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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OCT 21 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 703(e)
of the Telecommunications Act
of 1996)

Amendment of Commission's Rules
and Policies Governing Pole
Attachments)

CS Docket No. 97-151

REPLY COMMENTS OF AT&T CORP.

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SUMMARY

The comments submitted in this proceeding demonstrate the continuing need for the Commission to ensure that telecommunications carriers have access to poles, ducts, conduit, and rights-of-way at just and reasonable rates. Owners have proposed radical changes in the Commission's existing rules that would severely constrain the parties that qualify for the protections of Section 224 when, in fact, Congress sought to achieve the opposite result by expanding the definition of an attacher in the Telecommunications Act of 1996. They also urge the Commission to adopt untenable positions such as the classification of usable conduit space as unusable simply because no one is currently occupying that space. Moreover, they continue to complain about the "fairness" of the rates that owners can assess under the new rate formula even though these new rates may significantly exceed rates under the current pole attachment formula.

AT&T demonstrates in Section I that commenters generally support space-conserving practices such as overlashing and the third party use of an existing attacher's excess capacity. These practices should not be restricted through unnecessary procedural requirements. Nor should they result in additional charges -- as almost every party admits, overlashing and the use of dark fiber do not use additional space.

In Section II, AT&T shows that the Commission should adopt its proposal to count incumbent LECs, utilities providing telecommunications services, government agencies, and cable operators as attachers for the purpose of apportioning unusable space costs. As many commenters demonstrate, these classifications are consistent with the legislative history of the Telecommunications Act and the language of Section 224. Further, the Commission should adopt

a rebuttable presumption that there are three attachers in rural areas and six attachers in urban areas.

In Section III, AT&T shows that there is widespread support for the Commission's unusable space proposal with respect to poles. A number of commenters, however, agree that the Commission should modify the formula to replace "Number of Attachers" with "Attacher of Record for Each Foot of Space." This change will ensure that attachers bear pole costs in proportion to the amount of space that they occupy.

Section IV demonstrates that no conduit space should be classified as unusable because maintenance ducts are usable and are in fact used. Most conduit owners' proposals regarding unusable space, by contrast -- including proposals to classify almost all conduit space as unusable -- clearly would have the anticompetitive effect of unnecessarily raising conduit occupancy rates.

AT&T illustrates in Section V the nearly unanimous support for a case-by-case approach to rights-of-way. It is critical, however, that owners abide by the principles adopted in the Local Competition Order and that the Commission adopt an expansive interpretation of rights-of-way in resolving any complaints.

Finally, as shown in Section VI, many commenters support the Commission's existing presumptions regarding usable space, pole height, and safety space as well as the Commission's use of net book instead of gross book costs. In addition, the Commission should not permit pole owners to discriminate between different types of attachments, including wireless attachments.

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_____)

REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's Notice of Proposed Rulemaking,¹ AT&T Corp. ("AT&T") hereby submits its reply comments with respect to the designated issues concerning rates for attachment to poles, ducts, conduits, and rights-of-way.

INTRODUCTORY STATEMENT

As in Docket No. 97-98,² the comments submitted by pole, duct, conduit, and right-of-way owners demonstrate the continuing need for Commission oversight to ensure that providers

¹ 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, Notice of Proposed Rulemaking (released August 12, 1997) ("NPRM").

² Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, Notice of Proposed Rulemaking (released March 14, 1997) ("Interim Proceeding"). Comments submitted by various parties in Docket No. 97-98 will be appropriately identified, e.g., AT&T 97-98 Reply Comments.

of telecommunications services have nondiscriminatory access to these facilities at just and reasonable rates. As one commenter notes, such access "is critical for telecommunications providers to rapidly deploy competing telecommunications networks that serve the American public." Omnipoint at 1. Yet, owners continue to assert untenable positions that would have the Commission withhold the protections that Congress granted in the Pole Attachment Act and expanded in the Telecommunications Act of 1996 ("1996 Act").

SBC (at 6), for example, maintains that the Commission should simply refuse to rule whether a utility is required to allow access for "non-standard" attachments -- which, to SBC, apparently includes even industry standard overlashed cables -- and instead should make such decisions "on a case-by-case basis." But if attachers are forced to petition the Commission each time that a pole owner denies access on the asserted ground that an attachment is "non-standard," facilities-based competition may be significantly retarded. In this regard, utilities' claims that overlashing might somehow "damage" poles are plainly makeweights, as demonstrated by the fact that these utilities fail to document any such problem and instead ask the Commission to adopt their anticompetitive position solely on the basis of electric utility "lore." Electric Utilities II at 8.

