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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

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MCI PETITION FOR RECONSIDERATION

Lawrence Fenster  
Senior Economist  
1801 Pennsylvania Ave., NW  
Washington, DC 20006  
202-887-2180

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## **Executive Summary**

MCI Telecommunications Corporation (“MCI”) hereby submits its Petition for Reconsideration and Clarification of portions of the Telecommunications Pole Attachment Order. In this Order, the Commission contravenes new legislative requirements to limit the cable attachment rate to facilities that exclusively carry cable services. The Commission also grants attaching parties the right to reserve pole space for their own future telecommunications use, in violation of Section 224(f)(1) of the Act. Finally, the Commission’s conduit rules are arbitrary, capricious, and unworkable. The Commission’s telecommunications pole attachment rules erect new barriers to local exchange competition. MCI strongly urges the Commission to reconsider the following decisions:

*Extension of Heritage Decision.* Permitting cable companies to provide internet services over facilities at the cable attachment rate is prohibited by new Section 224(d)(3) and discriminates against telecommunications companies that provide internet services. In its *Order* the Commission contravened explicit direction from Congress prohibiting facilities carrying internet services from receiving the cable attachment rate when the facilities are commingled with facilities carrying cable services. The Commission must adopt rules that limit the cable attachment rate to facilities carrying only cable services.

At the same time, the Commission failed to determine that telecommunications facilities carrying internet service pay a regulated rate under Section 224. The Commission must so rule. Congress did not place any conditions limiting the telecommunications rate to facilities carrying only telecommunications services.

*Third-party Overlashing.* By failing to adjust the usable space presumptions downward to account for overlashing, the Commission has granted attaching parties a right to reserve space on a pole for telecommunications purposes. According to the *Order*, attaching parties may, but are not required to, permit third parties to overlash their attachments. Thus, a party already on a pole may deny a third party the ability to overlash, and then overlash its own attachment at a later date. This is tantamount to allowing parties already on the pole the right to reserve space on the pole for their own future telecommunications use. Granting an attaching party sole discretion whether and when to permit a third party to overlash its attachment grants the host attaching party a right to reserve unused capacity for its future telecommunications’ use, in violation of Section 224(f)(1), and

Commission's rules in CC Docket 96-98. The Commission must either adjust its presumption regarding the amount of space required for a pole attachment downward to account for overlashing, or mandate attaching utilities to make their attachments available to third parties on a nondiscriminatory basis.

*Unusable Conduit Space.* In its *Order* the Commission concluded that "...unusable space means space involved in the construction of a conduit system, without which there would be no usable space..." It is arbitrary and capricious to define the "other-than-usable space" of a conduit system as space located *outside* of the system. The arbitrary and capricious nature of the Commission's definition is revealed when it abandons its own definition of unusable space and directly identifies the "cost of unusable conduit space" by reference to installation and maintenance costs. However, treating all costs in a conduit system except the pipe as other-than-usable, is also arbitrary and capricious. It results in over 90% of conduit costs being classified as other-than-usable, and saddles the first entrant with over 60% of total conduit costs. The Commission must adopt a definition of usable and other-than-usable conduit space based on space actually in the conduit system, and apply those definitions to total conduit costs as it has done with regard to poles.

*Good Faith Negotiations.* In this *Order*, the Commission extended the rate protections of Section 224 to wireless attachments by asking the parties to use good faith negotiations to modify its presumptions to account for the unique features of wireless attachments. The Commission has already determined that electric utility transmission facilities use poles and rights of way, and are therefore subject to Section 224(f)(1) of the 1996 Act. MCI requests the Commission to declare that parties seeking to attach to electric transmission facilities also be asked to modify through good faith negotiations presumptions to account for unique features of electric utility transmission facilities.

## I. Introduction

MCI Telecommunications Corporation ("MCI") hereby submits its Petition for Reconsideration and Clarification of portions of the Telecommunications Pole Attachment Order.<sup>1</sup> In this *Order* the Commission adopts rules implementing Section 703 of the Telecommunications Act of 1996 ("1996 Act")<sup>2</sup> which amends Section 224 of the Communications Act of 1934. The purpose of Section 224 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 communications providers must use in order to provide service.<sup>3</sup>

The 1996 Act amended Section 224 by extending the pole attachment protections, heretofore limited to cable companies, to telecommunications carriers.<sup>4</sup> The Act gave cable companies and telecommunications carriers a mandatory right of access to utility poles, conduits, and rights-of-way, and mandated the establishment of just, reasonable, and nondiscriminatory rates for such attachments.<sup>5</sup> The 1996 Act defined 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,

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<sup>1</sup>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 (*Order*), FCC 98-20 (released February 6, 1998).

