

overlapping facilities must do so with the pole owner's consent and the owner should have the option of charging a full attachment rate for overlapped facilities.<sup>49</sup>

Ameritech and others propose that incumbent entities should not be charged for overlapping existing facilities.<sup>50</sup> In effect, these entities are arguing that they should be able to consume pole capacity at no cost while new entrants will be required to pay an attachment fee to place their facilities on the pole. In addition, a new entrant is more likely to be placed in the position of bearing the make-ready costs for a thicker pole. Adopting Ameritech's proposal would lead to cost avoidance on the part of incumbents and cost shifting to new entrants that currently do not have attachments on a pole.<sup>51</sup>

Finally, the Electric Utilities reiterate their position that if overlapping is mandated, then the only fair solution is to give utilities the unbridled authority to allow any entity to overlap over any other entity's facilities.<sup>52</sup> Without this authority, incumbent attachers will

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<sup>49</sup> Post-2001 Comments of AEP, et al., at VII.B. It should also be noted that the incumbent attacher has the ability to avoid two attachment fees by removing facilities that are no longer being used. Because of the FCC's current policy regarding overlapping, attaching entities have no incentive to remove old attachments. This leads to the inefficient use of pole resources. In fact, as pointed out by MCI, free overlapping could actually lead to anti-competitive behavior on the part of incumbent attaching entities. Post-2001 Comments of MCI at 7. If attaching entities were required to pay for overlapped attachments, they would have an incentive to remove facilities that are not being used so as to avoid unnecessary attachment fees. See Pre-2001 Comments of AEP, et al., at Section VIII.G.

<sup>50</sup> See, e.g., Post-2001 Comments of Ameritech at 5; Post-2001 Comments of U.S. West at 10.

<sup>51</sup> Post-2001 Comments of MCI at 7.

<sup>52</sup> Post-2001 Comments of AEP, et al., at 50. As part of this authority, the FCC must also establish that the utility has no liability for anything that happens to the incumbent's facility as a result of overlapping. In light of the many claims by cable system operators that overlapped facilities are extremely light and create no

have the ability to add network capacity without concern for public safety, the pole capacity expended, the affect on other attachers, or the uninterrupted delivery of services.

**VII. Individual Utility Averages Must Be Relied On For Determining The Number Of Attaching Entities On Or In A Pole, Duct or Conduit**

The Electric Utilities proposed that the FCC allow each utility to derive the average number of attaching entities using a given type of local distribution infrastructure.<sup>53</sup> As part of this proposal, the Electric Utilities stated that each utility must be given the flexibility to determine the number of attaching entities based on geographic areas, such as by state or city, or by population centers such as urban, suburban and rural areas.<sup>54</sup> Other commenters submitted similar proposals.<sup>55</sup> Upon review of all the comments filed in this rulemaking, the Electric Utilities continue to believe that utility-determined averages will result in the most accurate determination of the average number of attaching entities.

**A. A Presumption Of A National Average Of One Attaching Entity Is An Acceptable Default To Individually Determined Averages**

Adelphia Communications proposes that the FCC adopt an industry-wide rebuttable presumption for the average number of attaching entities because allowing utilities to develop

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noticeable burden on the pole or underlying attachment, there should be no objections to the FCC's granting utilities this authority.

<sup>53</sup> Post-2001 Comments of AEP, et al., at Section V.B.

<sup>54</sup> Id.

<sup>55</sup> See, e.g., Post-2001 Comments of Ameritech at 13; Post-2001 Comments of Sprint Local Telephone Companies at 3; Post-2001 Comments of KMC at 7.

their own averages will unnecessarily lead to litigation.<sup>56</sup> The commenters believe a rebuttable industry average is fair, in that it will simplify the calculation of pole rates and will eliminate the need for utilities or the FCC to conduct costly surveys. The Electric Utilities prefer a method that would allow them to use more accurate data, however, they are willing to use a national average that is based on the actual number of attaching entities on electric utility poles. Based on best information and belief, the Electric Utilities hold that the actual average number of attaching entities on their distribution poles is one.<sup>57</sup>

**B. A National Average Derived From Projected Future Fiber Deployment Is An Unacceptable Default To Individually Determined Averages**

NCTA and Comcast support the development of a rebuttable presumption derived from projections on the number of attachments likely to be placed on poles by the year 2001 — the year in which the first rate increase under § 224(e) would become effective.<sup>58</sup>

Relying on the FCC's most-recent Fiber Deployment Update,<sup>59</sup> Comcast argues that it is reasonable to assume that poles in urban and suburban areas will support a minimum of six

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<sup>56</sup> Post-2001 Comments of Adelphia Communications, et al., at 7.

