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Before the
Federal Communications Commission
Washington, D.C. 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

MCI REPLY COMMENTS

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Summary

In these Reply Comments, MCI rebuts the proposals that, if implemented, would prevent the establishment of just and reasonable attachment rates for poles, conduits, and transmission facilities, and inhibit the development of facilities-based competition. MCI urges the Commission to quickly apply its pole attachment formula to both telephone and electric conduit. MCI also urges the Commission to implement clear rules that are easy to administer and enforce. Incumbent utilities often insist on unreasonable provisions in their pole attachment contracts. Incumbent utilities control a resource that is essential for facilities-based entry into the local exchange market. This resource is scarce and without substitute. New entrants are at a significant negotiating disadvantage gaining access to this scarce resource.

MCI supports the Commission's proposal to extend its existing attachment complaint procedures. These procedures are simple and maintain the burden of proof on the pole owner. The burden of proof must remain on the pole owner if local market entry is to be encouraged. The Commission should not adopt incumbent complaint procedure LEC proposals. They would increase the leverage the pole owner already has by lengthening the time required for a new entrant to establish a market presence, and shift the burden of proof to the complainant.

MCI opposes proposals requiring complainants to file additional information, such as their cost calculations, as part of their complaint. Very often the party seeking attachment is unable to obtain reliable information from the incumbent utility. MCI also urges the Commission to reject proposals to eliminate rate disagreements as grounds for complaints. This proposal would permit pole owners to refuse to comply with Commission rules setting presumptive pole heights,

accounts, formulas, etc., and never be found in violation of those rules. MCI supports the proposal for the Commission to adopt a rule permitting new entrants to attach to an incumbent's pole facilities prior to reaching an agreement over rates, terms, and conditions.

The leasing of dark fibers generally does not involve an attachment, does not increase load on the pole, and is therefore not an activity a pole owner may limit under the Pole Attachment Act. Congress did not address the rate treatment required for attachments that deliver neither cable nor telecommunications services. Consequently, the rate implications of the Heritage Decision for information services remain untouched by the recent amendments to the Pole Attachment Act.

MCI supports the proposal to count telecommunications attachments of cable companies according to the ratio of a cable company's telecommunications customers to its total customers, provided cable companies impute the full telecommunications attachment rate on estimated telecommunications attachments, and pass the economies of scope directly through to their cable customers. In order to ensure that the estimate of telecommunications attachments are properly identified and properly imputed their full cost, the Commission should require all CATV operators to file an annual report certifying the number of telecommunications customers in the geographic region of each utility providing it pole space; the number of cable customers in the geographic region of each utility providing it pole space; and the total cost imputed to their telecommunications customers in the geographic region of each utility providing it pole space.

No one argues that Congress has explicitly addressed the rate treatment of overlashed cable. Consequently, the Commission may decide the rate treatment of overlashed cable according to principles of non-discrimination, equity, and just and reasonable recovery. The only

rate treatment for overlashings that does not discriminate against third party overlashers and does not permit pole owners to double-recover the cost of the pole, is to adjust the amount of presumptive usable space by the amount of additional space made possible by overlashing. MCI urges the Commission to expand the amount of usable space as the method of charging overlashes. Doing so will share the benefits of overlashing equitably among providers of cable and telecommunications services.

All parties except the pole owners support the adoption of a presumptive number of attachments. Consensus estimates place the presumptive number of original attachments between 4 and 5, and the presumptive number of overlashes between 2 and 3, for a presumptive total number of attachments between 8 and 15. MCI recommends the Commission adopt 12 attachments as a reasonable presumption.

The safety space should not be allocated to non-useable purposes. The NESC permits the installation of communications lines above the safety space, so the safety space may be used for telecommunications attachments. If any change in the allocation of the safety space was contemplated, it would make most sense to transfer this it to telecommunications usable space. It would therefore be available for additional telecommunications attachments, free of arbitrary conditions imposed by the electric companies.

The record in this proceeding lends support for the position advocated by MCI and others that the Commission should adopt a one-third duct convention (with one innerduct reserved for maintenance). MCI knows of no new entrant who is installing copper cable in conduit. Pulling new cable through a duct is easier, safer, and provides much greater capacity if the cable is fiber. Where the duct is unoccupied and innerduct is installed, the one-third duct convention becomes a

very conservative presumption.