<sup>2</sup>Pub. L. No. 104-104, 110 Stat. 61, 149-151, codified at 47 U.S.C. § 224.

<sup>3</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>4</sup>47 U.S.C. § 224.

<sup>5</sup>47 U.S.C. § 224(a), (f).

ducts, conduits, or rights-of-way used, in whole or in part, for wire communications; and a pole attachment as any."<sup>6</sup> The Act also defined a pole attachment as "any attachment by a cable television system or provider of telecommunications service...."<sup>7</sup> In the *Local Competition Order*, the Commission adopted a number of rules implementing the new nondiscriminatory access provisions of Section 224.<sup>8</sup>

Section 224 contains two new separate, but parallel, provisions governing just and reasonable rates for pole attachments: § 224(d)(3) which covers attachments used *solely* to provide cable service;<sup>9</sup> and § 224(e)(2) which covers attachments for telecommunications services.<sup>10</sup> Section 224(d)(1) defines a just and reasonable rate for cable attachments as a rate no higher than the portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles, conduits, or rights-of-way that is equal to the portion of usable pole space that is occupied by an attacher.<sup>11</sup> Sections 224(e)(2-3) define a just and reasonable rate for

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<sup>6</sup>47 U.S.C. § 224(a).

<sup>7</sup>47 U.S.C. § 224(a)(4).

<sup>8</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>9</sup>Hereafter referred to as the *cable attachment rate*.

<sup>10</sup>Hereafter referred to as the *telecommunications attachment rate*.

<sup>11</sup>*Id.* at 19-20.

telecommunications attachments as a rate no higher than the 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; plus two-thirds of the portion of costs that a utility would incur in owning and maintaining poles, conduits, and rights-of-way, were it to allocate these costs to entities according to an equal share of other-than-usable space.

In this *Order* the Commission adopts decisions, affecting crucial aspects of pole and conduit attachments, that either fail to implement clearly stated Congressional guidelines with respect to poles, conduits, and rights-of-way; or are so unworkable and outdated they result in arbitrary and capricious decisions. These areas include:

*Extension of Heritage Decision.* Permitting cable companies to provide internet services over facilities at the cable attachment rate is prohibited by new Section 224(d)(3) and discriminates against telecommunications companies that provide internet services. In its *Order* the Commission contravened explicit direction from Congress prohibiting facilities carrying internet services from receiving the cable attachment rate when the facilities are commingled with facilities carrying cable services. The Commission must adopt rules that limit the cable attachment rate to facilities carrying only cable services.

At the same time, the Commission failed to determine that telecommunications facilities carrying internet service pay a regulated rate under Section 224. The Commission must so rule. Congress did not place any conditions limiting the telecommunications rate to facilities carrying only telecommunications services.

*Third-party Overlashing.* By failing to adjust the usable space presumptions downward to account for overlashing, the Commission has granted attaching parties a right to reserve space on a pole for telecommunications purposes. According to the *Order*, attaching parties may, but are not required to, permit third parties to overlash their attachments. Thus, a party already on a pole may deny a third party the ability to overlash, and then overlash its own attachment at a later date. This is tantamount to allowing parties already on the pole the right to reserve space on the pole for their own future telecommunications use. Granting an attaching party sole discretion whether and when to permit a third party to overlash its attachment grants the host attaching party a right to reserve unused capacity for its own telecommunications' use, in violation of Section 224(f)(1), and Commission's rules in CC Docket 96-98. The Commission must either adjust its presumption regarding the amount of space required for a pole attachment downward to

account for overlashing, or mandate attaching utilities to make their attachments available to third parties on a nondiscriminatory basis.

*Unusable Conduit Space.* In its *Order* the Commission concluded that “...unusable space means space involved in the construction of a conduit system, without which there would be no usable space...” It is arbitrary and capricious to define the “other-than-usable space” of a conduit system as space located *outside* of the system. The arbitrary and capricious nature of the Commission’s definition is revealed when it abandons its own definition of unusable space and directly identifies the “cost of unusable conduit space” by reference to installation and maintenance expenses. However, treating all costs in a conduit system except the pipe as other-than-usable is also arbitrary and capricious. It results in over 90% of conduit costs being classified as other-than-usable, and saddles the first entrant with over 60% of total conduit costs. The Commission must adopt a definition of usable and other-than-usable conduit space based on space actually in the conduit system, and apply those definitions to total conduit costs as it has done with regard to poles.

