

DOCKET FILE COPY ORIGINAL ORIGINAL
RECEIVED

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

APR 13 1998
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 OF ICG COMMUNICATIONS, INC.
FOR RECONSIDERATION AND CLARIFICATION**

ICG COMMUNICATIONS, INC.

Cindy Z. Schonhaut
Senior Vice President, Government and
External Affairs
ICG Communications, Inc.
161 Inverness Drive West
Englewood, Colorado 80112
303 414 5464

Albert H. Kramer
Dickstein, Morin, Shapiro & Oshinsky
2101 L Street, N.W.
Washington, DC 20037 1526
202 828 2226

April 13, 1998

No. of Copies rec'd 012
LIST A B C D E

TABLE OF CONTENTS

I. Summary of Position. 1

II. The Commission Should Allocate Total Conduit Costs Between Usable and Unusable Space Based Upon the Relative Number of Usable and Unusable Ducts. 3

III. The Commission Must Clarify that Electric Utilities Are Attaching Entities for Purposes of the Equal Apportionment of Two-Thirds of Unusable Space Costs. 6

IV. The Commission Should Abandon the One Foot Usable Space Presumption or, in the Alternative, Clarify that Telecommunications Carriers and Cable Operators Have the Right to Occupy Less than One Foot of Usable Space and to Pay Rates Based upon the Amount of Usable Space that They Actually Occupy. 9

V. Conclusion. 13

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

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

**PETITION OF ICG COMMUNICATIONS, INC.
FOR RECONSIDERATION AND CLARIFICATION**

ICG Communications, Inc. (ICG) hereby petitions for reconsideration and clarification of the Commission's Report and Order¹ in the above-captioned proceeding.

I. Summary of Position.

ICG seeks reconsideration or clarification of three issues: the determination of the costs associated with conduits that are considered to be unusable space costs, the treatment of electric utilities for purposes of the equal apportionment of two-thirds of unusable space costs among attaching entities, and the Commission's adherence to its long-standing presumption that all attachments to utility poles occupy one foot of usable space.

ICG submits that the Commission should not attempt to identify some of the costs of constructing conduit systems as costs of unusable space and others as costs of usable space, but should instead allocate the total cost of conduit systems between usable and unusable space based upon the number of ducts available for use and those reserved for maintenance. The approach

¹ *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 (February 6, 1998) (the *Report and Order*).

proposed by a group of electric utilities and adopted by the Commission treats as unusable space costs the cost of activities that are required for the construction of the entire conduit system and could just as logically be treated as usable space costs. The classification of conduit costs adopted by the Commission is inconsistent with its approach to determining the cost of unusable space on poles and would be impractical to apply because the necessary cost information generally is not available. Finally, the methodology is likely to result in excessive conduit rates, especially for the use of electric utility conduits, and is thus contrary to Congress's desire to facilitate competitive entry.

The Commission needs to clarify that electric utilities are attaching entities for purposes of the equal allocation of two-thirds of unusable space costs under Section 224(e)(2). Congress did not limit in any way the meaning of the term attaching entity, but rather intended that all commercial users of a pole should share the cost of unusable space. Failure to treat electric utilities as attaching entities would permit ILECs to overrecover their pole costs and impede competitive entry.

The Commission should also reconsider its decision to reaffirm its one foot usable space presumption. The authority cited by the Commission in support of its rejection of ICG's arguments on this issue actually supports ICG's position, and the Commission's reliance on actual construction practices rather than accepted engineering requirements tends to perpetuate utility practices that increase new entrants' cost of constructing their networks. In the alternative, the Commission should clearly state that telecommunications carriers and cable operators have the right to occupy less than one foot of usable space and to pay pole attachment rates based upon the amount of space they actually occupy.

II. The Commission Should Allocate Total Conduit Costs Between Usable and Unusable Space Based Upon the Relative Number of Usable and Unusable Ducts.