Congress did not distinguish between per entity and per attachment allocation. The per entity method will permit parties that have the most attachments, and the largest established customer bases, to obtain a lower attachment rate than new entrants are seeking their first attachment. Attachment rates for identical attachments will not vary for any identifiable cost difference, but will vary simply according to the entry status of the attacher. The per attachment method is the only method that results in nondiscriminatory pole attachment rates.

Incumbent LECs will come to no harm by having their attachments included in the attachment count for the allocation of non-usable space costs. Incumbent LEC (and electric company) attachment rates are currently set at rates that recover their share of useable and non-usable space. Incumbent LEC requests to exclude their attachments from the attachment count, would permit the pole owner to recover these costs twice.

There may arise local pockets where municipalities are not receptive to new entrants rights of way issues, and incumbent utility poles and conduits are fully occupied. In this situation the pole owner may be able to exercise market power in these local pockets. MCI supports the proposal for the Commission to adopt certain principles to which parties negotiating rates for access to private rights of way and easements must adhere. These include the principles that rates must be based on cost; that already recovered capital costs should be excluded, and that new entrants must recover direct and incremental costs of accessing these rights of way.

I. Introduction

MCI Telecommunications Corporation ("MCI") respectfully submits its Reply Comments in response to comments filed in the above-captioned docket¹. In the Notice, the Commission requested comments regarding establishment of rules governing attachment charges for carriers that provide telecommunications services. In particular, the Commission sought comment on the following issue areas:

- ▶ whether to apply its existing complaint procedures, rules, and formulas to carriers providing telecommunications service;
- ▶ how to treat the issue of usable space for telecommunications attachments;
- ▶ how to treat the issue of non-usable space for telecommunications attachments;
- ▶ how to treat the issue of access to private rights of way; and
- ▶ how to treat the transition to the permanent rate methodology for telecommunications attachments.

In these Reply Comments, MCI rebuts the proposals that, if implemented, would prevent the establishment of just and reasonable attachment rates for poles, conduits, and transmission facilities, and inhibit the development of facilities-based competition. MCI urges the Commission to quickly apply its pole attachment formula to both telephone and electric conduit. MCI also urges the Commission to implement clear rules that are easy to administer and enforce. Incumbent utilities often insist on unreasonable provisions in their pole attachment contracts. Incumbent utilities control a resource that is essential for facilities-based entry into the local exchange market. This resource is scarce and without substitute. New entrants are at a

¹Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments, *Notice*, CS Docket No. 97-151, Released August 12, 1997.

significant negotiating disadvantage gaining access to this scarce resource.

II. Complaint Procedures Should Not Impede Entry

A. The Commission Should Extend its Existing Complaint Procedures

In its Notice, the Commission proposed applying the rules under which cable companies file complaints regarding attachment rates to telecommunications companies.² These rules require an attacher to attempt to resolve its dispute before filing a complaint, and then briefly summarize the steps it has taken to resolve disputes as part of its complaint. MCI supports the Commission's proposal to extend its complaint procedures. The complaint procedures are simple and maintain the burden of proof on the pole owner. The burden of proof must remain on the pole owner if local market entry is to be encouraged.

Existing pole owners propose additional conditions on a party seeking to file a complaint that transfer the burden of proof to the complainant. SBC, US West and Bell South propose requiring a complainant to certify that it has communicated with the pole owner over every disputed issue prior to filing a complaint.³ USTA also proposes requiring an aggrieved attacher to file a thirty-day notice of intent alerting the pole owner of its issues in order to allow the parties to reach resolution prior to Commission involvement.⁴ GTE proposes requiring a complainant to disclose its own rate calculations prior to filing a complaint.⁵ The electric utilities would impose more severe limitations on a party's ability to achieve timely resolution of complaints. For

²Notice at 7.

³See SBC Reply Comments at 4, footnote 9.

⁴USTA at 2.