<sup>57</sup> To the extent that the FCC also adopts a national average for conduit, the actual average number of attaching entities in the Electric Utilities' conduit is somewhere close to zero. In light of this information, it would be better for the FCC to rely on the individual case basis formula proposed by the Electric Utilities for calculating conduit attachment rates. Pre-2001 Comments of AEP, et al., at Section IX.

<sup>58</sup> Post-2001 Comments of Comcast Corporation, et al., at 8; Post-2001 Comments of NCTA at 20.

<sup>59</sup> Jonathan M. Kraushar, Fiber Deployment Update End of Year 1996, Common Carrier Bureau (released Aug. 29, 1997).

attaching entities.<sup>60</sup> Comcast projects that poles in rural areas will have three attaching entities.<sup>61</sup> These projections are speculative and are based on incorrect assumptions.

Comcast and NCTA improperly include certain types of attachments when deriving their presumptive averages. More specifically, § 224 does not allow the FCC to count pole owners, ILECs, government entities with non-wire/non-telecommunications attachments, or electric utilities with conductors or core business telecommunications attachments as attaching entities when allocating the costs associated with unusable space.

Pole owners must be excluded because they already bear 1/3 of the cost of the unusable space.<sup>62</sup> As acknowledged by the FCC itself, ILEC's were excluded explicitly from the definition of "telecommunications carriers" in § 224(a)(5),<sup>63</sup> thus their attachments should not be counted for purposes of implementing § 224(e)(2).<sup>64</sup> Next, unless a government entity is acting as a telecommunications carrier or cable system operator by providing wireline telecommunications or cable services, its attachments are outside the scope of § 224.<sup>65</sup> Electric utility conductors are not "attachments" under § 224(a)(4). Therefore,

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<sup>60</sup> Post-2001 Comments of Comcast Corporation, et al., at 10.

<sup>61</sup> Id.

<sup>62</sup> 47 U.S.C. § 224(e)(2); Post-2001 Comments of Ameritech at 11-12; Post-2001 Comments of GTE at 11. Contrary to GTE's bald assertion that the pole attachment rate formula should serve as a "backstop" for ILEC pole attachment rates, § 224 specifically excludes ILECs from receiving any benefit under § 224. See Post-2001 Comments of GTE at 6.

<sup>63</sup> Post-2001 NPRM ¶ 23 (citing 47 U.S.C. § 224(a)(4)-(5)).

<sup>64</sup> Id.

<sup>65</sup> Post-2001 Comments of AEP, et al., at Section V.A.3; Post-2001 Comments of ICG at 34-35.

electric utilities cannot be counted as attaching entities simply by virtue of their having conductors placed on poles.<sup>66</sup> Finally, electric utility wireline telecommunications facilities that are used to carry services that do not fit the definition of a "telecommunications service" or "cable service" must be excluded.<sup>67</sup> When each of these adjustments are made, it becomes apparent that the average number of attaching entities proposed by Comcast and NCTA are not in line with the actual average number of attaching entities that will have attachments on poles by the year 2001.

**C. The FCC Cannot Rely On Projections That Fail To Consider Pole Capacity As The Basis For Determining The Average Number Of Attachments Or Attaching Entities Possible On A Pole**

Lastly, the Electric Utilities would like to note that the proposals submitted by MCI regarding the total number of attachments possible on a pole are extraordinary. It is inconceivable that an average 37'6" pole could bear anywhere near the number of attachments projected by MCI while also accommodating the attachments required by an electric utility to provide electric service to consumers. In addition, MCI's proposal with regards to how the FCC should use the attachment projections is statutorily precluded.

First, MCI proposes that overlashing expands the number attachments possible on a pole.<sup>68</sup> It begins with the premise that each 37'6" pole can bear six non-electric attachments.<sup>69</sup> MCI goes on to say that each of these attachments can support two or three,

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<sup>66</sup> 47 U.S.C. § 224(a)(4); Post-2001 Comments of AT&T at 9. This is an assumption that is also incorrect in GTE's proposal. Post-2001 Comments of GTE at 11.

<sup>67</sup> Comments of AEP, et al., at Section V.

<sup>68</sup> Post-2001 Comments of MCI at 8.

<sup>69</sup> Id.

1" or 1½" overlashed fibers without adding stress to the pole, thus leading to twelve to eighteen possible overlashed attachments.<sup>70</sup> Since they claim attachments can be placed on both sides of a pole, it is possible for the maximum number of overlashed attachments to be doubled to 36.<sup>71</sup> The implementation of MCI's proposal would be virtually impossible based on accepted engineering standards.

Initially, MCI's proposal contains an error in that it assumes that attachments placed on both sides of a pole are treated as a single cross sectional area for purposes of wind loading. Section 251B.2 of the NESC states that wind loading applies to all lines on a pole.<sup>72</sup> Thus, MCI has underestimated the wind loading effect of its dual-side attachments.