In the Notice of Proposed Rulemaking in this docket, the Commission proposed to divide conduit costs between usable and unusable space by classifying ducts available for occupancy as usable space and ducts reserved for maintenance as unusable space. Accordingly, most of the comments focused on whether and under what circumstances ducts reserved for maintenance should be considered to be unusable space. In an effort to inflate the conduit costs to be borne by conduit licensees, however, a group of electric utilities argued that most of the cost of a conduit bank should be considered unusable space cost. The electric utilities' argument is illogical in classifying buried rock and concrete as space, is inconsistent with the treatment of the same issue with respect to poles, is impractical to apply because the information necessary to develop rates either is not available or can be assembled only through a protracted and detailed examination of the utility's records, and is likely to lead to very high conduit rates, especially for the first attaching party in an electric utility conduit bank. The Commission's acceptance of this argument, if not reconsidered and reversed, will result in protracted disputes over appropriate conduit rates and prohibitively high costs for conduit licensees.

The electric utilities' position is illogical on its face. The only space in a conduit system is the space within the individual ducts, which may or may not be usable depending upon whether it is available for long term occupancy or reserved for short term use in connection with maintenance activities. The costs of obtaining permits, excavating and trenching, shoring, treating surfaces, backfilling, and the like are just as much a part of the cost of making available the usable

space as they are part of the cost of unusable space. It would be equally logical to classify all of these costs as usable space costs, as they all are necessary to the creation of the usable space.

The Commission's adoption of the electric utilities' position is inconsistent with its treatment of the cost of usable and unusable space on poles. The Commission did not attempt to classify some pole costs, such as perhaps the cost of setting the pole, as unusable space costs and others, such as tree trimming expenses, as usable space costs. Rather, it allocated the total cost of the pole between usable and unusable space based upon the relative amounts of usable and unusable space on the pole. The Commission should take the same approach with conduit costs, allocating the total cost between usable and unusable space based upon the amounts of space in the ducts that is usable or unusable.

The classification of specific costs as unusable space costs would create significant practical problems as well, rendering impossible the simple and expeditious determination of conduit rates. Although new ducts and conduits are constantly being constructed, the overwhelming majority of the conduits in use today have been in use for some time. Conduit systems in urban centers may often be nearly a century old. Utilities' publicly filed cost reports, upon which the Commission has always relied in order to simplify the calculation of pole attachment rates, report only the aggregate cost of utility conduit systems. Most utilities simply do not have records of the costs of the various components making up a conduit system or the various and varying work involved in constructing a conduit bank. Even where such information is available at all, determining the costs classified as usable and unusable under the approach adopted by the Commission would require a detailed examination of massive records accumulated over scores of years. In its regulation of pole attachment rates the Commission consistently has eschewed the complex, detailed procedures

historically employed to determine utility rates, but a traditional utility rate case would be relatively simple in comparison to the determination of conduit rates under the approach adopted by the Commission.

Finally, the approach adopted by the Commission will, if not reconsidered and reversed, result in excessive conduit rates in many instances. By accepting the electric utilities' argument, the Commission has classified virtually all of the cost of conduit as unusable space cost. These costs typically include obtaining permits, excavating rock, shoring trench sides and treating subsurfaces. *Report and Order* at ¶ 110 n.349. The costs associated with creating [unusable space as so defined] may generally include trenching, excavation, supporting structures, concrete, and backfilling. *Id.* n.355. The only cost that clearly would qualify as usable space cost pursuant to the *Report and Order* appears to be the cost of the materials constituting the actual ducts, which is a nearly negligible portion of the total cost of constructing and maintaining a conduit system.

Because two-thirds of the cost of unusable space is apportioned equally among attaching entities, if the costs the Commission has identified were all treated as unusable space costs, a telecommunications carrier occupying half a duct in an ILEC's conduit bank consisting of perhaps four or more ducts would bear up to one-third of the cost of the entire conduit bank. If the Commission does not clarify that electric utilities are attaching entities, as discussed below, the first licensee in an electric utility's conduit system could be forced to bear roughly two-thirds of the cost of the entire conduit system in return for its occupancy of one-half duct or less. In many cases, it would be less expensive for the telecommunications carrier to construct its own duct, but this often is not feasible because of congestion and local government right-of-way management

policies, so new entrants are forced in many cases to use existing utility conduits, whatever the rate, if they are to construct their networks.

