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

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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

**PETITION FOR RECONSIDERATION OF THE
UNITED STATES TELEPHONE ASSOCIATION**

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SUMMARY

In its petition for reconsideration, USTA asks the Commission to reconsider decisions that were made in the CS Docket No. 97-151 Report and Order concerning: the pole attachment rate applicable to cable television systems that commingle cable service and Internet service over the same facility; the usable and other than usable space costs for conduit; and the mandate that utilities develop average numbers of attaching entities on the basis of urban, rural and urbanized locations. USTA also asks for clarification concerning the applicability of usable space costs to third party overlashers by pole owners.

USTA asserts that some services that are provided as Internet service are telecommunications services. Therefore, the Commission should reconsider its decision that the applicable pole attachment rate for a cable television system that commingles cable service and Internet service on the same facility is always the subsection 224(d)(3) rate. USTA maintains that in some instances the proper rate will be the subsection 224(e) rate.

USTA believes that the Commission was vague in identifying the usable space costs associated with conduit and that it should adopt the proposal put forth by Bell Atlantic for usable space and other than usable space costs. Additionally, USTA believes that the Commission should make the development of average numbers of attaching entities by location permissive rather than mandatory.

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**PETITION FOR RECONSIDERATION OF THE
UNITED STATES TELEPHONE ASSOCIATION**

The United States Telephone Association (USTA),¹ through the undersigned, hereby requests reconsideration of certain portions of the Federal Communications Commission's (Commission) Report and Order adopted in the above-captioned proceeding on February 6, 1998.² In this proceeding, the Commission adopted rules implementing Section 703 of the Telecommunications Act of 1996 concerning pole attachments (hereafter Section 224 of the Communications Act).³ Below, USTA discusses the specific decisions in the Report and Order

¹ USTA is the nation's oldest trade organization for the local exchange carrier industry. USTA currently represents more than 1200 small, mid-size and large companies worldwide.

² Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments, Report and Order, CS Docket No. 97-151, FCC 98-20 (rel. Feb. 6, 1998) (Report and Order).

³ Codified at 47 U.S.C. § 224.

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for which it seeks reconsideration. The decisions concern the treatment to be accorded to the Internet services of cable services providers, the identification of usable space for conduit, and the mandate to develop presumptive average numbers of attaching entities for areas that share similar characteristics. USTA asserts that reconsideration of the Commission's decisions on these matters is warranted in order to conform the Report and Order to Section 224 and produce a result that best serves the public interest. Additionally, USTA asks that the Commission clarify a sentence in the Report and Order that may allow for an incorrect inference to be drawn as to the Commission's intent concerning the charges applicable to third party overlashers by pole owners.

DISCUSSION

I. A Cable Television System That Provides Internet Telephony Or Data Transport Service Commingled With Its Cable Service Is An Attaching Telecommunications Carrier And Must Be Allocated A Portion Of The Costs For Other Than Usable Space

In the Report and Order, the Commission addressed the issue of the pole attachment rate to be applied to cable television systems whose facilities carry commingled cable service⁴ and

⁴ The Communications Act defines "cable service" at subsection 602(6) [47 U.S.C. § 602(6)] as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service;". "Video programming" is defined at subsection 602(20) as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." A "cable system" is defined at subsection 602(7) as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, ... ;".

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Internet service. The Commission concluded that “the just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate.”⁵ The Commission reached this conclusion: after determining that its Heritage Decision⁶ had not been overruled by the Telecommunication Act of 1996,⁷ after determining that subsection 224(b)(1) gives it the authority to set pole attachment rates where traditional cable service and Internet service are commingled on one transmission facility,⁸ and after concluding that the provision of Internet service is not the provision of a telecommunications service.⁹ The Commission’s unqualified conclusion that Internet service is not a telecommunications service is wrong as a matter of fact and law. Accordingly, the Commission’s unqualified conclusion that the subsection 224(d)(3) rate applies to the pole attachments of cable television systems that carry commingled cable and Internet services is also wrong and should be reconsidered.

