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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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)
)
Amendments of the Commission's Rules)
And Policies Governing Pole Attachments)

CS Docket No. 97-151

To: The Commission

CONSOLIDATED COMMENTS OF
THE EDISON ELECTRIC INSTITUTE
AND
UTC, THE TELECOMMUNICATIONS ASSOCIATION
ON PETITIONS FOR RECONSIDERATION

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Summary

The FCC should reconsider its decision to allow cable companies to continue to receive the Section 224(d) “cable-only” rate if they are providing commingled cable and non-cable services. The statute is clear that a cable operator is only entitled to the 224(d) rate if it is utilizing its pole attachments solely to provide cable television service. Thus, the use of a cable company’s pole attachments to support equipment to provide non-video services in addition to video would not be used “solely” to provide cable services and would, at a minimum, trigger the new fully-allocated cost formula of section 224(e). FCC policy should not distort the market for Internet services to the advantage of cable companies and require utilities and even other competing Internet services providers to subsidize cable operators’ forays into this competitive market.

The FCC should adopt rules that treat all attaching entities the same by requiring each overlying party to obtain a separate agreement from the pole owner and by requiring all overlying entities to compensate the pole owner for the use of its property. The underlying record clearly established that overlying has serious physical impacts, constitutes a separate attachment, and must necessarily be coordinated with the pole owner. It makes no difference from an operational or economic analysis whether the overlayer has an existing attachment or not.

In implementing the Section 224(e)(2) requirement of an equal apportionment of two-thirds of the costs of providing unusable space among all attaching entities the FCC correctly concluded that the apportionment of common costs is expressly limited to those entities obtaining pole attachments to provide “telecommunications services,” and therefore does not include electric utility attachments that are used to provide electricity. In addition, ILECs should not be counted as attaching entities for purposes of allocating the non-usable space on a

pole. Similarly, a governmental telecommunications network that is not used to provide cable television service or telecommunications service on a common carrier basis should not be counted as an attaching entity.

The FCC properly included in its new formula a rate element for non-usable space in conduits. Further, the FCC was correct in its conclusion that that non-usable space in a conduit system is comprised of all components of the conduit system other than the actual ducts that make the system usable. This includes cement or other encasement materials, backfill, vaults, handholes, manholes and other related equipment that allow for deployment of, access to, and maintenance of cable facilities. The FCC should eliminate the half-duct convention for electrical conduits and instead employ a “whole-duct” convention.

EET and UTC oppose MCI’s recommendation that the FCC declare that telecommunications carriers seeking to attach to electric transmission towers are entitled to access and that the utility is to utilize good faith negotiations to modify the standard presumptions about poles to account for unique features of electric utility transmission facilities. The suggestion is outside the scope of the FCC’s authority and of this rulemaking. Similarly, Teligent’s request that the FCC determine that utilities are required to provide access to building rooftops for the siting of wireless antennas should be rejected. Electric utilities do not have the authority to convey access to private building rooftops owned by third parties, and nothing in Section 224 alters this fact.

The FCC should provide utilities with the option of developing the presumptive number of attaching entities on a variable geographic basis. The FCC should provide the utilities with the flexibility to develop presumptions in the manner that best suits their specific location and the type of information that they have available.

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**CONSOLIDATED COMMENTS OF
THE EDISON ELECTRIC INSTITUTE
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UTC, THE TELECOMMUNICATIONS ASSOCIATION
ON PETITIONS FOR RECONSIDERATION**

Pursuant to Section 1.429 of the Commission's Rules, the Edison Electric Institute (EEI) and UTC, The Telecommunications Association,¹ hereby respectfully submit the following consolidated comments on the various petitions for clarification and/or reconsideration that were filed in response to the FCC's *Report and Order (R&O)*, FCC 98-20, released February 6, 1998, in the above-captioned matter regarding the adoption of final rates, terms and conditions governing pole attachments after February 8, 2001.²

The *R&O* was adopted pursuant to the Congressional directive in the Telecommunications Act of 1996 to implement the provisions of new Section 224(e) prescribing regulations to govern charges for attachments to utility poles, ducts, conduits and rights-of-way by telecommunications carriers when the parties fail to resolve a dispute over such charges. As

¹ UTC was formerly known as the Utilities Telecommunications Council.

