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Federal Communications Commission

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Before the  
Federal Communications Commission  
Washington, D.C. 20554

DISPATCH

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

**REPORT AND ORDER**

**Adopted: February 6, 1998**

**Released: February 6, 1998**

By the Commission:

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Appendix A: Revised Rules

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## I. INTRODUCTION

1. In this *Report and Order* ("*Order*"), the Commission adopts rules implementing Section 703 of the Telecommunications Act of 1996 ("1996 Act")<sup>1</sup> relating to pole attachments.<sup>2</sup> Section 703 requires the Commission to prescribe regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services.<sup>3</sup> Section 703 also requires that the Commission's regulations ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.<sup>4</sup> We adopt the rules set forth in Appendix A hereto based upon the comments and reply comments filed in response to the *Notice of Proposed Rulemaking* in this docket (the "*Notice*").<sup>5</sup> A list of commenters, as well as the abbreviations used in this *Order* to refer to such parties, is contained in Appendix B hereto. The commenters generally represent the interests of one of the following three categories: (1) utility pole owners;<sup>6</sup> (2) cable operators;<sup>7</sup> and (3) telecommunications carriers.<sup>8</sup>

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<sup>1</sup>Pub. L. No. 104-104, 110 Stat. 61, 149-151, codified at 47 U.S.C. § 224.

<sup>2</sup>Section 703 amended Section 224 of the Communications Act. Currently Section 224 defines "pole attachment" as any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit or right-of-way owned or controlled by a utility. 47 U.S.C. § 224(a)(4). Section 224 defines "utility" as 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, not including any railroad, any person who is cooperatively organized, or any person owned by the federal government or any state. 47 U.S.C. § 224(a)(1).

<sup>3</sup>47 U.S.C. § 224(e)(1).

<sup>4</sup>*Id.*

<sup>5</sup>*Notice of Proposed Rulemaking*, CS Docket No. 97-151, 12 FCC Rcd 11725 (1997). In addition, to the extent relevant, we have considered the comments and reply comments filed in response to the *Notice of Proposed Rulemaking* in CS Docket No. 97-98 relating to the existing formula for pole attachments. *Notice of Proposed Rulemaking*, CS Docket No. 97-98 (Amendment of Rules and Policies Governing Pole Attachments), 12 FCC Rcd 7449 (1997) ("*Pole Attachment Fee Notice*"). The *Pole Attachment Fee Notice* specifically seeks comment on the Commission's use of the current presumptions, on carrying charge and rate of return elements of the formula, on the use of gross versus net data and on a conduit methodology.

<sup>6</sup>Commenting utility pole owners generally include American Electric, et al., Carolina Power, et al., Colorado Springs Utilities, New York State Investor Owned Electric Utilities, Dayton Power, Duquesne Light, Edison Electric/UTC, Ohio Edison, Texas Utilities and Union Electric.

<sup>7</sup>Commenting cable operator interests generally include Adelphia, et al., New York Cable Television Assn., Comcast, et al., NCTA, SCBA and Summit.

<sup>8</sup>Commenting telecommunications carrier interests generally include Ameritech, AT&T, Bell Atlantic, BellSouth, Champlain Valley Telecom, et al., GTE, ICG Communications, KMC Telecom, MCI, Omnipoint, RCN, SBC, Sprint, Teligent, USTA, U S West and Winstar.

## II. BACKGROUND

2. The purpose of Section 224 of the Communications Act<sup>9</sup> is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers.<sup>10</sup> The rules we adopt in this *Order* further the pro-competitive goals of Section 224 and the 1996 Act by giving incumbents and new entrants in the telecommunications market fair and nondiscriminatory access to poles and other facilities, while safeguarding the interests of the owners of those facilities.

3. As originally enacted, Section 224 was designed to ensure that utilities' control over poles and rights-of-way did not create a bottleneck that would stifle the growth of cable television. Congress sought to prohibit utilities from engaging in "unfair pole attachment practices . . . and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public."<sup>11</sup> As mandated by Section 224, the Commission established a formula to calculate maximum rates that utilities could charge cable operators for the installation of attachments on utility facilities where such rates are not regulated by a state.<sup>12</sup> In subsequent proceedings the Commission amended and clarified its methodology for establishing rates and its complaint process.<sup>13</sup>

4. The 1996 Act amended Section 224 in several important respects. While previously the protections of Section 224 had applied only to cable operators, the 1996 Act extended those protections to telecommunications carriers as well.<sup>14</sup> Further, the 1996 Act gave cable operators and telecommunications carriers a mandatory right of access to utility poles, in addition to maintaining a

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<sup>9</sup>Pub. L. No. 95-234 ("1978 Pole Attachment Act") codified at Communications Act of 1934, as amended ("Communications Act"), § 224, 47 U.S.C. § 224.

<sup>10</sup>S. Rep. No. 580, 95th Cong., 1st Sess. 19, 20 (1977) ("1977 Senate Report"), reprinted in 1978 U.S.C.C.A.N. 109, 121.

<sup>11</sup>*Id.*

<sup>12</sup>*First Report and Order* (Adoption of Rules for the Regulation of Cable Television Pole Attachments), CC Docket No. 78-144, 68 FCC 2d 1585 (1978) ("*First Report and Order*"); see also *Second Report and Order*, 72 FCC 2d 59 (1979) ("*Second Report and Order*"); *Third Report and Order*, 77 FCC 2d 187 (1980) ("*Third Report and Order*"), *aff'd Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (per curiam); *Report and Order*, CC Docket No. 86-212 (Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles), 2 FCC Rcd 4387, 4387-4407 (1987) ("*Pole Attachment Order*"), *recon. denied*, 4 FCC Rcd 468 (1989).

<sup>13</sup>*Second Report and Order*, 72 FCC 2d 59; *Memorandum Opinion and Order* (Petition to Adopt Rules Concerning Usable Space on Utility Poles, RM 4556), FCC 84-325 (released July 25, 1984) ("*Usable Space Order*"); see also *Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985) (upholding challenge to the Commission's pole attachment formula relating to net pole investment and carrying charges). Following *Alabama Power*, the Commission revised its rules in the *Pole Attachment Order*, 2 FCC Rcd 4387.

<sup>14</sup>47 U.S.C. § 224.

scheme of rate regulation governing such attachments.<sup>15</sup> In the *Local Competition Order*, we adopted a number of rules implementing the new access provisions of Section 224.<sup>16</sup>

5. As amended by the 1996 Act, Section 224 defines a utility as one "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 wire communications."<sup>17</sup> The 1996 Act, however, specifically excluded incumbent local exchange carriers ("ILECs") from the definition of telecommunications carriers with rights as pole attachers.<sup>18</sup> Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though the ILEC has no rights under Section 224 with respect to the poles of other utilities. This is consistent with Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants.<sup>19</sup>

6. Section 224 contains two separate provisions governing maximum rates for pole attachments, one of which covers attachments used to provide cable service and one of which covers attachments for telecommunications services (including attachments used jointly for cable and telecommunications). Section 224(b)(1), which was not amended by the 1996 Act, grants the Commission authority to regulate the rates, terms, and conditions governing pole attachments for cable service to ensure that they are just and reasonable.<sup>20</sup> Section 224(d)(1) defines a just and reasonable rate as ranging from

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<sup>15</sup>47 U.S.C. § 224(a), (f).

<sup>16</sup>*First Report and Order*, CC Docket No. 96-98 (Implementation of the Local Competition Provisions in the Telecommunications Act of 1996), 11 FCC Rcd 15499, 16058-107, paras. 1119-1240 (1996) (the "*Local Competition Order*"), *rev'd on other grounds*, *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom.*, *AT&T Corp. v. Iowa Utilities Board*, 66 U.S.L.W. 3387, 66 U.S.L.W. 3484, 66 U.S.L.W. 3490 (U.S. Jan. 26, 1998) (No. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1411). In August 1996, the Commission also issued a *Report and Order* in CS Docket No. 96-166 (Implementation of Section 703 of the Telecommunications Act of 1996), 11 FCC Rcd 9541 (1996), amending its rules to reflect the self-effectuating additions and revisions to Section 224.