Congress clearly could not have intended this result. The purpose of the amendments to Section 224 was to facilitate competitive entry by telecommunications carriers while requiring them to bear somewhat more of the cost of using utility poles, ducts, conduits and rights-of-way than cable operators historically have paid. Congress's purpose was not to permit utilities to shift most of the cost of their conduit systems to new entrants in return for the use of a small portion of the usable space. The classification of nearly all of the cost of building a conduit system as unusable space cost is illogical, is inconsistent with the Commission's treatment of the same issue in the context of poles, would lead to impossibly protracted conduit rate proceedings, and would saddle new entrants with a disproportionate share of the cost of using utility conduits. The Commission must reconsider its position and should allocate the total cost of a conduit system between usable and unusable space based upon the number of ducts available for general use and the number reserved for maintenance purposes.

III. The Commission Must Clarify that Electric Utilities Are Attaching Entities for Purposes of the Equal Apportionment of Two-Thirds of Unusable Space Costs.

In its Reply Comments, ICG noted that electric utilities that do not provide telecommunications or cable services must be treated as attaching entities under Section 224(e)(2) in order to avoid overrecovery of pole costs by ILECs.² This issue was also addressed by the National Cable

² Reply Comments of ICG Communications, Inc. at 15 16.

Television Association,³ Comcast Cable Communications, Inc., *et al.*,⁴ and GTE Service Corporation,⁵ among others. Yet the Commission did not discuss the status of electric utilities as attaching entities in the *Report and Order* except to the extent that they may provide telecommunications or cable services. The Commission must clarify that *all* users of a pole, duct, conduit, or right-of-way except *government* users that do not provide telecommunications or cable services are attaching entities for purpose of the apportionment of the cost of providing unusable space.

Based upon the Commission's discussion of governmental users, its silence on this issue appears to derive from its belief that only parties owning pole attachments as defined in Section 224(a)(4) are attaching entities, but Congress carefully avoided limiting the term attaching entities in any way. Section 224(e)(2) does not even use the term attachment, much less the narrower defined term pole attachment. As discussed in the Comcast Reply Comments at 11 12, it is clear from Section 224(i) that pole owners are entities who own attachments whether or not they provide telecommunications or cable services. Because they benefit at least as much as any other party from the unusable portions of a pole, electric utilities must be counted as attaching entities.⁶

³ Reply Comments of the National Cable Television Association at 16 17.

⁴ Reply Comments of Comcast Cable Communications, Inc., *et al.* (Comcast Reply Comments) at 9 14.

⁵ Comments of GTE Service Corporation (GTE Comments) at 11.

⁶ Indeed, it is arguable that electric utilities derive a greater benefit from the unusable pole space (primarily the space between the ground and the lowest point of attachment) than other users do. As discussed in ICG's Opening Comments at 31, the NESC permits significantly lower clearances above ground when the lowest line on a pole is a communications line rather than a

As discussed in ICG's Reply Comments at 15 16, the failure to count electric utilities as attaching entities on poles owned by ILECs results in the over-recovery of pole costs by ILECs and may actually result in an ILEC bearing *none* of the cost of a pole it owns. Under many joint use agreements between electric utilities and ILECs, the electric utility bears as much as sixty percent of the cost of an ILEC's pole.⁷ If an ILEC has as few as two other licensees, it may collect sixty percent of the cost of the entire pole from the electric utility and twenty-two percent of the cost of unusable space from each other licensee. This recovery of one hundred four percent of the cost of unusable space from the electric utility and two licensees, plus the recovery of sixty percent of usable space costs from the electric utility and pro rata shares of usable space costs from the other licensees, could easily leave the ILEC bearing none of the cost of the pole. The purpose of the amendments to Section 224 was to facilitate competitive entry by facilities-based telecommunications carriers, not to relieve ILECs of the cost of their own poles.

In order to minimize disputes concerning the number of attaching entities and avoid the overrecovery of pole costs by ILECs, the Commission must clarify that electric utilities, like all other commercial users of a pole, duct, conduit, or right-of-way, are attaching entities for purposes of the apportionment of unusable space costs under Section 224(e)(2).

power conductor. If it were not for the presence of communications users, electric utility poles would require more unusable space in order to achieve the required clearances.

