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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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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 the Commission's)
Rules and Policies Governing)
Pole Attachments)

CS Docket No. 97-151

REPLY COMMENTS OF TELIGENT, L.L.C.

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Teligent, L.L.C. ("Teligent")¹ hereby submits its Reply
Comments in the above-captioned proceeding.²

I. INTRODUCTION AND SUMMARY

Because the input costs of telecommunications services will
be reflected in the rates of end users, unreasonable right-of-way
access rates will result in diminished industrial rivalry and in
decreased financial benefits that consumers can expect from local
exchange competition. Rights-of-way are essential facilities
controlled by incumbents with historic monopolies. This simple

¹ Teligent was formerly known as Associated Communications,
L.L.C.

² 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, FCC 97-234 (rel. August 12,
1997) ("Notice").

fact must inform the Commission's response to the incumbents' recommendations to leave right-of-way access rates to negotiations. A new entrant's negotiations with an incumbent monopolist to gain access to essential facilities -- facilities which cannot be duplicated but which are necessary to the provision of service -- are not likely to result in cost-based just and reasonable rates. Rather, monopoly rents will be extracted and the "benefits" of competition will accrue not to consumers, but to the incumbents.

To avoid this scenario, the Commission should devise a methodology applicable to rates for right-of-way access. Through the use of a methodology, the range of acceptable rates for access will narrow and the relative bargaining positions of the negotiating parties will become less unbalanced. Section 224 provides telecommunications carriers access not only to public rights-of-way, but also to rights-of-way over private property. The Commission must ensure that the latter category is not removed from the utilities' access obligations.

II. THE COMMISSION MUST ADOPT A RIGHT-OF-WAY RATE METHODOLOGY TO PROMOTE COMPETITIVE PROVISION OF TELECOMMUNICATIONS SERVICES.

Timely implementation of a right-of-way rate methodology will facilitate competitive entry. The most critical time for right-of-way access is now -- as competitive carriers begin to develop. By contrast, delay in adopting a methodology will not encourage construction of ubiquitous competitive networks but rather will increase the difficulty and expense of obtaining

access to rights-of-way.³ Moreover, the unreasonably high right-of-way access rates likely to result from the absence of a methodology will pass to consumers and diminish the savings they would otherwise enjoy from competition.

The controllers of the right-of-way bottleneck facilities generally oppose the adoption of a methodology for determining just and reasonable rates for access to rights-of-way. Their position relies primarily on the notion that rights-of-way contours will vary considerably, rendering it difficult to implement a generally applicable methodology.⁴ Others more clearly seek maintenance of the status quo. SBC asserts that "[u]tilities and attachers have managed without a formula for conduit for the last 20 years. Likewise, they should be able to handle right-of-way access without the need for any specific Commission rules on the subject."⁵ One consortium of electric utilities goes so far as to recommend that the Commission abdicate its statutory obligation of ensuring just and reasonable

³ The need for a right-of-way methodology is before the Commission with urgency not present in connection with the other matters in this rulemaking. The right-of-way methodology would apply immediately to all telecommunications carriers and cable operators, while the remainder of the issues before the Commission in this rulemaking will not take effect until 2001. Logically, then, the Commission should devote its immediate attention to the adoption of a right-of-way access methodology in accordance with the principles described herein.

⁴ See, e.g., American Electric Power Service, et. al. ("White Paper Utilities") Comments at 61; Ameritech Comments at 15; U S WEST Comments at 12.

⁵ SBC Communications Comments at 35.

rates for rights-of-way and to "refrain from any rate regulation of right-of-way whatsoever."⁶

The variation in rights-of-way to which the incumbents refer counsels in favor of a methodology, not against one. The potential for rate and access discrimination increases when easily comparable situations do not present themselves. The relative uniformity of pole attachments facilitates comparisons of rates and access terms which can offer evidence of price gouging, discrimination, and unreasonableness. The difficulty of engaging in comparisons of right-of-way access rates and terms enhances the need for a controlling methodology. Moreover, as the Colorado Springs Utilities notes, a methodology offers guidance, predictability, and uniformity.⁷

A properly crafted methodology will account for the variety of circumstances in which right-of-way access is sought while establishing an objective method of calculating just and reasonable rate levels. Specifically, a generally applicable methodology is possible through use of incremental cost presumptions. In response to the incumbent utilities' comments concerning the inability to design a workable right-of-way rate

⁶ White Paper Utilities Comments at 59.