⁵GTE at 4.

example, they proposes: 1) extending the amount of time that a party must negotiate with the pole owner before filing a complaint from 30 to 180 days; 2) eliminating rate disagreements as grounds for filing a complaint; and 3) requiring parties seeking attachments to obtain a utility company's pre-approval in order to use their distribution infrastructure.⁶

B. The Commission Should Reject Restrictions That Would Undermine the Goals of the Pole Attachment Act.

1. ILEC complaint proposals would impede entry

The Commission should not adopt incumbent complaint procedure LEC proposals. These proposals would increase the leverage the pole owner already has by shift the burden of proof to the complainant, and lengthening the time required for a new entrant to establish a market presence. Time to market is a crucial factor determining which companies will be able to profitably provide service.

The Commission's existing complaint procedures already require the complainant to describe the steps that have been taken in private negotiations, or describe why further negotiation would be fruitless. If these explanations are not sufficient, the complaint may not be heard by the Commission. If they are sufficient, then it is not necessary for the ILEC to be given an additional 30 days to negotiate "for real" this time, or to be presented with legal certification for every issue.

MCI opposes proposals requiring complainants to file additional information, such as their cost calculations, as part of their complaint. Very often the party seeking attachment is unable to obtain reliable information from the incumbent utility. If the complainant has obtained cost data

⁶See American Electric Power, et. al., at 36. See Union Electric Comments pp 16-18. Since Commission rules do not require identical rates, terms, and conditions, Union Electric's request that the Commission not require prices terms or conditions to be identical is moot. See also EEI at 7.

from the pole owner supporting its case, it may certainly file this information if it chooses. MCI is concerned that if the Commission made this a condition of filing a complaint, it would restrict the ability of parties to seek resolution of problems when the incumbent utility is being most intransigent.

Similarly, MCI believes requiring complainants to certify they have communicated with the pole owner over every disputed issue prior to filing a complaint would inhibit timely resolution of complaints. When a pole owner is intransigent, the party seeking attachment may reasonably conclude that it would be either fruitless, or an unacceptable delay of entry, to attempt to resolve every contested issue through face-to-face negotiations.

2. Electric company complaint proposals would eviscerate the Commission's enforcement authority

While the ILEC proposals would increase pole owner leverage and intransigence *viz. a viz.* attachers, the electric company proposals would completely eliminate the possibility of reasonably priced telecommunications attachments. Union Electric's proposal to eliminate rate disagreements as grounds for complaints would permit pole owners to refuse to comply with Commission rules setting presumptive pole heights, accounts, formulas, etc., and never be found in violation of those rules. Union Electric's proposal is simply an attempt to eviscerate the Commission's enforcement authority and should be rejected.

MCI also opposes the proposal requiring negotiations to proceed 6 months before a complaint may be filed. This proposal would serve to significantly delay entry in markets. A six month delay would effectively prohibit new entrants not affiliated with the pole owner from entering local telecom markets. MCI is alarmed at the accelerating of the pole owners,

particularly the electric companies, to delay attachment and deny reasonably priced, nondiscriminatory, access to their facilities.

American Electric Power goes so far as to argue that telecommunications carriers may not use the Commission's complaint procedures governing pole attachments, since Congress did not broaden the scope of the Pole Attachment Act. AEP argues that since Congress envisioned different rate treatments for cable and telecommunications attachments, it also must have envisioned different complaint rules, and further, that no complaint procedures should be available to telecommunications carriers.⁷

Different rate methods do not imply different complaint procedures. The 1996 Act regularly provides different rate methods for different classes of carriers, but still provides all classes of carriers to be treated in a non-discriminatory fashion. If a carrier seeks interconnection with incumbent local exchange companies, rate treatment is governed by §251(2) and §252(d) -- i.e. at incremental cost. A carrier seeking interconnection with other local exchange companies will have rates governed under §251(b)(5) -- i.e. according to reciprocal compensation. Similarly, a carrier seeking wholesale services of incumbent LECs will have its rates governed under §251(c)(4) and §252(d)(3) -- i.e. net of avoided costs; while a carrier seeking wholesale services of other local exchange companies will have rates governed under §251(b)(1) -- i.e. at market rates. In spite of different rate treatment for different classes of carriers, all classes of telecommunications carriers must provide non-discriminatory access to its wholesale services and interconnecting facilities.⁸

⁷AEP at 17.