Other owners urge crabbed interpretations of "telecommunications carrier," "telecommunications service," and "pole attachment" that would place wireless attachments, attachments that carry dark fiber and other purported "non-standard" attachments beyond the scope of § 224 altogether, leaving attachers entirely at the mercy of monopoly structure owners. See, e.g., Electric Utilities I at 11; TUEC at 5. The Commission has repeatedly and consistently rejected such attempts to discriminate between attachments types and among the services provided by attachers, and it should reaffirm those holdings here.

Certain electric utilities, seeking to maximize the burden on attachers, urge the Commission to classify almost every molecule in a conduit system as unusable space, two-thirds of which would then be assigned to attachers. See, e.g., Electric Utilities I at 53 (unusable space includes “everything from the manhole cover, down into the underground space occupied by the ducts, and all the cement and other stabilizing and reinforcing materials keeping the ducts in place and intact”). Not to be outdone, Bell Atlantic would have the Commission define unusable space to include any duct not currently being used. See Bell Atlantic at 8. The sheer absurdity of these arguments is demonstrated by applying the utilities’ unusable space “logic” to poles: every part of a pole and its support structure would be deemed “unusable” except for the few square inches of pole surface where attachments currently exist. In fact, as AT&T and other commenters have demonstrated, no conduit space should be classified as “other than usable space.”

Electric utilities also continue to press their flawed claims that the Commission must change its current presumptions regarding pole height, usable space, the treatment of safety space, or the presumptive amount of space occupied by an attachment. The utilities fail to provide any new evidence or arguments in support of these claims, and AT&T refers the Commission to the comments in Docket No. 97-98, where each such claim has been extensively and completely refuted. In this regard, the utilities’ claim here that their positions must be accepted to ensure “fair” compensation is particularly baseless -- the Supreme Court has already upheld the Commission’s existing approach against such constitutional challenges (see FCC v. Florida Power Corp., 480 U.S. 245, 253 (1987)), and all agree that the new statutory scheme likely will significantly inflate rates above current levels. See AT&T at 3-4.

Owners also seek to evade Commission oversight by denying telecommunications providers access to the Commission's established complaint process and other procedural mechanisms in favor of protracted "negotiations." But, as one facilities-based competitor points out, "time to market is critical, as a telecommunications carrier's request to a utility for a pole attachment agreement is often prompted by the need to construct facilities to serve a particular customer." ICG at 11. Thus, any delay in commencing the complaint process would raise significant barriers to entry. Indeed, the need for quick resolutions in competitive and potentially competitive markets is yet another reason why the Commission should reject the owners' attempts to limit this proceeding and should definitively rule with respect to overlashing, wireless attachments and other attachment practices: "[c]arriers are commonly faced with the choice of agreeing to a utility's proposed rate in order to obtain an agreement in time to serve the customer or filing an access or rate complaint with the Commission that stands little chance of being resolved before service to the customer must commence." Id.

In short, the owners' comments confirm the Commission's conclusion in the Notice that it must continue to protect entrants from utilities' ongoing anticompetitive practices. Further, the comments of attachers and, in some cases owners as well, provide ample record support for most of the Commission's proposals to modify its rules to do so. For example, the comments confirm that there is no legitimate basis for any owner to restrict overlashing, third party access to existing excess capacity or other efficient practices or to assess additional "attachment" charges when additional use is made of attachment space for which the owner has already been fully compensated. Commenters also largely support the Commission's proposal to count as attachers cable companies, incumbent LECs, government agencies, and utilities providing

telecommunications services when apportioning the costs of unusable space. Support for the Commission's proposed unusable pole space formula is almost unanimous. And there is widespread agreement that rights-of-way complaints should be handled on a case-by-case basis in accordance with certain fundamental principles, most importantly that rates must reflect costs.

I. POLE OWNERS SHOULD NOT BE PERMITTED TO RESTRICT OR CHARGE FOR OVERLASHING AND OTHER EFFICIENT, SPACE-CONSERVING PRACTICES.

In its Notice, the Commission recognized the benefits of overlashing new cables to existing cables and of the sharing of existing excess capacity. NPRM ¶ 14. The comments affirm both the efficiency of these practices and the Commission's conclusion that overlashers and lessees of dark fiber and other excess capacity should not pay pole owners additional attachment charges for additional use of space that is already paid for by the existing attacher.³

A few pole owners do contend that overlashers should pay a separate fee.⁴ They make three arguments: (i) absent additional charges overlashers would avoid their fair share of pole

³ See, e.g., US WEST at 10 ("Overlashing is a reasonable practice when done in accordance with engineering and safety standards."); Adelphia at 2, 6; KMC at 8; Bell Atlantic at 3 ("the attaching entity does have an ownership interest in its own fiber facilities and should not require the consent of the pole or conduit owner before subleasing its dark fiber to third parties"); Electric Utilities I at 43-44; NCTA at 8; ICG at 17-19; Comcast at 12-13; Dusquesne at 29; KMC at 8; SBC at 12-13; GTE at 7-8; Electric Utilities II at 6; Comcast at 5 (an attacher's own overlashed cables should not receive an additional charge); USTA at 7-8; CTTANY at 7; NCTA at 18 ("The Commission has long held that separate strand facilities that occupy an additional one-foot of space should be counted as an additional attachment.") (citing Texas Cablevision Co. v. Southwestern Electric Power Co., PA-84-0007, Mimeo No. 2747 (February 26, 1985), review denied, PA-84-0007, Mimeo No. 36108 (August 22, 1985)).