<sup>17</sup>47 U.S.C. § 224(a).

<sup>18</sup>47 U.S.C. § 224(a)(5).

<sup>19</sup>*Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference*, 104th Cong., 2d Sess. 98-100, 113 ("*Conf. Rpt.*").

<sup>20</sup>*Cf.* 47 U.S.C. § 224(c)(1). The Commission does not have authority where a state regulates pole attachment rates, terms, and conditions. Section 224(c)(3) directs that jurisdiction for pole attachments reverts to the Commission generally if the state has not issued and made effective rules implementing the state's regulatory authority over pole attachments. Reversion to the Commission also occurs, with respect to individual cases, if the state does not take final action on a complaint within 180 days after its filing with the state, or within the applicable period prescribed for such final action in the state's rules, as long as that prescribed period does not extend more than 360 days beyond the complaint's filing.

47 U.S.C. § 224(c)(3).

the statutory minimum (incremental costs) to the statutory maximum (fully allocated costs).<sup>21</sup> Incremental costs include pre-construction survey, engineering, make-ready and change-out costs incurred in preparing for cable attachments.<sup>22</sup> Fully allocated costs refer to the portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles that is equal to the portion of usable pole space that is occupied by an attacher.<sup>23</sup>

7. Separately, Section 224(e)(1), the subject of this *Order*, governs rates for pole attachments used in the provision of telecommunications services, including single attachments used jointly to provide both cable and telecommunications service. Under this section, the Commission must prescribe, no later than two years after the date of enactment of the 1996 Act, regulations "to govern charges for pole attachments used by telecommunication carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges."<sup>24</sup> Section 224(e)(1) states that such regulations "shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for such pole attachments."<sup>25</sup> The section also sets forth a transition schedule for implementation of the new rate formula for telecommunications carriers. Until the effective date of the new formula governing telecommunications attachments, the existing pole attachment rate methodology of cable services is applicable to both cable television systems and to telecommunications carriers.<sup>26</sup>

8. In the *Notice*, the Commission sought comment on implementing a methodology to ensure just, reasonable, and nondiscriminatory maximum pole attachment and conduit<sup>27</sup> rates for telecommunications carriers.<sup>28</sup> Under the present formula, a portion of the total annual cost of a pole is included in the pole attachment rate based on the portion of the usable space occupied by the attaching

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<sup>21</sup>47 U.S.C. § 224(d)(1).

<sup>22</sup>"Make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. See 1977 Senate Report at 19. A pole "change-out" is the replacement of a pole to accommodate additional users. *Pole Attachment Order*, 2 FCC Rcd at 4405 n.3. Congress expected pole attachment rates based on incremental costs to be low because utilities generally recover the make-ready or change-out charges directly from cable systems. See 1977 Senate Report at 19.

<sup>23</sup>*Id.* at 19-20.

<sup>24</sup>47 U.S.C. § 224(e)(1). The 1996 Act was enacted on February 8, 1996.

<sup>25</sup>*Id.*

<sup>26</sup>47 U.S.C. § 224(d)(3); 47 C.F.R. § 1.1401. Pursuant to Section 224(d)(3), the current formula will continue to be applicable to cable systems providing only cable service and, until February 8, 2001, to cable systems and telecommunications carriers providing telecommunications services. See Section VI below regarding the implementation and the effective date of the rules we adopt herein.

<sup>27</sup>A conduit is a pipe placed in the ground through which cables are pulled. FCC ARMIS Operating Data Report, FCC Report 43-08 (January 1992).

<sup>28</sup>*Notice*, 12 FCC Rcd at 11739-40, paras. 36-41.

entity.<sup>29</sup> Under the 1996 Act's amendments, the portion of the total annual cost included in the pole attachment rate for cable systems and telecommunications carriers providing telecommunications services will be determined under a more delineated method. This method allocates the costs of the portion of the total pole cost associated with the usable portion of the pole and the portion of the total pole cost associated with the unusable portion of the pole in a different manner. The Commission also sought comment on how to ensure that rates charged for use of rights-of-way are just, reasonable, and nondiscriminatory.<sup>30</sup>

9. The rules we adopt today implement the plain language of Section 224. That section provides that the regulations promulgated will apply "when the parties fail to resolve a dispute over such charges."<sup>31</sup> Accordingly, and as discussed below, we encourage parties to negotiate the rates, terms, and conditions of pole attachment agreements. Although the Commission's rules will serve as a backdrop to such negotiations, we intend the Commission's enforcement mechanisms to be utilized only when good faith negotiations fail. Based on the Commission's history of successful implementation and enforcement of rules governing attachments used to provide cable service, we believe that the new rules we adopt today will foster competition in the provision of communications services while guaranteeing fair compensation for the utilities that own the infrastructure upon which such competition depends.

### III. PREFERENCE FOR NEGOTIATED AGREEMENTS AND COMPLAINT RESOLUTION PROCEDURES

#### A. Background

10. The 1996 Act amended Section 224 by adding a new subsection (e)(1) to:

... govern the charges for pole attachments used by telecommunications providers to provide telecommunications services when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable and nondiscriminatory rates for pole attachments.<sup>32</sup>

The statute,<sup>33</sup> legislative policy,<sup>34</sup> administrative authority,<sup>35</sup> and current industry practices<sup>36</sup> all make

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<sup>29</sup>See *Third Report and Order*, 77 FCC 2d 187 (1980).

<sup>30</sup>*Notice*, 12 FCC Rcd at 11740, paras. 42-43.

<sup>31</sup>47 U.S.C. § 224(e)(1).

<sup>32</sup>47 U.S.C. § 224(e)(1).

<sup>33</sup>47 U.S.C. §§ 224(b)(1), (d)(1), (e)(1).

<sup>34</sup>1977 *Senate Report* at 19-20; *Conf. Rpt.* at 205-207.

<sup>35</sup>*First Report and Order*, 68 FCC 2d 1585 (setting initial rules for the complaint process, formula elements and the use of historical costs); *Second Report and Order*, 72 FCC 2d 59 (setting spatial presumptions and defined incremental and fully allocated costs for use in formula); *Third Report and Order*, 72 FCC 2d 187, *aff'd*

private negotiation the preferred means by which pole attachment arrangements are agreed upon between a utility pole owner and an attaching entity.<sup>37</sup> Pursuant to the Commission's authority to provide for just, reasonable, and nondiscriminatory rates, terms and conditions for pole attachments,<sup>38</sup> attaching entities have recourse to the Commission when unable to resolve a dispute with a utility pole owner. The Commission's rules establish a specific complaint process.<sup>39</sup> Under the current rule, in reviewing a complaint about rates, the Commission will compare the utility's proposed rate to a maximum rate calculated using the statutory formula.<sup>40</sup>

11. In proposing a methodology to implement Section 224(e), the Commission stated in the *Notice* that the Commission's role is limited to circumstances when the parties fail to resolve a dispute and that negotiations between a utility and an attacher should continue to be the primary means by which pole attachment issues are resolved.<sup>41</sup> The Commission also indicated that Congress recognized the importance of access in enhancing competition in telecommunications markets and that parties in a pole attachment negotiation do not have equal bargaining positions.<sup>42</sup> To further Congressional intent to foster competition in telecommunications, the Commission proposed to apply to telecommunications carriers the Commission's existing complaint rules developed to resolve pole attachment rate disputes between cable operators and utilities.<sup>43</sup>

12. Some telecommunications carriers and utility pole owners agree that negotiations between a utility and an attaching entity will continue, under Section 224(e), to be the primary means by which

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*Monongahela Power Co. v. FCC*, 655 F.2d 1254; *Pole Attachment Order*, 2 FCC Rcd 4387, *recon. denied*, 4 FCC Rcd 468.

<sup>36</sup>See, e.g., Carolina Power, et al., Comments at 11; NCTA Comments at 4-7; USTA Reply at 2.

<sup>37</sup>From 1979, when the first pole attachment complaint was filed with the Commission, to 1991, approximately 246 pole attachment complaints were filed. From 1991 through 1996, approximately 44 such complaints were filed. Currently, there are seven pole attachment complaints under review by the Commission's Cable Services Bureau. We view this number of complaints to the Commission, in light of the penetration of cable service in the nation's communities, to be indicative that most pole attachment rates are negotiated without resort to the Commission.