MCI's proposal is also incorrect with regards to the amount of stress created on a pole by overlashed facilities. MCI states that the average cable can support overlashing up to 3 inches in diameter without affecting the stress on the pole.<sup>73</sup> Since MCI believes that a pole can support a similar attachment on each side of a pole, two bundled attachments would use six inches. The NESC requires that pole owners in regions such as Washington D.C. account for ice accumulation on each cable. Assuming a total of 1½ inches of ice on each bundle based on the uneven surface of the bundle, the two iced cables now consume a minimum of nine inches. When multiplied by MCI's projection of six similar pairs of attachments on a pole, the total linear distance occupied on the pole would be 54 inches.

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<sup>70</sup> Id.

<sup>71</sup> Id. at 8-9.

<sup>72</sup> 1997 NESC § 251B.2.

<sup>73</sup> Post-2001 Comments of MCI at 8.

When this number is converted to a cross sectional area for purposes of calculating transverse loading, the result is 900 square feet. Second, attachments are typically restricted to one side of the pole (usually the street side). The FCC should not mandate or authorize engineering design standards that are not acceptable to, or conflict with, approved pole owner design and attachment standards.

Wind loading is a product of cross sectional area, the shape factor of the attachments, the distance to the base of a pole and the wind pressure. Using conservative assumptions for each factor, the number of pole attachments proposed by MCI would place 79,200 ft-lb of bending-moment-stress on a pole.<sup>74</sup> The design criteria for a typical class 5 pole would allow it to support only 15,000 ft-lb at initial installation. As is evident, MCI's proposal is not possible absent wholly impractical local distribution infrastructure design modifications.<sup>75</sup>

Second, MCI proposes that the FCC use MCI's projected number of attachments as the means for allocating the costs associated with unusable space.<sup>76</sup> The FCC cannot adopt this proposal for two reasons. As discussed below, § 224(e) is written such that the costs

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<sup>74</sup> To calculate this figure, the Electric Utilities assumed a cross sectional area of 900 square feet, a shape factor of 1 for a cylindrical cable, an average attachment height of 22 feet and a wind pressure of 4 PSF. Using these figures, the calculation yields:

$$900 \times 1 \times 22\text{ft} \times \text{PSF} = 79,200 \text{ ft-lb}$$

<sup>75</sup> For example, an electric utility could accommodate MCI's projected number of attachments if it did not install any electric facilities and placed poles 37 feet apart. Working from MCI's logic, the electric utility could also "bundle" its poles at each location; 6 hypothetical poles at each location somehow connected and having a congruity supporting one another to successfully support MCI's load.

<sup>76</sup> Post-2001 Comments of MCI at 8-9, 12.

associated with unusable space must be allocated among attaching entities equally, not based on the number of attachments placed on the pole.<sup>77</sup> Furthermore, the statute is written in terms that make it clear that Congress intended that the FCC allocate unusable space costs based on actual attaching entities, not possible attachments. The FCC, therefore, is precluded from adopting MCI's proposals.

#### **VIII. Section 224(e) Does Not Allow For The Proportional Allocation Of The Costs Associated With Unusable Space**

AT&T and other parties propose that the FCC modify its unusable space formula to allow for the costs associated with this space to be allocated in proportion to the space occupied on a pole by a given attaching entity.<sup>78</sup> As stated by Adelpia Communications, the amendments to § 224 preclude the FCC from allocating the unusable space costs "among all attaching entities in the same proportion as the usable space."<sup>79</sup>

Congress was clear that the costs associated with unusable space are to be apportioned "equally among all attaching entities."<sup>80</sup> In comparison, the costs associated with usable space are allocated based on "the percentage of usable space required by each entity."<sup>81</sup> If Congress had intended that the FCC adopt AT&T's interpretation of § 224(e)(2), it would have simply created a single subsection to govern the allocation of all

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<sup>77</sup> See discussion infra Section VII.

<sup>78</sup> Post-2001 Comments of AT&T at 15; Post-2001 Comments of RCN at 3.

<sup>79</sup> Post-2001 Comments of Adelpia Communications, et al., at 6.

<sup>80</sup> 47 U.S.C. § 224(e)(2).

<sup>81</sup> 47 U.S.C. § 224(e)(3).

costs based on occupied space. Instead, as U.S. West correctly explains in much greater detail, Congress chose to differ the language in these two subsections to reflect the fact that the costs associated with unusable space would be allocated based on the number of attaching entities.<sup>82</sup> Therefore, the Electric Utilities urge the FCC to reject the proposals of AT&T and others that it incorporate occupied space into any rate formula used to allocate the costs associated with unusable space.

**IX. Unusable Conduit Space Must Be Properly Defined Prior To Allocating The Costs Associated With Such Space**

Some commenters have taken the position that unusable conduit space be limited to duct space that is unused, reserved for maintenance or municipal use, or is deteriorated.<sup>83</sup> This definition of unusable space is too narrow. Unusable conduit space must constitute everything that comprises a conduit system, other than the space in the ducts themselves.

