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

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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

JOINT OPPOSITION TO PETITIONS FOR RECONSIDERATION

**TEXAS CABLE & TELECOMMUNICATIONS
ASSOCIATION
CABLE TELECOMMUNICATIONS ASSOCIATION OF
MARYLAND, DELAWARE & DISTRICT OF
COLUMBIA
MID-AMERICA CABLE TELECOMMUNICATIONS
ASSOCIATION
JONES INTERCABLE, INC.
GREATER MEDIA, INC.
HELICON, INC.
RIFKIN & ASSOCIATES**

Paul Glist
John Davidson Thomas
COLE, RAYWID & BRAVERMAN, L.L.P.
1919 Pennsylvania Avenue, NW, Suite 200
Washington, DC 20006
(202) 659-9750

Their Attorneys

May 12, 1998

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SUMMARY

The Joint Cable Parties oppose the petitions for reconsideration submitted by USTA, Bell Atlantic, Inc., SBC, Inc., UTC/EEI, and MCI of the Commission's February 6, 1998 Order, and request grant of the Petition for Reconsideration filed by the National Cable Television Association ("NCTA") in this docket.

The petitions, combined with parallel petitions for review that the electric utilities have filed in various United States Courts of Appeal, represent the latest utility efforts to maintain the pole and conduit resource as a choke point of facilities-based competition.

In its February 6 Order, the Commission has directed that utility pole owners generate presumptions for the number of attaching entities according to urban, urbanized and rural Census area designations so that the costs of unusable pole space can be properly allocated among the parties. Rather than offer methodological alternatives or empirical data for producing such presumptions, the utilities attack the Commission's Census-area based scheme as unworkable. In addition, they attempt to eliminate virtually every "entity" defined by the statute that would force the first cable operator diversifying into telecommunications to jump from an approximately \$5.00 per-pole video rate to a telecommunications rate of approximately \$30.00.

As cable operators have shown consistently throughout this proceeding, the following should be considered attaching entities for the purposes of allocating unusable space costs: electric utilities; electric utilities with internal communications services; ILECs; ILECs providing video services; cable operators not providing telecommunications; CLECs; and governmental attachments. This result is not only required by a plain reading of the statute and the legislative history, and, by practical field reality, but to prevent pole owners from penalizing

their telecommunications competitors by charging a \$30.00 annual rate.

Similarly, various petitioners suggest that only a minuscule portion of its conduit network costs—the costs of duct material alone—should be treated as "usable" and that all other costs be treated as unusable. The effect of such a view would be the same as eliminating all attaching parties from the definition of "entities" for allocating unusable pole space: to drive rates to punitive/prohibitive levels. Because the utility proposals to limit usable space to the smallest sub-elements (as well as the Commission's initial view of "unusable" conduit space on which NCTA has sought reconsideration) would require at best herculean efforts to disaggregate these sub-elements from internal utility records (at worst this disaggregation would be impossible), it is antithetical to the Commission's strong preference to rely on publicly filed information. Adherence to this standard has been extremely successful in allowing most pole-rate matters to be resolved by the parties without the need for protracted rate cases at the Commission.

The Commission should also stand by its February 6 Order and reject utility efforts to impose an automatic additional charge for overlashed attachments, as well as MCI's novel and unworkable theory that would require cable operators and others to accord MCI access to the space that they already occupy on the pole.

Next, the utilities ask the Commission to reconsider its rejection of reproduction/replacement cost theory as a viable approach to pole attachment regulation. As Congress, the Commission and state regulators have repeatedly found, use of such a theory is simply not appropriate in the pole context. The Pole Attachment Act requires reliance of "the actual capital costs of the utility" as does the legislative history to the passage of the Pole Act

which found that "[s]pecial accounting measures or studies should not be necessary." Since the passage of the Pole Act in 1978, Congress has substantially modified the Communications Act in 1984, 1992 and 1996, each time declining to modify the net-book cost mandate. Likewise, the Commission's rules, pole attachment rulemaking orders and adjudicated complaint cases require pole rents to be based on book costs. The February 6 Order is simply the latest confirmation of long-established precedent.

Finally, the Commission should not reconsider its decision not to apply the higher telecommunications rate to high-speed Internet access services provided over cable television systems. As has been shown throughout the course of this proceeding, and as seconded by at least one ILEC, Internet services provided by cable operators over their networks are cable services and should not trigger the higher telecommunications attachment rate. Even assuming that hybrid Internet services were not ultimately deemed to be cable services, the April 10, 1998 Report to Congress confirms that hybrid Internet services are not telecommunications services, and thus would not be subject to the higher pole attachment rate. ILEC claims to the contrary are calculated to hamper Internet services development and the growth of Internet networks.