⁸§251(b)(1) and §251(b)(5).

3. The Commission must ensure timely resolution of complaints

MCI believes the Commission must do more than reject pole owner proposals, it must take positive steps to ensure even more timely resolution of complaints. MCI believes ICG's proposal for the Commission to adopt a rule permitting new entrants to attach to an incumbent's pole facilities prior to reaching an agreement over rates, terms, and conditions, would remove the competitive harm of owner intransigence and untimely resolution of complaints.⁹

II. The Commission Should Adopt Pro-Competitive Usable Space Principles

A. Heritage Decision

Various parties support the Commission's proposal to extend its *Heritage Decision* to telecommunications companies that are building out their facilities.¹⁰ As MCI noted in its comments, the *Heritage Decision* made two distinct findings. The first finding was that a pole owner may not charge a cable company a higher attachment rate for a non-cable attachment. The second finding was that it is not reasonable for the pole owner to limit, prohibit, or demand to approve an attachers' leasing of dark fibers from its attachments.¹¹

⁹ICG Comments at 15.

¹⁰*Heritage Cablevision Association of Dallas, L.P. v. Texas Utilities Electric Company, Heritage Decision*, 6 FCC Rcd., 7099 (1991).

¹¹Cites.

1. Leasing dark fiber does not require a pole attachment

There is nearly unanimous agreement among commenting parties that the leasing of dark fibers generally does not involve an attachment, does not increase load on the pole, and is therefore not an activity a pole owner may limit under the Pole Attachment Act.¹² Several parties argue that where a party seeking the lease of dark fiber requires physical attachment to the pole or conduit, that party must negotiate a pole attachment agreement with the pole owner.¹³ MCI agrees, provided that a separate attachment and additional attachment space are actually required. MCI also notes that the rates and terms of this agreement would be governed by the Commission's pole attachment rules.

2. Heritage may apply to information service attachments

Agreement is less clear regarding the rate implications of the *Heritage Decision*. Cable companies generally support *Heritage* unconditionally, and do not explicitly address the rate implications of that decision.¹⁴ That may be because §224(e) of the 1996 Act requires that telecommunications attachments should be responsible for a portion of the costs associated with non-usable pole space. This section of the 1996 Act implicitly overturns the rate aspects of the Commission's *Heritage Decision* pertaining to telecommunications attachments.

However, Congress did not address the rate treatment of attachments that provide neither cable nor telecommunications services. These would include attachments intended for radio

¹²MCI at 6; SBC at 13; Union Electric at 26; AEP at 43; ICG at 18; New York Electric Utilities (NYEU) at 10; Bell Atlantic at 3; Ameritech at 7; and GTE at 8.

¹³See e.g., NYEU at 11;

¹⁴NCTA at 10; Adelphia at 3;

based video services, internet access, and other information services.¹⁵ Electric companies argue correctly that information services are neither telecommunications nor cable services.¹⁶ However, they are incorrect that the Commission's Heritage Decision may no longer apply to these services.¹⁷ Congress did not address the rate treatment required for attachments that deliver neither cable nor telecommunications services. Consequently, the rate implications of the Heritage Decision for information services and open video service remain untouched by the recent amendments to the Pole Attachment Act.

3. Cable companies should identify their telecommunications attachments

Now that attachments of cable companies that provide telecommunications services will receive different rate treatment than attachments that do not provide telecommunications services, the Commission must determine how cable companies should identify attachments that provide telecommunications services, and how they should notify pole owners of the service status of their attachments.

a. Cable attachments should be counted as telecommunications poles in proportion to telecommunications subscription

As a general matter, if an attachment owned by a cable company provides a telecommunications service, it should be identified as a telecommunications attachment. NCTA

¹⁵Attachments that simultaneously provide information services and telecommunications services would be subject to §224(e) of the 1996 Act.