<sup>38</sup>47 U.S.C. §§ 224(b)(1), (e)(1), (f)(1).

<sup>39</sup>47 C.F.R. §§ 1.1401-1.1416.

<sup>40</sup>47 U.S.C. § 224(d)(1).

<sup>41</sup>*Notice*, 12 FCC Rcd at 11731, para. 12.

<sup>42</sup>*Id.*

<sup>43</sup>*Id.* The current complaint rule provides that "[t]he complaint shall include a brief summary of all steps taken to resolve the problem prior to filing. If no such steps were taken, the complaint shall state the reason(s) why it believed such steps were fruitless." 47 C.F.R. § 1.1404(i).

pole attachment issues are resolved.<sup>44</sup> Several utility pole owners, however, suggest a number of changes to the complaint process, such as adding a mandatory negotiation period and establishing a statute of limitations and a minimum amount in controversy.<sup>45</sup> American Electric, et al., also contend that meaningful negotiations can occur "only when the default pricing mechanism established by the Commission is somewhere close to the price on which the parties would agree absent such regulation."<sup>46</sup> Attaching entities respond that the American Electric, et al., proposals would eliminate recourse to the Commission, contrary to the content and spirit of the law.<sup>47</sup>

13. The Association of Local Telecommunications Services ("ALTS")<sup>48</sup> asserted in its comments in response to the *Pole Attachment Fee Notice* that its members have experience attempting to obtain pole attachments from numerous utilities,<sup>49</sup> and many negotiations were unsatisfactory in part due to the intransigence by or blatant refusal of utilities to negotiate.<sup>50</sup> USTA, a national trade association representing over 1,000 LECs,<sup>51</sup> contends that while the most efficient manner to determine just and reasonable pole attachment rates is that of permitting pole owners and attachers to negotiate reasonable agreements,<sup>52</sup> the proposal by American Electric, et al., contravenes the statute.<sup>53</sup>

14. Electric utility pole owners oppose the continued use of the current negotiation process and complaint procedures established for cable operators, claiming the current regulatory scheme has resulted in government-sponsored unilateral contract modification and subsidization of the cable industry

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<sup>44</sup>See Bell Atlantic Reply at 2 (negotiation is essential means to establish just and reasonable rates for pole attachments); Carolina Power, et al., Reply at 11 (private negotiations are the cornerstone of attachment agreements); GTE Comments at 4-5; USTA Reply at 2. *But see* MCI Comments at 2 (formula for maximum rate is a necessary condition to making negotiations, and therefore industry resolution of disputes, possible at all).

<sup>45</sup>See American Electric, et al., Reply at 30; Carolina Power, et al., Comments at 18-19; Duquesne Light Comments at 18-20; Edison Electric/UTC Comments at 7; GTE Reply at 4-5; USTA Comments at 2.

<sup>46</sup>American Electric, et al., Comments at 12-13. American Electric, et al., believe that any default pricing formula established pursuant to Section 224(e) should be based on Forward-Looking Economic Pricing Model based on economic capital costs. American Electric, et al., Comments at 13,39 and CS Docket No. 97-98 Comments at 4, 42-46, 91-94.

<sup>47</sup>See, e.g., NCTA Reply at 4; *see also* Association for Local Telecommunications Services CS Docket No. 97-98 Comments at 2; USTA CS Docket No. 97-98 Reply at 6.

<sup>48</sup>ALTS is a national trade association representing over 30 telecommunications carriers that are facilities based competitive local exchange carriers ("CLECs"). ALTS CS Docket No. 97-98 Comments at 1.

<sup>49</sup>ALTS CS Docket No. 97-98 Comments at 2.

<sup>50</sup>*Id.*

<sup>51</sup>USTA Comments at 1.

<sup>52</sup>USTA CS Docket No. 97-98 Comments at 2.

<sup>53</sup>USTA CS Docket No. 97-98 Reply at 5-6.

by the electric utility ratepayer.<sup>54</sup> American Electric, et al., contend that the Commission must recognize that the bargaining relationship between electric utilities and cable companies has changed since 1978 when Congress provided the cable television industry with access to the distribution poles of utilities at just and reasonable rates.<sup>55</sup> In asserting that attaching entities no longer represent an industry that needs rate regulation under Section 224,<sup>56</sup> American Electric, et al., acknowledge that in 1978 "Congress was concerned with the cable companies' inferior bargaining position vis-a-vis utilities and wanted to assist an industry in its infancy."<sup>57</sup> USTA interprets Congressional intent as expecting the Commission to intervene and rely on the statutory formula only in instances where negotiating parties are unable to reach a mutually acceptable agreement.<sup>58</sup> USTA further states that the Commission has established and maintained a case-by-case dispute resolution process since 1978, rather than adopting a uniform pole attachment rate prescription process in compliance with that Congressional mandate.<sup>59</sup> Cable and telecommunications carriers assert that potential and existing attaching entities do still need pole attachment rate regulation because they are still not able to bargain from a level position with utility pole owners.<sup>60</sup> Cable operators and telecommunications carriers urge the Commission to extend the existing negotiation and complaint resolution system to telecommunications carriers.<sup>61</sup>

15. Some attaching entities suggest that the Commission impose on itself a 90-day time frame in which to issue a decision on a pole attachment complaint.<sup>62</sup> Other cable and telecommunications carriers request that the Commission impose upon utility pole owners the requirement that pole attachment

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<sup>54</sup>See, e.g., American Electric, et al., Comments at 18-20.

<sup>55</sup>American Electric, et al., CS Docket No. 97-98 Comments at 8 (stating that since 1977, the cable industry has grown to a 67% coverage of homes in America, citing *Third Annual Report*, CS Docket No. 96-133 (In the Matter of Annual Assessment of Status of Competition in the Market for Delivery of Video Programming), 12 FCC Rcd 4358, 4368, para. 14 (1997)); see also American Electric, et al., Reply at 5.

<sup>56</sup>American Electric, et al., CS Docket No. 97-98 Comments at 23.

<sup>57</sup>*Id.*

<sup>58</sup>USTA CS Docket No. 97-98 Comments at 2 (quoting the 1977 *Senate Report* at 3 ("The basic design of S. 1547, as reported, is to empower the [Commission] to exercise regulatory oversight over the arrangements between utilities and [cable television] systems in any case where the parties themselves are unable to reach a mutually satisfactory arrangement")).

<sup>59</sup>USTA CS Docket No. 97-98 Comments at 2.

<sup>60</sup>See Comcast, et al., Reply at 16; NCTA Reply at 3-6; New York Cable Television Assn. at 2-3; Teligent Reply at 5-6.

<sup>61</sup>See, e.g., AT&T Comments at 2, Reply at 4; Champlain Valley Telecom, et al., Reply at 6 (objecting to attitude of American Electric, et al., reminding the Commission that its authority is not plenary); Comcast, et al., Reply at 16; NCTA Reply at 3-6. Cf. New York Cable Television Assn. at 2-3 (current rule gives utility pole owner too much leverage); Teligent Reply at 5-6 (sole reliance on negotiations is not enough).

<sup>62</sup>See Ameritech Reply at 3-4 (complaint process should provide for expeditious resolution of disputes); KMC

agreements between private parties be on public record so that an attaching entity will have notice of: (1) the expectations of the utility; and (2) the terms provided to other attaching entities.<sup>63</sup> The result would be that the most favored provisions from various agreements would then be available to all attaching entities.<sup>64</sup> Pole owners assert that attaching entities have no legitimate expectation that all provisions be available to all attaching entities.<sup>65</sup>

## B. Discussion

16. Our rules for complaint resolution will only apply when the parties are unable to arrive at a negotiated agreement.<sup>66</sup> We affirm our belief that the existing methodology for determining a presumptive maximum pole attachment rate, as modified in this *Order*, facilitates negotiation because the parties can predict an anticipated range for the pole attachment rate.<sup>67</sup> We further conclude that the current complaint procedures are adequate to establish just and reasonable rates, terms, and conditions for pole attachments.<sup>68</sup> No party has demonstrated that the Commission's time for resolution has been a problem in the past. While we will not impose a deadline for Commission action, we will continue to endeavor to resolve complaints expeditiously. An uncomplicated complaint process and a clear formula for rate determination are essential to promote the use of negotiations for pole attachment rates, terms, and conditions.<sup>69</sup> We are committed to an environment where attaching entities have enforceable rights, where the interests of pole owners are recognized, and where both parties can negotiate for pole attachment rates, allowing the availability of telecommunications services to expand.