USTA does not take issue here with the Commission’s conclusion that the Heritage Decision may be applied in a way that does not conflict with Section 224, as modified by the Communications Act of 1996. To the extent that the Heritage Decision is now interpreted to

⁵ Report and Order at ¶ 32. The subsection 224(d)(3) rate is the “rate for any pole attachment used by a cable television system solely to provide cable service.”

⁶ Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Company, 6 FCC Rcd 7099 (1991) (Heritage Decision), 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).

⁷ Report and Order at ¶ 30.

⁸ Id.

⁹ Id. at ¶ 33.

stand for the proposition that the Commission, pursuant to subsection 224(b)(1), has the authority to determine the just and reasonable pole attachment rate for cable services providers who commingle their traditional cable services with nontraditional cable services, that are not telecommunications services, the Commission may be correct about the continuing vitality of this decision. But neither the Heritage Decision nor subsection 224(b)(1) authorizes the Commission to ignore subsection 224(e) which requires that a rate different from that applied pursuant to subsection 224(d)(3) be applied to pole attachments used by telecommunications carriers to provide telecommunications services.¹⁰ The Commission's unqualified conclusion that the pole attachment rate for commingled cable and Internet services should be the subsection 224(d)(3) "cable only" rate produces a result that is contrary to that required by subsection 224(e), to the extent that the Internet service provided by the cable services provider is, in whole or in part, a telecommunications service.

The Commission can no longer simply lump Internet service in with information services

¹⁰ Subsection 224(d)(3) references the standard set forth in subsection 224(d)(1) for determining the rate applicable to the pole attachments used by a cable television system solely to provide cable service. Subsection 224(d)(1) states that "a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way." Subsections 224(e)(2) and (3) set forth the standard for determining the rate applicable to the pole attachments used by telecommunications carriers to provide telecommunications services. Subsection 224(e)(2) allows a utility to apportion two thirds of the costs for unusable space to attaching entities. Subsection 224(e)(3) allows a utility to apportion the cost of providing usable space among all entities on the basis of the percentage of usable space required for each entity.

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and ignore the reality that Internet service can comprise multiple services -- some of which are information services and some of which are telecommunications services. No one can credibly claim today that significant elements of Internet service are not the functional equivalent of telecommunications service. Daily, there are announcements concerning companies offering Internet telephony, sometimes at less than half of the cost for traditional telephone services. Internet telephony is neither anomalous nor incidental. Internet telephony is not a service that is soon to be available -- it is available now, and its availability is expected to dramatically increase. It was recently reported that a cable company executive at a CableLabs conference stated that by the year 2000, Internet protocol telephony may be fully deployed entirely over cable facilities.¹¹ It has also been reported that the cable industry envisions being able to by-pass the public switched telephone network for the provision of telephone service as a result of the cost differential between telephone network switches and Internet network routers.¹² Clearly, Internet telephony is functionally equivalent as a service to traditional telephone service, and providing it constitutes the provision of a telecommunications service.

It is also the case that Internet backbone networks are increasingly being used to transport data and voice traffic. Much of the traffic that these backbone networks are carrying is not materially different than the traffic that is regularly transported by telecommunications carriers. There is growing recognition and concern that increasing amounts of data, that are currently

¹¹ See Warren's Cable Regulation Monitor, March 30, 1998, at p. 6.

¹² Id.

transported by traditional telecommunications carriers, are migrating to Internet networks because of regulatory exemptions accorded to Internet networks that provide them with cost advantages over traditional telecommunications carriers.

The significance of these develops in the context of this proceeding is that the Commission refused to acknowledge these realities in the Report and Order when it concluded that “Internet service is not the provision of a telecommunications service under the 1996 Act.”¹³ Certainly, a number of services that are provided under the mantle of Internet service are, in fact, telecommunications services and must be treated accordingly. With respect to pole attachments, this means that cable television systems should not automatically be charged the subsection 224(d)(3) “cable only” rate when they secure pole attachments for facilities on which cable and Internet services are commingled. Information concerning the nature of the Internet service must be provided to the pole owner that is sufficient to make a determination whether any telecommunications services are being carried over the cable facility as a part of the Internet service.¹⁴ To the extent that voice telephony, voice or data transport,¹⁵ or any other telecommunications service is carried over the attached cable facility, the subsection 224(e) rate

¹³ Report and Order at ¶ 33.