¹⁶They incorrectly argue that OVS is not a cable service. However, Congress referred to local exchange company OVS customers as "cable" customers. "A local exchange company may provide cable service to its cable service subscribers ...through an open video system." Consequently, OVS attachments are cable attachments provided they do not also provide telecommunications services. See 47 U.S.C. 573.

¹⁷AEP at 8; Ohio Edison at 22.

and COMCAST seek to distinguish attachments that carry telecommunications signals from attachments that deliver the telecommunications service to the end-user.¹⁸ They argue that the most efficient method of upgrading their systems to provide telecommunications services would require permitting telecommunications signals to be distributed throughout their cable attachments, even if only 10 percent of their customers actually subscribe to telecommunications services. Requiring their attachments on all poles to be charged at the higher rate would unfairly burden their cable customers.

NCTA, and COMCAST propose charging the telecommunications attachment rate in proportion to the number of subscribers in a system who subscribe to telecommunications services. They offer the example of a system with 10,000 poles providing cable service to 20,000 subscribers, where 5 percent, or 1,000 customers, also receive telecommunications services. In this case, the telecommunications attachment rate would be applied to 5 percent, or 500, of the poles.

MCI agrees it would be unfair to cable customers if they were charged the higher telecommunications attachment rate to receive the same cable service. MCI supports the NCTA and COMCAST proposal so long as cable companies impute the full telecommunications attachment rate on those 500 poles estimated to be in use by their telecommunications customers, and pass the economies of scope directly through to their cable customers. Suppose, for example, the cable attachment rate is \$5 per pole, and the telecommunications attachment rate is \$10 per pole. MCI believes the NCTA and COMCAST proposal would involve a \$10 payment on 500 poles for a total payment of \$5,000. §224(g) requires the cable company to impute or assign all

¹⁸COMCAST at 17; NCTA at 23.

of this \$5,000 to its telecommunications customers. This would mean the cable company would impute \$5 per year to each of its 1,000 telecommunications customers.

The NCTA and COMCAST proposal does not make clear whether payments for cable attachments would decline from \$50,000 to \$45,000, or whether they would remain at \$50,000. MCI believes the "\$5,000" benefit generated by the joint offering of cable and telecommunications services should be refunded to either the electric utility's core customers, or the cable company's core customers. Since the Commission does not have jurisdiction over electric rates, and may not order an electric rate refund, MCI recommends the Commission require cable companies to make an exogenous adjustment to their cable programming service tier rates. In the above example, each cable customer would get an annual rate reduction of 25 cents.

- b. Cable companies should annually certify the number of "telecommunications poles"

In order to ensure that the estimate of telecommunications attachments are properly identified and properly imputed their full cost, the Commission should require all CATV operators to file an annual report certifying:

- ▶ the number of telecommunications customers in the geographic region of each utility providing it pole space;
- ▶ the number of cable customers in the geographic region of each utility providing it pole space;
- ▶ the total cost imputed to their telecommunications customers in the geographic region of each utility providing it pole space; and
- ▶ the benefit per customer cable customer in the geographic region of each utility providing it pole space.

B. Overlashings Should be Charged the Average Cost of an Attachment

Opinion on rate treatment for overlashings breaks down into three groups: (1) parties that already have attachments on poles covering most of the country, such as incumbent LECs, AT&T and the cable companies, propose charging overlashings on an incremental cost basis. This would permit a rate close to zero and confine the benefits of overlashings to parties with existing attachments;¹⁹ (2) parties that have few attachments on poles, such as MCI, ICG, RCN, and other new entrants, propose charging overlashings according to share of space occupied. This would establish rates based on average costs, and would share the benefits of expanded usable space due to overlashings with all attachers;²⁰ and (3) electric companies who propose charging the full rate for overlashings and capturing all the benefits of expanded usable space due to overlashings for themselves.²¹

No one argues that Congress has explicitly addressed the rate treatment of overlashed cable. Consequently, the Commission may decide the rate treatment of overlashed cable according to principles of non-discrimination, equity, and just and reasonable recovery. The electric companies correctly argue that if an overlash is counted for purposes of allocating the costs of non-usable space, it must also be considered an attachment that shares in the recovery of costs associated with usable space.²² MCI endorses this principle of cost allocation equity. The allocation of space that is appropriate for non-usable space must also apply to the allocation of

¹⁹US WEST at 10; COMCAST at 4; Ameritech at 5; AT&T at 4; and NCTA at 5.