*Good Faith Negotiations.* In this *Order*, the Commission extended the rate protections of Section 224 to wireless attachments by asking the parties to modify through good faith negotiations its presumptions to account for the unique features of wireless attachments. The Commission has already determined that electric utility transmission facilities use poles and rights of way, and are therefore subject to Section 224(f)(1) of the 1996 Act. MCI requests the Commission to declare that parties seeking to attach to electric transmission facilities also be asked to modify presumptions through good faith to account for unique features of electric utility transmission facilities.

## **II. The 1996 Act Modified *Heritage* by Limiting the Extension of Regulated Attachment Rates to Services Commingled with Telecommunications Services**

### **A. Facilities Carrying Services Commingled with Cable Services are No Longer Entitled to the Cable Attachment Rate**

Prior to passing the 1996 Act, Congress did not limit the 224(d)(1) cable attachment rate solely to attachments providing cable services. Consequently, the Courts upheld the Commission’s extension of the cable attachment rate to facilities that commingle cable and non-cable services.<sup>12</sup> Now, by amending Section 224(d) with new subsection (d)(3), Congress

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<sup>12</sup>*Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Company* (“*Heritage*”) 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).

explicitly limited the cable attachment rate to facilities that exclusively carry cable services.

The plain language of the 1996 Act makes clear that any pole attachment made by a cable system may receive the regulated cable attachment rate pursuant to §224(d)(1) only if all the services provided over those facilities are limited to cable services.<sup>13</sup> Section 224(d)(3) states that “[t]his subsection shall apply to the rate for any pole attachment used by a cable television system *solely to provide cable service.*”

Legislative history confirms this conclusion. The Senate version would have permitted cable companies to receive the regulated cable attachment rate if non-traditional (i.e. non-cable) services were also provided.<sup>14</sup> However, the Conference Report makes clear that Congress rejected the Senate version of rate treatment for attachments by cable companies that carry non-cable services when it added new subsection (e)(1). Rather, the language in this new subsection conforms to the House version which states that:

“...to the extent that a company seeks pole attachment for a wire used *solely to provide cable televisions services* (as defined by section 602(6) of the Communications Act), that cable company will continue to pay the rate authorized under current law (as set forth in subparagraph (d)(1) of the 1978 Act). If however, a cable television system also provides telecommunications services, then that company shall instead pay the pole attachment rate prescribed by the

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<sup>13</sup>Cable service is defined at 47 U.S.C. § 602(6) to mean “(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.”

<sup>14</sup>Section 204 of the Senate bill amends § 224 of the 1996 Act [by requiring that] ... poles, ducts, conduits and rights-of-way controlled by utilities are made available to cable television systems at the rates, terms and conditions that are just and reasonable regardless of whether the cable system is providing cable television services or telecommunications services.” Joint Explanatory Statement of the Committee of Conferees, pp. 205-206.

Commission pursuant to the fully allocated cost formula.”<sup>15</sup>

Finally, principles of statutory construction also confirm this conclusion. It is well established that the more specific legislative provision controls the general and the more recent controls the earlier.<sup>16</sup> New Section 224(d)(3) is both more recent than 224(d), which was adopted in 1978, and because it places conditions on the range of services to which Section 224 applies, it is more specific. The Commission must adopt rules that limit the cable attachment rate to facilities carrying only cable services.

**B. The Commission Must Determine that Facilities Carrying Internet Service Must Pay a Regulated Rate under Section 224 Only If They Are Commingled with Facilities Carrying Telecommunications Services**

In amending Section 224, Congress adopted two new separate, but parallel, provisions governing just and reasonable rates for pole attachments used to provide cable services (§ 224(d)) and telecommunications services (§ 224(e)). Congress retained the cable rate rules that limited cable attachment rates to the share of usable space occupied by cable facilities. However, by adopting new Section 224(d)(3), Congress limited this very favorable rate to facilities that exclusively carry cable services.