¹⁴ A pole owner should be able to file a complaint and recover the difference between the rate charged and the rate that should have been charged, with interest, if accurate data concerning the Internet service is not provided in a timely fashion.

¹⁵ A service that simply provides cable subscribers with access to an Internet service provider and is functionally equivalent to the dial-up access that a local exchange carrier provides to its customers in order to enable them to reach an Internet service provider should be considered a telecommunications service.

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applicable to telecommunications carriers is the appropriate charge to be assessed under Section 224. This determination is unaffected by the fact that the telecommunications service is bundled into the Internet service.

In justifying its conclusion that the provision of Internet service is not the provision of a telecommunications service, the Commission cited to its Universal Services Order¹⁶ and implied that the Universal Services Order is dispositive on this matter.¹⁷ To the contrary, the Universal Services Order acknowledged that the proper classification of Internet service was complicated and that there needed to be a reevaluation of which services qualify as information services.¹⁸ As pointed out in the Universal Services Order, the Commission has a proceeding pending that will address the treatment of Internet access service, as well as provide a comprehensive review of the status of information services providers under the Telecommunications Act of 1996.¹⁹ In light of today's realities concerning the uses of the Internet and the ongoing evaluation by the Commission of the proper classification to be given to Internet service, the Commission should reconsider its unqualified conclusion in the Report Order that the subsection 224(d)(3) "cable

¹⁶ Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776 (rel. May 8, 1997) (Universal Services Order).

¹⁷ Report and Order at ¶ 33.

¹⁸ Universal Services Order at ¶ 790.

¹⁹ Id. It is noteworthy that in an April 10, 1998, Report to Congress concerning its universal service implementation decisions, the Commission stated that the provision of transmission capacity to Internet service providers constitutes the provision of telecommunications. The Commission also observed that certain forms of phone-to-phone IP telephony have the characteristics of telecommunications services. Report to Congress (FCC 98-67), April 10, 1998.

only” pole attachment rate is to be applied for commingled cable and Internet services. The Commission should require cable services providers to make information available to utilities about their provision of Internet or Internet access services with sufficient specificity to allow a determination as to whether a telecommunications service is being provided as a part of any Internet service. If a telecommunications service is being provided, the utility must be permitted to charge the cable services provider the subsection 224(e) rate for the pole attachments.

II. Usable Conduit Space Is Distinguishable
From Other Than Usable Conduit Space
And The Costs Should Be Assessed Accordingly

In addressing the matter of usable and other than usable space with respect to conduit, the Commission spoke to what it believed to be the costs associated with other than usable space but was not specific about the costs that are appropriate for inclusion in rate development for usable space. As to other than usable space, the Commission stated that “the costs for the construction of the system, which allow the creation of the usable space, should be part of the unusable space allocated among attaching entities.”²⁰ It further indicated that the “costs associated with creating this portion of space may generally include trenching, excavation, supporting structures, concrete, and backfilling.”²¹ Additionally, the Commission acknowledged that there may be space within the conduit system that becomes unusable such as maintenance ducts reserved for the benefit and use of all attaching entities.

²⁰ Id. at ¶110.

²¹ Id., fn. 355.

Although inferences may be drawn as to the costs associated with usable space based on the Commission's discussion of costs attributable to other than usable space, the Commission should specify the costs that are appropriate for inclusion in calculating the rate component associated with usable conduit space. USTA believes that the proposal set forth by Bell Atlantic in its comments and reply comments in this proceeding is the most appropriate way in which to delineate the usable space and other than usable space costs associated with conduit and that the Commission should adopt the Bell Atlantic proposal on reconsideration. Rather than restate what Bell Atlantic has presented, attached hereto as Exhibit No. I are the relevant sections from Bell Atlantic's comments and reply comments in this proceeding.

To the extent that the Commission does not adopt the Bell Atlantic proposal, it should clarify what constitutes usable space costs as set forth in the reply comments of the Electric Utilities Coalition.

