

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

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FEDERAL COMMUNICATIONS COMMISSION
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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

COMMENTS OF BELL ATLANTIC¹ ON PETITIONS FOR
CLARIFICATION OR RECONSIDERATION

I. Introduction and Summary

Several petitioners agree with Bell Atlantic that the Commission should reconsider its decision to extend the preferential pole attachment rates under Section 224(d) – rates that Congress specified should be available only to the extent that attachments are used “solely to provide cable service” -- to cable companies that provide Internet service. As the petitioners point out, this conclusion is wrong both as a matter of law, and of sound public policy. The Internet is fast becoming a substitute for the circuit switched telephone network, and many of the voice and data transmission services that cable companies can provide over the Internet are similar to, and directly compete with, telecommunications services offered by other telecommunications carriers. The

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.

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Commission should adopt a simple and equitable rule requiring cable companies to pay the same rate based upon Section 224(e) as all other telecommunications providers to the extent that they use pole attachments to provide an Internet service.

As is discussed below, the Commission also should grant the petitions that request reconsideration or clarification of the Commission's rules concerning the apportionment of conduit costs, the obligations of third parties that overlash existing pole attachments, the establishment of presumptive numbers of pole attachments by geographical area, and the inclusion of the incumbent local exchange carrier as an "attaching entity" for purposes of apportioning the costs of unusable space since the incumbent already must bear a full third of this cost.

II. The Commission Should Require Cable Companies To Pay The Section 224(e) Pole Attachment Rates Whenever They Provide Internet Service.

Several petitioners agree with Bell Atlantic that the Commission should clarify or reconsider its decision that cable companies should pay the more preferential Section 224(d) pole attachment rate when they provide "commingled" cable and Internet services. USTA at 2-8; SBC at 3-7; MCI at 4-8. This result is required both as a matter of law and of sound public policy.

First, as a purely legal matter, Congress could not have been more clear in directing the Commission to apply the Section 224(d) formula only where a cable company uses pole attachments "solely to provide cable service." 47 U.S.C. § 224(d)(3). In contrast, as shown by Bell Atlantic and others, a cable company that provides the underlying transmission services for access to the Internet is providing a

“telecommunications service” under the Act, and is subject to the Section 224(e) rate for pole attachments used by telecommunications carriers.

Other petitioners agreed with this basic analysis. USTA, for example, pointed out that “Internet telephony is functionally equivalent as a service to traditional telephone service,” that “providing it constitutes the provision of a telecommunications service,” and that the Internet “backbone” is being used increasingly to transport both data and voice traffic. USTA at 5. Accordingly, USTA explains that a cable facility that is used to provide voice telephony, voice or data transport, or any other telecommunications service must be subject to the 224(e) rate for pole attachments. USTA at 6-7. SBC explains that, at a minimum, a cable company’s provision of two-way telecommunications transmission capabilities, such as electronic mail, file transfers, public and semi-private chat rooms, instant messaging, and Internet telephony should trigger the Section 224(e) rate. SBC at 6. And MCI emphasized that the Commission must require cable companies to pay the Section 224(e) rate if they provide information services or any other non-cable services on the grounds that the commingling of any non-cable service with a cable service makes the Section 224(d) rate unavailable. MCI at 6-7.

Second, for policy and practical reasons, the Commission should amend its rules simply to provide that any cable company is subject to the Section 224(e) rate to the extent that it provides access to the Internet. From a policy perspective, the only result that is consistent with the pro-competitive policies of the 1996 Act is to find that the rate for pole attachments used by a cable company to provide Internet services is the same rate that applies to other telecommunications carriers that provide the same type of Internet

services. As the petitions for reconsideration demonstrate, the Internet is being used increasingly as a substitute for the circuit switched network to carry two-way voice and data transmissions. Applying the same pole attachment rate to cable companies that provide Internet access as is applied to other providers is the only way to ensure that economic efficiency – rather than an artificial regulatory preference – determines results in the competitive marketplace.²