Had Congress intended this limitation to apply to facilities carrying telecommunications services, Congress would have adopted the same or similar limitation in Section 224(e). However, Congress explicitly declined to impose this limitation. Principles of statutory construction confirm the conclusion that Congress did not intend to limit the telecommunications

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<sup>15</sup>*Ibid.*

<sup>16</sup>Smith v. Robinson, 468 U.S. 992, 1024 (1984); Patterson v. McLean Credit Union, 491 U.S. 164, 181 (1989).

attachment rate exclusively to facilities carrying telecommunications services. It is well established that where a modification appears in one provision of a statute but is omitted in a parallel provision of the same statute, Congress intended that the modification not be applicable to the latter.<sup>17</sup>

By adopting new Section 224(e)(2), Congress adopted a different condition on telecommunications attachments. Congress required telecommunications attachments to recover costs associated with “other-than-usable-space,” in addition to costs associated with the usable space they occupy. Thus, only cable facilities are exempted from recovering costs associated with “other-than-usable-space,” but only cable facilities are prohibited from receiving a regulated attachment rate for facilities that carry “other-than-cable-services.” Only telecommunications facilities may receive a regulated attachment rate when they are commingled with facilities carrying internet services, but only telecommunications facilities are required to recover costs associated with “other-than-usable-space.” Consequently, cable companies that provide internet services must pay a regulated attachment rate only if they also provide telecommunications services.

In its *Order*, the Commission contravened explicit direction from Congress prohibiting facilities carrying internet services from receiving the cable attachment rate when the facilities are commingled with facilities carrying cable services, but failed to determine that telecommunications facilities carrying internet service must pay a regulated rate under Section 224. The Commission must so rule. Section 224(b)(1) still requires the Commission to “...regulate the rates, terms, and

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<sup>17</sup>An exclusion appearing in one provision of statute but not in another implies that exclusion is inapplicable to latter. Cf. League to Save Lake Tahoe, Inc. v. Trounday, 598 F.2d 1164, 1171 (9th Cir. 1979)

conditions for pole attachments....” And Section 224(a)(4) still defines a pole attachment as *any* attachment by a provider of telecommunications service.

In addition, the Commission has already determined that Congress intended “...all services the Commission has previously considered to be ‘enhanced’ to be included in the statutory term ‘information service’.”<sup>18</sup> Internet services are currently classified as information services.<sup>19</sup> MCI requests the Commission declare that telecommunications carriers must pay the telecommunications attachment rate for facilities that may carry information services and services other than telecommunications services.

### **III. The Commission’s Treatment of Third Party Overlapping is Seriously Flawed**

#### **A. The Commission’s Failure to Update its Usable Space Presumptions Unlawfully Grants Attaching Utilities the Right to Reserve Space on a Pole**

In its *Order* the Commission retained its presumption that one foot of space is required per pole attachment, stating that “[s]ufficient record has not been presented to change our [usable space] presumption as a general matter.”<sup>20</sup> However, in the same *Order*, the Commission also determined that one foot of usable space is sufficient to permit both an original attachment and

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<sup>18</sup>Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications act of 1934, 11 FCC Rcd 21905, 21955-56 (1996) at ¶ 102.

<sup>19</sup>The term ‘information service’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operations of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153 (20).

<sup>20</sup>*Order* at ¶ 91.

one or more overlashings.<sup>21</sup> It is not logically possible for the Commission to presume that a single attachment requires one foot of space and at the same time is presumed to require less than one foot of space. If overlashing is presumed possible, the Commission must adjust its usable space presumptions accordingly.

The importance of the issue of the presumptive amount of space required for a pole attachment goes far beyond the calculation of a just and reasonable attachment rate. By failing to adjust the usable space presumptions downward to account for presumptive overlashing, the Commission has granted those fortunate enough to have existing attachments a right to reserve space on a pole for telecommunications purposes. According to the *Order*, attaching parties may, but are not required to, permit third parties to overlash their attachments.<sup>22</sup> Thus, a party already on a pole may deny a third party the ability to overlash, and then overlash its own attachment at a later date. This is tantamount to allowing parties already on the pole the right to reserve space on the pole for their own future telecommunications use.

In its *Local Competition Order* the Commission determined that utility companies may not reserve or recover reserved space to provide telecommunications or video programming services.

“An electric utility may not reserve or recover reserved space to provide telecommunications or video programming service...”<sup>23</sup>

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<sup>21</sup>“...we find that the one foot presumption shall continue to apply where an attaching entity has overlashed its own pole attachments. We also determine that facilities overlashed by third parties onto existing pole attachments are presumed to share the presumptive one foot of usable space of the host attachment.” *Order* at ¶ 92.

<sup>22</sup>“Accordingly, we will allow third party overlashing subject to the same safety, reliability, and engineering constraints that apply to overlashing one’s own pole attachment.” *Order* at ¶ 68.