17. We agree with attaching entities that time is critical in establishing the rate, terms, and conditions for attaching.<sup>70</sup> Prolonged negotiations can deter competition because they can force a new entrant to choose between unfavorable and inefficient terms on the one hand or delayed entry and, thus,

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<sup>63</sup>See ICG Communications Comments at 16, Reply at 1-2; KMC Telecom Comments at 5-6.

<sup>64</sup>See ICG Communications Comments at 16.

<sup>65</sup>See American Electric, et al., Reply at 34; Duquesne Light Comments at 19; Edison Electric/UTC Comments at 6-7; Ohio Edison Comments at 18; Union Electric Comments at 17.

<sup>66</sup>See American Electric, et al., Comments at 15; AT&T Comments at 2; Bell Atlantic Reply at 2; Carolina Power, et al., Reply at 11; GTE Reply at 5; MCI Comments at 2; NCTA Comments at 3-4; New York State Investor Owned Electric Utilities Comments at 6; USTA Reply at 2.

<sup>67</sup>See, e.g., AT&T Reply at 4; ICG Communications Comments at 11; MCI Comments at 2; NCTA Comments at 3-4; see also Ameritech Reply at 3-5 (favors transparent maximum rate determinations); GTE Reply at 4-5 (uniform and transparent rate formula facilitates private negotiations); KMC Telecom Reply at 1-2 (clear formula and complaint process supports negotiation).

<sup>68</sup>See AT&T Comments at 2; MCI Comments at 2; NCTA Comments at 3-4.

<sup>69</sup>See GTE Reply at 4-5.

<sup>70</sup>See AT&T Reply at 4; Ameritech Reply at 3; ICG Communications Comments at 11; MCI Reply at 3.

a weaker position in the market on the other.<sup>71</sup> For these reasons, we reject a proposal by utilities that we mandate a 180-day negotiation period prior to filing a complaint with the Commission. We agree with cable and telecommunications carriers that such a requirement would not be conducive to a pro-competitive, deregulatory environment.<sup>72</sup> Such an extended period of time could delay a telecommunications carrier's ability to provide service and unnecessarily obstruct the process.<sup>73</sup>

18. We disagree with utilities suggesting that, in addition to the existing time frames, the pole owner should receive 30 days' notice by a cable operator or telecommunications carrier of any intention to file a complaint.<sup>74</sup> Such a notice requirement would be redundant under our rule and would unnecessarily prolong the resolution of disputes. The current rule provides for a 45-day period in which the utility pole owner must respond to the request for access filed by a cable operator or telecommunications carrier seeking to install an attachment.<sup>75</sup> A complaint to the Commission must be filed within 30 days of the denial of a request for access.<sup>76</sup> The utility then has an additional 30 days to respond to the complaint.<sup>77</sup> When a cable operator or a telecommunications carrier believes it has cause to complain that a pole attachment rate, term, or condition is not just or reasonable,<sup>78</sup> a detailed set of data and information is required under the current rule.<sup>79</sup> A utility has 30 days in which to respond to an attaching entity's request for the data and information regarding the rate, term, or condition required for the complaint.<sup>80</sup> Under the present rules, the utility has had communication with the attaching entity prior to the filing of the complaint, to such a degree as is necessary to understand the issues in conflict outlined in the complaint. The utility has sufficient notice of the issues involved, making additional notice requirements unnecessary.

19. GTE suggests that we impose a one year statute of limitations on the filing of a complaint

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<sup>71</sup>See AT&T Reply at 4 (time is of the essence in negotiation); Ameritech Reply at 3-4 (the Commission should provide for expeditious resolution so that market entry is not delayed); ICG Communications Comments at 11 (timing is important); MCI Reply at 3 (time to market is critical).

<sup>72</sup>See ICG Communications Reply at 2-3; KMC Telecom Reply at 4; MCI Reply at 2-3.

<sup>73</sup>But see Duquesne Light Comments at 18; Edison Electric/UTC Comments at 7; Carolina Power, et al., Comments at 18-19.

<sup>74</sup>See American Electric, et al., Reply at 30; Edison Electric/UTC Reply at 6; GTE Comments at 4-5; USTA Comments at 2, Reply at 4.

<sup>75</sup>47 C.F.R. § 1.1403(b).

<sup>76</sup>47 C.F.R. § 1.1404(k).

<sup>77</sup>47 C.F.R. § 1.1407(a).

<sup>78</sup>47 U.S.C. §§ 224(b)(1), (d)(1), (e)(1).

<sup>79</sup>47 C.F.R. §§ 1.1404(g)(1-12), (h), (i).

<sup>80</sup>47 C.F.R. § 1.1404(h).

and suggests an amount in controversy threshold of \$5,000.<sup>81</sup> We view these proposals as unnecessarily restrictive as they could foreclose remedy of an unjust or unreasonable rate, term, or condition of pole attachments, especially for small enterprises.<sup>82</sup> There is no provision in the statute for such restrictions. Establishing a threshold of any dollar amount could preclude relief to small entities and would be inconsistent with Section 257 and the pro-competitive goals of the 1996 Act.<sup>83</sup>

20. Utility pole owners must provide access to attaching entities on a non-discriminatory basis.<sup>84</sup> While we do not agree that all pole attachment agreements have to be identical, differing provisions must not violate the statutory requirement that terms be just, reasonable, and nondiscriminatory. We believe that these statutory standards are enforceable under the current rule.

21. We believe it is implicit in our current rule<sup>85</sup> that all parties must negotiate in good faith for non-discriminatory access at just and reasonable pole attachment rates.<sup>86</sup> In the *Local Competition Order*, the Commission addressed the requirement of Section 251 that requires an ILEC to provide interconnection and other rights to new entrants, and observed that new entrants have little to offer the incumbent.<sup>87</sup> Rather, these new competitors seek to reduce the incumbent's subscribership and weaken the incumbent's dominant position in the market. An ILEC is likely to have scant, if any, economic incentive to reach agreement.<sup>88</sup> In the *Local Competition Order*, the Commission determined that a utility

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<sup>81</sup>See GTE Comments at 4-5.

<sup>82</sup>See generally, SCBA Reply.

<sup>83</sup>47 U.S.C. § 257. This section requires the Commission to eliminate market entry barriers for entrepreneurs and other small businesses in the provision or ownership of telecommunication services or in the provision of parts or services to telecommunications providers.

<sup>84</sup>47 U.S.C. § 224(f)(1).

<sup>85</sup>47 C.F.R. § 1.1404.

<sup>86</sup>In furtherance of our original mandate to institute an expeditious procedure for determining pole attachment rates with a minimum of administrative costs and consistent with fair and efficient regulation, we adopted a program for non-discriminatory access to poles, ducts, conduits and rights-of-way in the *Local Competition Order*. 11 FCC Rcd at 16059, para. 1122 (citing the 1977 *Senate Report* at 19). In the *Notice*, the Commission affirmed its interpretation of Congressional intent that negotiations between a utility and an attacher should continue to be the primary means by which pole attachment issues are resolved. See *Notice*, 12 FCC Rcd at 11731, para. 12; see also 47 U.S.C. § 224(f)(1).

<sup>87</sup>11 FCC Rcd at 15570, para. 141.