From a practical perspective, it simply would not be possible in many instances, and would extraordinarily burdensome where it is, to apply different pole attachment rates to varying types of Internet services that a cable company may provide. For instance, a cable company may offer Internet access initially without Internet telephony service, but later add the service itself or through an unaffiliated provider. Even where a cable company offers Internet access without an end-to-end Internet telephony service, customers might use their own computer software to conduct voice communications with other persons on the Internet. At a broader level, a cable company's customers may use Internet access for applications such as voice, facsimile, e-mail, or file transfer. Trying to distinguish between these varying applications, and to apply a different rate to each, would simply be unworkable. In contrast, a simple rule that any provision of Internet service by a cable company would trigger the Section 224(e) rate would be easy for the

² The Commission had it backwards when it decided to apply the Section 224(d) rate to cable companies that provide Internet access to avoid “penalizing” those companies for expanding their services in a way that would promote competition. *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 11 Comm. Reg. (P&F) 79, ¶ 32 (1998) (“*Pole Attachments Order*”). It does not penalize a company to treat it the same as its direct competitors, and it does not promote competition to give

cable companies to understand, easy for the pole owners to verify, and easy for the Commission to administer in case of dispute.

Moreover, the Commission should adopt such a rule regardless of whether it agrees with Bell Atlantic and the other petitioners that provision of Internet access is a “telecommunications service.” The Act is clear that the Section 224(d) pole attachment rate is applicable only where a cable company uses a pole attachment “solely” to provide cable service. Internet access clearly is not a cable service, and the Commission is precluded by the express terms of the Act from extending the Section 224(d) rate to other services.

On a related note, the Commission also should reconsider its rejection of EEI’s proposal to require cable companies to certify to the pole owner the extent to which they are only providing cable service as a prerequisite to obtaining the more favorable Section 224(d) rate. EEI at 11-12. Such a requirement would impose no discernible burden on the cable companies, whereas it would be difficult for the pole owner to determine whether or not a cable company was providing something more than pure cable services, such as Internet access or other telecommunications services.

Finally, the Commission should grant SBC’s request to clarify that the Section 224(e) rate applies to a cable company that permits a telecommunications carrier to overlash the cable company’s pole attachments. SBC at 7-8. The *Pole Attachments Order* states that the Section 224(e) rate applies to a cable company that leases dark fiber

one class of competitors (the cable companies) an artificial cost advantage through the more favorable Section 224(d) pole attachment rate.

to telecommunications carriers, but it makes no mention of overlashing. However, it is clear that where a third party telecommunications carrier is allowed to overlash its facilities on a cable attachment, that attachment is no longer used “solely to provide cable service,” and therefore it is not entitled to the Section 224(d) rate.

III. The Commission Should Amend Its Rules For Distinguishing The Costs Of Usable And Other Than Usable Conduit Space.

The Commission should grant the petitions that ask it to reconsider its rules for distinguishing usable from “other than usable” conduit costs.³ The Commission's decision to treat the costs of constructing a conduit system (such as the costs associated with trenching, excavation, supporting structures, concrete, and backfilling) as other than usable leaves little more than the cost of the conduit itself as the cost of usable space. As the petitioners point out, this results in about 90 percent of the cost of conduit being allocated under the Section 224(e)(2) formula for unusable space. But that formula allocates two thirds of those costs among users based on the *number* of “attaching” entities, regardless of the amount of space actually occupied by any particular user of the conduit.