<sup>23</sup>Implementation of the Local Competition Provisions in the Telecommunications act of 1996, *Local Competition Order*, CC Docket 96-98, First Report and Order, released August 8,

“Section 224(f)(1) requires nondiscriminatory treatment of all providers of such services and does not contain an exception for the benefit of such a provider on account of its ownership or control of the facility or right-of-way. Allowing the pole or conduit owner to favor itself or its affiliate with respect to the provision of telecommunications or video services would nullify, to a great extent, the nondiscrimination that Congress required. Permitting an incumbent LEC, for example, to reserve space for local exchange service, to the detriment of a would-be entrant...would favor the future needs of the incumbent LEC over the current needs of the new LEC.”<sup>24</sup>

**B. Granting a Party the Right to Reserve Space on the Pole for its Own Future Use Transforms That Party into a Utility Company Subject to the Pole Attachment Act**

Granting a party the right to reserve space on a pole owned by another for its own future use has important legal implications. New § 224(f)(1) requires a utility to “...provide a cable television system or any telecommunications carrier ... nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.” When the Commission granted an attaching party the right to reserve space for its own future use, and determine whether and when to permit third parties to overlash its attachment, the Commission shared control over the pole right-of-way among the pole owner and attaching parties. The attaching party becomes a utility, subject to the Pole Attachment Act, by virtue of this Commission-conferred control over a portion of the pole right-of-way.

Section 224(f)(1) prohibits all utility companies, even those that control, but do not own, a right-of-way from discriminating against cable company or telecommunications carrier attachments. Parties attaching to a pole owned by another utility are also utilities. Congress defined a utility as “any person who is a local exchange carrier or an electric, gas, water, steam, or

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1998, FCC 96-325 at ¶ 1169.

<sup>24</sup>*Id.*, at ¶ 1170.

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.”<sup>25</sup> New local exchange companies, and incumbent local exchange companies are clearly public utilities subject to Section 224.<sup>26</sup>

Cable companies are exempt from being considered public utilities, so long as they do not offer telecommunications services.<sup>27</sup> Once cable companies offer telecommunications services, they become telecommunications carriers, and so may not reserve space for their future telecommunications use.<sup>28</sup> Consequently, cable companies may deny a third party from overlying its cable facilities, but if they do so, they may not subsequently offer telecommunications services.

Having determined that third party overlying is technically feasible, the Commission is consequently legally required to implement rules that make such overlying attachments available on a nondiscriminatory basis.<sup>29</sup> The Commission’s argument that because the host attaching party

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<sup>25</sup>47 U.S.C. § 224(a)(1).

<sup>26</sup>47 U.S.C. § 251(a)(4).

<sup>27</sup>47 U.S.C. § 541(c).

<sup>28</sup>“We affirm the following formula, to be used to determine the maximum just and reasonable pole attachment rate for telecommunications carriers, including cable operators providing telecommunications services...” *Order* at ¶ 102. See also, Se 47 U.S.C. § 541(d)(1) and (d)(2).

<sup>29</sup>*Heritage* permitted third party overlying, but did not require the host attaching party to make its attachment available on a nondiscriminatory basis, because the Pole Attachment Act did not contain this requirement at that time. By enacting new Section 224(f)(1), Congress explicitly directed the Commission to ensure that access to pole attachments and pole attachment rates were *nondiscriminatory* in order to promote robust local exchange competition. Congress’ concern with regard to cable television pole attachment rates was narrower. Congress only directed the Commission to ensure that pole attachment rates for cable operators are just and reasonable.

does not have market power the Commission does not need to establish a regulated rate for the third party, fails to address the strong likelihood of discrimination that results when a scarce resource — pole space — is made available at the discretion of an existing competitor. Discrimination may occur by denying access, and not only by providing access at a discriminatory rate. Moreover, the fact that the third-party attacher overlashes another's attachment does not transform its connection into anything other than a "pole attachment." Section 224(a)(4) defined a pole attachment as "any attachment by a cable television system or provider of telecommunications service."

In its *Local Competition Order* the Commission confirmed the position argued here, that utilities become subject to the Pole Attachment Act even where their facilities are attached to rights-of-way they do not own. In that order the Commission determined that "...the access obligations of section 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access.<sup>30</sup> The Commission also determined that a utility "...should be expected to exercise its eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access...."<sup>31</sup>

C. Host Attaching Parties May Not Charge a Third Party More than the Cost of the Share of its Useable Space Occupied by the Third Party

In this *Order* the Commission determined that a third party that receives permission to overlash a host attaching party is counted as an entity for the "...purposes of allocating the costs

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<sup>30</sup>*Local Competition Order*, at ¶ 1179.

