

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

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In The Matter of)
)
Implementation of Section 703(e))
of the Telecommunications)
Act of 1996)
)
Amendments of Rules and Policies)
Governing Pole Attachments)

CS Docket No. 97-151

REPLY COMMENTS OF BELL ATLANTIC

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VI. The Commission Should Adopt Bell Atlantic's Definition of "Other Than Usable Space" for Conduits

Although the Act provides explicit guidance with regard to defining the usable space on a pole,⁶³ it does not provide any guidance as to how to define either usable or other than usable space in conduits. The Commission should adopt Bell Atlantic's proposal to define "other than usable" space in conduits as "encompassing all spare or excess capacity not actually being used by the conduit owner or any attaching entity."⁶⁴ This definition is most consistent with the plain meaning of the phrase, and ensures that the portion of conduit costs that benefit all attaching entities are shared by them.

A number of electric utilities claim that the only usable space is the duct itself and that the remainder of the conduit system is other than usable space.⁶⁵ The costs of the supporting components of the conduit system (e.g., cement and other stabilizing and reinforcing materials) and related costs (e.g., trenching and repaving) are reflected in local exchange carrier accounts and are recovered under the Commission's current usable space rate formula on a per duct in use basis. While the formula does not currently permit recovery of those costs to the extent associated with unused ducts (e.g., spare,

⁶³ See 47 U.S.C. Section 224(d)(2).

⁶⁴ Bell Atlantic Comments at 9.

⁶⁵ See, e.g., Electric Utility Coalition at 16; EEI UTC at 29; Electric Utilities at 53.

maintenance and municipal ducts), those costs would be recoverable as other than usable space costs when Section 224(e) becomes effective. under Bell Atlantic's proposal.

AT&T⁶⁶ and MCI⁶⁷ argue that all conduit space and therefore all conduit costs must be categorized as usable because even maintenance and municipal ducts are, in fact, "used."⁶⁸ The fact that maintenance ducts, held in reserve for temporary emergency use, are periodically used for such purposes does not render them "usable" space. If they were usable, they could be charged to a specific entity; instead, they exist for the common good of all attaching entities as needed. Similarly, the fact that municipal authorities often require that a duct be reserved for public health and safety reasons does not make that space "usable" for purposes of cost recovery; instead, it is other than usable space that the facility owner(s) reserve for municipal purposes. The reservation of that space benefits all attaching entities, who would otherwise have to reserve ducts in their own

⁶⁶ AT&T at 16.

⁶⁷ MCI at 16.

⁶⁸ AT&T also alleges that the Commission must treat all conduit as usable to avoid overrecovery. According to AT&T, if the Commission determines that maintenance ducts are to be treated as unusable, "the occupant would not only pay for part of the reserved duct pursuant to the unusable formula, the occupant would also bear the cost for part of the reserved duct's costs through the usable space formula." That is because under the FCC's proposed usable space formula, maintenance ducts are subtracted from the average number of ducts in the denominator of the occupied space component, thus reducing the denominator. That would not happen under Bell Atlantic's proposal to define other than usable space as including maintenance ducts. Under that approach, the average number of ducts in the denominator of the occupied space component of the usable space formula would not be adjusted for maintenance ducts. Thus the costs of the maintenance ducts would be recovered, as they should be, only as other than usable space costs.

facilities for municipal use if they built their own conduit instead of sharing access to existing conduit.

VII. Right of Way Issues Should Be Addressed on a Case by Case Basis

There is a general consensus among commenters that the Commission should not adopt any particular methodology for rates or other detailed rules for access to rights of way, but should instead address these issues on a case-by-case basis.⁶⁹ Nevertheless, there are several broad guidelines that the Commission should adopt to minimize the number of disputes that must be resolved through the complaint process.

First, the Commission should clarify that a utility may grant access to such rights of way to third parties only to the extent that, under state law or the terms under which the utility has obtained the right of way from the underlying property owner, it has the legal right to do so.⁷⁰ Even if such access is permitted, any third party attacher would be required to obtain any necessary approvals from the underlying property owners to its presence, and would be subject to the same restrictions and conditions on use of such rights of way as the utility to whom the right of way is granted.⁷¹ In addition, the third party attacher must comply with all applicable environmental and zoning laws and bear all associated costs relating to such compliance. Any other terms of the occupation should be decided between the attaching entity and utility. If the grant of access to third

⁶⁹ See, e.g., MCI at 22; USTA at 14-15; Duquesne Light at 52.

⁷⁰ See Interconnection Order at para. 1179. See also, Bell Atlantic Further Reply Comments in CC Docket No. 96-98 at 12, n. 36 (filed June 3, 1996).

⁷¹ Of course, the attaching entity enjoying access to the utility's right of way receives no property or other ownership interest in the utility's right of way. Interconnection Order at para. 1216.