⁴ No commenter advocated charging an additional fee to lessees of an attacher's existing dark fiber.

costs,⁵ (ii) attachers do not have the right to allow others to use their leased pole space,⁶ and (iii) overlashing increases the “burden” on the pole.⁷ None has merit. The first argument ignores that “[b]ecause overlashed facilities do not require any space on a pole in addition to the space taken by the existing attachment, no additional fee should be assessed.” Bell Atlantic at 5. The existing attacher has already paid for the space occupied on the pole as well as for unusable space costs. Further, if the overlasher is a third party, the overlasher will be paying its “fair” share by paying the existing attacher for the right to use part of the space for which the existing attacher has already fully compensated the pole owner.

With respect to attachers’ rights to “sublease” space, the utilities’ attempts to draw analogies to the renting of hotel rooms or apartments⁸ are clearly misplaced. Room rental agreements provide for a specific use and sometimes a specific number of people. Under the Commission’s longstanding rules and precedents, however, attachers pay for the right to use pole space in whatever manner they choose so long as it conforms with accepted engineering practices. The rate does not depend on the type of attachment, the service carried on the attachment, or the size of the attachment, and a cable with another cable overlashed is just a “type” of attachment.

⁵ See, e.g., Union Electric at 38, Electric Utilities III at 8-9.

⁶ See, e.g., Electric Utilities II at 10.

⁷ See, e.g., Duquesne at 36.

⁸ See Electric Utilities II at 10.

And there is virtually no support for setting rates based on the “burden” the attachment places on the pole.⁹ As AT&T and others demonstrated, the premise that overlashed cables place significant additional burdens on poles is simply not true. Further, any finding that the incremental burden of an overlashed cable justifies assessing overlashers additional charges would, by definition, require a corresponding finding that electric utilities and many incumbent LECs should pay or be allocated much higher charges for the much larger and heavier cables they have traditionally deployed.

A few commenters oppose overlashing altogether¹⁰ or propose unnecessary procedural hurdles,¹¹ but they have failed to identify any problems that cannot be addressed simply by requiring overlashers to notify the pole owner of their presence. Indeed, none of the comments contains a single concrete example of a problem unique to overlashing. Rather, a group of electric utilities from around the country simply alleges that “[u]tility lore is rife with anecdotal evidence of poles being damaged. . . [by] overlashing.” (emphasis added). Anecdotes and lore, no matter how tall the tales may be, cannot overcome the fact that overlashing has become a widespread practice because of its efficient use of pole space.

⁹ See NCTA at 15 (“Neither weight nor windloading have a place in usable space calculations”); Ameritech at 9; USTA at 9 (“these costs are reflected in the carrying charge components”); CTTANY at 6; GTE at 9; SBC at 15.

¹⁰ See, e.g., TUEC at 7; Ameritech at 2, 5-7. At the same time, Ameritech takes a very different position elsewhere in its comments: “[u]tilities must permit any proposed attachment that does not prohibit safety, reliability or engineering principles.” *Id.* at 10.

¹¹ See, e.g., Bell Atlantic at 2 (“First, the pole owner must be given advance notice of, and specifications for, the overlashing in order to evaluate the safety considerations, consent to the overlashing, and determine what ‘make ready’ work is required . . . Second, where a third party seeks to overlash to an existing attacher’s facility, the existing attacher must consent to the overlashing. Third, a third party overlasher must enter into a license agreement directly with the pole owner.”)

The various procedural hurdles to overlashing urged by some pole owners are also unnecessary and anticompetitive. Comcast (at 4) correctly observes that “[t]he issue . . . is not whether overlashing presents an engineering threat to pole plant, but whether onerous utility permitting procedures present a competitive threat to deployment of independently-owned facilities.”¹² Utilities have attempted to justify these requirements on the grounds that they must ensure safety and know the identity of an overlasher in cases of emergency or when attachments must be transferred to another pole.¹³ If the overlasher simply provides the pole owner notice, however, the same objectives will be accomplished. The identity of the overlasher will be known and, if the pole owner has reason to believe that the marginal impact the overlashed cable has on the pole poses a threat, it can take appropriate action. Such occurrences should be very rare given that an overlashed cable, which typically weighs much less and is much smaller than a traditional attachment, will virtually never transform a safe pole into an unsafe one. The only conditions imposed on overlashing should be industry-accepted engineering practices, including those set forth in the National Electric Safety Code (“NESC”).¹⁴

¹² See also CTTANY at 4 (such procedures should be viewed “with great skepticism”); NCTA at 7 (“In recent years, pole owners have sought to frustrate the deployment of fiber optics by cable systems through the imposition of severe and pretextual engineering review procedures.”); Comcast at 4.