<sup>88</sup>*Id.* The Commission continued, determining that a request by an incumbent that a new entrant contractually waive its legal rights or remedies could constitute a violation of the duty to negotiate in good faith imposed by Sections 251(c)(1) and 252, stating: "We reject the general contention that a request by a party that another party limit its legal remedies as part of a negotiated agreement will in all cases constitute a violation of the duty to negotiate in good faith. A party may voluntarily agree to limit its legal rights or remedies in order to obtain a valuable concession from another party. . . . [W]e find that it is a per se failure to negotiate in good faith for a party to refuse to include in an agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules. Refusing to permit a party to include such a provision would be

stood in a position vis-a-vis the competitive telecommunications provider seeking pole attachment agreements that was virtually indistinguishable from that of the ILEC with respect to a new entrant seeking interconnection agreements under Sections 251 and 252 of the 1996 Act.<sup>89</sup> We find that a utility's demand for a clause waiving the licensee's right to federal, state, or local regulatory relief would be per se unreasonable and an act of bad faith in negotiation. In particular, a request that a pole attachment agreement include a clause waiving statutory rights to file a complaint with the Commission is per se unreasonable.<sup>90</sup>

#### IV. CHARGES FOR ATTACHING

##### A. Poles

##### 1. Formula Presumptions

22. In determining a just and reasonable rate, two elements of the pole are examined: usable space and other than usable space. The costs relating to these elements are allocated to those using the pole. In the *Second Report and Order*, consistent with Section 224(d)(2), the Commission defined total usable space as the space on the utility pole above the minimum grade level<sup>91</sup> that is usable for the attachment of wires, cables, and related equipment.<sup>92</sup> This determination was based upon survey results, consideration of the National Electric Safety Code ("NESC"), and practical engineering standards used in constructing utility poles. The Commission found that "the most commonly used poles are 35 and 40 feet high, with usable spaces of 11 to 16 feet, respectively."<sup>93</sup> The Commission recognized the NESC guideline that 18 feet of the pole space must be reserved for ground clearance<sup>94</sup> and that six feet of pole space is for setting the depth of the pole.<sup>95</sup> To avoid a pole by pole rate calculation, the Commission adopted rebuttable presumptions of an average pole height of 37.5 feet, an average amount of usable space of 13.5 feet, and an average amount of 24 feet of unusable space on a pole. The Commission established a rebuttable presumption of one foot as the amount of space a cable television attachment occupies.<sup>96</sup>

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tantamount to forcing a party to waive its legal rights in the future." *Id.* at 15576, para. 152.

<sup>89</sup>See *id.* at 15570, para. 141.

<sup>90</sup>See Letter from Meredith J. Jones, Chief, Cable Services Bureau to Danny E. Adams, Esq., Kelley Drye & Warren LLP, DA No. 97-131 (January 17, 1997).

<sup>91</sup>In this context, minimum grade level generally refers to the ground level or elevation above which distances are measured for determining required clearances.

<sup>92</sup>See 72 FCC 2d at 69; 47 C.F.R. § 1.1402(c).

<sup>93</sup>72 FCC 2d at 69.

<sup>94</sup>*Id.* at 68, n.21.

<sup>95</sup>*Id.*

<sup>96</sup>*Id.* at 69-70.

These presumptions serve as the premise for calculating pole attachment rates under the current formula.

23. A group of electric utilities filed a white paper ("*White Paper*") in anticipation of the *Notice* and the *Pole Attachment Fee Notice*<sup>97</sup> in which they suggest that an increase in the current presumptive pole height is appropriate. The *White Paper* asserts that over time, and with increased demand, the average pole height has increased to 40 feet. At the same time, the *White Paper* contends that the usable space presumption should be reduced from 13.5 feet to 11 feet.<sup>98</sup> The Commission sought comment on these presumptions in the *Pole Attachment Fee Notice* and sought further comment in the *Notice* to establish a full record for attachments made by telecommunications carriers under the 1996 Act.<sup>99</sup>

24. We will address changing the existing presumptions in the *Pole Attachment Fee Notice* rulemaking.<sup>100</sup> Until resolution of that proceeding, we will apply our presumptions as they presently exist and proceed with the implementation under the 1996 Act of a methodology used in the provision of telecommunications services by telecommunications carriers and cable operators.

25. The *Notice* also sought comment on an issue raised by Duquesne Light in its reconsideration petition of the Commission's decision in the *Local Competition Order* proceeding.<sup>101</sup> Duquesne Light advocates that the number of physical attachments of an attaching entity is not necessarily reflective of the burden on the pole, and therefore of the costs relating to the attachment. Duquesne Light states that varying attachments place different burdens on the pole and proposes that any presumption include factors addressing weight and wind loads.<sup>102</sup> We will address whether any presumptions should reflect these factors in the *Pole Attachment Fee Notice* rulemaking.

## 2. Restrictions on Services Provided over Pole Attachments

26. In the *Notice*, we sought comment on whether the Commission's decision in *Heritage*

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<sup>97</sup>See *White Paper* filed by the law firm of McDermott, Will and Emery on August 28, 1996, on behalf of the American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Florida Power and Light Company, Northern States Power Company, The Southern Company and Washington Water Power Company.

<sup>98</sup>*Id.* at 11.

<sup>99</sup>*Notice*, 12 FCC Rcd at 11733, para. 17.

<sup>100</sup>See *Pole Attachment Fee Notice*, 12 FCC Rcd at 7458-59, paras. 18-20. We reserve decision on issues regarding the 37.5 ft. presumptive pole height, the 13.5 ft. presumptive amount of usable space, the minimum ground clearance amount, the allocation of the 40-inch safety space, and the exclusion of 30 ft. poles from the calculation of costs of a bare pole and the determination as to whether such poles lack a sufficient amount of usable space to accommodate multiple attachments.

<sup>101</sup>*Notice*, 12 FCC Rcd at 11733, para. 18 (citing *Local Competition Order*, 11 FCC Rcd at 16058-107, paras. 1119-1240); see also Duquesne Light CC Docket No. 96-98 Comments at 17-18.

<sup>102</sup>Duquesne Light CC Docket No. 96-98 Comments at 17-18.

*Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Company* ("*Heritage*")<sup>103</sup> should be extended.<sup>104</sup> In *Heritage*, a cable operator provided traditional cable services as well as nontraditional services through its facilities. Those facilities consisted of coaxial cable lashed to aerial support strands and fiber optic cable overlashed to the aerial support strands.<sup>105</sup> The nontraditional services provided by the cable operator consisted of non-video broadband communications services, including data transmission services.<sup>106</sup> The pole owner attempted to charge the cable operator an additional, unregulated rate for those poles with pole attachments supporting the facilities transmitting both video signals and data.<sup>107</sup>

27. In *Heritage*, which was decided prior to the 1996 Act, the Commission determined that the provision by a cable operator of both traditional cable services and nontraditional services on a commingled basis over a single network within the cable operator's franchise area justified only a single, regulated pole attachment charge by the utility pole owner.<sup>108</sup> The Commission affirmed its longstanding view of cable as a provider of video and nonvideo broadband services and determined that its pole attachment authority includes nonvideo broadband services under Section 224. The Commission stated that its jurisdiction under Section 224 was not limited by definitions emanating from the Cable Communications Policy Act of 1984 ("*Cable Act of 1984*")<sup>109</sup> because such definitions apply only for purposes of Title VI.<sup>110</sup> Further, it stated that, even when Section 224 is read in conjunction with the Cable Act of 1984, the Cable Act of 1984 and its legislative history indicate that a cable system providing both video and nonvideo broadband services is not excluded from the benefits of Section 224.<sup>111</sup>

28. Whether *Heritage* continues to apply raises significant issues as cable operators expand into new service areas, such as Internet services. Generally, commenters disagree as to the applicability of *Heritage* since the passage of the 1996 Act amendments to Section 224. Some utility pole owners contend that *Heritage* has been overruled by the 1996 Act, but they do not agree as to the effect of the overruling. Some of the utility pole owners argue that the new Sections 224(d)(3) and 224(e) create a new

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<sup>103</sup>6 FCC Rcd 7099 (1991), *recon. dismissed*, 7 FCC Rcd 4192 (1992), *aff'd sub nom. Texas Utilities Electric Co. v. FCC*, 977 F.2d 925 (D.C. Cir. 1993).

<sup>104</sup>*Notice*, 12 FCC Rcd at 11731, para. 13.

<sup>105</sup>*Heritage*, 6 FCC Rcd at 7100.