⁷ See Colorado Springs Utilities Comments at 4. The Colorado Springs Utilities ("CSU") "encourages the FCC to adopt a policy for attachment rates for the use of rights-of-way" and believes that "such a policy may facilitate predictability and uniformity for both the telecommunications providers and the utilities." Id.

methodology, Teligent suggests language in an Appendix to these Reply Comments.

III. SOLE RELIANCE ON NEGOTIATIONS WILL IMPAIR RIGHT-OF-WAY ACCESS AT JUST AND REASONABLE RATES.

Many of the incumbents' proposed alternatives to a methodology promise delay, uneven bargaining, unreasonably high rates and the general perpetuation of monopoly control over essential facilities.⁸ Some incumbents recommend that the Commission address complaints on a case-by-case basis, leaving the bulk of the responsibility for obtaining access at just and reasonable rates to private negotiations and contracts.⁹

Sole reliance upon private negotiations will not suffice. The Commission itself has recognized the unequal bargaining power inherent in these negotiations.¹⁰ If the nation's second largest

⁸ Moreover, they seek simultaneous impairment of the availability of the Commission's complaint process. For example, GTE recommends a \$5,000 amount in controversy minimum for rate complaints (which, if applicable to building-specific right-of-way issues could preclude the filing of any right-of-way access or rate complaints). See GTE Comments at 5. Ohio Edison, Duquesne Light Company, and Union Electric Company urge the Commission to require an aggrieved party to wait six months before it could even begin the complaint process at the Commission (a proposal framed in terms of pole attachment complaints, but which would seem to apply equally to right-of-way disputes). See Ohio Edison Comments at 17; Duquesne Light Company Comments at 18; Union Electric Company Comments at 16-17.

⁹ See, e.g., Bell Atlantic Comments at 9; Edison Electric Institute/UTC Comments at 30 (rates should be based on negotiated amounts); USTA Comments at 14.

¹⁰ See Letter from Meredith J. Jones, Chief, Cable Services Bureau, Federal Communications Commission to Danny E. Adams, Esq., Kelley Drye & Warren LLP, DA 97-131, at 2 (Jan. 17, 1997) ("Section 224, as originally enacted and as amended, acknowledges that parties in a pole attachment relationship do not have equal bargaining positions, and that the

interexchange carrier has experienced difficulty in gaining access to a utility's easement to a non-utility private right-of-way through private negotiations,¹¹ the need to rely on means other than private negotiations for ensuring access becomes apparent. The Commission would contradict its recent statements and would subvert its policy of promoting competition were it to place a competitive carrier's access to rights-of-way, and the level of rates therefor, at the discretion of the incumbent controller of the essential facility.

IV. THE COMMISSION POSSESSES ADEQUATE EXPERIENCE TO REGULATE RIGHT-OF-WAY ACCESS RATES IN A PROSPECTIVE MANNER.

In the Notice, the Commission expressed a lack of experience in confronting right-of-way issues.¹² The incumbent utilities assert that the Commission's lack of experience with right-of-way issues counsels against the adoption of a right-of-way methodology.¹³ The Commission's lack of experience with right-

potential for barriers to competitive entry emanating from the lack of access or unreasonable rates is significant"). The Commission, too, took notice of Congress' recognition of the general unequal bargaining power between the ILECs and new entrants. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 at ¶ 15 (1996) ("Congress recognized that, because of the incumbent LEC's incentives and superior bargaining power, its negotiations with new entrants over the terms of [interconnection, UNE and resale] agreements would be quite different from typical commercial negotiations").