²⁰MCI at 6; RCN at 4; and ICG at 39.

²¹Union Electric at 24; AEP at 46; EEI at 11; and NYEU at 9.

²²AEP at 43.

usable space.²³ However, electric company proposals to charge overlashings the rate that would otherwise be charged to original attachments, would violate the principle of just and reasonable cost recovery. If the sum of rates for original attachments yields full recovery, charging that rate to an overlash, without reducing original attachment rates, will permit the pole owner to recover its pole costs twice. This option must therefore be rejected.

Cable companies, incumbent LECs, and AT&T argue that overlashings do not occupy additional space, are not an attachment, and so should not be charged any rate. This proposal solves the over-recovery problem advocated by the electric companies, but fails the principles of non-discrimination and cost allocation equity. These same parties do not propose making the free overlash charge available to third party overlashers. Rather, they would charge a third party overlasher the full market rate.²⁴ If the overlash is truly cost-free, than the Commission may not enact a rule that results in separate charges for an overlash depending on the ownership status of the overlash. Moreover, as the electric companies point out, a zero charge for an overlash would not permit the Commission to count it as an attachment. Under this rate treatment, overlashings would not recover the costs associated with non-usable space, thus violating the principles of cost allocation equity and non-discrimination.

The only rate treatment for overlashings that does not discriminate against third party overlashers and does not permit pole owners to double-recover the cost of the pole, is to adjust

²³ One consequence of applying this principle is the allocation of two-thirds of the useable space for non-electric purposes.

²⁴ "Accordingly, the ownership of the overlashed cable is simply irrelevant. The amount of space used does not increase. And, no additional costs are imposed on the pole owner, so long as the overlashes are engineered properly. Thus, attachers should be free to contract with thrived parties who want to overlash to the attachers' cables." AT&T at 6. See also SBC at 13.

the amount of presumptive usable space by the amount of additional space made possible by overlashing. MCI proposed accomplishing this by retaining the one foot usable space presumption per attachment, but adjusting the total amount of usable space by a presumptive amount of overlashings.²⁵ ICG accomplishes this by reducing the usable space presumption per attachment from one foot to 3-6 inches.²⁶

MCI urges the Commission to expand the amount of usable space as the method of charging overlashes, either as proposed by MCI or ICG. Doing so will share the benefits of overlashing equitably among providers of cable and telecommunications services. It will avoid the mirror pitfalls of over-recovering pole costs as proposed by the electric utilities, and discriminatory charges as proposed by AT&T. This method will reduce the cost of attachments for cable and telecommunications attachments alike, and thereby encourage cable systems to upgrade their cable services, and expand into data and internet services. At the same time non-cable telecommunications carriers will not be placed at a competitive disadvantage expanding their telephony, data and internet service offerings. This proposal is competitively neutral and will most efficiently promote varied and advanced service development.

C. Access Treatment of Overlashings

No party takes exception to the technical feasibility of overlashing.²⁷ Overlashing one's own attachment is common practice and, provided standard engineering precautions are followed,

²⁵MCI Comments at 8.

²⁶ICG at 40.

²⁷AEP at 50; EEI at 13; MCI at 6; ICG at 22; AT&T at 6; NCTA at 6; RCN at 7; Ameritech at 5; Bell Atlantic at 2; GTE at 7; US West at 3.

present no technical problems. The electric companies argue that overlashing creates additional safety risks that require a party seeking to overlash to submit engineering studies and obtain the pole owners approval before proceeding.²⁸ Provided standard engineering standards are followed, overlashings do not present any special concerns that would not already be covered in an original pole attachment agreement. The electric company proposals requiring special engineering studies only serve to delay new entrants time to market, and should be rejected. The pole owner must of course be notified about the overlash. This will permit the owner to pass through the new, lower, rates that will occur due to the allocation of usable and non-usable costs across additional attachments. Overlashing an existing attachment by a third party should be treated essentially the same as an overlashing performed by an original attacher. However, third-party overlashes may impose additional costs on the attached party in the event the attached party rearranges its attachment(s), the party seeking to overlash an existing attachment should be required to compensate the original attacher for these costs.