The usable space in conduit is the cost of the actual duct itself.
... . The cost of the ducts, being the usable space, can be deducted from the total cost of the conduit, on a per foot basis, to complete the calculation of the maximum rate under the statute.²²

USTA believes that Bell Atlantic's proposal is preferable to the proposal of the Electric Utilities Coalition because it parallels the treatment for poles. Should the Commission not adopt the Bell Atlantic proposal on reconsideration, then it should identify the costs that are associated with usable conduit space as described by the Electric Utilities Coalition.

²² Reply Comments of the Electric Utilities Coalition at p. 10.

III. The Development Of Presumptive Average
Numbers Of Attachers For Areas That Share Similar
Characteristics Should Be Permissive And Not Mandatory

The Commission has mandated that each utility “develop, through the information that it possesses, a presumptive average number of attaching entities on its poles based on location [urban, rural, urbanized]”²³ By mandating this exercise, the Commission has created a burden on many utilities for which there is likely to be little, if any, benefit in return.

The location definitions that the Commission has imposed come from the Bureau of Census, U.S. Department of Commerce. They are very confusing and overlapping. For example, in the definitions for urban and rural, the reader is told that:

The urban and rural classification cuts across the other hierarchies; for example, there is generally both urban and rural territory within both metropolitan and non-metropolitan areas.²⁴

While the location definitions may be eminently reasonable and make perfect sense for tracking demographics in the United States, they are far more complex than necessary for sorting the average number of attaching entities in a utility’s service area. It is likely that many companies will not have existing data available that will enable them to perform the task that is required. In the case of many small and rural companies, only the rural definition is relevant. Most

²³ Report and Order at ¶ 78.

²⁴ Urban and Rural Definitions - U.S. Department of Commerce (rel. Oct. 1995).

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telecommunications companies track their pole and conduit investment by state and would have to substantially modify the manner in which they inventory poles in order to comply with the Commission's mandate. Additionally, the record does not support the need for the Commission to require the development of average numbers of attaching entities by areas that share similar characteristics. Rather, the record demonstrates that utilities want to have the flexibility to develop presumptive averages by location where it makes sense for them, and without being constrained by one set of location definitions applicable to all utilities irrespective of individual circumstances.

The Commission should make the development of average numbers of attaching entities on the basis of areas that share similar characteristics permissive instead of mandatory. The Commission should give utilities that elect to develop averages by location the latitude to choose the location or area definitions that are most appropriate for their service areas. Some utilities may find that it is appropriate to have one presumptive average number of attaching entities for their entire service area. USTA believes that they should have the flexibility to do so.

IV. The Commission Should Clarify That Third Party Overlashers Are Liable To Pole Owners For Other Than Usable Space Costs But Not For Usable Space Costs

At paragraph 69 of the Report and Order, the Commission addresses the issue of third party overlashers and the appropriateness of pole owners charging third party overlashers for an allocated portion of the costs associated with other than usable space. In the course of the discussion, the Commission makes reference to charges for usable space ("... that third party

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overlapping entity should be classified as a separate attaching entity for purposes of allocating costs of unusable and usable space”) although later in the Report and Order the Commission states that the host attaching entity (as opposed to the third party overlasher) remains responsible to the pole owner for the use of the one foot of usable space.²⁵ USTA believes that the reference in paragraph 69 to allocating the cost for usable space to third party overlashers is confusing and may have been unintended. Therefore, USTA asks the Commission to clarify this paragraph as to the matter of allocating costs to third party overlashers for usable space.

CONCLUSION

On the basis of the foregoing, USTA requests that the Commission reconsider its decisions concerning: 1) the applicable pole attachment rate to be charged when a cable television system commingles cable service and Internet service on the same facility; 2) the usable and other than usable space costs for conduit; and 3) the mandate that utilities develop presumptive average numbers of attaching entities for areas that share similar characteristics (urban, rural and urbanized). In reconsidering these decisions, the Commission should adopt the

²⁵ *Id.* at ¶ 94.

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recommendations of USTA that are discussed above. Finally, USTA asks that the Commission clarify its intent with respect to the charges that may be levied by pole owners on third party overlashers.

Respectfully submitted,

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April 13, 1998

CERTIFICATE OF SERVICE

I, Carl McFadgion, do certify that on April 13, 1998 copies of the Petition For Reconsideration of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the person on the attached service list.