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The Texas Cable & Telecommunications Association, Cable Telecommunications Association of Maryland, Delaware & District of Columbia, Mid-America Cable Telecommunications Association, Jones Intercable, Inc., Greater Media, Inc., Helicon, Inc., Rifkin & Associates (collectively "Joint Cable Parties") respectfully submit this Joint Opposition to the Petitions for Reconsideration filed by USTA, Bell Atlantic, Inc., SBC, Inc., UTC/EEI, and MCI of the Commission's February 6, 1998 Order.

I. INTRODUCTION AND BACKGROUND

Utility pole owners—and even one "competitive" telecommunications interest—have launched yet another effort to maintain the pole, conduit and right-of-way resource as a choke point of facilities-based competition. Electric utilities have filed for reconsideration on numerous elements of the Commission's February 6 Order as the second part of a two-pronged attack on the Commission's effort to ensure just and reasonable telecommunications rates and terms and conditions of access in accordance with its congressional mandate. In addition to the EEI/UTC petition for reconsideration filed in this proceeding, there are no fewer than 8 petitions

for review of the Commission's February 6 Order pending in various United States Courts of Appeal.¹ Apart from the predictable opposition of many electric utilities and incumbent local exchange carriers ("ILECs"), MCI seeks to reverse many of the Order's pro-competitive findings, by attempting to (a) stunt the deployment of Internet services over cable TV networks; (b) upend long-established economic principles and operational practices by attempting to force its way into attaching parties' one foot of attachment space; and (c) advocate a curious approach to so-called "unusable" conduit space that is unduly complicated and results in occupancy rates that would discourage the use of existing available duct capacity.

II. THE COMMISSION SHOULD COUNT ENTITIES FOR THE PURPOSES OF ALLOCATING UNUSABLE POLE SPACE IN A MANNER CONSISTENT WITH NCTA'S PETITION FOR RECONSIDERATION AND THE CABLE-OPERATOR POSITIONS IN THIS OPPOSITION

The electric utilities and SBC reassert claims made at rulemaking that attaching entities should not count when dividing up the nonusable space. The Order directs the utilities to adopt the presumptions according to urban, urbanized and rural Census areas.² Rather than proceed with the development of these presumptions, however, the utilities exaggerate potential problems in developing presumptions for the three indicated Census areas, and seek reconsideration of this Commission finding.³ Utilities complain about mechanical and cost

¹ See, e.g., *Gulf Power Co., et al. v. FCC*, No. 98-6222 (11th Cir.) (Pet. for Review filed Mar. 23, 1998); *Florida Power & Light Co. v. FCC*, No. ____ (11th Cir.) (Pet. for Review filed Apr. 27, 1998). Other utilities filing identical challenges include: Tampa Electric Company (11th Cir.); Virginia Electric Power Company (4th Cir.); Carolina Power & Light Company (3rd Cir.); Duquesne Light Company (3rd Cir.); Delmarva Power & Light Co. (3rd Cir.); Duke Energy Corporation (4th Cir.).

² Order ¶ 77.

³ See, e.g., EEI/UTC Petition at 22-23.

difficulties in counting entities. They want the "flexibility" to count attaching entities to allow them to recover the highest possible rate, irrespective of the actual number of attachers in the relevant geographic areas. Some advocate a state-wide average basis,⁴ while others do not commit to a specific geographic region and urge only that they should be allowed to average the number of entities across an entire multistate service region if they should choose to do so.⁵

Throughout this proceeding cable operators have advocated a common-sense interpretation of the plain meaning of the statute,⁶ under which all of the entities on a pole should be counted for the purposes of allocating unusable pole space. This would include electric utilities; electric utilities with internal communications services; ILECs; ILECs providing video services; cable operators who do not provide telecommunications; CLECs; and governmental attachments.⁷

Under the view adopted by the pole owners, where only one party is deemed an attaching party for unusable space, the first cable system to diversify would face a rate increase from approximately \$5.00 (video) to \$30 (telecom, 1 party). This rate shock would work an obvious and substantial disincentive to diversification. In addition to the clear practical and policy reasons why the Commission should discourage such a result, this interpretation is legally unsound.⁸

⁴ See, e.g., SBC Petition at 10-13.

⁵ EEI/UTC Petition at 10-11.

⁶ See, e.g., NCTA Comments at 17-22; Comcast Comments at 9-15.