D. The Commission Should Establish a Presumptive Number of Attachments

All parties except the pole owners support the adoption of a presumptive number of attachments. Pole owners support case-by-case determination of a so-called "presumptive" number of attachments per pole.²⁹ Presumptive amounts are generally understood as an average of case-by-case amounts. Labelling a case-by-case determination of number of attachments "presumptive" does not make it so. MCI urges the Commission to adopt a presumptive number of attachments per pole. The purpose of determining presumptive amounts is to reduce the

²⁸Duquesne at 26; Ohio Edison at 25; EEI at 12; and AEP at 51.

²⁹NYEU at 24; Ameritech at 13; EEI at 24; AEP at 44.

administrative burden on the owner associated with case-specific survey costs; and reduce the area for dispute among negotiating parties, thereby minimizing negotiating costs. Reducing these administrative costs remain an important policy goal in the 1996 Act.

Parties supporting a presumptive number of attachments break down into those that would count overlappings as an attachment and those that would not count overlappings. MCI proposed 4 presumptive original attachments, and 2 presumptive overlashes per original attachment, for a presumptive total of 12 attachments.³⁰ ICG proposes reducing the one foot presumption of space required per attachment to 3-6 inches. On 6 feet of usable non-electric space, this would yield 6 original attachments and 2-3 overlashes per original attachment for 12-24 presumptive attachments.³¹ Comcast and NCTA propose between 3-6 original attachments.³² AT&T proposes 3 original attachments.³³ Consensus estimates place the presumptive number of original attachments between 4 and 5, and the presumptive number of overlashes between 2 and 3, for a presumptive total number of attachments between 8 and 15. MCI recommends the Commission adopt 12 attachments as a reasonable presumption.

E. Safety Space Should Remain Useable Electric Space

In the earlier, companion pole attachment proceeding, electric companies argued that the safety space should be considered non-usable space since “..the Commission has previously held

³⁰See Section II.B. above.

³¹ICG at 40.

³²COMCAST at 10, NCTA at 20.

³³AT&T at 13.

that the risk of maintaining this safety space effectively falls on the cable operator."³⁴ In response, MCI showed that since cable operators have effectively shouldered the investment risk for maintaining this safety space in the event their demand for additional space encroached upon the safety space, they are already responsible for costs associated with the safety space.³⁵ ICG and NYEU each raise new arguments in favor of allocating costs associated with the safety space to non-usable purposes. MCI takes this opportunity to address these new arguments.

NYEU argues that since §224(i) shifts the risk of additional pole cost in the event pole height must be increased to maintain the safety space away from cable companies, telecommunications companies should be responsible for two-thirds of the costs associated with the safety space.³⁶ NYEU is not correct that §224(i) shifts this risk away from cable operators; it places these risks onto parties seeking either their first, or an additional, attachment. Cable and telecommunications companies are included in this group, and so continue to bear risk associated with maintaining safety space.³⁷

ICG argues that since the NESC permits the installation of communications lines above the safety space, the safety space may actually be used for telecommunications attachments. ICG

³⁴Electric Whitepaper at 11.

³⁵MCI Comments, Amendment of Rules and Policies Governing Pole Attachments, CS Docket No 97-98. at 11.

³⁶"The second reason — CATV operators' responsibility for pole replacement costs needed to maintain a 40 inch safety zone — has been eliminated by an amendment ... Section 224(i)..." NYEU Comments at 19.

³⁷NYEU also argues that §224(e) makes telecommunications companies responsible for space required for their attachment over and above the space actually used. However, because cable and telecommunications companies continue to bear safety space risk costs pursuant to §224(i), they are already responsible for whatever safety space costs required for their attachment.

concludes that since the safety space is useable by telecommunications attachments, telecommunications companies should pay for a share of this space through non-usable cost recovery.³⁸ However, if the space is usable it should not be allocated to non-usable purposes. The logical action would transfer this space to telecommunications usable space. It would therefore be available for additional telecommunications attachments, free of arbitrary conditions imposed by the electric companies. However, the electric companies are not required to make this space available for telecommunications attachments on a non-discriminatory basis if it is allocated to non-usable purposes. By arguing that the space remains non-usable they are able to reserve it for their own telecommunications affiliate, or make it available on a discriminatory basis to non-affiliated companies.