¹³ See, e.g., Bell Atlantic at 2.

¹⁴ NCTA at 10.

II. ATTACHMENTS BY CABLE COMPANIES, INCUMBENT LECS, UTILITIES PROVIDING TELECOMMUNICATIONS SERVICES, AND GOVERNMENT AGENCIES SHOULD ALL BE CONSIDERED IN APPORTIONING THE COSTS OF UNUSABLE SPACE.

The comments evince widespread support for the Commission's proposal to count as attachers for purposes of apportioning unusable space costs: cable operators, incumbent LECs, utilities providing telecommunications services, and government agencies. NPRM ¶¶ 22-24.¹⁵ Counting all of these parties is necessary to minimize overrecovery and is supported by the 1996 Act's text, structure, purposes and history.¹⁶

Cable operators. Many commenters, including cable operators, support the Commission's tentative conclusion that cable operators should be counted in apportioning the costs of unusable space.¹⁷ As AT&T (at 11-12) demonstrated, excluding cable operators would produce absurd results, possibly allowing the incumbent LEC pole owner to bear as little as 25% of unusable space costs in direct contravention of § 224(e)(2) which requires the incumbent LEC to bear one-third of these costs.

NCTA (at 24), however, attempts to evade the requirements of § 224 by arguing that "[p]oles should be presumed to be used for telecommunications in proportion to the number of

¹⁵ See, e.g., Electric Utilities I at 40 (telecommunications carriers and cable companies); KMC at 6; Adelphia at 5-7; Ameritech at 4-5 ("Every other facility of a cable television system or telecommunications carrier providing services other than, or in addition to, 'cable services' as defined in Section 602(6) of the Act should be treated as a telecommunications service subject to the attachment rates under Section 224(e) for the purposes of Section 224.")

¹⁶ See AT&T at 10-14.

¹⁷ See UTC at SBC at 19; ICG at 32-33; AT&T at 11-12. The Electric Utilities I (at 21) even recommend that the Commission establish a presumption that cable operators are telecommunications carriers.

subscribers in a system who subscribe to telecommunications services over the cable system.”¹⁸ Such a rule would be entirely inconsistent with the way that other telecommunications services provider attachers are treated. A cable operator should not be allowed to provide telecommunications services and incur lower pole costs in serving its customer as NCTA’s proposal might allow. Once they begin offering telecommunications services, they should lose their “grandfathered” status with respect to all poles, ducts, conduits, and rights-of-way to which they attach, and should incur the same charges as their competitors. Any other result would be flatly discriminatory and anticompetitive.

Incumbent local exchange carriers. There is also widespread support for the Commission’s proposal to count incumbent LECs as attaching entities.¹⁹ Like other attachers, incumbent LECs “have separate agreements with electric utilities under which they pay for their attachments.” Duquesne at 41. Clearly then, incumbent LECs are utilities providing telecommunications services. To the extent incumbent LECs are not counted as attaching entities for purposes of apportioning unusable space costs, other attachers would bear more than their fair share of total pole costs.

SBC (at 22) asserts that counting incumbent LECs as attachers is inconsistent with the Act’s legislative history. SBC, however, is mischaracterizing § 224. The definition of “telecommunication carriers” provided in § 224(a) is designed to prevent incumbent LECs from asserting the rights the 1996 Act extended to other telecommunications carriers and the Pole

¹⁸ See also Comcast at 17.

¹⁹ ICG at 44 (“The Commission correctly proposes to count an incumbent LEC as an attaching entity when apportioning the cost of unusable space.”); Comcast at 6; Duquesne at 41; Ohio Edison at 39; Electric Utilities II at 5

Attachment Act had already provided for cable operators. Sections 224(e)(2) and (3), by contrast, specifically refer to attaching “entities” not “telecommunications carriers” or “cable operators.” An incumbent LEC that has placed its wireline or wireless facilities on a utility pole is unquestionably an “entity” that has attached its facilities to that structure. Congress did not intend to have the Commission blindly ignore their presence on poles when apportioning unusable space costs.²⁰ Further, the imputation requirement of § 224(g) indicates that Congress intended incumbent LECs to be treated like other attachers with respect to cost allocation. AT&T at 12-13. In sum, including incumbent LECs as attachers for the purpose of apportioning unusable space costs is consistent with Congress’ intent and produces a more equitable allocation of total pole costs.