⁷ *Id.*

⁸ See, e.g., NCTA Petition for Reconsideration at 5-8.

In practical reality, there is no doubt that electrical utilities are clear beneficiaries of the "non-usable" space on poles, and disproportionately so. Poles that carry only telecommunications attachments may be shorter and less costly than poles that contain power attachments. Telecommunications lines may be installed at lower minimum grade clearances than power lines and still comply with applicable safety requirements, while electric facilities *must* have greater clearance from the ground. Electric utilities disproportionately occupy more usable space (for primaries, secondaries, streetlights, and the prescribed clearances among circuits of differing voltages) than required by communications attachers. The taller the pole, the greater the unusable space, because pole setting depth below ground increases as a function of pole height (2 feet plus 10% of the pole length is standard.) Thus, in practical field reality electric utilities are entities which benefit from non-usable space on a pole.

The legislative history of the Act corroborates this practical reality. An early version of the bill apportioned nonusable space in proportion to usable space used, as has been the case since 1978.⁹ The Senate legislation passed on June 15, 1995 allocated the nonusable space equally among all *attachments* on the pole.¹⁰ The adopted legislation was charged 2/3 of the support costs equally among attaching "entities" — not "some of" the entities excluding owners. The legislative history clarifies that "entities" referred both to "entities that hold an ownership interest in the pole" and to "an entity that obtains an attachment through a license."¹¹

⁹ See, e.g., S. Rep. No. 104-23 (March 30, 1995).

¹⁰ 141 Cong. Rec. S8570, S8579 (June 16, 1995).

¹¹ S. Rep. No. 104-23 (March 30, 1995).

Likewise, the Act defines pole owners as "entities."¹² ILECs are also "entities." They were excluded from the definition of *telecommunications carriers* who would otherwise be entitled to invoke the price formula for 224(e), so that their joint use agreements with power would not be subject to the new formula. An "*attaching entity*" for allocating nonusable space is not so narrowly defined.

Excluding electric utilities from the count of attaching entities could lead to results plainly at odds with the underlying statutory purpose. The first CLEC would pay all of the allocable (2/3) costs for nonusable space when using a two-party pole—that is more than the pole owner itself.¹³

At a minimum, the Commission should clarify that any utility "counts" as an entity that has communications attachments if the utility conducts communications for internal purposes. This harmonizes with the Commission's approach in the *Interconnection Order*,¹⁴ in which it found that a utility's use of its poles even for internal communications triggers the mandatory access provisions of Section 224.

We reject the contention that, because an electric utility's internal communications do not pose a competitive threat to third party cable operators or telecommunications carriers,

¹² 47 U.S.C. § 224(i) (emphasis added).

(i) An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way)

¹³ See, e.g., Reply Comments of Comcast *et al.* at 11-12.

¹⁴ *Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, 11 FCC Rcd. 15499 (Aug. 8, 1996) ("*Interconnection Order*").

such internal communications are not "wire communications" and do not trigger access obligations. Although internal communications are used solely to promote the efficient distribution of electricity, the definition of "wire communication" is broad and clearly encompasses an electrical utility's internal communications.

Interconnection Order ¶ 1174 (Aug. 8, 1996).

Likewise, governmental attachments are clearly attaching entities. Local governments have been utilizing such attachments to build competitive broadband systems, institutional networks, wide area networks, and similar communications ventures which clearly benefit from the pole.

Joint Commenters continue to believe that the interests of simple, predictable and non-controversial rate setting will be best served by the establishment of entity-attachment presumptions—comparable to that employed for usable space—that can be rebutted with credible contrary evidence. To the extent that the utilities are to be relied on to develop the attaching party presumptions, they must adhere rigorously to counting the attaching parties as outlined here and in NCTA's Petition for Reconsideration, and according to the Census areas designated by the Commission in the Order. As the February 8, 2001 phase-in implementation date approaches, however, it may become necessary to request the Commission to re-examine its proposal to entrust utilities with providing accurate entity data.

III. THE COMMISSION SHOULD DENY THE UTILITIES' AND MCT'S PETITIONS FOR RECONSIDERATION WITH RESPECT TO THE CALCULATION OF CONDUIT RATES FOR TELECOMMUNICATIONS SERVICES

Conduit owners suggest various means for raising the allocable share of conduit costs to very high levels, including counting only the *material* of the installed ducts as the only usable space costs. In one of the more extreme efforts to treat virtually all conduit costs as

"unusable space," SBC asserts that only the costs of the material forming the walls of the individual conduits be considered the costs of usable space.¹⁵ Similarly, UTC argues either that all spare conduit capacity should be unusable, or, alternatively (like SBC) only the costs of the duct itself should be regarded as usable.¹⁶ For its part, MCI offers an alternative to calculating rates for the telecommunications conduit rate which, curiously, would permit the conduit owner to charge an anticompetitive rate, seemingly to MCI's (and all non-owners') disadvantage.

