703),[5] expanded the protected class to include telecommunications attachers (47 U.S.C. § 224(a)(4)), and directed the Commission to develop new rules, to take effect in 2001, "to ensure that a utility charges just, reasonable and nondiscriminatory rates for pole attachments" (47 U.S.C. § 224(e)(1)).

It is, of course, essential that the Commission develop detailed and explicit pro-competitive rules for pole access in its local competition dockets and for pole rates in its permanent rate proceeding to be conducted later this year. Poles, ducts, conduits, and rights-of-way are essential inputs to the provision of all wireline and wireless telecommunications services and will remain so as new technologies are deployed. And it is a simple fact that competitive bypass of existing utility structures will rarely be economically feasible. Nor would it "make economic sense to send cost signals that encourage new entrants to invest in duplicative pole networks or to seek other, more expensive alternatives for access to an infrastructure that is capable of delivering their services." Consumer Power Company, No. U-10741, 1997 WL 107296, at *10 (Michigan PSC, Feb. 11, 1997). Indeed, as communities increasingly adopt environmental, "aesthetic" and other ordinances that multiply the costs of obtaining necessary rights-of-way and installing structures -- or even flatly prohibit the deployment of aerial wires or wireless towers -- competitive bypass often will not even be a technical possibility.[6] For these

[5] The term "utility" now includes "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1).

[6] See, e.g., the Clayton, Missouri Municipal Ordinance Code, § 7-56.1 (1947) which provides that "[i]t shall be unlawful for any person to erect or construct utility poles or lines for the transmission of electricity, telephone messages or other public utility transmissions above the surface of the grounds within the confines of the city." See also Consumer Power Company,

(. . . continued)

reasons, both full and partial facilities-based competitors will be highly dependent upon a utility's poles, ducts, conduits, and rights-of-way. Consequently, Congress' long-term vision of facilities-based competition cannot become a reality unless the Commission (and its state commission counterparts) make every effort through their new access and rate rules to prevent utilities from using pole and conduit "rates, terms, and conditions" (47 U.S.C. § 224(b)(1)) as strategic weapons to disadvantage new entrants.

It is equally important, however, that the Commission act now, in this interim rate proceeding, to safeguard against potentially significant entry barriers that could defeat facilities-based competition before it even has an opportunity to emerge. It will be nearly four years before the permanent rate rules required by the 1996 Act take effect, but carriers are attempting to enter each other's markets today. The Commission should therefore make certain that its existing pole rate formula and rules are not abused by incumbents to inflate the price of access to poles and conduit or to otherwise encumber access by competitive carriers to these essential facilities in ways that stifle nascent competition.

Specifically, the Commission should do three things. First, and most fundamentally, the Commission should clarify that under the existing rate formula, an attacher pays for the use of a given amount of vertical space on a pole (or a given number of inner ducts in conduit) and that the attacher is free (subject to reasonable safety and operational restrictions) to deploy in that space the attachment or attachments of its choice -- without incurring multiple or

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(. . . continued)
1997 WL 107296 at *10 ("duplicative facilities might exacerbate aesthetic and safety concerns in communities that are saddled with competing pole networks").

discriminatory attachment charges that would unjustly enrich pole owners, raise barriers to entry, and discourage efficient use of pole space. Second, the Commission should reject utility proposals to inflate pole rates through self-serving "technical" adjustments to the existing rate formula. The Commission has found that the existing formula's "approximations" cut both ways and "tend to be balanced" (NPRM n.59).[7] Hence, it would be arbitrary and capricious to "fix" perceived "under recovery" aspects of the formula without considering the impact of offsetting "over recovery" aspects (as the Commission presumably will do when it revisits the entire formula in its upcoming permanent rate proceeding). In any event, the particular modifications proposed by the utilities are unwarranted and anticompetitive even examined individually. Third, the Commission should develop a formula and rules to constrain conduit occupancy rates. AT&T agrees with the Commission that this conduit formula (that will apply until the permanent rules required by the 1996 Act take effect) should generally track the existing pole formula. As demonstrated below, however, in order to fully compensate conduit owners without erecting anticompetitive barriers to entry, that formula should reflect a "one-third," rather than a "half-duct," convention.

I. THE COMMISSION SHOULD CLARIFY THAT UTILITIES MAY NOT CIRCUMVENT THE COMMISSION'S RULES BY DOUBLE CHARGING FOR POLE SPACE OR OTHERWISE DISCRIMINATING AGAINST ATTACHERS.

The Commission's pole attachment rules are designed to ensure just, reasonable, and nondiscriminatory terms and conditions for the use of pole space. Indeed, the maximum

[7] In fact, the "balance" clearly tilts in favor of pole and conduit owners who, inter alia, get the benefit of rates that are highest in the early years when the time value of money is the greatest.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996 Amendment of the Commission's Rules and Policies Governing Pole Attachments	CS Docket No. 97–151

COMMENTS OF ICG COMMUNICATIONS, INC.

ICG Communications, Inc. ("ICG") hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. ICG is a diversified competitive telecommunications carrier that has been engaged in the provision of telecommunications services, including facilities-based competitive access services and interexchange, international and maritime voice and data services, since 1984. ICG is currently providing or in the final stages of preparing to provide local exchange services in over twenty metropolitan areas across the United States. In these Comments, ICG addresses most of the issues raised in the NPRM, as well as many of the contentions raised in the position paper titled *Just and Reasonable Rates and Charges for Pole Attachments: The Utility Perspective* that was filed with the FCC on August 28, 1996 by McDermott, Will and Emery on behalf of a group of electric utilities (the "Whitepaper Utilities").[1]

[1] The Whitepaper Utilities are American Electric Power Service Corp., Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Florida

I. Summary of Position

The Commission proposes to require telecommunications carriers to engage in good faith negotiations with a utility concerning rates before filing a complaint with the Commission and to summarize their attempts at negotiation in any filed complaint. The competitive harm that telecommunications carriers can suffer due to delays in obtaining access to utility poles, ducts, conduits and rights-of-way gives utilities leverage that some can and do use to impose excessive rates and unreasonable terms and conditions, however, and the Commission needs to do more to facilitate negotiations on an equal footing. The Commission should give telecommunications carriers the option of attaching their facilities before they reach agreement with utilities on rates, terms and conditions and should clarify that good faith requires utilities to agree to appropriate most favored nations provisions.

Dark fiber leasing fosters the development of a competitive facilities-based telecommunications market by providing a method for the sharing of costs associated with the installation of cables along a particular route while imposing no additional burden or obligation on the utility that owns the poles, ducts, conduits or rights-of-way on which the cable is installed. Accordingly, the Commission should encourage dark fiber leasing by prohibiting utilities from restricting, conditioning or charging additional fees for the leasing of dark fibers.

Power & Light Company, Northern States Power Company, The Southern Company, and Washington Water Power Company.