<sup>106</sup>*Id.*

<sup>107</sup>*Id.*

<sup>108</sup>*Id.* at 7107.

<sup>109</sup>Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (Oct. 30, 1984).

<sup>110</sup>*Heritage*, 6 FCC Rcd at 7103-04.

<sup>111</sup>*Id.* at 7104. The U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission's decision on appeal because it was "consistent with the congressional purpose to avoid abusive pole attachment practices by utilities for the FCC to regulate any attachment by a cable operator within its franchise area and within its cable television system." *Texas Utilities v. FCC*, 977 F.2d at 936.

regime requiring new rules,<sup>112</sup> and therefore *Heritage* is no longer applicable. Some of these commenters also argue that, after the year 2001, a cable company is entitled to the old incremental rate under Section 224(d)(3) if the pole attachment is used solely to provide cable services. They contend that the use of a cable attachment to provide nonvideo services in addition to video would not be an attachment used solely for cable service and such attachment would be subject to the Section 224(e) telecommunications services rate.<sup>113</sup> Other utility pole owners argue that the provision of services other than cable and telecommunications services are outside the scope of Section 224 and are therefore not subject to the Commission's jurisdiction.<sup>114</sup> They contend that such services will be subject to market place negotiations.<sup>115</sup>

29. Cable operators generally contend that *Heritage* has not been overruled by the 1996 Act. They also contend that high speed Internet access is a cable service and an operator offering such service should not be assessed the Section 224(e) telecommunications services rate.<sup>116</sup> Telecommunications carriers generally agree that *Heritage* has not been overruled, and therefore the pre-1996 Act rules continue to provide that a utility should not charge different pole attachment rates based on the type of service provided by the cable operator, and further that a utility should be prohibited from placing unreasonable restrictions on the use of pole attachments by permitted attachers.<sup>117</sup> Some of the telecommunications carriers, however, oppose any extension of *Heritage*, arguing that such extension would provide preferential treatment for cable operators.<sup>118</sup> At least one telecommunications carrier argues that the distinctions established by Congress effectively overrule *Heritage* and that cable operators providing additional services besides video service are to be treated as telecommunications carriers under Section 224.<sup>119</sup>

30. We disagree with the utility pole owners who assert that the *Heritage* decision has been "overruled" by the passage of the 1996 Act insofar as it held that a cable system is entitled to a Commission-regulated rate for pole attachments that the cable system uses to provide commingled data and video. The definition of "pole attachment" does not turn on what type of service the attachment is used to provide. Rather, a "pole attachment" is defined to include any attachment by a "cable television

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<sup>112</sup>Texas Utilities Reply at 2; GTE Comments at 8; USTA Comments at 4.

<sup>113</sup>Edison Electric/UTC Comments at 9.

<sup>114</sup>American Electric, et al., Comments at 11 (citing *Report and Order*, CC Docket No. 96-45 (In the Matter of Federal-State Joint Board on Universal Service), 12 FCC Rcd 8776 ("*Universal Service Order*"), 9176, para. 781); Duquesne Light Comments at 21; Ohio Edison Comments at 20; Union Electric Comments at 19.

<sup>115</sup>Duquesne Light Comments at 21; Ohio Edison Comments at 20; Union Electric Comments at 19.

<sup>116</sup>Comcast, et al., Comments at 18; NCTA Comments at 6-7, n.9; New York Cable Television Assn. Comments at 8.

<sup>117</sup>RCN Comments at 5-6; Sprint Comments at 2, Reply at 1-2 (citing MCI Comments at 4-5); U S West Comments at 4-5.

<sup>118</sup>MCI Comments at 6.

<sup>119</sup>See Ameritech Comments at 4.

system."<sup>120</sup> Thus, the rates, terms and conditions for all pole attachments by a cable television system are subject to the Pole Attachment Act.<sup>121</sup> Under Section 224(b)(1), the Commission has a duty to ensure that such rates, terms, and conditions are just and reasonable.<sup>122</sup> We see nothing on the face of Section 224 to support the contention that pole owners may charge any fee they wish for Internet and traditional cable services commingled on one transmission facility.

31. The history of Section 224 further supports our conclusion. The purpose of the amendments to Section 224 made by the 1996 Act was similar to the purpose behind Section 224 when it was first enacted in 1978, *i.e.*, to remedy the inequitable position between pole owners and those seeking pole attachments.<sup>123</sup> The nature of this relationship is not altered when the cable operator seeks to provide additional service. Thus, it would make little sense to conclude that a cable operator should lose its rights under Section 224 by commingling Internet and traditional cable services. Indeed, to accept contentions that cable operators expanding their services to include Internet access no longer are entitled to the benefits of Section 224 would penalize cable entities that choose to expand their services in a way that will contribute "to promot[ing] competition in every sector of the communications industry," as Congress intended in the 1996 Act.<sup>124</sup>

32. Having decided that cable operators are entitled to the benefits of Section 224 when providing commingled Internet and traditional cable services, we next turn to the appropriate rate to be applied. We conclude, pursuant to Section 224 (b)(1), that the just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate. In specifying this rate, we intend to encourage cable operators to make Internet services available to their customers.<sup>125</sup> We believe that specifying a higher rate might deter an operator from providing non-traditional services. Such a result would not serve the public interest. Rather, we believe that specifying the Section 224(d)(3) rate will encourage greater competition in the provision of Internet service and greater benefits to consumers.

33. We emphasize that our decision to apply the Section 224(d)(3) rate is based on our regulatory authority under Section 224(b)(1). Several commenters suggested that cable operators providing Internet service should be required to pay the Section 224(e) telecommunications rate.<sup>126</sup> We

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<sup>120</sup>47 U.S.C. § 224(a)(4).

<sup>121</sup>47 U.S.C. § 224(b)(1).

<sup>122</sup>*Texas Utilities v. FCC*, 977 F.2d at 934-35.

<sup>123</sup>1977 *Senate Report* at 19, 20.

<sup>124</sup>Preamble to the 1996 Act; *see also* 142 Cong. Rec. S687-01, S687 (daily ed. February 1, 1996) (Statement of Sen. Hollings).

<sup>125</sup>We have, through social contracts, encouraged cable operators to provide Internet services to their customers. *See Social Contract for Continental Cablevision*, 10 FCC Rcd 299 (1995), *amended by* 11 FCC Rcd 11118 (1996); *Social Contract for Time Warner*, 11 FCC Rcd 2788 (1995), *amended by* FCC Rcd 3099 (1995), *further amended by* 12 FCC Rcd 14881(1996).

<sup>126</sup>*See, e.g.*, Ameritech Comments at 4; Edison Electric/UTC Comments at 9-10; GTE Comments at 6; MCI Comments at 6.

disagree. The *Universal Service Order* concluded that Internet service is not the provision of a telecommunications service under the 1996 Act.<sup>127</sup> Under this precedent, a cable television system providing Internet service over a commingled facility is not a telecommunications carrier subject to the revised rate mandated by Section 224(e) by virtue of providing Internet service. We note, however, that Congress has directed the Commission to undertake a review of the implementation of the provisions of the 1996 Act relating to universal service, and to submit a report to Congress no later than April 10, 1998.<sup>128</sup> That report is to provide a detailed description of, among other things, the extent that the Commission's definition of "telecommunications" and "telecommunications service," and its application of those definitions to mixed or hybrid services, are consistent with the language of the 1996 Act.<sup>129</sup> We do not intend, in this proceeding, to foreclose any aspect of the Commission's ongoing examination of those issues.

