

recovered as recurring charges, from all attachers, not just attachers seeking additional attachment space. However, the Commission has recognized that this is not permitted by §224(h).<sup>46</sup>

### III. The Commission Should Establish Procompetitive Non-Usable Space Principles

#### A. Congress Did Not Distinguish Per Attachment Allocation from Per Entity Allocation of the Costs of Non-Usable Space

Parties are divided on the issue of whether the Commission should allocate the costs of non-usable space equally to each entity regardless of the number of attachments made by that entity, or whether the Commission should count entities in one foot increments, resulting in a per attachment allocation.<sup>47</sup> MCI agrees with US West that Congress did not distinguish between per entity and per attachment allocation.<sup>48</sup> §224(e)(2) requires the Commission to allocate the cost of non-usable space “...to such an entity under an equal apportionment of such costs among all attaching entities.” But the Conference Report explains that Congress meant for the Commission to recognize that “...other than the usable space is of equal benefit to all entities attaching to the

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<sup>46</sup>MCI understands §224(h) and §224(i) as mutually defining provisions. Because §224(i) insulates existing attachers from bearing costs of capacity expansion, only parties that are the proximate cause of the capacity expansion remain responsible for cost recovery purposes. Conversely, because §224(h) requires parties that are the proximate cause of the capacity expansion to be responsible for the additional costs, no cost obligation due to capacity expansion may be imposed on existing attachers. Thus, one may refer to either §224(h) or §224(i) when establishing the legislative prohibition against recovering upgrade costs (which are forward looking costs) through recurring rates assigned to existing attachers.

<sup>47</sup>The per entity formulation is proposed in ¶ 22 of the Notice, and the per attachment formulation is proposed in para ¶23 of the Notice.

<sup>48</sup>“...equal apportionment of such costs among all attaching entities’ is ambiguous since there are many possible ways of ‘equally apportioning’ the costs of non-usable space among attaching entities — the most logical of which is to assign these costs equally among all attachments. This would also be in accord with the intent of Congress as reflected in the Conference Report, and would recognize that all attachments benefit equally from non-usable space.” US West Comments at 8.

pole and therefore [to] apportion the cost of the space other than the usable space equally among all such attachments...”.<sup>49</sup>

Not only was a per attachment allocation of non-usable space envisioned by Congress, MCI submits that it is the only method that results in nondiscriminatory pole attachment rates. There is no argument that 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.<sup>50</sup> Rates for identical attachments will not vary for any identifiable cost difference, but will vary simply according to the entry status of the attacher. No doubt that is why incumbents generally support this method. However, it is clearly discriminatory.

ICG, USTA, GTE, and the electric companies argue that the per attachment method would yield the same rates for telecommunications attachments under §224(e) as if §224(d) were used. They argue Congress would not have required a different rate method for telecommunications attachments if it had intended telecommunications attachment and cable attachment rates to be identical.<sup>51</sup> An example shows however, that the per attachment method of implementing §224(e) does not yield the same rates as §224(d). Table 1 compares the effects of using the Commission’s proposed formulas for calculating 224(e) rates using the per attachment method and per entity methods of allocating non-usable costs to rates that would be calculated under the cable formula pursuant to §224(d). The example makes the following presumptions:

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<sup>49</sup>Conference Report on S. 652 at 206.

<sup>50</sup>See calculations in Table 1 below.

<sup>51</sup>ICG at 33; GTE at 10; USTA at 6 11; and Electric Utilities Coalition at 6.

net cost of a bare pole times the annual carrying charge rate	\$100.0
maximum number of attachments	6.0
pole height (feet)	37.5
useable space (feet)	13.5
non-usable space (feet)	24.0
space required per attachment (feet)	1.0

Table 1 shows that the per attachment method of allocating the costs of non-usable space yields higher rates per attachment than would occur using the Commission's cable rate attachment formula, fully consistent with Congressional intent.