Utilities providing telecommunications services. There is almost no dispute that utilities providing telecommunications services should be counted as attachers. “This proposal is a straight application of the statute and should be incorporated in the Commission’s rules.” NCTA at 17. Even the electric utilities acknowledge that they are attachers when they provide telecommunications services.²¹ The only contested issues are how to treat (i) electric utilities that

²⁰ See also NCTA at 18 (“The Act’s exclusion of ILECs from the definition of ‘telecommunications carrier’ was for the purpose of leaving utility/ILEC joint use agreements to private contract. That is why the exclusion applies to ‘telecommunications carriers’ which would otherwise be subject to the rate formula of Section 224(e), and why that formula speaks to an allocation among ‘entities,’ rather than among ‘telecommunications carriers.’”).

²¹ See generally Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange, Carriers and Commercial Mobile Radio, Service Providers, CC Docket Nos. 96-98, 95-185, First Report and Order, ¶¶ 1172-1174 (released August 8, 1996) (“Local Competition Order”) (discussing electric utility attempts to only “devote a portion of their poles, ducts, conduits, and rights-of-way to wire communications without subjecting all such property to the access obligations of section 224(f)(1)”).

use attached fiber optic cables to self-provide telecommunications services, and (ii) electric utilities that have a subsidiary providing telecommunications services. The Electric Utilities I (at 40) believe that they should not be classified as attachers when they are only using telecommunications to serve themselves. This argument, however, simply ignores the fact that such an electric utility is a direct competitor with other service providers. Companies that would have served those electric companies may now be foreclosed from doing so if the electric utility receives preferential attachment treatment. Moreover, the Commission has specifically rejected this argument: "Although internal communications are used solely to promote the efficient distribution of electricity, the definition of 'wire communication' is broad and clearly encompasses an electric utility's internal communications." Local Competition Order ¶ 1174.

With respect to telecommunications subsidiaries, Duquesne (at 42) and Ohio Edison (at 39) believe that only the subsidiary and not the parent electric utility should be treated as an attacher. The Commission, however, should not permit utilities to avoid their § 224 obligations by placing their telecommunications operations in a separate legal entity. And, as the Commission has already recognized, § 224 encompasses "control" of poles, ducts, conduits, and rights-of-way, not just ownership of these essential facilities. Local Competition Order ¶ 1173. In light of the greatly increased attachment rates that may emerge under the Commission's proposed rules, electric utilities should not be allowed yet another strategic advantage simply by isolating their telecommunications operations in a subsidiary.

Government agencies. The Commission should also adopt its tentative conclusion that government agency attachers should be counted as attaching entities. Contrary to the claim of SBC (at 21), pole, conduit, and right-of-way owners are compensated by government agencies.

Owners obtain the rights to place their facilities in a particular area, franchise rights to provide utility or telecommunications services, and other rights that depend upon the particular circumstances. Attachers, by contrast, only obtain the right to use pole, duct, conduit, or right-of-way space that belongs to the owner. Hence, owners should bear the costs associated with these attachments. In any event, § 224 does not limit “attaching entities” to entities that pay attachment fees.

Overlashers. The Commission has tentatively concluded that overlashers should not be counted as attachers for the purpose of apportioning unusable space costs. So long as overlashers are not improperly assessed additional attachment fees, that conclusion is correct and supported by the comments in this proceeding.²² Indeed, unlike incumbent LECs, government agencies, cable operators, and utilities, overlashers do not actually attach to the pole at all, only to an existing cable. Therefore, it would be inconsistent to count them among the other attachers.

Presumptions. There are many proposals for determining rebuttable presumptions regarding the number of attachers on poles. Most of the pole owners’ proposals would give owners wide latitude in setting presumptions. These owners urge the Commission to allow them to, *inter alia*, determine whether or not to aggregate their presumptions at the state or national level, or instead provide different urban, suburban, and rural presumptions.²³ These schemes,

²² See, e.g., *Electric Utilities I* at 43; *Adelphia* at 6; *Electric Utilities II* at 6.

²³ *Bell Atlantic* at 7 (“some carriers may find it even more accurate to calculate different presumptive averages within each state for urban, suburban and rural areas. The level of granularity a pole owner deems appropriate for calculating such averages should be left to its discretion”); *Ameritech* at 13 (the presumption should be “tailor[ed] by the utilities”); *USTA* at 14 (the Commission should allow pole owners “a great deal of latitude” in defining the areas in which they will establish presumptions).

which would provide pole owners with the ability to game the system and produce the highest possible attachments rates where they face the most competition (thereby earning the owner monopoly rents and simultaneously creating a barrier to entry), should be rejected.