34. We need not decide at this time, however, the precise category into which Internet services fit. Such a decision is not necessary in order to determine the pole attachment rate applicable to cable television systems using pole attachments to provide traditional cable services and Internet services. Regardless of whether such commingled services constitute "solely cable services" under Section 224(d)(3), we believe that the subsection (d) rate should apply. If the provision of such services over a cable television system is a "cable service" under Section 224(d)(3), then the rate encompassed by that section would clearly apply.<sup>130</sup> Even if the provision of Internet service over a cable television system

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<sup>127</sup>See Federal-State Joint Board on Universal Service, *Report and Order*, CC Docket No. 96-45, 12 FCC Rcd 8776, at 9180-81, para.789 (rel. May 8, 1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *appeal pending in Texas Office of Public Utility Counsel v. FCC and USA*, No. 97-60421 (5th Cir. 1997); Federal-State Joint Board on Universal Service, *Order on Reconsideration*, CC Docket No. 96-45, 12 FCC Rcd 10095 (rel. July 10, 1997); Changes to the Board of Directors of the National Exchange Carrier Association Inc., Federal-State Joint Board on Universal Service, *Report and Order and Second Order on Reconsideration*, CC Docket Nos. 97-21, 96-45, FCC 97-253 (rel. July 18, 1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket No. 96-45, DA 97-2477 (rel. Dec. 3, 1997); Changes to the Board of Directors of the National Exchange Carrier Association Inc., Federal-State Joint Board on Universal Service, *Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket Nos. 97-21, 96-45, FCC 97-292, 12 FCC Rcd 12437 (rel. Aug. 15, 1997); Federal-State Joint Board on Universal Service, *Third Report and Order*, CC Docket No. 96-45, (rel. Oct. 14, 1997), as corrected by Federal-State Joint Board on Universal Service, *Erratum*, CC Docket Nos. 96-45 and 97-160 (rel. Oct. 15, 1997); Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, *Second Order on Reconsideration in CC Docket 97-21*, CC Docket Nos. 97-21, 96-45, FCC 97-400 (rel. Nov. 26, 1997); Federal-State Joint Board on Universal Service, *Third Order on Reconsideration*, CC Docket No. 96-45, FCC 97-411 (rel. Dec. 16, 1997); Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge, *Fourth Order on Reconsideration*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, FCC 97-420 (rel. Dec. 30, 1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, DA 98-158 (rel. Jan 29, 1998).

<sup>128</sup>Pub. L. 105-119, 111 Stat. 2440 (1997), sec. 623.

<sup>129</sup>*Id.*

<sup>130</sup>The legislative history of the 1996 Act may be read to support such a conclusion. See Conf. Rpt. at 206 which indicates that, "to the extent that a company seeks pole attachment for a wire used solely to provide cable television services (as defined by Section 602(6) of the Communications Act), that cable company will continue to pay the rate

is deemed to be neither "cable service" nor "telecommunications service" under the existing definitions, the Commission is still obligated under Section 224(b)(1) to ensure that the "rates, terms and conditions [for pole attachments] are just and reasonable," and, as Section 224(a)(4) states, a pole attachment includes "any attachments by a cable television system." And we would, in our discretion, apply the subsection (d) rate as a "just and reasonable rate" for the pro-competitive reasons discussed above. We again emphasize the pervasive purpose of the 1996 Act and the premise of the Commission's *Heritage* decision, to encourage expanded services, and that a higher or unregulated rate deters this purpose.<sup>131</sup> We note that in the one case where Congress affirmatively wanted a higher rate for a particular service offered by a cable system, it provided for one in section 224(e). In requiring that the Section 224(d) rate apply to any pole attachment used 'solely to provide cable service,' we do not believe Congress intended to bar the Commission from determining that the Section 224(d) rate methodology also would be just and reasonable in situations where the Commission is not statutorily required to apply the higher Section 224(e) rate.

35. We also disagree with utility pole owners that submit that all cable operators should be "presumed to be telecommunications carriers" and therefore charged at the higher rate unless the cable operator certifies to the Commission that it is not "offering"<sup>132</sup> telecommunications services.<sup>133</sup> We think that a certification process would add a burden that manifests no benefit. We believe the need for the pole owner to be notified is met by requiring the cable operator to provide notice to the pole owner when it begins providing telecommunication services. The rule we adopt in this *Order* will reflect this required notification. We also reject the suggestions of utility pole owners that the Commission should be responsible for monitoring and enforcing a certification of cable operators regarding their status.<sup>134</sup> The record does not demonstrate that cable operators will not meet their responsibilities. If a dispute arises, the Commission's complaint processes can be invoked.

### 3. Wireless Attachments

#### a. Background

36. In the *Notice*, the Commission stated that, although wireless carriers have not historically affixed their equipment to utility poles, the 1996 Act gives them the right to do so and entitles them to

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authorized under current law (as set forth in subparagraph (d)(1) of the 1978 Act)." Further, the Conference Report states that "[t]he conferees intend the amendment to reflect the evolution of cable to interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services," but was not intended to "cause dial-up access to information services over telephone lines to be classified as a cable service." *Conf. Rpt.* at 169.

<sup>131</sup>See also *Texas Utilities v. FCC*, 977 F.2d at 931-933.

<sup>132</sup>Telecommunications services means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. 47 U.S.C. § 153(43).

<sup>133</sup>See *American Electric, et al.*, Comments at 46-47; *Bell Atlantic Comments* at 3; *Colorado Springs Utilities Comments* at 3; *ICG Communications Comments* at 27; *MCI Comments* at 6-9.

<sup>134</sup>See *American Electric, et al.*, Comments at 46-47; *Bell Atlantic Comments* at 3; *Colorado Springs Utilities Comments* at 3; *ICG Communications Comments* at 27; *MCI Comments* at 6-9.

rates consistent with Commission rules.<sup>135</sup> The *Local Competition Order* held that Section 224 does not describe the specific type of telecommunications equipment that an entity may attach, and that establishing an exhaustive list of equipment is not advisable or even possible.<sup>136</sup>

37. Some utility pole owners argue for limiting the type of equipment that a party may attach to facilities and assert that wireless carriers should not have the benefit of Section 224. They rely on legislative history accompanying the 1978 Pole Attachment Act<sup>137</sup> and the failure of Section 224 to include the word "wireless" in its language.<sup>138</sup> According to the pole owners, Congress intended to cover pole attachments only for wire communications, and would have explicitly expanded that scope in the 1996 Act if it wanted to do so.<sup>139</sup> These interests cite the *1977 Senate Report* stating, "Federal involvement in pole attachment matters will occur only where space on a utility pole has been designated and is actually being used for communications services by wire or cable."<sup>140</sup> In contrast, wireless providers assert that they are telecommunications carriers entitled to the protection of Section 224.<sup>141</sup> These parties cite Section 3(44), which defines "telecommunications carrier" as "any provider of telecommunications services," and Section 3(46), which defines "telecommunications service" as "the offering of telecommunications for a fee . . . regardless of the facilities used."<sup>142</sup> Wireless providers contend they do not have easy alternatives for placing their equipment because they have had difficulty getting permits to erect antennas.<sup>143</sup> They argue that telecommunications competition arises in many forms and the Commission's regulations should not deter any particular method of delivering services.<sup>144</sup> In short, they ask the Commission to decide that Section 224 "unambiguously affords all telecommunications providers a legal right of access to poles."<sup>145</sup>

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<sup>135</sup>*Notice*, 12 FCC Rcd at 11741, para. 61.

<sup>136</sup>11 FCC Rcd at 16085, para. 1186.

<sup>137</sup>*1977 Senate Report*.

<sup>138</sup>*See, e.g.*, American Electric, et al., Comments at 11; Edison Electric/UTC Reply at 8; Petition for Reconsideration by Consolidated Edison Company of NY in CC Docket No. 96-98 at 11-12; Petition for Reconsideration by Duquesne Light Co. in CC Docket No. 96-98 at 17-18; Petition for Reconsideration by American Electric Power, et al., in CC Docket No. 96-98 at 1-18, 26-29; Petition for Reconsideration by Florida Power & Light in CC Docket No. 96-98 at 24-26; *see also* Carolina Power, et al., CS Docket 97-98 Reply at 34-37; Edison Electric/UTC CS Docket No. 97-98 Comments at 3-7.

<sup>139</sup>*Id.*

<sup>140</sup>*1977 Senate Report* at 15; *see, e.g.*, Petition for Reconsideration by American Electric Power, et. al., in CC Docket No. 96-98 at 10-11.

<sup>141</sup>*See, e.g.*, Bell Atlantic Reply at 6-9; Omnipoint Reply at 2-3; Teligent Comments at 2.