F. One-third Remains the Most Reasonable Innerducting Presumption

The record in this proceeding lends additional support for the position advocated by MCI and others that the Commission should adopt a one-third duct convention (with one innerduct reserved for maintenance). In this docket, an incumbent LEC conduit owner, US West, supports the proposed one-third duct convention.³⁹ MCI's Reply Comments, in CS Docket 97-98 showed that the NESC permits communications' cables to share the same duct as electric supply cables, so long as the cables are maintained or operated by the same utility.⁴⁰ A standard 4 inch duct will permit 3-4 fiber cables to be installed if innerduct is pulled through the duct. The electric companies fail to offer new evidence or arguments in support of their intransigent view that the

³⁸ICG at 31.

³⁹US West at 5.

⁴⁰MCI Reply Comments, CS Docket 97-98 at 42.

Commission should not account for innerducting in the conduit formula.

In CS Docket 97-98 SBC argued that the one-third duct presumption could only be justified on a forward looking methodology. They argue that their conduit only supports the installation of one copper telecommunications cable or two coaxial cable wires. SBC supports the half-duct method, since it would assign an entire duct if the cable used the whole duct.⁴¹

This argument might be valid if those seeking conduit attachments were installing copper cables. SBC suggests this will be the case when it argues that the half-duct presumption is reasonable "...since the CLEC might use copper and take the whole duct."⁴² MCI knows of no new entrant who is installing copper cable in conduit. Pulling new cable through a duct is easier, safer, and provides much greater capacity if the cable is fiber. Where the duct is unoccupied and innerduct is installed, the one-third duct convention becomes a very conservative presumption. Where one copper cable occupies an entire duct, it would be appropriate to charge for 3 innerducts.

However, MCI believes such situations will only occur occasionally, and will best be handled on a case-by-case basis. Generally, where a duct is occupied by a copper telecommunications cable, or an electric supply cable, it will either not be made available or will not be attractive to new entrants. Consequently, most cases where a new entrant seeks conduit attachment, the one-third presumption will be accurate. In those cases where the cable of an entrant occupies a whole duct, it should be charged for 3 attachments.

⁴¹SBC at 31.

⁴²SBC at 34.

G. §224(i) Does Preclude Forward Looking Rate Methods for Determining Recurring Pole Attachment Rates

The electric utility companies repeat their arguments that the Commission should adopt a forward-looking method for determining pole attachment rates. MCI has been a strong supporter of setting rates according to properly conceived forward-looking cost methods. MCI showed in its Reply Comments in CS Docket 97-98 that proper application of such a method would yield declining pole and conduit attachment rates. However, §224(i) of the 1996 Act appears to preclude the use of forward looking cost methods for regulating pole attachment rates, since it requires upgrade costs to be levied on the party requiring the upgrade.⁴³

Union Electric is the only party to question MCI's argument. Union Electric argues that §224(i) only protects existing attachers from bearing the costs of rearranging their cables in the event of a pole change-out, and does not protect parties with existing attachments from higher rates to recover the additional investment needed to change out the pole.⁴⁴ This conclusion is contradicted by the Commission's finding in CC Docket 96-98, that

“...section 224(h) imposes the cost of modifying attachments on those parties that benefit from the modification. If, for example, a cable operator seeks to make an attachment on a facility that has no available capacity, the operator would bear the full cost of modifying the facility to create new capacity, such as by replacing an existing pole with a taller pole. Other parties with attachments would not share in the cost, unless they expanded their own use of the facilities at the same time.”⁴⁵

Because a forward-looking rate methodology requires one to account for near term capacity requirements as part of a bottoms-up network design, capacity expansion costs would have to be

⁴³MCI Reply Comments, CS Docket 97-98 at 19.

⁴⁴Union Electric at 15.

⁴⁵Local Competition Order, CC Docket 96-98, at ¶1166.