The better approach is the proposal of NCTA (at 20), which recognizes potential urban/rural differences but properly constrains pole owners' abilities to act on their anticompetitive incentives by "presum[ing] that poles located outside of rural areas will have attachments by six entities, and poles in rural areas will have attachments by at least three."²⁴ If the owners wish to challenge these presumptions, then they can, of course, avail themselves of the Commission's complaint process. Finally, the Commission should reject proposals like that made by SBC (at 25) to calculate the presumption by "divid[ing] the number of attaching entities on the utility's billing records by the total number of poles in the state." Such a method or any study mechanism that includes poles with no attachments will overstate costs and increase entry barriers. See AT&T at n.14-15. Therefore, if such an approach is used, the Commission should establish the presumptive number of attachments per pole by dividing the total number of attachments by the number of poles with attachments. For example, if half of the poles in an area have two attachments and half have no attachments, the Commission should establish a presumption of two attachments per pole, not one attachment per pole. If the Commission uses the lower figure, then attachers will be paying much higher rates as well as compensating the pole owner for the cost of unusable space on poles that have no attachments at all.

²⁴ See also GTE at 12 ("the appropriate presumption is three"); AT&T at 13-14 (advocating at least three attachments").

III. THERE IS NEARLY UNANIMOUS SUPPORT FOR THE COMMISSION'S UNUSABLE POLE SPACE COST ALLOCATION FORMULA.

Except for a few commenters still arguing that the Commission should simply abandon its long-standing rate methodology²⁵ -- a suggestion debunked by commenters in Docket No. 97-98²⁶ -- none of the commenters oppose the Commission's proposed formula. Some attachers and pole owners, however, properly urge the Commission to replace "Number of Attachers" with "Attacher of Record for Each Foot of Space."²⁷ The rationale for this conclusion is clear: "all attaching entities do not receive the same benefit from the unusable pole space." RCN at 3. As SBC (at 24-25) asserts, "an attaching entity that occupies two spaces on the pole should be allocated twice as much cost as an attaching entity that only occupies one space." If this approach is not used, highly inequitable and nonsensical results could be produced. For example, an attacher could occupy one foot or 7.41% of usable pole space and the incumbent LEC could have cables on 12.5 feet or 92.59% of usable pole space, and yet the attacher would pay for almost half of total pole costs.²⁸ An attacher of record for each foot of space approach also

²⁵ See, e.g., Electric Utilities I at 51-52 (advocating a replacement cost basis for conduit occupancy rates).

²⁶ See, e.g., NCTA 97-98 Comments at 7; AT&T 97-98 Reply Comments at 11-13; Tele-Communications 97-98 Reply Comments at 7-10; SBC 97-98 Reply Comments at 32-34; MCI 97-98 Reply Comments at 18-20.

²⁷ See, e.g., RCN at 4 ("RCN believes that the statutory requirement of equal apportionment among all attaching entities must be treated equally *regardless of the nature of the physical attachment installed.*") (emphasis in original); KMC at 6 (each attacher per foot should be counted); US WEST at 9 ("US WEST recommends that the Commission adopt rules requiring that the costs of nonusable. . .space be assigned among entities on the basis of the number of attachments"); accord Comcast at 7 (when an ILEC installs an additional attachment to provide video services, it should be counted as two entities).

²⁸ In this example, the attacher pays for 7.41% of usable space costs and 66.67% of unusable space costs. Usable space, in turn, accounts for 36% of total pole costs while unusable space
(. . . continued)

reduces pole owners' incentives to deploy additional cables, unnecessarily using up any remaining pole space, and thereby forcing an entrant to incur the much higher pole replacement cost that would be required before any attachment could take place.

Contrary to the claims of some pole owners, this approach is consistent with the statutory language.²⁹ The primary difference between the scheme for usable space cost allocation contained in § 224(e)(2) and § 224(e)(3)'s methodology for apportioning unusable space costs is that the owner is specifically excluded from the two-thirds apportionment of § 224(e)(2) when the owner is not also an attacher.³⁰ Thus § 224(e)(2) provides for an "equal apportionment of such costs among all attaching entities." (emphasis added). By contrast, § 224(e)(3) provides for the costs of usable space to be allocated "among all entities." The statute, then, does not preclude the Commission from adopting the more equitable and efficient interpretation and counting each attacher per foot in determining the apportionment of unusable space costs.

IV. OWNERS HAVE FAILED TO DEMONSTRATE THAT ANY CONDUIT SPACE SHOULD BE CLASSIFIED AS UNUSABLE.

As AT&T (at 16) indicated in its initial comments, defining unusable space in conduit presents unique considerations. The positions adopted by other parties to this proceeding can be grouped into three categories. Many of the electric utilities would define virtually all conduit

(. . . continued)

accounts for 64% of total pole costs. Hence, the single attachment is responsible for $(7.41\% \times 36\%) + (66.67\% \times 64\%)$ of total pole costs or approximately 45.33% of the total.