In their comments filed in the Pre-2001 Rate Rulemaking, the Electric Utilities defined a conduit system as the combination of ducts, conduit, cement or other encasement materials, vaults, handholes, manholes and other related equipment that allow for deployment of, access to, and maintenance of wire facilities.<sup>84</sup> The electric utility industry defines "conduit" as a combination of one or more ducts, where a "duct" is a single raceway through

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<sup>82</sup> Post-2001 Comments of U.S. West at 6-10; see also Post-2001 Comments of GTE at 10; Post-2001 Comments of USTA at 11.

<sup>83</sup> See, e.g., Post-2001 Comments of Bell Atlantic at 8.

<sup>84</sup> Pre-2001 Comments of AEP, et al., at Section IX.B.2.

which conductors are placed.<sup>85</sup> The Electric Utilities' definition of a conduit system takes into account that a utility constructs an entire underground system in order to support wire conductors. This entire system is required for any entity to be able to run facilities between two points.

In order to understand why unusable conduit space must be defined to include the entire conduit system, an analogy can be drawn to poles. A section of a pole is comprised of usable space, which is further divided into the space occupied by any attaching entity. The portion of a pole that is buried below ground and up to the minimum point of attachment above ground is considered to be unusable space. The usable space on a pole does not stand alone — it requires the unusable space in order to exist. Ignoring the role played by the lower half of the pole would be akin to believing that the usable pole space floated in the air. Applying this same argument to conduit, while an attaching entity is only occupying the empty space in a conduit or duct, that empty space would be non-existent or nonfunctional were it not for the supporting infrastructure that creates, supports and protects the empty space and provides access to the space.

In light of the above, it is clear that attaching entities must be responsible for sharing in the costs of the entire conduit infrastructure and not just the cost of the PVC pipe that encircles the empty space through which facilities are pulled. The FCC cannot adopt any other definition without causing the utilities to be left without the ability to recover the actual costs associated with providing access to their conduit.

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<sup>85</sup> See 1997 NESC, Section 2 (defining "conduit," "duct" and "conduit system").

**X. The Electric Utilities Will Rely On Individual Rebuttals To Modify The Figure Used For The Average Height Of Their Poles**

The Electric Utilities have had an opportunity to review the comments and reply comments filed by all parties in the Pre-2001 Rate Rulemaking and the comments filed in the current rulemaking. As a result of this review, the Electric Utilities see that the majority of commenting parties believe that the average height of a pole has not increased.<sup>86</sup> The Electric Utilities, therefore, defer to the recommendation of others that the average height of a pole remain at 37'6". As advised by the same entities, the Electric Utilities will rely on their ability to rebut the pole height presumption on an individual basis.

**XI. The Electric Utilities Agree That The FCC Must Adopt Procedures That Bring Greater Certainty And Speed To The Negotiation And Finalization Of Pole Attachment Agreements**

There are two suggestions offered by commenters to improve the pole complaint to process. First, USTA and GTE proposed a procedure that would require an attaching entity to provide a utility with 30-days notice of its intent to file a pole attachment complaint.<sup>87</sup> The Notice of Intent would include a statement of the issues that are still unresolved, including proposed solutions and the attaching entity's own rate calculation and any reasons why the attaching entity believes the utility's rate calculation is incorrect.<sup>88</sup> The Electric Utilities support this proposal. In addition, the Electric Utilities propose that, to the extent that an attaching entity discloses an issue along with a proposed solution and the utility

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<sup>86</sup> See, e.g., Post-2001 Comments of GTE at 9; Post-2001 Comments of USTA at 9.

<sup>87</sup> Post-2001 Comments of GTE at 4; Post-2001 Comments of USTA at 2.

<sup>88</sup> Id.

adopts the proposed solution, the attaching entity should be precluded from later filing a complaint about the given issue.<sup>89</sup>

When a complaint is filed, USTA suggests that the attaching entity should be required to certify that all of the issues raised in the complaint were previously discussed with the pole owner, but the parties were unable to reach an agreement.<sup>90</sup> The Electric Utilities believe this to be a valuable procedure because they have been blind-sided by issues in pole complaints that they thought had been resolved to the satisfaction of the attaching entity.

The FCC's adoption of each of these proposals would encourage private negotiation and resolution of the rates, terms and conditions of pole attachment agreements. In addition, it would facilitate the most efficient use of FCC, utility and attaching entity resources by reducing the number and scope of pole complaints to those few matters that the parties are truly unable to resolve for themselves.

## **XII. Interested Third Parties Must Have Standing To Challenge The Certification Of A "Pure" Cable System Operator**

ICG proposes that utilities should have a duty to investigate claims by other attachers that a cable system operator is offering telecommunications services. A pole owner has a responsibility to allow access in a nondiscriminatory manner. It cannot place this duty of "neutrality" in jeopardy by being required to investigate or enforce claims — frivolous or

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<sup>89</sup> The attaching entity should not be allowed to request one solution and then later complain that the solution was inadequate.