² Notice of the petitions was published in the Federal Register on April 27, 1998.

the principal industry representatives of the utilities directly impacted by the Commission's interpretation and implementation of the Pole Attachment Act, 47 U.S.C. § 224, as amended by the Telecommunications Act of 1996, EEI and UTC were extensively involved in the underlying proceeding that resulted in the *R&O* and filed their own petition for reconsideration concerning certain aspects of the Commission's decision. Accordingly, EEI and UTC are pleased to offer the following comments.

I. A Cable Operator Is Not Entitled To The "Cable-Only" Rate If It Is Utilizing Its Pole Attachments To Provide Non-Cable Services

A. Cable Companies That Provide Internet Access Or Commingled Data Are Not Entitled To The Cable-Only Rate

EEI and UTC agree with Bell Atlantic, MCI, SBC, and the United States Telephone Association (USTA) that the FCC should reconsider its decision to allow cable companies to continue to receive the Section 224(d) "cable-only" rate if they are providing commingled cable and non-cable services. The statute is clear that a cable operator is only entitled to the 224(d) rate if it is utilizing its pole attachments solely to provide cable television service.³ Thus, the use of a cable company's pole attachments to support equipment to provide non-video services in addition to video would not be used "solely" to provide cable services and would, at a minimum, trigger the new fully-allocated cost formula of section 224(e). Despite this clear language the FCC concluded that a cable system is entitled to the cable-only rate for pole attachments that the cable system uses to provide commingled data and video.

The stated rationale for this decision is the FCC's belief that the purpose of the 1996 amendments to Section 224 was to remedy the inequitable position between pole owners and those seeking pole attachments, and that the nature of this relationship is not altered when a cable

³ Section 224(d)(3).

operator seeks to provide additional services.⁴ The FCC therefore concluded that the *Heritage* decision is still applicable.⁵

However, as the House Committee Report makes clear the amendments to 224 were “intended to remedy the inequity of charges for pole attachments among providers of telecommunications services.”⁶ In other words, the amendments were aimed at rectifying the outcome of the *Heritage* decision under which a cable company could utilize its status as a cable company to offer telecommunications services with pole attachment rates that were not available to non-cable-affiliated telecommunications companies. While it is true that the Congressional remedy to this problem was to expand the number and types of entities entitled to the benefits of Section 224, it is equally true that the amendments adopted a different and more equitable rate formula for all telecommunications providers, including cable companies, in order to eliminate the unfair advantage enjoyed by cable operators because of the *Heritage* decision. It is precisely for this reason that Section 224(d)(3) specifically limits the availability of the Section 224(d) rate to pole attachments used by a cable television system “solely” to provide cable service.

The FCC attempts to argue that because Internet and data services are not telecommunications services then the Section 224(d) rate is applicable even if these services are deemed not to be cable services.⁷ The FCC states that this position is supported by the fact that Congress only specified the Section 224(e) rate for a particular service – telecommunications.⁸ While this is a creative reading of the statute, it is not accurate. The language of 224(d)(3)

⁴ *R&O*, para. 31.

⁵ See *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, 6 FCC Rcd. 7099 (1991), recon. denied, 7 FCC Rcd. 4192, aff'd sub nom. *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

⁶ House Commerce Committee Report (emphasis added).

⁷ While Internet and data services are not “telecommunications,” the FCC concluded in its April 10, 1998, Universal Service Report to Congress that the provision of Internet access services and the underlying transmission of data are “telecommunications” under the Act because they constitute the transmission of information.