¹¹ MCI Comments at 22-23.

¹² See Notice at ¶ 42.

¹³ See, e.g., SBC Communications Comments at 35; Union Electric Company Comments at 46-47; USTA Comments at 14.

of-way issues is inapposite. Through its regulation of pole attachments, the Commission has developed a considerable level of expertise with the principles that must guide the calculation of rates for right-of-way access. It is the Commission's experience with the relevant operating principles that is valuable, not its experience, or lack thereof, with rights-of-way themselves.

Moreover, the courts have long recognized the Commission's authority to change its policies to account for the dynamic nature of communications.¹⁴ Should further experience with right-of-way issues compel a change in the Commission's methodology, the Commission can address the requisite changes at that time. In the interim period, though, the existence of a methodology will assist greatly as carriers seek to construct alternative networks.

¹⁴ See, e.g., F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940) ("Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."); see also National Broadcasting Co. v. U.S., 319 U.S. 190, 218-219 (1943) ("True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. . . . the Act gave the Commission not niggardly but expansive powers."); see also Philadelphia Television Broadcasting Co. v. F.C.C., 359 F.2d 282, 284 (D.C. Cir. 1966) ("Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry").

V. A REASONABLE RIGHT-OF-WAY ACCESS RATE SHOULD REFLECT ONLY THE INCREMENTAL COSTS OF ACCESS.

The Commission has interpreted, on several occasions, the meaning of the "just and reasonable" requirement.

The zone of reasonableness is bounded on the lower end by the utility's incremental costs, and on the upper end by the . . . telecommunications carrier's share of the utility's fully allocated costs of owning and maintaining the poles to which an attachment has been made. Incremental costs are those costs that the utility would not have incurred "but for" these attachments.¹⁵

Application of this requirement to the right-of-way context is possible in a general sense, but application of the specific formulaic components used for pole and conduit attachments would be awkward. The right-of-way methodology should avoid the complicating and largely inapplicable components of the pole attachment and conduit rates in favor of a simpler approach.

Section 224's pole attachment and conduit rate provisions emphasize, at minimum, the recoupment by the utility of the incremental costs imposed by an attaching entity and, at maximum, the recovery of a proportionate share of the cost of the shared facility from the attaching entity.¹⁶ The same principle is applicable to charges for the use of a utility's right-of-way. To most fully permit the extension of the benefits of competition to consumers, a methodology should assess telecommunications

¹⁵ Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, *Notice of Proposed Rulemaking*, FCC 97-98 at ¶ 2 (rel. March 14, 1997); see also Notice at ¶ 5.

¹⁶ See 47 U.S.C. § 224(e)(2).

carriers rates equal to the incremental costs to the utility caused by their use of the utility's right-of-way. Because this approach is prospective in nature, it avoids the incentive of a utility to seek compensation for a proportionate share of the "historic costs" that may be embedded in the maintenance of rights-of-way but which have already been recovered. Moreover, the utility should have the ability to document and justify incremental costs thereby simplifying review in the event of disputes.¹⁷

It is entirely possible that the incremental cost of telecommunications carrier access will be zero, assuming that the carrier granted access bears equipment and installation expenses. In a proceeding before the Texas Public Utility Commission, Southwestern Bell Telephone Company recently stated that, in most instances, it had obtained building access at no cost.¹⁸

¹⁷ In the Appendix, Teligent recommends use of the Commission's pole attachment complaint procedure for the resolution of right-of-way access rate disputes. However, Teligent believes that the Commission's alternative dispute resolution ("ADR") process may provide another forum for resolution of right-of-way access rate disputes. The ADR process, in conjunction with a baseline methodology, would allow due consideration of any unique variables that may arise in the right-of-way context.