<sup>31</sup>*Id.*, at ¶ 1181.

of unusable and usable space...”<sup>32</sup> The Commission also seems to have required the third party to directly compensate the pole owner for its share of the costs of other-than-usable space, since the Commission referred to the third party’s agreement with the pole owner as part of the implementation of the allocation of costs associated with “other-than-usable space.”<sup>33</sup>

Since the Commission has now transformed the host attaching party into a utility company for the purposes of applying the pole attachment requirements, the host attaching party may not charge an unregulated rate to a third party seeking to overlash its attachment.<sup>34</sup> Since the Commission appears to have determined that a third party overlasher will compensate the pole owner for its share of costs associated with other-than-usable space, the only costs for which the host attaching party may be compensated are those costs associated with the useable space occupied by the third party overlasher.<sup>35</sup> The Commission must either adjust its presumption regarding the amount of space required for a pole attachment downward to account for overlashing, or mandate attaching utilities to make their attachments available to third parties on a nondiscriminatory basis.

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<sup>32</sup>*Order*, at ¶ 69.

<sup>33</sup>“In order to implement the allocation of unusable space, the third party overlasher will necessarily need to have some understanding or agreement with the pole owner...” *Ibid*.

<sup>34</sup>47 U.S.C. § 224 (e)(2-3).

<sup>35</sup>Thus, if a host attaching party has one attachment and has paid for one foot of usable space, and a third party overlasher occupies only 3 inches of space, the host attaching party would be able to recover no more than one-fourth of its usable space charge to the pole owner from the overlashing party. In the event the Commission did not intend the third party attacher to directly compensate the pole owner for its share of other-than-usable space costs, the host attaching party would also be able to recover this charge from the third party.

#### **IV. The Commission's Treatment of Unusable Conduit Space Cost is Arbitrary and Capricious**

##### **A. The Commission's Definition of Unusable Conduit Space is Arbitrary and Capricious**

In its *Order* the Commission concluded that "...unusable space means space involved in the construction of a conduit system, without which there would be no usable space..."<sup>36</sup> It is noteworthy that under this definition, "unusable space" is not actually part of the conduit system. It is space that once existed when the trench was being dug, but no longer exists when the conduit is completed and the trench is backfilled. The Commission conceives of this space as the "...level to which one must go in order to lay the system, much like one must go up on a pole to reach the usable space there."<sup>37</sup>

It is capricious to define the "other-than-usable space" of a conduit system as space located *outside* of the system. The space located outside a conduit system is not analogous to the space one must go up the pole to find usable space. With poles, this distance is actually *on* the structure to which parties attach. With conduit, the depth to which the conduit is placed is not part of the structure. To give an idea of the arbitrary and capricious results that flow from this definition, consider a conduit placed on the floor of a lake, through which cables may be pulled. A conduit system 2 feet in radius and 2,000 feet long will have a volume of 25,133 cubic feet.<sup>38</sup> If it is placed 100 feet below water surface, according to the Commission's definition, the unusable

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<sup>36</sup>47 U.S.C. § 1.1402 (l).

<sup>37</sup>*Order* at footnote 355.

<sup>38</sup>Volume =  $(4\pi) \times 2000$ .

space would have a volume of 774,867 cubic feet.<sup>39</sup> Unusable space would be more than 30 times greater than volume of the entire conduit system.

When it adopted new § 224(e)(2), Congress required the Commission to “...implement rules that apportioned the cost of providing space on a ... conduit ....” In other words, Congress conceived of both usable and other-than-usable space as space located *on* the structure owned by a utility company. Since one only attaches cable to the inside of a conduit, it does not make sense to include space outside the conduit as other-than-usable conduit space. The Commission has adopted a fallacious definition that is at odds with the plain meaning of statutory language.

B. The Commission’s Unusable Conduit Formula is Arbitrary and Capricious

The unworkable nature of the Commission’s definition of unusable conduit space becomes evident upon examining the unusable space charge factor, which is the formula designed to actually implement its definition of “unusable space.” Rather than calculate the total cost of the structure and apply the share of space that is unusable, to determine the amount of unusable costs, as the Commission does when developing the telecommunications rate for attaching to poles, the Commission completely avoids determining the amount of unusable space outside the conduit system, abandoning its own definition of unusable space. Instead, the Commission’s unusable conduit space factor directly identifies the “cost of unusable conduit space.”<sup>40</sup> The *Order* suggests that non-plant, maintenance and construction expense, accounts represent other-than-

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<sup>39</sup>Volume of Unusable Space = (2000 x 100 x 4) - (4π x 2000).