<sup>90</sup> Post-2001 Comments of USTA at 2.

justified — that one attacher may assert against another attacher. Furthermore, the pole owner has no duty, by statute or otherwise, to spend its time and resources investigating such claims. If one attaching entity believes another attaching entity has misrepresented its status or has a complaint against another attacher, it may contact the other party or file a complaint with the FCC. The FCC then has the duty to investigate such claims through its pole complaint process.<sup>91</sup>

Through the complaint process, a "pure" cable company will be given the opportunity to demonstrate to the FCC and the attaching entity filing the complaint whether its certification regarding its traffic is true. Allowing attaching entities to file such complaints will ensure that all affected parties have the ability to foster the creation and maintenance of a level playing field.

### **XIII. Agreements Between Joint Pole Owners Adequately Allocate Responsibility For Responding To Attaching Entity Requests**

Omnipoint requests that the Commission find that joint pole owners — namely an electric utility and an ILEC — are individually and severally responsible under § 224 for

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<sup>91</sup> The FCC's pole attachment complaint procedures are written in terms of "complainant" and "respondent." For purposes of pole attachment complaints, § 1.1402(e) of the Commission's rules defines a "complainant" as "a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers who files a complaint." 47 CFR § 2.1402(e). The term "respondent" is defined as "a cable television system operator, a utility, or a telecommunications carrier against whom a complaint is filed." 47 CFR § 1.1402(f). By virtue of the definitions employed under the Pole Attachment Complaint Procedures, it is evident that attaching entities have the ability to file complaints against each other.

responding to attaching entity requests for attachment to jointly-owned poles.<sup>92</sup> The Electric Utilities urge the Commission to reject Omnipoint's proposal as unnecessary. When the Electric Utilities enter into joint pole ownership agreements, a clause is included that delegates to one of the parties the responsibility for handling pole attachment requests. This process is followed by the Electric Utilities because it is a simple and cost-effective means for ensuring compliance with § 224. Despite Omnipoint's claim to the contrary, the joint owner that does not have responsibility for responding to such requests will quickly and clearly inform the attaching entity of this fact so as to avoid expending resources unnecessarily. Thus, the FCC does not need to interfere with the ability of pole owners to contract between themselves in order to address the abuses of a few joint pole owners. Instead, attaching entities can seek relief via the pole attachment complaint procedures.

#### **XIV. The Concept Of "Nondiscriminatory Rates, Terms And Conditions" Does Not Require That Rates, Terms and Conditions Be Identical Among Attaching Entities**

KMC states that utilities are entering into agreements with attaching entities that involve rates, terms and conditions that differ from those applied to other attaching entities and that such differences violate Congress's requirement that rates, terms and conditions be nondiscriminatory.<sup>93</sup> As a result, KMC urges the FCC to require utilities to establish uniform rates, terms and conditions for access and attachment to poles, ducts, conduit and

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<sup>92</sup> Post-2001 Comments of Omnipoint at 4.

<sup>93</sup> Post-2001 Comments of KMC at 4.

right-of-way.<sup>94</sup> KMC has misconstrued the term "nondiscriminatory" to mean that utilities must offer identical agreements to attaching entities for such access.<sup>95</sup>

Section 224(e)(1) of the 1996 Act provides for voluntary negotiations by which a utility and telecommunications carrier may negotiate and enter into a binding agreement for access to the utility's infrastructure on terms that best suit the particular circumstances of both parties. Specifically, § 224(e)(1) states that the FCC will prescribe regulations:

to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges.<sup>96</sup>

Clearly, Congress intended for utilities and telecommunications carriers to voluntarily enter into binding agreements that reflect the specific needs of both parties.

The Conference Report explaining the 1996 Act amendments to the Pole Attachments Act further supports the explicit statutory language where it states that Congress added § 224(e)(1) to allow parties to negotiate the rates, terms and conditions for attaching to poles,

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<sup>94</sup> Id.

<sup>95</sup> See Local Competition Comments of AEP, et al., at Section I (filed May 20, 1996); Local Competition Reply Comments of AEP, et al., at Section I (filed June 3, 1996); Local Competition Petition for Reconsideration of AEP, et al., at Section IV.A (filed Sept. 30, 1996). In a matter still pending on reconsideration before the Commission, the Electric Utilities have argued that "nondiscriminatory access" does not create a right of access. Utilities have the ability to freely contract with attaching entities and any governmental impedance of this ability could lead to an unconstitutional taking. This same argument applies to governmental mandates that eliminate the ability for a utility to negotiate rates, terms and conditions for access that reflect the unique characteristics of the transaction. The Electric Utilities request that their comments and reply comments filed in the Local Competition proceeding be incorporated by reference into this rulemaking. The Petition for Reconsideration of AEP, et al., was incorporated by reference in the Electric Utilities' Post-2001 Comments.