¹⁸ Questions Regarding Rights of Telecommunications Utilities and Property Owners Under PURA Building Access Provisions, Project No. 18000, Southwestern Bell Telephone Company's Comments at 8 (Tex. PUC, filed Oct. 2, 1997) ("SWBT Texas Building Access Comments") ("certain facilities (e.g., conduit cable and wiring) may have been placed by [a] telecommunications utility under an easement or other agreement between the utility and the property owner. Often, those facilities were placed at no charge because the building owner needed telephone service to the building and there was only one provider").

Teligent is of the understanding that Southwestern Bell's situation is representative of the normal historic practices of utilities. If a utility bears no cost to hold an easement through or on a building, allowing it to recover access fees for occupation would not be cost-based and, hence, would exceed a "just and reasonable" rate.¹⁹

VI. THE TERMS OF UTILITIES' PRIVATE EASEMENTS CANNOT BAR TELECOMMUNICATIONS CARRIERS' ACCESS.

Many incumbent utilities claim that their private rights-of-way do not permit access or use by third parties, that their private rights-of-way do not permit uses different from existing uses, or that negotiation with, approval by, and compensation to the owner of the underlying fee is required before access may be granted. These conditions undermine the terms of Section 224. If given effect, they would demand duplication of a monopolist's network by competitors -- an impossible result sought to be avoided by the 1996 Act.

As Teligent discussed in its Comments, the 1996 Telecommunications Act represents a statutory design that seeks to promote competition on the basis of service and rates rather than allowing market dominance through exertion of historic monopoly power. To give operative effect to this goal, the Act

¹⁹ AT&T observes that despite the unique circumstances surrounding rights-of-way, a uniform set of principles must govern access and rates must be based on cost. AT&T Comments at 18. AT&T suggests a presumption that a utility has already recovered the capital costs of obtaining the rights-of-way, and the occupants need only pay for direct and incremental costs. *Id.* Teligent supports AT&T's proposal.

extends to competitors access to and use of those bottleneck facilities used, owned, or controlled by incumbents as a function of their historic monopoly status.²⁰ By granting access to the essential facilities owned or controlled by utilities, the Pole Attachment Act was the forerunner of this larger scheme. Through enactment of the original Pole Attachment Act, Congress sought to promote the growth and development of cable television systems. In 1996, Congress redesigned the same tool to operate with an expanded scope in order to promote competition in local exchange and other telecommunications services.

When viewed together, the cases demonstrate that the design manifested in the Pole Attachment Act of 1978 and the Telecommunications Act of 1996 may be promoted in the manner recommended by Teligent.²¹ These cases recognize that

²⁰ SWBT Texas Building Access Comments at 12 ("before the presence of competitive choices of telecommunications utilities, incumbent providers placed facilities as the provider of last resort").

²¹ Nor does the Eighth Circuit decision operate to cast doubt on the Commission's jurisdiction in this matter. In Iowa Utilities Board, the court observed that because Congress amended Section 2(b) to grant exclusive jurisdiction to the Commission over the regulation of CMRS rates and entry, Commission action taken pursuant to Section 332 is not subject to the traditional Section 2(b) analysis. See Iowa Utilities Board v. F.C.C., 120 F.3d 753, 800 n.21 (8th Cir. 1997). The same analysis would apply to the Commission's authority to regulate access to rights-of-way under Section 224. As with Section 332, Congress expressly exempted Section 224 from the reach of Section 2(b). See 47 U.S.C. § 152(b) ("Except as provided in sections 223 through 227, inclusive, and Section 332 . . ."). Therefore, the Commission retains exclusive authority to interpret and implement the terms of Section 224 without Section 2(b) limitations and subject only to a State's appropriate use of the reverse preemption provision contained in Section 224. To use the language of the Eighth Circuit, the Commission

statutorily designated third parties may lawfully access the rights-of-way owned or controlled by utilities without the need for negotiations with, approval of, and compensation to the owner of the servient property. As the Eleventh Circuit stated:

Since most developers voluntarily grant easements for use by utilities . . . Congress may force the developer to allow a cable franchise to use the easement without offending the taking[s] clause of the Constitution. Such "voluntary" action by developers may be an integral part of zoning procedures or the obtaining of necessary building permits. However obtained, once an easement is established for utilities it is well within the authority of Congress to include cable television as a user.²²

In ruling on whether an electric utility's easement would allow a cable operator to gain access to a subdivision through use of such easement, the Fourth Circuit determined that:

[t]he fact that an additional wire would be introduced to the many others on the poles

has no "2(b) fence" to overcome in its regulation under Section 224.