⁸ *R&O*, para. 34.

clearly states that the cable rate would **only** apply to pole attachments “used solely to provide cable service.” The wording of this provision is clearly aimed at circumscribing the availability of the Section 224(d) rate to a particular service: cable television. If Congress had intended to allow cable companies to offer any services other than telecommunications services at the cable pole attachment rate it could have said nothing, leaving the *Heritage* decision in place, or it would have used much more precise language to make clear that cable operators were to receive preferential rates over any other business entity for any non-telecommunications attachments. Moreover, the limitation would not have been placed on the offering of cable services but instead would have focused on the offering of telecommunications services by cable companies. In the *Heritage* decision the court stated that the regulated rate would have been limited to cable services if the statute had included “an express requirement that any such attachment be solely for the purpose of transmitting video programming.”⁹

It is apparent the Commission chose to interpret the application of Section 224(d) in a manner that would advance its policy of expanding the availability of Internet services to the public. While this may be a laudable social goal, the FCC cannot ignore clear statutory language in order to achieve this objective.¹⁰ Moreover, such a policy distorts the market for Internet service to the advantage of cable companies and requires utilities and even other competing Internet services providers to subsidize cable operators’ forays into this competitive market. The FCC has provided no basis, other than the naked assertions of cable companies, that they will in any way dissuaded from providing Internet access service if forced to pay the Section 224(e)

⁹ *Heritage*, p. 13 (emphasis added).

¹⁰ Such a policy also runs counter to the clear directive of the Telecommunications Act to eliminate all implicit subsidies and make them explicit. Congress could not possibly have intended that implicit subsidies be eliminated for telecommunications carriers but not cable companies when they are offering telecommunications services commingled with cable services.

rate. Even at the Section 224(e) rate cable companies arguably will have an inherent advantage over other non-cable affiliated new entrants in offering Internet access and data transport services because the Internet attachment rate for the cable company will only amount to an incremental increase over the existing cable rate that is already being paid from cable service revenues. The FCC should not compound this advantage by providing cable companies with an even lower rate.

The Amendments to Section 224 were intended to close the *Heritage* loophole.¹¹ Cable television operators should not be allowed to re-open this loophole to provide data and Internet transmission services pursuant to a regulated cable-only rate. Such an outcome would require utility customers and shareholders to further subsidize non-cable services and would place non-cable affiliated data and Internet providers at an unfair competitive disadvantage.

B. Overlapping of Cable Facilities

SBC asks that FCC to clarify that if an attachment previously used for providing solely cable service would, as a result of third-party overlapping, also be used for providing telecommunications services, the rate for the “host” attachment should be determined under the telecommunications rate of Section 224(e). EEI and UTC agree. The subleasing of attachment space by a cable company to a third-party telecommunications carrier must necessarily convert the cable company’s attachment to the status of one that is no longer being utilized “solely” to provide cable service.

¹¹ It is significant to note that the court in the *Heritage* case suggested that its outcome might be different if a larger percentage of the poles in question were being utilized to offer non-cable television services. *Heritage*, p. 19.

II. Treatment of Overlapping

A number of petitioners raise objections to the Commission's treatment of overlapping. For example, MCI raises a valid concern regarding the ability of attaching entities to obtain a competitive advantage over other competitive entrants by dictating the terms and conditions under which they will allow overlapping of their attachments. However, MCI's proposed solution of requiring attaching entities to make their attachments available to third parties for overlapping on a non-discriminatory basis is inappropriate and not authorized by the Act. Attaching entities should not be compelled to provide access for overlapping by third-parties. Indeed, the FCC has no authority to compell such access. Instead, the FCC should adopt rules that treat all attaching entities the same by requiring all overlapping parties to obtain a separate agreement from the pole owner and by requiring all overlapping entities to compensate the pole owner for the use of its property.

The underlying record clearly established that overlapping has serious physical impacts, constitutes a separate attachment, and must necessarily be coordinated with the pole owner. It makes no difference from an operational or economic analysis whether the overlasher has an existing attachment or not. Absent the grant of specific authority to overlap in the existing pole attachment agreement, all parties seeking to overlap existing facilities must be required to notify the utility and enter into a new/revised pole attachment agreement, and pay any necessary make-ready costs.

As discussed in EEI and UTC's petition, mandatory access to utility property constitutes a "taking" of private property requiring the payment of just compensation. To allow an attaching entity to overlap its own facilities without paying additional fees ignores the impact that such overlapping has on the pole's overall capacity, which denies the utility full compensation for the

use of its property and is therefore unconstitutional under the Fifth Amendment. Moreover, in this way, the treatment of overlashing will be competitively neutral among all attaching entities.