⁷ Comments of the New York State Investor Owned Electric Utilities at 21 n.7.

IV. The Commission Should Abandon the One Foot Usable Space Presumption or, in the Alternative, Clarify that Telecommunications Carriers and Cable Operators Have the Right to Occupy Less than One Foot of Usable Space and to Pay Rates Based upon the Amount of Usable Space that They Actually Occupy.

In the *Report and Order*, the Commission rejected the arguments of ICG and others that telecommunications carriers' attachments should be presumed to occupy less than one foot of usable space on a pole, citing the Bellcore Blue Book Manual of Construction Procedures (Bellcore Blue Book) for the requirement of one foot of clearance at the pole between communications cables supported on different strands of suspension. *Report and Order* at ¶ 88. The Bellcore Blue Book, however, is not the kind of generally accepted engineering standard that the Commission previously has stated must form the basis for pole attachment decisions. Moreover, it does not require a *vertical* separation of one foot one foot of usable pole space between communications cables in any event.

The Commission previously has ruled that decisions concerning access to utility poles, ducts, conduits and rights-of-way must be based upon generally accepted engineering standards, and not upon the preferences of particular pole owners. [I]n evaluating a request for access, a utility may continue to rely on such codes as the NESC to prescribe standards with respect to capacity, safety, reliability, and general engineering principles. *Implementation of the Local Competition Provisions in the Telecommunications Act*, CC Docket No. 96 98, First Report and Order, 11 FCC Rcd. 15499 (1996), at para. 1151. [W]e reject the contention of some utilities that they are the primary arbiters of [capacity, safety, reliability, or engineering concerns], or that their determinations should be presumed reasonable. *Id.* at ¶ 1158.

Just as access decisions must be based upon generally accepted engineering standards, so too should pole attachment rate determinations. The 1996 edition of the Bellcore Blue Book, however, was published while Bellcore was owned by the former Bell companies. Indeed, Section 3.1 of the Blue Book, expressly states that the clearances specified are in accordance with the Bellcore Client Company (BCC) recommendations. Bellcore Blue Book § 3.1 at p. 3 1 (footnote omitted).⁸ At least until the next edition of the Blue Book is published it cannot be the basis for a nondiscriminatory denial of access, and similarly, it should not be permitted to govern pole attachment rate determinations.

Moreover, the section of the Blue Book cited by the Commission actually supports a usable space allocation of four inches, not twelve. The provision notes that communications cables supported on different strands must be separated by twelve inches at the pole, but it specifically endorses a twelve inch *diagonal* separation achieved by placing attachments on opposite sides of the pole and notes that only a four inch vertical separation is required in order to insure that the bolt holes are far enough apart that they do not threaten the structural integrity of the pole. Because only a four inch vertical separation is required, each attachment can occupy as little as four inches of usable pole space.

The Commission also rejected ICG's argument that fiber optic cables installed in the electric supply space above the neutral or safety space that separates power conductors from most communications lines must be allocated sixteen inches of usable space, stating simply that ICG Communications has not adequately supported its suggested allocation. *Report and Order* at ¶ 88.

⁸ The omitted footnote explains that 'Bellcore Client Company' or 'BCC' means a divested Bell Operating Company.

Yet no party even attempted to rebut ICG's point that NESC Rule 235C (Table 235 5) requires a clearance of sixteen inches between a communications line located in the electric supply space and any electric supply conductor. ICG submits that the Commission cannot adopt a presumption even a rebuttable presumption that all attachments occupy one foot of usable space when the only universally accepted engineering standard requires sixteen inches for certain kinds of attachments.

It is apparent from the discussion of these issues in the *Report and Order* that the Commission seeks to base its pole attachment rate formula on what it perceives to be actual practices, and not on what is theoretically possible based upon accepted engineering principles. This approach, while facially appealing, disregards the practical impact of the Commission's rate policies on utilities' field practices. The Commission's insistence upon a one foot usable space presumption encourages utilities to require construction practices that increase telecommunications carriers' and cable operators' costs and thus impede competitive entry.