²⁹ See, e.g., Bell Atlantic at 6.

³⁰ As explained supra in Section II, owners should be counted as attachers when they are providing telecommunications services.

space as unusable. For example, the Electric Utilities I (at 53) claim that this space “would include everything from the manhole cover, down into the underground space occupied by the ducts, and all the cement and other stabilizing and reinforcing materials keeping the ducts in place and intact.” This position is entirely without merit. As explained above, this is essentially the same as arguing that only the few square inches of surface area on a pole where attachments actually touch the pole should be considered usable pole space. The remainder, including the core of the pole, portions of brackets, and other space not actually touching an attachment, would, under this approach, be classified as unusable. Clearly this absurd result is not what Congress had in mind.³¹

The second group of comments classifies any unused capacity as unusable space even though that space can and likely will be used.³² This position is equally untenable given that the statute creates a clear dichotomy between “other than usable space” (§ 224(e)(2)) and “usable space.” § 224(e)(3). That a conduit owner would even attempt to classify all of its capacity as unusable until that space is actually used simply highlights the anticompetitive threat utilities continue to pose to new telecommunications providers.

³¹ See Green v. Bock Laundry Machine Co., 490 U.S. 504, 509-10 (1989) (courts should reject an interpretation of a statute if it would have irrational results); In re Chapman, 166 U.S. 661, 667 (1897) (“nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion”).

³² Bell Atlantic at 8 (“the Commission should define [unusable space] as encompassing all spare or excess capacity not actually being used by the conduit owner or any attaching entity . . . All occupants of the conduit system benefit from the ability to expand capacity without the expense and disruption of repeatedly obtaining municipal permits to open roads and municipal rights-of-way to add capacity later. Other than usable space should also be defined to include maintenance ducts reserved for temporary use by an attaching entity in the event of an emergency.”)

The third group of comments roughly follows the Commission's tentative proposal to classify maintenance ducts as usable space. The few commenters that advocate this position also include ducts remaining empty to prevent excessive heat, ducts set aside for municipal use, and deteriorated space.³³ The Commission should reject this approach as well. Maintenance ducts, as AT&T (at 16) and other commenters have demonstrated, are not "other than usable space" because they are actually usable and used.³⁴ NCTA (at 26) correctly notes that "[t]here has never been a suggestion that this duct is unusable; indeed, it could not be useful for maintenance if it was not usable and subject to occupation by wires." Similarly, ducts set aside for municipal use are not "other than usable space." Further, if it is found that certain ducts must remain empty to prevent excessive heat as a result of electric utility cables, then those ducts should be treated like the safety space on poles and assigned to the electric utility because these ducts could be used but for the presence of the electric utility. The Commission should not account for deteriorated ducts either because they are a rare occurrence in any of the conduit types that have been installed in the last 50 years. And even when deterioration does arise, it is often due to the owners' failure to repair and maintain the ducts or remove abandoned cable. Finally, given that most conduit today contains at least four inner ducts, even AT&T's proposed one-third duct approach allows for more than a sufficient level of capacity to accommodate maintenance ducts, municipal set asides,

³³ See ICG at 53-54 ("maintenance ducts should be deemed to be unusable space only if they are available for the temporary use of any party."); *id.* ("any ducts that must remain entirely empty in order to prevent excessive heat should also be considered unusable space"); USTA at 4 (maintenance space, deteriorated space, and space set aside for municipal use should be classified as unusable space).

³⁴ See, e.g., NCTA at 26; Comcast at 21; Ameritech at 14; MCI at 16-17

and deteriorated ducts. Classifying these ducts as unusable space is thus a recipe for double recovery.³⁵

The only reasonable alternative, then, is for the Commission to embrace the approach endorsed by AT&T (at 16), NCTA (at 26), Comcast (at 21), Ameritech (at 14), and MCI (at 16-17), which defines all conduit space as usable. By contrast, if the Commission were to classify any space as unusable, the conduit owner would be overcompensated. In fact, under the half-duct methodology, the owner might not have to pay for any conduit costs at all.³⁶ In sum, the Commission should use a one-third duct methodology and define all conduit space as usable.

V. THE COMMENTS ILLUSTRATE THE NEED TO ENSURE THAT UTILITIES PROVIDE ACCESS TO THEIR RIGHTS-OF-WAY IN ACCORDANCE WITH THE COMMISSION'S LOCAL COMPETITION ORDER AND OTHER PROCOMPETITIVE PRINCIPLES.