<sup>40</sup>Conduit Unusable =  $\frac{2}{3}$  X Net Linear Cost of X Carrying  
 Space Factor 3 Unusable Conduit Space Charge Rate  
 Number of Attachers

usable space.<sup>41</sup>

It is true that one cannot build and maintain a conduit system without incurring costs associated with construction, installation, and maintenance. A trench must be dug to a safe depth; conduits must be placed in the trench and racked together; the trench must be backfilled, and manholes and cable vaults must be periodically placed to permit access for repairs and maintenance. Similarly with poles, one must prepare the right-of-way, dig the hole, secure the pole, and maintain the pole over time.

However, costs do not become other-than-usable simply because they are not physical assets. The Commission did not classify all costs except the depreciated value of the physical pole asset as “unusable pole costs.” Rather, the Commission first identified the annual revenue requirements for poles, by placing an overhead charge factor on the depreciated value of physical assets and non-physical maintenance and construction expenses. The Commission identified legitimate pole costs without reference to whether they were usable or nonusable, and subsequently allocated these annual revenue requirements or costs among usable and nonusable purposes.<sup>42</sup>

The capricious nature of the Commission’s unusable conduit factor becomes clear when one considers that with the exception of the cost of the conduit asset itself, there are no conduit costs other than construction and maintenance. The conduit is nothing but pipe, and its annual depreciated expense is a very small part of annual conduit revenue requirements. By identifying

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<sup>41</sup>“The costs associated with creating this portion of space [i.e. unusable conduit space] may generally include trenching, excavation, supporting structures, concrete, and backfilling.” *Order* at footnote 355.

<sup>42</sup>47 U.S.C. § 1.1417(b).

the costs of constructing and maintaining the conduit structure as unusable costs, the Commission has determined that over 90% of conduit costs are to be recovered through other-than-usable charges.

Since two thirds of this amount is recovered from the first new telecommunications user of conduit, the first new entrant will be charged over 60% of total conduit revenue requirements for a single attachment. As long as the Commission allocates costs associated with other-than-usable space according to number of attaching entities, rather than number of attachments, there will be some incentive for competitive LECs to delay entry until others drive down the level of costs associated with other-than-usable space that would be allocated to them. The anticompetitive incentive that comes from allocating two-thirds of costs associated with other-than-usable space to the first new entrant might not have been a serious problem if the Commission had chosen a definition of unusable space that had some basis in reality. However, the Commission's arbitrary definition and formula grossly exacerbate the anticompetitive incentives already contained in its unusable conduit factor.

In reality, there is no such thing as "unusable space costs." When a company installs a pole or conduit it incurs plant and non-plant costs to create the structure. Some of that structure becomes usable and some may not be occupied, but nevertheless remains useful or beneficial space. Congress required the Commission's telecommunications pole and conduit formula to be based on a fully allocated cost formula, rather than the incremental cost formula established for cable attachments.<sup>43</sup> Since the cable formula only assigns costs in proportion to the space

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<sup>43</sup>"The new provision directs the Commission to regulate pole attachment rates based on a "fully allocated cost" formula." Conference Report at 206.

occupied by an attachment, it would not be possible for a pole owner to recover their total costs unless the costs not recovered through usable space charges were somehow allocated to all attachers. That is why Congress referred to this concept as “other-than-usable space” rather than unusable space cost. It is merely a residual concept. The identification of other-than-usable “cost” is nothing but a construct required to implement new Section 224(e)(2).<sup>44</sup> There is no such thing as “other-than-usable space cost” that can be identified in utility accounts. Consequently, it would be arbitrary and capricious for the Commission to retain a definition of unusable space costs that relies on identifying such accounts. The Commission must actually identify the share of total conduit space that is not occupied and which provides a common benefit for all attachers.<sup>45</sup>

C. Other-than-usable Space Is Limited to Space Required for Maintenance in the Case of Conduit

In order to properly analyze unusable space in a conduit, one must identify the forces that render space unusable on a pole, and then consistently apply that analysis to conduit. A typical 37.5 foot pole requires 6 feet of placement in the ground and 14 feet of ground clearance, so about 50% of the space on a pole is not available for attachment. The 6 feet of placement in the ground is required because poles are vertical structures, and require this for stability against the combined forces of wind, rain, ice, snow and gravity. The 14 feet of ground clearance is also

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<sup>44</sup>In the future, the Commission should refrain from using the term unusable cost. It would be more appropriate to refer instead to costs allocated to unusable purposes.