In its petition US West seeks clarification as to what rate a utility should apply to a third-party overlashing entity and specifically asks whether a utility may charge an attaching entity for both usable and non-usable space. EEI and UTC believe that the attaching entity should be responsible for the costs of the usable space, and the overlashing party should be counted as an attaching entity and required to pay its proportionate share of the costs of the non-usable space on a pole. Of course, the overlashing party should pay the associated costs of any make-ready or engineering/inspections required.

III. Counting Attaching Entities

A. Utilities Should Only Be Considered Attaching Entities To The Extent That They Actually Provide Telecommunications Services

In implementing the Section 224(e)(2) requirement of an equal apportionment of two-thirds of the costs of providing unusable space among all attaching entities the FCC correctly concluded that the apportionment of common costs is expressly limited to those entities obtaining pole attachments to provide “telecommunications services,” and therefore does not include electric utility attachments that are used to provide electricity.

In their respective petitions, both ICG and the National Cable Television Association (NCTA) argue that that the FCC should count electric utilities that do not provide telecommunications or cable services as attaching entities for purposes of the equal apportionment of the costs of two-thirds of unusable space on poles, ducts and conduits. ICG and NCTA claim that not counting electric utilities will result in an over-recovery of pole costs by pole owners.

The arguments of ICG and NCTA should be rejected. The statute is clear that electric utility attachments that are not used for the provision of telecommunications services do not constitute “attachments” under the allocation of non-usable space in Section 224(e) of the Act. Contrary to the assertions of ICG and NCTA, not counting utilities in the allocation of non-usable space does not result in an over-recovery by the utility because the statute specifically accounts for electric utility usage of poles, ducts and conduits in the separate allocation to the pole owner of 1/3 of non-usable space costs. Thus, in all cases pole-owning electric utilities will pay for a full 1/3 of the costs of the non-usable space, whereas the percentage of costs borne by attaching entities will vary depending on the number of attaching entities on the pole.¹² To further reduce the amount of compensation available to utility pole owners would clearly constitute an unconstitutional taking of property without just compensation.

ICG’s concern appears to be primarily aimed at the possibility of ILECs over-recovering if electric utilities are not counted. However, apart from being at odds with the plain language of the statute it also fails to recognize that in many areas of the country electric utilities own a greater percentage of poles than ILECs and therefore counting the electric utility as an additional attaching entity will simply result in additional subsidization by the electric utilities.

NCTA’s alternate suggestion -- that electric utilities with internal communications attachments should be counted as attaching entities -- should be similarly rejected. EEI and UTC agree with the FCC’s conclusion that Section 224(e)(2) requires a utility or its subsidiary to be counted as an attaching entity for purposes of apportioning non-usable space if it has attachments that are used to provide “telecommunications services.” However, as noted in the EEI and UTC petition, this requirement must not apply to utility communications attachments that are not used

¹² It is assumed that the costs to attaching entities will decrease over time as more entities attach to the pole.

to offer “telecommunications services” as defined in the Act.¹³ For example, utility attachments for private internal communications must not be counted as part of the apportionment of the costs of the non-usable space. Such communications systems are an integral part of providing reliable and safe electricity to the public and are neither offered for a “fee” nor offered “directly to the public.” As the FCC and Congress have properly recognized private, internal utility telecommunications systems are an essential component in maintaining the nation’s critical infrastructure.

Clarification is needed that only that utility plant which is actually used for the utility’s provision of telecommunications services should be counted for purposes of allocating the cost of unusable space. For example, a utility would only be required to count itself as an attaching entity on those poles where the utility actually has attachments used to provide telecommunications services. The utility would not count itself as an attaching entity on the rest of its poles where it does not have attachments to provide telecommunications services. Further, such clarification is consistent with the treatment of utility facilities that are actually used by the utility or its subsidiary to provide telecommunications services under 224(g).¹⁴

Finally, NCTA’s suggestion that by 2001 all investor-owned electric utilities will have diversified into commercial telecommunications and should therefore be counted as attaching entities at the outset, is widely speculative, unsupported by any facts and completely irrelevant.¹⁵ If indeed all electric utilities diversify into commercial telecommunications by 2001 then they

¹³ The Act defines “Telecommunications Services” as “the offering of telecommunications for a fee directly to the public...”