With almost no exceptions, the commenters support a case-by-case approach to handling rights-of-way complaints.³⁷ Nevertheless, it cannot be doubted that “[t]he right of non-

³⁵ SBC (at 32) claims that anything more than the half-duct methodology would require reliance on hypothetical conduit systems. Nothing could be further from truth. Most conduit in the ground today can already accommodate three or more ducts. And conduit currently being placed in the ground can handle much more. GTE (at 14) even concedes that a conduit typically contains four ducts. Other commenters support a one-third or one-quarter duct approach. NCTA at 25; ICG at 55; US WEST at 5.

³⁶ For example, the conduit owner could reserve one duct for maintenance, use one duct for itself, and lease two ducts to occupants. In that case, each attacher would pay for one-sixth of total conduit costs through the usable space formula and one-third of total conduit costs under the unusable space formula. Thus, the two attachers would pay for all of the conduit costs (one sixth, plus one-sixth, plus one-third, plus one-third).

³⁷ Bell Atlantic at 9 (“Bell Atlantic urges the Commission to address any right-of-way complaints on a case-by-case basis, and revisit the question of rate methodology, if necessary, once the Commission and the industry have broader experience with these issues.”); NCTA at 27; Comcast at 25-26; Ameritech at 15; Duquesne at 52; US WEST at 12; Ohio Edison at 50; USTA at 14; SBC at 35; GTE at 14.

discriminatory access to rights-of-way is important to the future of local competition.” KMC at 10. Consequently, the Commission should clarify that it will resolve disputes involving rights-of-way in accordance with a few fundamental principles. In particular, rates should be based on costs. To simplify the process further, the Commission should presume that a utility has already recovered the capital costs associated with obtaining the rights-of-way. This presumption is appropriate because many rights-of-way were acquired many years ago³⁸ and full cost recovery has already been completed. In addition, the Commission should reaffirm the principles it established in its Local Competition Order with respect to utilities’ obligations to use their power of eminent domain to create new rights-of-way for the benefit of entrants:

[W]e disagree with those utilities that contend that they should not be forced to exercise their powers of eminent domain to establish new rights-of-way for the benefit of third parties. We believe a utility should be expected to exercise its eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments. Congress seems to have contemplated an exercise of eminent domain authority in such cases when it made provisions for an owner of a right-of-way that “intends to modify or alter such. . . right-of-way. . . .”

Local Competition Order ¶ 1181 (citing 47 U.S.C. § 224(h)). If the utilities are permitted to charge rates not based on cost or only use their eminent domain powers to establish new rights-of-way for their own use,³⁹ they will have a tremendous strategic advantage over their potential competitors. Finally, AT&T agrees with Teligent (at 2) and Winstar (at 4) that rights-of-way should be defined broadly. As competition develops, entrants will encounter situations that

³⁸ Electric Utilities I at 61 (some of the utilities’ easements “may have been given under grants that are more than fifty years-old.”)

³⁹ See NCTA at 27 (“utility rights-of-way carry a public trusteeship, which forbids the utilities from using them solely for their private gain.”)

necessitate their use of previously unused and possibly unidentified essential facilities. An inclusive interpretation of rights-of-rights will be more consistent with the purposes of Section 224 and the 1996 Act than a narrow one.

VI. THE COMMENTS BUTTRESS AT&T'S POSITION ON OTHER ISSUES PREVIOUSLY ADDRESSED IN THE INTERIM POLE ATTACHMENT PROCEEDING.

Wireless carriers must receive the same access and rates for their attachments.

Some commenters again argue that the rates adopted in this proceeding should not apply to wireless attachments.⁴⁰ To make these arguments, they twist the relevant statutory language and omit important terms in an attempt to limit the Commission's jurisdiction and the application of its rules. For example, the Electric Utilities I (at 6) claim that section 224 explicitly limits the Commission to regulating "distribution" rights-of-way, when distribution is not mentioned either explicitly or by description in that section. Similarly, the Electric Utilities I (at 53) assert that the Commission "may only regulate poles, ducts, conduit, and rights-of-way that are used for wire communications["], when section 224(a)(1) actually defines a "utility" as a "person" "who owns or controls poles, ducts, conduit, and rights-of-way" used "in part" for "wire communications." More important, as AT&T has previously explained, the electric utilities' arguments ignore the plain language of section 224.⁴¹ Section 224 makes clear that the Commission shall regulate pole attachment rates as they apply to any attachment by any telecommunications carrier. Wireless carriers are telecommunications carriers.⁴² Thus, wireless carriers should have access to all poles,

⁴⁰ See, e.g., Electric Utilities I at 11; UTC at 3; Electric Utilities II at 17.

⁴¹ See AT&T 97-98 Reply Comments at 9-10.

⁴² See 47 U.S.C. § 153(46) ("telecommunications service" means "the offering of
(. . . continued)