<sup>142</sup>47 U.S.C. § 3(44), (46); *see, e.g.*, Bell Atlantic Reply at 6-9; Omnipoint Reply at 3.

<sup>143</sup>*See, e.g.*, Bell Atlantic Reply at 6-9.

<sup>144</sup>*See, e.g.*, Teligent Comments at 2.

<sup>145</sup>Omnipoint Reply at 3.

38. Telecommunications carriers and the utility pole owners acknowledge that determining an appropriate formula for wireless attachments is difficult.<sup>146</sup> Some utility pole owners assert it is beyond the scope of this rulemaking.<sup>147</sup> Some telecommunications carriers and utility pole owners agree that previous and proposed rate formulas do not lend themselves to the requirements of wireless attachments.<sup>148</sup> On the other hand, wireless interests emphasize that pole attachment fees are assessed for the use of space, and should not depend primarily on what type of equipment occupies that space.<sup>149</sup> These parties contend that rates for wire and wireless attachments should be the same so that discriminatory pricing does not occur.<sup>150</sup>

b. Discussion

39. Wireless carriers are entitled to the benefits and protection of Section 224. Section 224(e)(1) plainly states: "The Commission shall . . . prescribe regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services."<sup>151</sup> This language encompasses wireless attachments.

40. Statutory definitions and amendments by the 1996 Act demonstrate Congress' intent to expand the pole attachment provisions beyond their 1978 origins. Section 224(a)(4) previously defined a pole attachment as "any attachment by a cable television system," but now states that a pole attachment is "any attachment by a cable television system *or provider of telecommunications service*."<sup>152</sup> Moreover, in Section 224(d)(3), Congress applied the current pole attachment rules as interim rules for "any telecommunications carrier . . . to provide any telecommunications service."<sup>153</sup> In both sections, the use of the word "any" precludes a position that Congress intended to distinguish between wire and wireless attachments. Section 224(e)(1) contains three terms whose definitions support this conclusion. Section 3(44) defines telecommunications carrier as "any provider of telecommunications services."<sup>154</sup> Section 3(46) states that telecommunications services is the "offering of telecommunications for a fee directly to the public . . . regardless of the facilities used," and Section 3(43) specifies telecommunications to be "the transmission, between or among points specified by the user, or information of the user's choosing,

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<sup>146</sup>See, e.g., Bell Atlantic Reply at 6-9; Edison Electric/UTC Reply at 2.

<sup>147</sup>See, e.g., American Electric, et al., Comments at 5-6; Carolina Power, et al., Reply at 17-18; Edison Electric/UTC Reply at 2-3.

<sup>148</sup>See, e.g., Bell Atlantic Reply Comments at 6-9; Comments at Edison Electric/UTC Comments at 3; GTE Reply at 18.

<sup>149</sup>See, e.g., Teligent Comments at 9-10.

<sup>150</sup>See, e.g., AT&T Reply at 21; Omnipoint Reply at 3; Teligent Comments at 9; Winstar Comments at 2.

<sup>151</sup>47 U.S.C. § 224(e)(1).

<sup>152</sup>47 U.S.C. §224(a)(4) (emphasis added).

<sup>153</sup>47 U.S.C. §224(d)(3).

<sup>154</sup>47 U.S.C. §153(44).

without change in the form or content of the information as sent and received."<sup>155</sup> The use of "any" in Section 3(44) precludes limiting telecommunications carriers only to wireline providers. Wireless companies meet the definitions in Sections 3(43) and 3(46). In fact, the Commission has already recognized that cellular telephone, mobile radio, and PCS are telecommunications services.<sup>156</sup>

41. There are potential difficulties in applying the Commission's rules to wireless pole attachments, as opponents of attachment rights have argued. They note that previous and proposed rate formulas do not account for the unusual requirements of wireless attachments.<sup>157</sup> These parties assert that such attachments are usually more than a traditional box-like device and cable wires strung between poles. They include an antenna or antenna clusters, a communications cabinet at the base of the pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service. One commenter noted that there are "far greater costs and operational considerations" for wireless attachments.<sup>158</sup>

42. There is no clear indication that our rules cannot accommodate wireless attachers' use of poles when negotiations fail. When an attachment requires more than the presumptive one-foot of usable space on the pole, or otherwise imposes unusual costs on a pole owner, the one-foot presumption can be rebutted. In addition, when wireless devices do not need to use every pole in a utility's inventory, the parties can agree on some reasonable percentage of poles for developing a presumptive number of attaching entities. If parties cannot modify or adjust the formula to deal with unique attachments, and the parties are unable to reach agreement through good faith negotiations, the Commission will examine the issues on a case-by-case basis.

#### 4. Allocating the Cost of Other than Usable Space

##### a. Method of Allocation

43. To determine the rate that a telecommunications carrier must pay for pole attachments, Section 224(e)(2) provides that:

A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.<sup>159</sup>

This statutory language requires an equal apportionment of two-thirds of the costs of providing other than

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<sup>155</sup>47 U.S.C. §§ 153(46), (43).

<sup>156</sup>See, e.g., *Universal Service Order*, 12 FCC Rcd at 9175; *Local Competition Order*, 11 FCC Rcd at 15997.

<sup>157</sup>See, e.g., Edison Electric/UTC Comments at 4; see also Petition for Reconsideration filed by Duquesne Light in CC Docket No. 96-98 at 17-18.

<sup>158</sup>Edison Electric/UTC Comments at 5.

<sup>159</sup>47 U.S.C. § 224(e)(2).



of the incumbent LEC, to subsidize "pure" cable attachments.<sup>163</sup> Similarly, other commenters argue that cable operators that solely provide cable service should not be included in the count because their attachments are not subject to rate regulation under Section 224(e)(2). We find these arguments unpersuasive. The statutory language compels a different conclusion. The statute states that the cost of unusable space shall be allocated under an equal apportionment "among all attaching entities."<sup>164</sup> While the cable operator rate is different, Congress made no indication that it intended to exclude any attaching entity when apportioning the costs of unusable space. On the contrary, the legislative history of the 1996 Act states that all attaching entities should be counted.<sup>165</sup> Congress explicitly provided for a different formula when determining pole attachment rates for cable operators providing cable services, but it made no such provision for the exclusion of those operators in the allocation of costs for unusable space. Moreover, Section 224(e)(2) does not restrict the use of the term "entities" to those entities that pay rates under Section 224(e).

(2) *Pole Owners Providing Telecommunications Services and Incumbent LECs*

48. In the *Notice*, the Commission tentatively concluded that, where a pole-owning utility is providing telecommunications services, the utility would also be counted as an attaching entity for the purposes of allocating the costs of unusable space under Section 224(e).<sup>166</sup> The Commission also tentatively concluded that an ILEC with attachments on a pole should be counted for the purposes of apportionment of the costs of unusable space. The Commission sought comment on how these two definitions impact its tentative conclusion.<sup>167</sup> The Commission noted that the definition of telecommunications carrier under Section 224 excludes ILECs, and a pole attachment is defined as any attachment by a cable television system or a provider of telecommunications service.

49. American Electric, et al., oppose counting an ILEC with attachments on the pole because the definition of a telecommunications carrier excludes ILECs and the definition of pole attachments specifically includes only attachments made by telecommunications carriers or cable operators.<sup>168</sup> Inclusion of ILECs in the apportionment of costs of unusable space, they conclude, would improperly extend the scope of Section 224 and contradict Congressional intent.<sup>169</sup> We disagree. The exclusion in Section 224(a)(5) of ILECs from the term telecommunications carrier is directed to the purpose of amended Section 224, to provide an important means of access. ILECs generally possess that access and

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<sup>163</sup>Ameritech Comments at 11; Duquesne Light Comments at 39; MCI Comments at 14; Ohio Edison Comments at 37; Union Electric Comments at 34.

<sup>164</sup>47 U.S.C. § 224(e)(2).

<sup>165</sup>*Conf. Rpt.* at 206.

<sup>166</sup>*Notice*, 12 FCC Rcd at 11734, para. 22.

<sup>167</sup>*Id.* at 11735, para. 23.

<sup>168</sup>American Electric, et al., Comments at 41.

<sup>169</sup>*Id.*