22

Centel Cable Television v. White Development Corp., 902 F.2d 905, 910 (11th Cir. 1990) (quoting Centel Cable Television v. Admiral's Cove Assoc., 835 F.2d 1359, 1363 n.7 (11th Cir. 1988)). Some cases have expressed an unwillingness to permit a cable operator's access to any building linked to electric, telephone, or video services. See, e.g., Cable Holdings of Georgia v. McNeil Real Estate, 953 F.2d 600, 605 (11th Cir. 1992), cert. denied, 506 U.S. 862 (1992); see also Media General Cable of Fairfax v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169, 1174 (4th Cir. 1993). However, these cases were decided under 47 U.S.C. § 621(a)(2). Section 621(a)(2)'s compensation mechanism is designed only for damages from the installation, operation or removal of facilities whereas Section 224 is designed to provide "just and reasonable" compensation for access separate from the aforementioned damages. Moreover, by its terms, Section 621(a)(2) is limited to public rights-of-way and dedicated easements, whereas Section 224 is not so limited.

does not impose any meaningful increase of burden on [the servient estate's] interest in the underlying property. . . . Moreover, the electrical signals themselves provide no basis for distinction for purposes of measuring the increased burden on the servient estate. Any possible difference would be impalpable and would not impose an additional burden on the servient estate.²³

Ultimately concluding that the cable operator could use the electric utility's easement over private property, the court noted that it was immaterial for easement purposes that the cable operator was not a telephone company, stating that "[t]he transmissions of a telephone company are virtually indistinguishable from transmissions of a non-telephone company transmitting television signals for purposes of a pole and wire easement grant."²⁴

In practice, a private easement's prohibition of telecommunications carrier access to the right-of-way appears to be an issue overstated by the incumbent utilities. The New York State Investor Owned Electric Utilities note that the leading New York case held that "utility company easements are apportionable

²³ C/R TV v. Shannondale, 27 F.3d 104, 109 (4th Cir. 1994).

²⁴ Id. Moreover, to the extent that a clause allowing "reasonably necessary" use of the easement exists in an easement contract, the Ninth Circuit has held that "compliance with mandatory federal programs imposing legal obligations on [the utility] is 'reasonably necessary' to the installation of [additional facilities within the easement]." Pacific Gas Transmission Co. v. Richardson's Recreational Ranch, 9 F.3d 1394, 1396 (9th Cir. 1993).

to cable operators even though the scope of the easement may not specifically include CATV."²⁵ They go on to state that:

[a]ppportioning the rights granted in existing utility easements has been acknowledged by the courts as the most economically feasible and least environmentally damaging way of installing cable [telecommunications] systems. Prohibiting cable and telecommunications companies from using such easements until compensation is paid to the landowners or until condemnation proceedings are instituted would greatly increase the cost to these companies and possibly deny the public the benefits of telecommunications competition.²⁶

Moreover, in the "Access to Poles, Conduit and Rights of Way: Technical Service Description" filed with the Commission by BellSouth in connection with its South Carolina Section 271 application, BellSouth states the following:

Where BellSouth has any ownership or rights-of-way to buildings or building complexes, or within buildings or building complexes, BellSouth will offer to CLEC through a license or other attachment the right to use any available space owned or controlled by BellSouth in the building or building complex to install CLEC equipment and facilities as well as ingress and egress to such space.²⁷

²⁵ New York State Investor Owned Electric Utilities Comments at 25.

²⁶ Id.