<sup>96</sup> 47 U.S.C. § 224(e)(1).

ducts, conduit and rights-of-way.<sup>97</sup> If the FCC were to require that the rates, terms and conditions for attachments must be identical for any attaching entity, there would be no need for negotiations and the terms included in § 224(e)(1) would be meaningless.

The concept of negotiated, individualized agreements also comports with the overarching policies behind the 1996 Act. The 1996 Act was "intended to provide for a pro-competitive, deregulatory national policy framework" whereby the market forces in the telecommunications industry would serve as the primary regulator.<sup>98</sup>

The rules of statutory construction require that an agency adopt a construction that gives effect to the statute as a whole.<sup>99</sup> A construction that renders meaningless one or more provisions of a statute must be avoided because agencies must not look solely at a particular clause, but must take into account the entire statute, as well as its underlying objectives and overarching policies.<sup>100</sup>

While similarly situated attaching entities must be treated consistently, Congress's modification to § 224 is an acknowledgment that each utility, attachment configuration and attaching entity is unique. Furthermore, because the needs of attachers may differ, it is simply impractical to attempt to impose an overly formulaic approach to developing agreements. As a result, the agreement that is reached between a utility and an attaching

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<sup>97</sup> HR Conf. Rep. No. 458, 104th Cong., 2d Sess. 207 (1996).

<sup>98</sup> Id. at 113.

<sup>99</sup> United States v. PUC of District of Columbia, 151 F.2d 609, 613 (1945).

<sup>100</sup> Stafford v. Briggs, 444 U.S. 527, 535 (1980) (quoting Brown v. Duchesne, 60 U.S. (19 How.) 183, 194 (1857)).

entity may vary in some ways from other agreements. Therefore, the FCC must reject KMC's proposal that the rates, terms and conditions for pole attachments must be identical.

The FCC must also reject ICG's request that it interpret the term "good faith" to require utilities to include most favored nation clauses in their contracts.<sup>101</sup> The U.S. Court of Appeals for the Eighth Circuit has found that FCC-mandated use of most favored nation clauses violates Congress's intent that parties be free to negotiate agreements because one party is given the unilateral ability to subsequently modify an existing agreement.<sup>102</sup> The court also stated that most favored nation treatment impedes the ability of later parties to enter into agreements that reflect their unique circumstances.<sup>103</sup> Most favored nation treatment improperly leads to agreements that are all the same, even when the attributes of the parties and the characteristics of the attachment arrangement differ. As § 224 requires that parties negotiate pole attachment agreements, the FCC would violate the Eighth Circuit's instruction if it required the use of most favored nation clauses in such agreements.

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<sup>101</sup> Post-2001 Comments of ICG at 16.

<sup>102</sup> In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 11 FCC Rcd 15,499 (released Aug. 8, 1996), 61 Fed. Reg. 45,476 (1996), rev'd in part sub nom., Iowa Utilities Board v. FCC, No. 96-3321 and consolidated cases, 1997 U.S. App. LEXIS 18183 (8th Cir. July 18, 1997) (the "Local Competition Order").

<sup>103</sup> Id.

**XV. Formulaic Rate Regulation Of Utility Rights-Of-Way Is Impractical And Unworkable**

**A. If The FCC Adopts A Case-By-Case Approach To Rate Regulation, Such Approach Should Be Based On Fair Market Negotiations**

The vast majority of commenters in this proceeding agree that the Commission should refrain from any sort of formulaic rate regulation of utility right-of-way.<sup>104</sup> Most commenters argued that because the rights-of-way that utilities own or control vary tremendously depending upon state law and the characteristics of the land, FCC regulation would be impractical, if not impossible.<sup>105</sup> Accordingly, many commenters believe that the Commission should adopt a case-by-case approach to regulation of right-of-way.

If the Commission does adopt a case-by-case approach to regulation in this area, the Electric Utilities emphasize that any compensation for distribution right-of-way owned by the utility should be calculated on the fair market value of the land based on negotiations between the parties.<sup>106</sup> If negotiations between the parties fail, the compensation should be

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<sup>104</sup> Post-2001 Comments of Ameritech at 15; Post-2001 Comments of Bell Atlantic at 9-10; Post-2001 Comments of Comcast Corporation, et al., at 26; Post-2001 Comments of Duquesne Power & Light at 52; Post-2001 Comments of EEI/UTC Comments at 30; Post-2001 Comments of Electric Utilities Coalition at 16; Post-2001 Comments of GTE at 14; Post-2001 Comments of MCI at 22; Post-2001 Comments of NCTA at 27; Post-2001 Comments of Ohio Edison Company at 50; Post-2001 Comments of SBC Communications at 34-35; Post-2001 Comments of Union Electric Company at 46; Post-2001 Comments of USTA at 14; Post-2001 Comments of U.S. West at 11-12.