In many, if not most, urban and suburban areas, pole makeready expenses the cost of rearranging existing attachments or replacing poles with taller ones in order to make room for additional attachments is a significant portion, or even the majority, of the cost of constructing a telecommunications or cable network. It is often possible, however, to install fiber optic cables in the electric supply space as permitted by NESC Rule 235C with little or no makeready work, and it is almost always possible to install an additional attachment between two existing attachments, but on the opposite side of the pole, as suggested by Bellcore Blue Book § 3.2 (and permitted by the NESC), with no makeready work. Such construction practices comport with

accepted engineering guidelines while significantly reducing the cost of constructing competitive telecommunications and cable facilities.

The Commission's one foot presumption, however, encourages electric utilities to refuse to permit attachments in the electric supply space on the ground that the rate formula only permits them to charge for one foot of usable space, while the attachment occupies sixteen inches. The presumption similarly reinforces the erroneous perception that a twelve inch vertical clearance is required, bolstering utility refusals to permit attachments that occupy less than a foot of pole space while relying on horizontal or diagonal clearances in order to satisfy engineering requirements.⁹ In practice, then, the Commission's effort to base pole attachment rates on actual field practices encourages the perpetuation of field practices that impede competitive entry.

ICG submits that the Commission's pole attachment rate policies should be based not upon the historical and current field practices that have impeded and continue to impede competitive entry by new, facilities-based telecommunications carriers and cable operators, but upon generally accepted engineering standards that maximize the efficient use of pole space. While a utility certainly should be permitted to establish in a particular case that an attachment actually requires a foot or more of usable space, the Commission's *presumptions* should provide incentives for utilities to permit construction practices that are consistent with accepted engineering principles while minimizing makeready expenses. Only by basing its rate policies upon what is permitted by

⁹ Such refusals, especially by incumbent LECs, may in some cases be based upon an anticompetitive desire to increase licensees' costs. In other cases, they are said to be based upon aesthetic concerns. While aesthetic considerations may cause local governments to adopt limitations on overhead utility lines, Section 224(f) does not permit utilities to deny access based upon aesthetics.

engineering standards, rather than upon the preferences of pole owners, can the Commission provide incentives for utilities to permit efficient construction practices that conflict with their preferences.

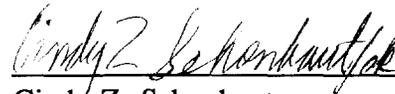
In the alternative, the Commission should at a minimum clarify that telecommunications carriers and cable operators have the right to employ construction practices that are permitted by generally accepted engineering standards while reducing makeready expenses and to pay rates based upon the amount of usable space they actually occupy. Similarly, the Commission should clarify that utilities are entitled to charge pole attachment rates based upon actual usable space when attachments require more than one foot of usable space, as communications cables located in the electric supply space do. Such policies would eliminate utilities' excuses for refusing to permit attaching parties to employ generally accepted construction practices that minimize makeready expenses. Pole attachment rates based upon actual field practices cannot be just and reasonable if the field practices on which they are based are themselves unjust, unreasonable, and discriminatory.

V. Conclusion.

For the foregoing reasons and those set forth in ICG's Opening Comments and Reply Comments, the Commission should: (1) reconsider its definition of usable and unusable conduit space costs, allocating the total cost of a conduit system to usable and unusable space based upon the number of available ducts and maintenance ducts; (2) clarify that electric utilities that do not provide telecommunications or cable services are nonetheless attaching entities for purposes of the apportionment of unusable space costs; and (3) reconsider and abandon its presumption that attachments to poles occupy one foot of usable space or, in the alternative, clarify that

telecommunications carriers and cable operators have a right to occupy less than one foot of usable space and to pay pole attachment rates based upon the amount of usable space that they actually occupy.

Respectfully submitted,



Cindy Z. Schonhaut
Senior Vice President, Government and
External Affairs
ICG Communications, Inc.
161 Inverness Drive West
Englewood, Colorado 80112
303 414 5464

Albert H. Kramer
Dickstein, Morin, Shapiro & Oshinsky
2101 L Street, N.W.
Washington, DC 20037 1526
202 828 2226

April 13, 1998