A handwritten signature in black ink, appearing to read 'Carl McFadgion', written over a horizontal line.

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Exhibit No. 1

DOCKET RECORD SYSTEM

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Pole Attachments)

CS Docket No. 97-151

COMMENTS OF BELL ATLANTIC¹

Bell Atlantic submits these comments in response to the Commission's above-captioned rulemaking to implement Section 224(e) of the Communications Act of 1934. The Notice of Proposed Rulemaking ("NPRM") also raises a number of issues addressed by Bell Atlantic and other commenters in previous proceedings in CS Docket No. 97-98.² Bell Atlantic will not repeat those comments here, in reliance on the Commission's statement that those comments, to the extent they are relevant, will be incorporated by reference in this proceeding.³

¹ The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., New York Telephone Company and New England Telephone and Telegraph Company.

² See Joint Comments of Bell Atlantic and NYNEX, *Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98 (filed June 27, 1997) ("Bell Atlantic Comments"); Joint Reply Comments of Bell Atlantic and NYNEX, *id.* (filed August 11, 1997) ("Bell Atlantic Reply Comments").

³ NPRM para. 8.

V. The Conduit Rate Formula Should Parallel the Formula for Pole Rates

For reasons explained more fully in Bell Atlantic's previous comments in CS Docket 97-98,¹⁷ the Commission should adopt its proposed half-duct methodology for conduit access rates for usable space but should use gross, rather than net book costs in the calculation.

With regard to conduit rates for "other than usable" space, the Commission should define that phrase as encompassing all spare or excess capacity not actually being used by the conduit owner or any attaching entity. As Bell Atlantic noted in its previous comments in CS Docket 97-98, "[g]iven the relatively high initial costs and sensitive civic considerations associated with opening underground facilities, the long design life of these facilities requires telephone companies to forecast and install the number of ducts sufficient to meet anticipated needs for growth and maintenance."¹⁸ Thus individual duct costs are kept down over time by prudent investment in spare duct capacity to meet projected demand. All occupants of the conduit system benefit from the ability to expand capacity without the expense and disruption of repeatedly obtaining municipal permits to open roads and municipal rights-of-way to add capacity later. Other than usable space should also be defined to include maintenance ducts reserved for temporary use by any attaching entity in the event of an emergency. Finally, ducts reserved for municipal use (if required) are not usable space. Reservation of such facilities is usually a condition for placing the conduit in the municipal right-of-way. Because all attaching entities benefit from not having to place their own conduit and reserve their own duct for municipal use, it is fair that all should share the costs of reserved municipal ducts.

¹⁷ Bell Atlantic Comments at pp. 2-7 and 12-13.

¹⁸ Bell Atlantic Comments at 12-13.

As with pole attachments, Section 224(e)(2) requires the costs of such spare or common unusable conduit space to be equally apportioned among all attaching entities. The costs of such space should be determined by subtracting from the total cost of the conduit facility the costs associated with the space currently being utilized by the conduit owner or any attaching entity. The remaining space would constitute "other than usable" space, the cost of which would be equally apportioned among all attaching entities. As with pole attachments, the Commission should allow conduit owners to establish a presumptive average number of attaching parties per conduit system in a given area (whether per state, per service area or any smaller geographic area) for purposes of allocating such other than usable costs. Such presumptions would, of course, be subject to rebuttal by a complainant in a complaint proceeding.

VI. Rights-of-Way Complaints Should be Addressed on a Case-By-Case Basis

The Commission should not adopt any particular formula or methodology for determining just and reasonable rates for access to rights-of-way in this proceeding. As the Commission observes, it has had only limited experience with rights-of-way issues.¹⁹ The same is true with regard to the industry. Given that limited experience, it would be difficult to determine the full range of circumstances that would have to be taken into account in establishing such a formula or methodology. Bell Atlantic urges the Commission to address any right-of-way complaints on a case-by-case basis, and revisit the question of rate methodology, if necessary, once the Commission and the industry have broader experience with these issues.

Moreover, unlike poles and conduits which are owned by local utility companies, rights-of-way are often granted under agreements to such utility companies only for their own

¹⁹ NPRM at para. 42.