<sup>105</sup> See, e.g., Post-2001 Comments of Ameritech at 15; Post-2001 Comments of U.S. West at 11-12. Many commenters further recognized that because right-of-way is so physically and contractually distinctive, the statutory notions of usable and non-usable space are meaningless when applied to such right-of-way.

<sup>106</sup> As discussed in Section XIV.C infra, NCTA's suggestion that the Commission adopt "guidelines" that may be used in a case-by-case approach is beyond the scope of this proceeding because it largely raises access issues that are the subject of a separate

determined in the same manner as the eminent domain compensation standard used in the particular state.<sup>107</sup> Adopting a principle of free negotiation or an eminent domain compensation methodology is the only way to deal with the huge diversity of site conditions, value, and local and state laws.

**B. Commenters Universally Acknowledge Very Little Demand For Access To Rights-Of-Way**

Moreover, many commenters emphasized that they have had few requests for access to right-of-way and, as such, have very little experience to offer the FCC with regards to how to regulate in this area.<sup>108</sup> This is true largely because only a minority of a utility's distribution facilities are on rights-of-way owned or controlled by the utility. Much of a utility's distribution poles and wires are on public road rights-of-way. In this regard, MCI recognized that utilities are not in a position to exercise market power over rights-of-way

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and distinct rulemaking. Nonetheless, NCTA's suggestion that the utilities are merely "public trustees" of right-of-way fails: (1) to distinguish between public rights-of-way (including platted, dedicated utility easements) and private utility rights-of-way; (2) to recognize that the terms and conditions of an easement between the private land owner and the utility control compensation and access issues; and (3) to recognize the fundamental distinctions between allowing access to a pole or conduit and allowing access to right-of-way.

<sup>107</sup> The FCC should follow the established approach used by the railroads when charging cable or telecommunications companies for use of railroad rights-of-way. This approach considers standard appraisal methodology in determining the fair market value of the land, including across the fence values and assemblage value. Indeed, contrary to NCTA's assertion, the compensation scheme for the railroad right-of-way illustrates that just because the right-of-way has been assembled for an arguably "public purpose" does not mean that such right-of-way is held in "public trust." Rather, the right of access to such right-of-way is determined by the fair market value for the land.

<sup>108</sup> See, e.g., Post-2001 Comments of Ameritech at 15; Post-2001 Comments of EEI/UTC at 30.

and, therefore, concluded that the FCC should not adopt a generally applicable rate methodology.<sup>109</sup>

The 1996 Amendments to Communications Act were premised on the notion that a deregulated, competitive telecommunications market results in efficiency and innovation and produces the greatest benefits for the American public. Adhering to these principles, the Commission should regulate only where such regulation is necessary to remedy quantifiable market imbalance. Because the comments in this proceeding overwhelmingly establish that rate regulation of utility right-of-way is unnecessary, the Commission should refrain from pursuing any other inquiry into rate regulation of utility right-of-way at this time.

**C. The Commission Should Refrain From Addressing Access To Rights-Of-Way Issues In This Proceeding**

Some commenters use the Commission's invitation to comment on the appropriateness of a right-of-way rate formula to re-argue positions taken in the Local Competition proceeding on access issues.<sup>110</sup> Because these issues are the subject of a pending petition for reconsideration, the Commission should not address such access issues in this proceeding. If the Commission does choose to address such issues in this proceeding, the Electric Utilities respectfully request that it proceed consistent with the positions advanced by the Electric Utilities in their petition for reconsideration of the Local Competition proceeding.<sup>111</sup>

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<sup>109</sup> See Post-2001 Comments of MCI at 22.

<sup>110</sup> See Post-2001 Comments of MCI at 22; Post-2001 Comments of NCTA at 27-28; Post-2001 Comments of Comcast Corporation, et al., at 23-26.

<sup>111</sup> See Post-2001 Comments of AEP, et al., Attachment 3.

#### **D. Building Rooftops Are Not Rights-Of-Way Under § 224**

A few commenters argued that the Commission should interpret the rights-of-way provision to include the siting of wireless facilities on building rooftops leased by utilities, and apply a "simplified" rate methodology to such access.<sup>112</sup> The Electric Utilities argued in their Petition for Reconsideration of the Local Competition Order that the Commission does not have the statutory authority to regulate the rates, terms and conditions for the attachment of wireless equipment to electric utility property.<sup>113</sup> Accordingly, until the Commission resolves the issues raised in the Local Competition proceeding, the Electric Utilities respectfully urge that this rulemaking only address rates for wireline attachment to utility distribution poles, ducts, conduit and rights-of-way. As such, comments addressing the siting of wireless equipment on building rooftops are beyond the scope of this rulemaking.