A more equitable approach, which was initially proposed by Bell Atlantic, would classify as “other than usable” the percentage of the entire costs of constructing and maintaining the conduit system attributable to the portion of the space in the conduit that

³ USTA at 8-9; SBC at 16-18; US West at 4-5; ICG at 3-7; MCI at 14-23; NCTA at 2-5. Bell Atlantic does not, however, agree with the data in NCTA's Exhibit 1, which contains unrealistic estimates of conduit costs for a “sample” telephone company. For instance, NCTA assumes \$500,000 in annual maintenance expenses, which is far too low for a “sample” company with \$100 million in conduit plant.

is reserved for spare, maintenance, municipal ducts, etc., and that is not used by the conduit owner or any attaching entity. This would typically classify about half of the conduit costs as other than usable, *see* MCI at 22, which would be apportioned among all users according to Section 224(e)(2). The cost of “usable” space, on the other hand, would be defined as the percentage of total cost that represents the portion of space in the conduit that is used by the owner or attaching entities. As provided by Section 224(e)(3), these costs would be apportioned among attaching entities based on the percentage of usable space required by each entity. This would allocate conduit costs more equitably among entities that occupy conduit space.

IV. The Commission Should Clarify Its Rules Regarding Overlashing.

USTA and US West point out that the *Pole Attachments Order* is unclear about the rate to be paid by third parties that overlash an existing pole attachment. USTA at 11-12; US West at 2-4. Paragraph 69 states that overlashing should be considered a separate attachment for purposes of apportioning the costs of both usable and unusable space, but paragraphs 73, 92, and 94 suggest that the overlasher is responsible only to the host attacher for a portion of the costs of one foot of usable space. The Commission should make it clear that an overlasher is counted as an “attaching entity” for purposes of apportioning the costs of other than usable space, and must pay its share of that space directly to the pole owner.⁴ The overlasher should be responsible for payment directly to

⁴ As noted in paragraph 73 of the *Pole Attachments Order*, the third party overlasher would have to have separate agreements with both the pole owner and the host attaching entity prior to overlashing an existing pole attachment.

the host attaching entity for payment of a share of the costs of usable space paid by that entity to the pole owner.

The Commission should not adopt MCI's proposal to force parties with pole attachments to allow overlashing by third parties. MCI at 8-13. A third party that wants access to a pole can approach the pole owner directly if it cannot reach an agreement with existing owners of pole attachments to overlash those attachments. Imposing an access obligation on the host attacher would create an unnecessary layer of regulation in an area where private negotiations are likely to result in mutually agreeable arrangements between host attachers and parties interested in overlashing.

The Commission should adopt US West's proposal to require advance notice to pole owners prior to overlashing of existing pole attachments by third parties. US West at 3-4. Such notice is necessary both to monitor whether overlashing is used to provide other than cable services (triggering the Section 224(e) rate where cable attachments are overlashed) and to allow the pole owner to determine whether the overlashing is consistent with engineering and safety standards or would interfere with any other work that is planned for the pole.

V. The Commission Should Allow Pole Owners Flexibility In Defining The Areas Within Which There Would Be A Presumptive Number Of Attaching Entities.

The Commission should grant the petitions that ask for greater flexibility in defining the geographic areas within which a pole owner would establish a presumptive number of attaching entities. USTA at 10-11; EEI at 22-23; SBC at 10-16.

The Commission decided that each utility should develop a presumptive average number of attaching entities on its poles based on Census Bureau definitions of urban, rural, and urbanized areas. *Pole Attachments Order*, ¶ 78. However, as the petitioners point out, there is a great deal of overlap among these areas, and pole owners are unlikely to have data that would allow them to segregate data into these areas. The Commission should give pole owners the flexibility to develop average numbers of attaching entities based on areas that share similar characteristics or areas for which the owners already have data that could be used to develop reasonable presumptions. In addition, the Commission should make the establishment of such presumptions permissive, rather than mandatory. USTA at 11. If it were permissive, pole owners would be likely to establish such presumptions where the cost of developing them was lower than the cost of determining the actual number of attaching entities in a given area.

VI. The Commission Should Not Count The Pole Owner As An “Attaching Entity” for Purposes Of Apportioning The Cost Of Other Than Usable Space.

The Commission also should hold that telecommunications carriers that own poles should not count themselves as “attaching entities” for purposes of apportioning the costs of other than usable space. SBC at 8-10.