¹⁴ This would also be consistent with the FCC’s suggestions that, when calculating the presumptive number of attaching entities, wireless attachers should be pro-rated because of the relatively small number of poles they might occupy.

¹⁵ It is far more likely that all cable companies will be providing telecommunications services by 2001 and therefore, perhaps, the FCC should allow utilities to charge all cable companies the higher 224(e) rate commencing on February 8, 2001.

will appropriately be counted as attaching entities under the FCC's current rule counting all telecommunications service providers as attaching entities.

B. ILECs Should Not Be Counted as Attaching Entities

EEI and UTC agree with SBC that ILECs should not be counted as attaching entities for purposes of allocating the non-usable space on a pole. To do otherwise is to ignore the plain meaning of the statute. As EEI and UTC indicated in their petition, the new rate under Section 224(e) clearly applies to "telecommunications carriers" who use pole attachments to provide telecommunications services, and 224(a)(5) explicitly states that ILECs are not considered "telecommunications carriers" for pole attachment purposes. Given the literal terms of the Act, and the absence of any evidence of a contrary Congressional intent, it would be appropriate and reasonable for a utility to exclude ILEC attachments in determining the number of attaching entities. Such an interpretation is also bolstered by the fact that as utility pole owners and users, ILECs are already required to pay their share of the costs of the non-usable space on their own poles.

C. The FCC Should Clarify Treatment Of Attachments By Government Agencies

EEI and UTC agree with SBC that the FCC should clarify that a governmental telecommunications network that is not used to provide cable television service or telecommunications service on a common carrier basis should not be counted as an attaching entity. As SBC notes, while the *R&O* indicates that government entities will only be counted as attaching entities to the extent that they provide cable or telecommunications service, the decision also provides a relatively narrow list of local government attachments that will not be counted, thus leaving open the possibility that internal municipal communications networks might be considered attachments.

Accordingly, consistent with the language of the Act, the FCC should clarify that municipal attachments should only be counted where they are actually used to provide commercial “cable television service” or “telecommunications service” as defined under the Telecommunications Act of 1996. Such a clarification is in keeping with the FCC’s conclusion that it will not count attachments by government agencies such as traffic signals that are used for the benefit of the general public.

IV. Usable Space Presumption

In the *R&O* the FCC adopted a presumption that attaching entities occupy one foot of usable space. In its petition ICG argues that the FCC should not rely on actual field practices but instead should adopt rules on what is “theoretically possible.” EEI and UTC strongly disagree: the one foot presumption should not be reduced. The one foot presumption represents the minimum amount of usable space occupied by cable attachments, is consistent with actual field engineering practices and should not be modified based on unproven, theoretical abilities to accommodate multiple attachments in an ever shrinking amount of space as this will negatively impact the overall safety and reliability of the facilities and the utility’s system.

V. Conduits

A. Calculation of Usable vs. Non-usable Space

In adopting regulations to implement Section 224(e) the FCC concluded that the costs of constructing a conduit system, which allows creation of the usable space, should be allocated among attaching entities as non-usable space. Further the FCC indicated that the costs of maintenance ducts or other ducts which are reserved for emergency use may also be considered “non-usable space” and charged on a proportionate basis to all attaching entities if they are reserved for the benefit of all conduit occupants.

ICG, MCI and NCTA oppose the FCC's interpretation of non-usable space in conduit systems. The most extreme argument comes from NCTA, which not only attempts to argue that the FCC's specific interpretation of non-usable space in conduits is wrong, but actually maintains that the entire concept of non-usable space is inapplicable to conduits. NCTA claims that there is no non-usable space in conduit systems. It argues that the usable space/non-usable space concept only applies to poles and is unnecessary for conduits. However, an examination of the actual language of Section 224(e)(2) indicates that Congress clearly intended that the new rate formula for telecommunications carriers be based in part on an apportionment of the costs of "the other than usable space" on a "pole, duct, conduit, or right-of-way." It is a rudimentary tenet of statutory construction that a term generally should not be ignored or interpreted as having no meaning or purpose. Thus, the FCC properly included a rate element for non-usable space in conduits for its new formula.