Assuming arguendo that the Commission has jurisdiction to regulate wireless attachments, building rooftops simply are not covered by § 224. No reasonable definition of right-of-way could possibly include building rooftops. Rights-of-way used by most electric utilities are land rights acquired for the use of linear electrical utility facilities. Indeed, Teligent seems to concede this point, but nonetheless argues for the application of § 224 to rooftops where the utilities have a "right of access." Because any interpretation of right-of-

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<sup>112</sup> See Teligent's Comments at 2; WinStar Comments at 5.

<sup>113</sup> See American Electric Power Service Company, et al.'s Petition for Reconsideration and/or Clarification of the Local Competition Order, at 26 (filed Sept. 30, 1996).

way under § 224 which includes building rooftops is contrary to the plain meaning of the statute, the Commission must reject these comments.<sup>114</sup>

In addition, § 224 only applies to rights-of-way owned or controlled by utilities. Teligent admits that local governments and individual building owners are the parties denying access to the facilities. Nonetheless, it believes that utilities should assist telecommunications carriers in gaining access to building rooftops. Because building rooftops are not "owned" or "controlled" by the utilities, the Commission must, by statute, reject this suggestion.

Some commenters further argue that rights-of-way are "essential facilities."<sup>115</sup> According to these commenters, because "local governments and individual building owners" refuse to admit the wireless facilities of carriers seeking to enter the local exchange market, building rooftops used by utilities are essential facilities and, as such, should be regulated under § 224.<sup>116</sup> This argument fails for several reasons. First, it does not identify the relevant market for purposes of the analysis. Second, it fails to consider the multitude of alternatives available to parties seeking to site wireless equipment.<sup>117</sup> For example, Hicks, Muse, Tate and Furst recently disclosed its plan to build a \$1 billion communications tower

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<sup>114</sup> Equally important, § 224 requires that any facilities regulated by the Commission already be used for wire communications. This is an essential nexus for federal jurisdiction.

<sup>115</sup> See Post-2001 Comments of Teligent at 2; Post-2001 Comments of WinStar at 5.

<sup>116</sup> See Post-2001 Comments of Teligent at 4.

<sup>117</sup> See Pre-2001 Rate Rulemaking Comments of AEP, et al., ¶¶ 64-68.

business.<sup>118</sup> Third, it fails to recognize the fundamental distinction between electric and telecommunications utilities for purposes of antitrust analysis. Accordingly, any effort to justify expansive federal regulation of electric utility property based on the notion that rooftops are essential facilities must fail.

Finally, even though Teligent and WinStar recognize that the statutory formulas do not lend themselves to rate regulation in the right-of-way context,<sup>119</sup> they nonetheless argue that the Commission should adopt a "simplified" formula for rate regulation of right-of-way. Because this position has been uniformly rejected by the vast majority of commenters, the Commission should dismiss their proposal. Accordingly, the Commission should dismiss Teligent's and WinStar's arguments as beyond the scope of this proceeding.

## **XVI. Conclusion**

The 1996 Act effected the most sweeping change in this Nation's telecommunications laws in sixty years. The change is premised on the notion that a deregulated, competitive market results in efficiency and innovation and produces the greatest benefits for the American public. The Electric Utilities urge the Commission to adopt such a deregulated, competitive approach with respect to the rates charged for attachments to poles, ducts, conduit and rights-of-way. Where regulation is needed, that regulation should be minimal and designed to achieve a specific goal.

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<sup>118</sup> Hicks, Muse to Invest \$1 Billion in Communications Tower Business, *Comm Daily* (Sept. 10, 1997) ("We intend to be the leading owner and operator of transmission towers in the country within a short period of time.").

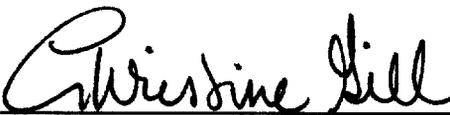
<sup>119</sup> See Teligent Comments at 2.

The Electric Utilities suggest that the recommendations presented in these reply comments are consistent with the overall deregulation and pro-competition themes of the 1996 Act. They urge the Commission to adopt a regulatory scheme, and specific regulations where necessary, consistent with their proposals.

WHEREFORE, THE PREMISES CONSIDERED, the Electric Utilities respectfully request that the Commission act upon the pole, duct, conduit and right-of-way attachment rate issues raised in this rulemaking in a manner consistent with the views expressed herein.

Respectfully submitted,

**AMERICAN ELECTRIC POWER SERVICE  
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DUKE ENERGY CORPORATION  
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October 21, 1997

**CERTIFICATE OF SERVICE**

I, hereby, certify that on this 21st day of October, 1997, I caused true and correct copies of the COMMENTS OF AMERICAN ELECTRIC POWER SERVICE CORPORATION, ET AL. to be served via hand delivery on:

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