As stated in NCTA's reconsideration petition in this proceeding, these various proposals simply are not consistent with the Act or with the need for reliance on public records to calculate just and reasonable conduit rates. Spare capacity by definition is usable, and it is unfair and contrary to logic as well as field practice to treat such capacity as unusable. It is also arbitrary to treat only the cost of PVC duct as "usable" in a duct network. Under this approach, almost no property would be used and useful for utility ratemaking purposes.

This approach would raise rents far above prevailing rates in effect today that have not been set according to any formula, and, under certain scenarios, could raise the rent to levels so high that construction of entirely new conduit networks would be less expensive over time than seeking access to the ample available capacity that exists in many places.¹⁷ Assuming that it were even possible to disaggregate detailed material costs data from utility record, the Commission would find that the cost of the duct material itself is a minuscule portion of the

¹⁵ SBC Petition at 17-18.

¹⁶ EEI/UTC Petition at 9.

¹⁷ See, e.g., *Tennessee Cable and Telecommunications Association, et al. v. BellSouth Telecommunications, Inc.*, PA No. 96-004, Complaint ¶¶ 14-21, Reply at 3-5 (Complaint filed Oct. 22, 1996) (\$6.00 per-foot conduit occupancy rate forcing cable operator to construct alternative conduit networks, paralleling ILEC network).

conduit networks that are integral to, and used for, access. This cannot be consistent with the statute, which intends to remove barriers to facilities-based competition, much less with basic economic principles, which encourage optimum utilization of available resources.¹⁸ Similar arguments that the costs associated with blocked, deteriorated ducts, and spare capacity (access to which conduit owners are most reluctant to accord to third parties) should be treated as "other than usable" and therefore allocated to attaching parties are likewise anticompetitive and should be rejected.¹⁹

Equally important, attempting the disaggregation necessary to effect the utilities' proposals of calculating according to a single element of their material costs (the duct itself) necessarily requires reliance on internal utility records. The cable industry time and again has shown that relying on internal company data,²⁰ as both the utilities' petitions and the Order requires, would create the need for hearings, rather than promoting the out-of-Commission rate settlements which have made the pole formula so successful. Not one utility has offered any practical mechanism under which such a regime would be workable, nor any empirical information on which the FCC could estimate its impact. We continue to believe that the fairest and most practical way of adhering to Congress's mandate is to have no special assignment for "unusable" conduit costs.

For these reasons, the Commission should deny the petitions for reconsideration of the utility parties and MCI insofar as they conflict with this Opposition and NCTA's Petition

¹⁸ See also ICG Petition at 5-6.

¹⁹ See, e.g., USTA Petition at 8-9.

²⁰ See, e.g., NCTA Petition at 5.

for Reconsideration filed in this proceeding.

IV. THE COMMISSION SHOULD NOT MODIFY ITS FINDINGS ON THE PROPER TREATMENT OF OVERLASHED FACILITIES

MCI seeks to compel cable operators to accommodate uninvited overloading by third parties, at a nominal fee. Under the guise of "efficient" use of pole space, MCI aims to make the complex task of pole administration and rate setting all but impossible. MCI accuses cable operators and others that already have significant numbers of attachments as "reserving" the pole space they already occupy.²¹ MCI alone attempts to equate non-pole owning attaching parties with utility poles owners, subject to the mandatory access provisions of Section 224(f)(1).

Neither MCI nor any other party has introduced evidence that pole capacity is so congested that this proposal is required. Electricians themselves have asserted before the Commission and elsewhere that poles have grown five feet in height over time,²² and the addition of five more feet of space is enough to accommodate five additional attaching parties (and many more if it is accepted that communications attachments can be safely accommodated in less than one foot of space). In many cases, cable operators in prior years have paid for the costs of the changeout to the taller pole because the pre-existing poles were not tall enough to accommodate their attachments.

Moreover, the standard business model for overloading is to use spare capacity in a hybrid-fiber-coax ("HFC") system or trunk run to lease transport capacity to third party. The physical fiber is normally part of the plant of the cable system, and does not belong to a third

²¹ MCI Petition at 8-13.