<sup>45</sup>This provides another reason why one must reject the reference to any space outside the conduit system as other-than-usable. The purpose of the concept of “other-than-usable space” was to permit recovery of costs in proportion to the amount of space on the structure that is not occupied, but is useful. Consequently the amount of usable and other-than-usable space must sum to 100% of the space of the pole or conduit. Referring to other-than-usable space as space outside the conduit, does not serve in any knowable way to permit the recovery of fully allocated costs. For this reason it must be rejected as arbitrary and capricious.

required because poles are vertical, above-ground structures, so attachments may sag, may be blown about, or be endangered by, or endanger, traffic below. Space may also need to be reserved to permit access to attachments for maintenance purposes. Unusable pole space is specifically derived from the circumstance that poles are vertical, above-ground structures. In short, wind, gravity, and traffic threaten the stability of poles and attachments made to poles and, in the case of poles, mitigating these threats require that space on the pole remain unoccupied. Unusable pole space is required to ensure the stability of the pole, the stability of the attachments on the pole, and the maintenance of attachments on the pole.

The forces of wind, gravity, and traffic either do not exert the same force on conduits, or may be mitigated without having to reserve unoccupied space on or in the conduit. Conduits are horizontal, buried structures. Wind exerts no force on conduits, and gravity does not cause conduit attachments to sag since ducts are placed in rigid conduits, and conduits are made of rigid material, and stabilized by backfill. Traffic does exert force on conduits, and is the reason why conduit must be buried greater than one foot below ground surface. However, burying the conduit for this purpose does not require space on or in the conduit to be unoccupied. The physical forces exerted on conduit, and the way these forces are mitigated, differ so substantially from the case of poles, that it is not necessary to reserve space to ensure the stability of the conduit or the attachments in the conduit.

The only space in a conduit system that must be unoccupied is related to the maintenance of conduit attachments. Line holes, load holes, and cable vaults are needed pull cable, to place load coils, cable, and splice cables. One duct per conduit system is also required in order to permit cable changeouts, general maintenance, and emergency repairs.

D. The Commission Must Remove the Maintenance Duct Adjustment from its Usable Charge Factor Formula

In its *Order* the Commission determined ducts<sup>46</sup> reserved for emergency and maintenance purposes would be classified as “other-than-usable space.”<sup>47</sup> Consequently, the cost of emergency and maintenance ducts should be recovered through other-than-usable space charges. However, the Commission proposes to recover the costs of maintenance and emergency ducts from usable space charges, by adjusting its usable charge factor to recover a greater amount of costs from remaining attachment placed in usable space.<sup>48</sup> If one duct is needed for emergency and maintenance purposes, its cost should not be included in the usable space charge factor. Rather, it should be included in the calculation of the percent of space in a conduit system that is “other-than-usable.”

The calculation of other-than-usable space should include amount of space reserved for emergency and maintenance ducts, and the amount of space occupied by line holes, load holes, and cable vaults within the conduit system. Line holes are typically 6 feet x 12 feet x 6½ feet.

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<sup>46</sup>According to the definitions just adopted in U.S.C. § 1.1402(k) of its rules, a conduit is the pipe which may be subdivided and through which innerduct may be pulled. Ducts are the single enclosed channels created when innerduct is pulled through conduit.

<sup>47</sup>*Order* ¶ 109.

<sup>48</sup>This was accomplished by reducing the denominator of the second term in the formula below, thereby raising the usable space factor charge.

$$\begin{array}{ccccccc} \text{Conduit} & & & & & & \\ \text{Usable} & & & & & & \\ \text{Space} & \equiv & \frac{1}{2} & \times & \frac{1 \text{ Duct}}{\text{Average Number of}} & \times & \text{Net Linear Cost of} \\ \text{Factor} & & & & \text{Ducts, less} & & \text{Usable Conduit} \\ & & & & \text{Adjustments for} & \times & \text{Space} \\ & & & & \text{maintenance ducts} & & \\ & & & & & & \text{Carrying} \\ & & & & & & \text{Charge} \\ & & & & & & \text{Rate} \end{array}$$