ICG, MCI, and NCTA all argue that the FCC should not have defined non-usable space of a conduit system to include space located outside of the system such as the surrounding earth and backfill. MCI objects to the FCC's decision to determine the costs of non-usable space by reference to installation and maintenance costs. MCI, US West and ICG urge the FCC to allocate the total cost of a conduit system between usable and non-usable space based upon the number of ducts available for general use and the number reserved for maintenance/emergency purposes. EEI and UTC agree that maintenance and emergency ducts should be included in the calculation of non-usable space costs. However, these costs should be included in addition to many other costs that appropriately should be attributed to non-usable space. The FCC got it right by stating that non-usable space in a conduit system is comprised of all components and costs of conduit systems other than the actual ducts that make the system usable. This includes, cement or other

encasement materials, backfill, vaults, handholes, manholes and other related equipment that allow for deployment of, access to, and maintenance of cable facilities.

Contrary to the assertions of NCTA and other attaching entities that are seeking to avoid paying their fair share of the costs of conduit systems, costs of non-usable space are an essential component of a true fully-allocated cost approach. Just as the portion of the pole that is buried under the ground is counted as part of non-usable space for poles, so too should the surrounding cement and casing materials of the conduit system be included as non-usable space costs. Finally, given the fact that unlike poles that depreciate, conduit systems and the property they are buried in appreciate in value and therefore are most appropriately valued in terms of their replacement costs. Thus, forward-looking construction costs are an appropriate definition of non-usable costs.

EEI and UTC agree with SBC that the usable costs should be limited to the costs of the duct itself. SBC asks the FCC to clarify that the costs of usable space are the costs of whatever material forms the walls of the individual ducts, whether that is polyvinyl chloride, concrete or some other material. This approach would appear to make sense provided that non-usable costs are identified as all other conduit system costs.

B. Half-Duct Methodology

Despite strong objections by electric utilities, the FCC has adopted its proposed “half duct” convention for calculating the cost of usable space. Under this methodology, there will be a rebuttable presumption that a cable or telecommunications attacher occupies only a half-duct space. The FCC states that the National Electric Safety Code does not prohibit the installation of electric and telecommunications cables in the same duct; it just conditions such duct sharing on the utility maintaining and operating both cables.

In its petition, MCI argues that the FCC should revise its half-duct methodology and instead adopt a one-third duct presumption for the allocation of usable space costs. MCI states that the half-duct methodology ignores the current practice of pulling multiple innerducts through a conduit.

EEI and UTC adamantly disagree. For electric utility conduit systems that have been constructed and are being used for the provision of electrical services it is absolutely irrelevant what the current practice is for telecommunications carriers with regard to innerduct. The half-duct methodology is inappropriate for electric utilities and amounts to an unconstitutional taking of utility property. The FCC ignored the evidence of the electric utilities that once a duct is utilized for telecommunications it is essentially useless for the installation of electrical cables. The FCC's reliance on a technical exception in the NESC allowing for telecommunications and electric cables within the same duct if owned or controlled by the utility is misplaced. While technically possible, from a practical and operational standpoint it does not occur.¹⁶

The FCC is embracing the half-duct methodology for electric utilities under the theory that electric utilities and telecommunications carriers can share the same duct provided one entity controls or owns all cables within the duct. Yet, in the "interconnection" *R&O* the FCC stated that it is not appropriate for an electric utility to compel an attaching party to hire the electric utility to perform the installation and maintenance work within a conduit bank. Since the FCC has concluded that the electric utility may not control the installation or maintenance of the cable

¹⁶ In the past, the FCC has relied on actual field practices in determining attachment space allocation issues. Thus, in concluding that the 40 inch neutral space on a pole should be allocated entirely to the pole owner rather than to all pole users, the FCC noted the "common practice" of electric utility companies to make resourceful use of this safety space," 72 FCC 2d 59, 71. (EEI and UTC dispute the application of the 40 inch space to utilities because it is not, in fact, the common practice that this space benefits utilities more than attaching entities.) In the same manner, the FCC should recognize that electric utilities, as a matter of "common practice" do not permit telecommunications and electric cable to occupy the same duct and should allocate the cost of an electric system duct entirely to the attaching entity.

within the duct it is difficult to see how a utility can allow access by a telecommunications carrier to a duct for the joint use of electric and telecommunications cables and at the same time comply with the NESC. An electric utility should not be required to choose between its legitimate interests in maintaining a reliable and safe electric system and its rights to fair compensation as a property owner.¹⁷ The FCC should eliminate the half-duct convention for electrical conduits and instead employ a “whole-duct” convention.