²⁷ Application by BellSouth Corporation for Provision of In-Region, InterLATA Services, CC Docket No. 97-208, Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in South Carolina, Attachment to Affidavit of W. Keith Milner, Appendix A, Exh. WKM-9, "CLEC Information Package: Access to Poles, Ducts, Conduit and Right of Way" at 3 (filed Sep. 30, 1997).

This offer suggests that BellSouth believes it may lawfully offer such access to its private rights-of-way.

Finally, electric utilities may already use their electric easements for purposes other than the transmission of electricity. Indeed, the Commission's rules contemplate the conduction of radio signals through public utility A/C power lines for transmission to AM radio receivers.²⁸ Moreover, the Wall Street Journal recently reported on technological advances by United Utilities and Northern Telecom which may permit the provision of telephone service and Internet access service over the power lines that bring electricity to homes and businesses.²⁹ Electric utility research of this sort suggests that electric utilities themselves view their electric easements as compatible with the provision of telecommunications services. The Commission should affirm that utilities' private rights-of-way are accessible by carriers offering different services and using similar facilities.³⁰

²⁸ See 47 C.F.R. § 15.207 (establishing electric utility conduction limits).

²⁹ See Gautum Naik, "Electric Outlets Could Be Link To the Internet," Wall Street Journal at B6 (Oct. 7, 1997).

³⁰ See Telecommunications Services Inside Wiring, CS Docket No. 95-184, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 97-376 at ¶ 180 (rel. Oct. 17, 1997) (the Commission recognizing its authority to review restrictions imposed upon the use of existing easements or rights-of-way to provide new or additional services).

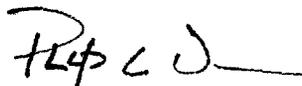
VII. CONCLUSION

In conclusion, Teligent urges the Commission to provide the needed guidance and promote local competition by adopting a right-of-way access methodology consistent with the principles recommended herein.

Respectfully submitted,

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APPENDIX

§ _____ Compensation for Access to Rights-of-Way

(a) *Rates:* Nondiscriminatory access for telecommunications carriers and cable operators shall be granted to rights-of-way owned or controlled by utilities in accordance with 47 U.S.C. § 224. Just and reasonable rates for access to a utility owned or controlled right-of-way, as distinct from attachment to or in a utility facility, shall not exceed the incremental cost to the utility of a telecommunications carrier's or a cable operator's access to the right-of-way. It shall be presumed that the incremental cost of a telecommunications carrier's or cable operator's access to a right-of-way owned or controlled by a utility is zero.

(b) *Rebuttals:* A utility may rebut the zero incremental cost presumption through the complaint procedure applicable to rights-of-way established in Subpart J of Part 1 of the Commission's rules.

(c) *Standard of review:* The utility must proffer substantial evidence of the actual incremental costs imposed by the telecommunication carrier's or cable operator's right-of-way access for successful rebuttal of the zero incremental cost presumption.

(d) *Access Status Pending Decision:* During the course of a right-of-way rate complaint proceeding before the Commission, a utility must grant access or continue to permit the telecommunications carrier's or cable operator's access to the utility's right-of-way at the zero incremental cost rate.

(e) *Indemnification:* A utility successful in a right-of-way dispute with a telecommunications carrier or cable operator may obtain from the telecommunications carrier or cable operator indemnification for the difference between the zero incremental cost rate and the rate determined by the Commission to be just and reasonable as compensation for access pending resolution of the dispute.

CERTIFICATE OF SERVICE

I, Gunnar D. Halley, do hereby certify that on this 21st day of October, 1997, copies of the foregoing "Reply Comments of Teligent, L.L.C." were delivered by hand to the following parties:

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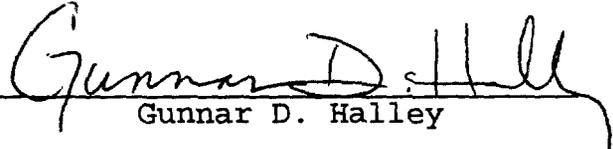
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