The Commission found that counting the pole owner as an “attaching entity” would be consistent with the finding in the Conference Report that unusable space is of equal benefit to all attaching entities and should be apportioned “equally among all such attachments.” *Pole Attachments Order*, ¶ 49. However, Section 224(e)(2) already requires the pole owner to bear one-third of the costs of other than usable space.

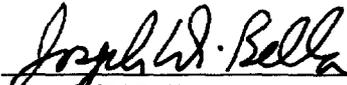
Requiring the pole owner to bear an equal share of two-thirds of the unusable costs with other attaching entities plus a 100 percent share of one third of the unusable costs clearly places an unequal burden on the pole owner. Moreover, the Commission's finding that incumbent local exchange carriers who are pole owners should be counted as "attaching entities" for purposes of apportioning unusable space costs is inconsistent with Section 224(a)(5), which excludes such carriers from the definition of "telecommunications carriers" for purposes of Section 224. Since incumbent local exchange carriers cannot use Section 224 to obtain pole attachments, it makes no sense to include these carriers in the Section 224(e) formula for charging pole attachment rates to telecommunications carriers.

VII. Conclusion

The Commission should reconsider or clarify its decisions in the *Pole Attachments Order* as discussed herein to apportion pole attachment costs more equitably among all attaching entities.

Respectfully submitted,

Of Counsel
Michael E. Glover



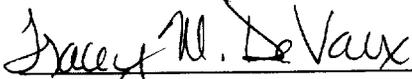
Joseph DiBella
1320 North Court House Road
Eighth Floor
Arlington, VA 22201
(703) 974-6350

Attorneys for the Bell Atlantic
telephone companies

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 1998 a copy of the foregoing "Comments of Bell Atlantic on Petitions for Clarification and Reconsideration" was sent by first class mail, postage prepaid, to the parties on the attached list.



Tracey M. DeVaux

* Via hand delivery.

John Logan*
Federal Communications Commission
Cable Services Bureau
2033 M Street, NW
Room 920
Washington, DC 20554

Barbara Esbin*
Federal Communications Commission
Cable Services Bureau
2033 M Street, NW
Room 904-E
Washington, DC 20554

Elizabeth Beaty*
Federal Communications Commission
Cable Services Bureau
2033 M Street, NW
Room 804-Q
Washington, DC 20554

ITS, Inc.*
1919 M Street, NW
Room 246
Washington, DC 20554

James Hannon
Suite 700
1020 19th Street, NW
Washington, DC 20036

David Swanson
Edison Electric Institute
701 Pennsylvania Avenue, NW
Washington, DC 20004

Counsel for US West

Jeffrey Sheldon
Sean Stokes
UTC
1140 Connecticut Avenue, NW
Suite 1140
Washington, DC 20036

Cindy Schonhaut
ICG Communications, Inc.
161 Inverness Drive West
Englewood, CO 80112

Albert Kramer
Dickstein, Morin
2101 L Street, NW
Washington, DC 20037

Lawrence Fenster
MCI Telecommunications Corp.
1801 Pennsylvania Avenue, NW
Washington, DC 20006

Counsel for ICG Communications

Daniel Brenner
David Nicoll
NCTA
1724 Massachusetts Avenue, NW
Washington, DC 20036

Laurence Harris
David Turetsky
Teligent, Inc.
Suite 400
8065 Leesburg Pike
Vienna, VA 22182

Mary McDermott
Linda Kent
Keith Townsend
Lawrence Sarjeant
USTA
1401 H Street, NW
Suite 600
Washington, DC 20005-2164

Paul Glist
John Davidson Thomas
Cole, Raywid
1919 M Street, NW
Suite 200
Washington, DC 20006

Counsel for NCTA

Philip Verveer
Gunnar Halley
Willke, Farr & Gallagher
Three Lafayette Center
1155 21st Street, NW
Washington, DC 20036

Robert Lynch
Durward Dupre
Jonathan Royston
SBC Communications
One Bell Plaza
Room 3022
Dallas, TX 75202