VI. Treatment of Transmission Facilities

MCI requests the FCC to declare that telecommunications carriers seeking to attach to electric transmission towers are entitled to access and that the utility is to utilize good faith negotiations to modify the standard presumptions about poles to account for unique features of electric utility transmission facilities.

EEI and UTC oppose this recommendation as being outside the scope of the FCC’s authority and of this rulemaking. The Commission did not raise the issue of attachments to transmission towers in the underlying *NPRM* and therefore a full and complete record was not developed on which the Commission can be expected to make an informed decision. More importantly, the utility industry questions the fundamental issue of whether the FCC has the authority to regulate access to utility transmission structures. EEI and UTC, as well as other utility representatives, have filed petitions for reconsideration of the FCC’s *First Report and Order* in CC Docket 96-98 regarding this issue. Pending the outcome of those petitions, EEI and UTC urge the FCC to refrain from taking any further action regarding such attachments.

The Act’s pole attachment provisions are aimed at facilitating competition in local telephone distribution services. This is precisely why the pole attachment access provisions of

¹⁷ *Speizer vs. Randall*, 357 US 513 (1958). See also, Gunther & Sullivan, *Constitutional Law*, p. 1318, 13th ed. (1997).

Section 224 were incorporated into the interconnection requirements of incumbent local exchange carriers in Section 251(b)(4) of the Telecommunications Act and were implemented by the FCC as part of its "local competition order," CC Docket No. 96-98. Transmission structures are generally located outside of distribution areas and are therefore of little practical value to the goal of advancing competition in local telephone service market.¹⁸ Finally, it must be recognized that the proposed rate formulas for pole attachments and conduits do not even attempt to account for the far greater costs and operational considerations associated with attachments to transmission towers. Indeed, it is instructive to note that the statutory definition of poles, ducts, conduits and rights-of-way, has not been altered since the original Pole Attachment Act of 1978, and yet the FCC has never thought to include in any of its existing or proposed rate formulas the FERC accounts on transmission towers within its presumptions regarding the average costs of poles. The application to transmission facilities of even a properly crafted formula based on distribution facilities would provide grossly inadequate cost-recovery, and clearly would amount to confiscation of property without just compensation. As the New York Public Service Commission recently determined, access to transmission towers is best left to market-based, private negotiations.¹⁹

VII. Rooftop Access

Teligent has renewed the request that the FCC determine that utilities are required to provide access to building rooftops for the siting of wireless antennas. With regard to utility

¹⁸ The fact that 224 is aimed at incumbent local telephone companies and not the transmission facilities of interexchange companies is instructive on the intent of Congress; the FCC must recognize that unlike the telephone industry, which has been split into local (distribution) and long distance (transmission) companies, the majority of the electric industry is still vertically integrated with the same company owning distribution and transmission facilities.

¹⁹ *Opinion and Order*, New York Public Service Commission, Opinion No. 97-10, Case No. 95-C-0341, June 17, 1997.

owned buildings the Commission quite properly rejected this argument in its “interconnection”

FR&O stating:

We do not believe that Section 224(f) mandates that a utility make space available on the roof of its corporate offices for the installation of a telecommunications carrier’s transmission towers...²⁰

Teligent raises no new substantive arguments as to why access should be afforded to utility rooftops. From a competitive point of view there is no inherent advantage in attaching to the rooftops of utility corporate offices over any other type of rooftop.

Teligent, however, broadens its request for access by demanding that the FCC compel access to the rooftops of third-party private property owners. This request must be rejected. As an initial matter electric utilities typically do not own or exercise control over building rooftops. More fundamentally, the pole attachment provisions speak in terms of poles, ducts, conduits and rights-of-way owned or controlled by the utility; it does not contemplate access to any and all utility facilities or other property where utilities conduct business but do not have legal control.