**TABLE 1**  
**Effects of Per Attachment and Per Entity Allocation of Non-Usable Space**

	Attachments Per Entity	224d Method		224e Per-Attachment Method		224e Per-Entity Method	
		Cost Per Attachment	Cost Per Entity	Cost Per Attachment	Cost Per Entity	Cost Per Attachment	Cost Per Entity
Entity 1	3	7.41	22.22	9.81	29.44	7.43	22.29
Entity 2	2	7.41	14.81	9.81	19.63	9.81	19.63
Entity 3	1	7.41	7.41	9.81	9.81	16.96	16.96

On the other hand, Table 1 shows that the per entity method is not consistent with Congressional intent, since it yields the same rate as the Commission's cable formula for telecommunication entities with the most attachments. In sum, the Commission will adhere more closely to Congressional intent by adopting the per attachment method of allocating non-usable costs, and will, at the same time, establish non-discriminatory telecommunications attachment rates.

B. Telecommunications Attachment Counts

1. The record supports excluding electric municipal attachments

In its Notice, the Commission proposed counting the electric attachments of municipal governments as attachments for the purpose of allocating the costs of non-usable space. The Commission presumably draws support for including municipal electric attachments by referring to language in §224(e)(2) that would allocate costs of non-usable space "...among all attaching parties." However, since §224(e) in general deals with the setting of rates for telecommunications attachments, it would not be appropriate to include electric attachments in the two-thirds allocation of the costs of non-usable space. If Congress intended telecommunications attachments to recover two-thirds of the costs of non-usable space, then electric attachments should recover the remaining one-third. No party except AT&T supports including municipal electric attachments in the recovery of telecommunications' share of non-usable costs.

2. ILEC attachments should be counted, even though they already recover a share of non-usable costs

In its Notice, the Commission proposed including incumbent LEC attachments in determining the per attachment allocation of non-usable costs among telecommunications attachers. Incumbent LECs argue that unless they are permitted to obtain pole attachments at rates regulated under §224(e), their attachments should not be included when the Commission determines the per attachment allocation of non-usable costs.<sup>52</sup>

However, as US West notes, it is reasonable to count incumbent LEC attachments since "Section 224(e)(2) refers to 'attaching entities' not telecommunications carriers. Furthermore, the

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<sup>52</sup>See e.g., Bell Atlantic at 5.

term 'pole attachment' includes any attachment by a 'provider of telecommunications service,' not just telecommunications carriers as defined in Section 224.<sup>53</sup> More importantly, incumbent LECs 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. Counting attachments only affects regulated pole attachment rates. Consequently, since the pole owners are already recovering most of their non-usable costs from the incumbent LEC (or electric) company, incumbent LEC requests to exclude their attachments from the attachment count, would actually impose an excessive allocation of non-usable costs to their competitors.

#### IV. Rights of Way

In its Notice, the Commission raised the issue of whether to adopt a methodology for setting rates for access to private rights of way and easements of utility companies; and if so, whether to adopt presumptive amounts regarding useable and non-usable space, and how to standardize the measurement of costs.<sup>54</sup> The Commission notes that it does not have experience setting rate principles in this area. There is strong consensus among commenting parties that the industry has limited experience in this area as well. Consequently, it is too early establish presumptive amounts.

In its Initial Comments, MCI stated that the absence of market power over private rights of way permitted just and reasonable rates to result from private negotiations between the parties. That conclusion is probably correct in most cases. However, there may arise local, circumscribed,

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<sup>53</sup>US West at 7.

<sup>54</sup>Notice at 16.

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, access to private rights of way and easements at just and reasonable rates is critical to successful entry by a local competitor. As a result, the pole owner may be able to exercise market power in these local pockets. Consequently, MCI supports proposals by AT&T 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 the incremental costs of accessing these rights of way.<sup>55</sup>

V. Conclusion

For the above-mentioned reasons, MCI encourages the Commission to adopt the MCI's recommendations discussed in these Reply Comments.

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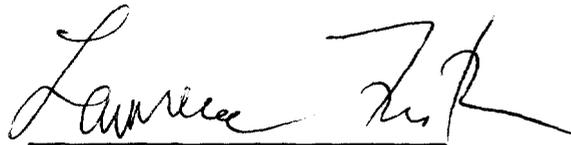
October 21, 1997

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<sup>55</sup>AT&T at 18.

**STATEMENT OF VERIFICATION**

I have read the foregoing and, to the best of my knowledge, information and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on October 21, 1997.

A handwritten signature in cursive script, appearing to read "Lawrence Fenster", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

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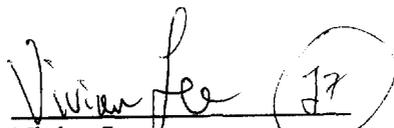
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