarly believes that comments made by various parties regarding access to ILEC rooftops are also beyond the scope of this proceeding and are more properly included in the Interconnection proceeding.⁵⁵ 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, at best, grossly exaggerated. Moreover, USTA would not expect the rates developed by ILECs to accommodate these unnecessary access requests to be *de minimis*. The building rooftop would be acting, in essence, as if it were a large pole. There are significant costs embedded in the creation and maintenance of that rooftop, including all of its supporting structure, maintenance costs, and the underlying property. These costs would properly be included in the rate development because they constitute actual and operating costs for the facility.

⁵⁴ See, Comments of MCI at p. 23, Comments of AT&T at p. 18, and Comments of KMC at p. 3 (all filed September 26, 1997).

⁵⁵ See, Comments of Winstar at p. 3 and Comments of Teligent at p. 9 (filed September 26, 1997).

CONCLUSION

For the above-stated reasons, USTA urges the Commission to adopt rules affirming the preference for negotiations and favoring pre-complaint dispute resolution. Also, the Commission should not adopt any rules that would obstruct a direct contractual relationship between a pole owner and an attacher.

The Commission should also avoid adopting rules that distort and misrepresent the reasonable burden of costs that should appropriately be borne by attachers. Given the widespread agreement on the development of presumptive averages, the Commission should adopt rules allowing pole owners to develop such averages themselves. On the matter of counting attaching entities, ILEC and government attachments should not be counted as attaching entities, while the proper unit for measuring the number of attaching entities is the business entity that owns the attachment(s). With respect to conduit space, the Commission itself has already recognized that there is unusable space in conduit, and so should reject arguments that all space in conduit is usable.

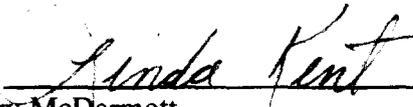
The Commission should treat information and enhanced services in a manner that is consistent with both the language and intent of Section 224 and should not adopt rules that discriminate in favor of cable operators. Finally, the costs incurred by ILECs to accommodate access requests to rights-of-way will not necessarily be *de minimis*. Consequently, any costs

USTA Reply Comments
CS Docket No. 97-151
October 21, 1997

incurred by ILECs that would not have arisen but for the request from the attacher should be borne by the attacher, either through make-ready fees or through inclusion in the rates developed for attachment to the right-of-way.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

BY 

Mary McDermott
Linda Kent
Keith Townsend
Hance Haney

Its Attorneys

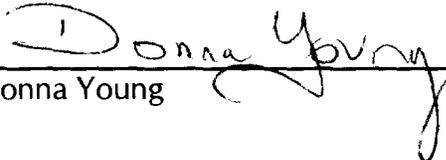
Todd Colquitt, Director
Legal & Regulatory Affairs

U.S. Telephone Association
1401 H Street, NW, Suite 600
Washington, DC 20005
(202) 326-7249

October 21, 1997

CERTIFICATE OF SERVICE

I, Donna Young, do certify that on October 21, 1997, copies of the accompanying Reply Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.


Donna Young

Mark J. Tauber
Mark J. O'Conner
Piper & Marbury L.L.P.
1200 19th Street, NW
7th Floor
Washington, DC 20036

Russell M. Blau
Grace R. Chiu
Swidler & Berlin, Chtd.
3000 K Street, NW
Suite 300
Washington, DC 20007

Gerald A. Friederichs
Ameritech
30 South Wacker Drive
39th Floor
Chicago, IL 60606

Tricia Beckenridge
KMC Telecom Inc.
1580 South Milwaukee Ave.
Suite 305
Libertyville, IL 60048

Philip L. Verveer
Gunnar D. Halley
Willkie Farr & Gallagher
1155 21st Street, NW - Three Lafayette Centre
Washington, DC 20036

Lawrence Fenster
MCI
1801 Pennsylvania Avenue, NW
Washington, DC 20006

Stuart F. Fleischman
Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, NW
Washington, DC 20036

John H. O'Neill, Jr.
Paul A. Gaukler
Norman J. Fry
Shaw, Pittman, Potts & Trowbridge
2300 N Street, NW
Washington, DC 20037-1128

Betsy L. Roe
Bell Atlantic
1320 North Court House Road
Th Floor
Arlington, VA 22201

Joseph Wilson
Debra Geibig
Colorado Springs Utilities
104 South Cascade
Suite 204
P.O. Box 240
Colorado Springs, CO 80901

Paul Glist
John Davidson Thomas
James W. Tomlinson
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

R. Michael Senkowski
Robert J. Butler
Bryan N. Tramont
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Henry Goldberg
Jonathan L. Wiener
W. Kenneth Ferree
Goldberg, Godles, Wiener & Wright
1229 19th Street, NW
Washington, DC 20036

Daniel L. Brenner
David L. Nicoll
NCTA
1724 Massachusetts Avenue, NW
Washington, DC 20036

David L. Swanson
Edison Electric Institute
701 Pennsylvania Ave., NW
Washington, DC 20004

Shirley S. Fujimoto
Christine M. Gill
McDermott, Will & Emery
1850 K Street, NW
Suite 500
Washington, DC 20006

Mark C. Rosenblum
Roy E. Hoffinger
Connie Forbes
Seth Gross
Room 3245G1
295 North Maple Ave.
Basking Ridge, NJ 07920

James A. Hirshfield, Jr.
Summit Communications, Inc.
3633-136th Place SE
Suite 107
Bellevue, WA 98006

Albert H. Kramer
Dickstein, Morin, Shapiro & Oshinsky
2101 L Street, NW
Washington, DC 20037

James D. Ellis
Robert M. Lynch
SBC Communications, Inc.
175 E. Houston
Room 1254
San Antonio, TX 78205

Durward D. Dupre
Mary W. Marks
Jonathan W. Royston
SBC Communications, Inc.
One Bell Center - Room 3520
St. Louis, MO 63101

Jeffrey L. Sheldon
Sean A. Stokes
UTC, The Telecommunications Assoc.
1140 Connecticut Ave., NW
Suite 1140
Washington, DC 20036

Thomas J. Navin
Catherine M. Krupka
McDermott, Will & Emery
1850 K Street, NW
Suite 500
Washington, DC 20006

James T. Hannon
U S WEST
1020-19th Street, NW
Suite 700
Washington, DC 20036

Cindy Z. Schonhaut
ICG Communications, Inc.
9605 E. Maroon circle
Englewood, CO 80112

David L. Lawson
Scott M. Bohannon
AT&T
1722 Eye Street, NW
Washington, DC 20006

Lori L. Ortenstone
SBC Communications, Inc.
525 B Street
Room 900
San Diego, CA 92101

ITS
1231-20th Street, NW
Washington, DC 20036

Ms. Elizabeth Beaty
FCC - Cable Services Bureau
2033 M Street, NW
Room 804 Q
Washington, DC 20554