As the FCC noted in the *FR&O*:

The intent of Congress in Section 224(f) was to permit cable operators and telecommunications carriers to “piggyback” along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.²¹

Teligent claims in its petition that building owners are frustrating its ability to build out its telecommunications network, and goes on to recite a litany of horrors that they have faced in attempting to obtain access to building rooftops and risers. However, nowhere in its petition does it allege that electric utilities have been the source of its difficulties. Teligent’s complaint is with private building owners and not utilities. The FCC should not attempt to place a utility in

²⁰ *R&O*, CC Docket 96-98, para. 1185.

²¹ *FR&O*, para. 1185.

the untenable position of forcing the utility's customers to provide access to their private property by telecommunications carriers on terms and conditions that are not acceptable to the customer. Electric utilities do not have the authority to convey access to private building rooftops owned by third parties, and nothing in Section 224 alters this fact.

VIII. Presumptive Average Number of Attaching Entities

In order to calculate the costs of non-usable space on a pole, the FCC has adopted a requirement that each utility develop, through the information it possesses, a presumptive average number of attaching entities on its poles based on location (urban, rural, urbanized). Consistent with the position of EEI and UTC, SBC and USTA argue that the FCC should provide utilities with the option of developing the presumptive number of attaching entities on a variable geographic basis. The FCC must recognize that many utilities do not possess information beyond the total number of poles in a geographic area (total service territory or perhaps division) without regard as to whether it is urban, suburban, or rural as defined by the US Census Bureau. At least one electric utility has estimated that it would incur costs of close to five million dollars to develop a more detailed data base.

As EEI and UTC maintained in their petition, the FCC should not dictate the specific geographic boundaries that must be used by a utility for calculating the presumptions for a particular location. Instead, the FCC should provide utilities with the flexibility to develop these presumptions in the manner that best suits their specific location and the type of information that they have available. For example, some utilities might need to use data based on their total service territory while others may determine averages based on the cable system's territory (e.g., a particular city or community) or other geographic area. So long as the utility is willing to

disclose how it derived the average, the FCC should not dictate the geographic boundaries that a utility must follow to derive the average number of attaching entities.

IX. Conclusion

The FCC should reconsider its decision to allow cable companies to continue to receive the Section 224(d) “cable-only” rate if they are providing commingled cable and non-cable services.

In implementing the Section 224(e)(2) requirement of an equal apportionment of two-thirds of the costs of providing unusable space among all attaching entities the FCC correctly concluded that the apportionment of common costs is expressly limited to those entities obtaining pole attachments to provide “telecommunications services,” and therefore does not include electric utility attachments that are used to provide electricity. In addition, ILECs should not be counted as attaching entities for purposes of allocating the non-usable space on a pole. Similarly, a governmental telecommunications network that is not used to provide cable television service or telecommunications service should not be counted as an attaching entity.

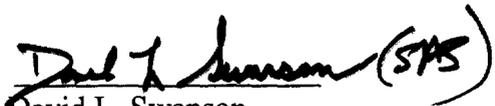
The FCC properly included a rate element for non-usable space in conduits for its new formula. Further, the FCC was correct in its conclusion that that non-usable space in a conduit system is comprised of all components and costs of conduit systems other than the actual ducts that make the system usable. The FCC should eliminate the half-duct convention for electrical conduits and instead employ a “whole-duct” convention.

Electric utility transmission facilities are outside the scope of the FCC’s authority and of this rulemaking. Similarly, the FCC should not require utilities to provide access to building rooftops for the siting of wireless antennas.

WHEREFORE, THE PREMISES CONSIDERED, the Edison Electric Institute and UTC respectfully urge the Commission to take action in a manner consistent with these comments.

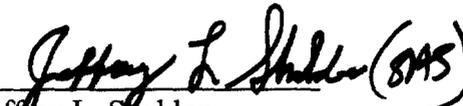
Respectfully submitted,

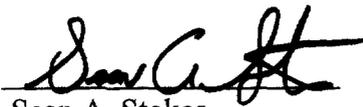
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May 12, 1998

CERTIFICATE OF SERVICE

I, Melissa Muscio, hereby certify that I have caused to be sent, on this 12th day of May 1998, a copy of the foregoing to each of the following:

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