²² *See, e.g.*, Electric Utility Whitepaper at 10 (submitted to FCC Aug. 1996).

party, but to the cable operator. Cable operators have not been holding out their existing strand and pole space for attachment by all comers in the manner in which telecommunications companies hold out access to their plant and services for common carriage. Because there is no legal basis for MCI's request, and because it neither raised the issue below or supplied evidence justifying the claim, it should be rejected.

In addition, some utilities want overlashing to automatically trigger the telecommunications rate.²³ There will be some cases where an overlashed attachment will trigger application of a higher telecommunications rate. After February 8, 2001, where telecommunications services are being provided *via* an overlashed conductor (or solitary attachment), the higher telecommunications rate will apply. The mere physical presence of an overlashed facility, however, should not trigger the higher rate. Indeed, as the cable industry has shown previously, and as the Commission has held, the presence of an overlashed attachment used for telecommunications services owned by someone other than the "host" attaching party triggers the higher attachment rate.

V. THE COMMISSION SHOULD REJECT UTILITY EFFORTS ON RECONSIDERATION TO ARGUE THAT REPRODUCTION COSTS ARE APPROPRIATE TO POLE RATE REGULATION

Reproduction costs have been repeatedly rejected as a viable means for calculating pole attachment rates. First, the statutory requirement of Section 224 is clear: it requires that the rate is to be based on the "actual capital costs of the utility."²⁴ This view is supported by the legislative history which directs reliance on pre-existing Form M (ARMIS) and FERC reports,

²³ See, e.g., SBC Petition at 7-8.

²⁴ 47 U.S.C. § 224(d).

to eliminate need for separate rate cases. "Special accounting measures or studies should not be necessary."²⁵

The FCC has remained faithful to these commands and has consistently incorporated them into its pole attachment regulations and rulings. For example, the Commission's complaint procedures dictate that "[d]ata and information should be based upon historical or original cost methodology, insofar as possible. Data should be derived from Form M, FERC 1, or other reports filed with state or federal regulatory agencies (identify source)."²⁶

In addition, the Commission specifically found that:

"[w]ith regard to the argument advanced by Bell and others that replacement costs should be taken into account in determining pole attachment rates, we do not consider such costs to be reflective of actual costs incurred. We believe historical costs most accurately reflect actual or embedded costs."²⁷

The Commission has reaffirmed this view in adjudicating complaints.²⁸

Congress re-validated the use of embedded booked costs in 1983, when it lifted the formula's five-year sunset provision contained in the original version of Section 224.²⁹ I did so again in 1984 when it amended Section 224 as part of the sweeping Cable Communications

²⁵ S. Rep. 95-580 at 20.

²⁶ 47 C.F.R. § 1.1404.

²⁷ *Second Report & Order* in CC Docket 78-144, 72 FCC 2d 59, 65 ¶15 (1979)

²⁸ *See, e.g., Teleprompter Corp. v. Mountain States Telephone & Telegraph Co.*, 49 R.R.2d 719 (1981), PA-79-0035, Mimeo No. 000736 (May 7, 1981).

²⁹ Communications Amendment Act of 1982, Pub. L. No. 97-259 (1983).

Policy Act of 1984 but left the formula intact;³⁰ in 1992, when it passed the Cable Competition and Consumer Protection Act,³¹ and, most recently, in 1996 when it passed the Telecommunications Act of 1996 and retained the formula.³² Indeed, the 1996 amendments to Section 224 changed only the method in which pole space was to be allocated to parties providing telecommunications services; it did not contemplate changes to the rate base or carrying charges associated with pole plant.

In addition to the repeated re-affirmation of net book costs as the basis for calculating pole attachment rates at the federal level, states also have rejected reproduction/replacement costs as appropriate for poles. For example, the state of California directs that "[t]he basis for computation of annual capital costs shall be historical capital costs less depreciation."³³ New York also has rejected reproduction costs for poles,³⁴ as has Michigan.³⁵

³⁰ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

³¹ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

³² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

³³ Cal. Gov. Code. § 767.5.

³⁴ *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, New York Pub. Serv. Comm'n. Case No. 95-C-0341, 1997 N.Y. PUC LEXIS 364, (Issued and effective June 17, 1997), recon. denied, 1997 N.Y. PUC LEXIS 639 (October 7, 1997) (rejecting TSLRIC and reproduction costs for poles and using FCC's historic cost method as most conducive to competition).

³⁵ *Consumers Power Co., et al.*, Michigan Pub. Serv. Case Nos. U-10741, U-10816, U-10831 at 27, 1997 Mich. PSC LEXIS 26 (Feb. 11, 1997), *reh'g denied* (April 24, 1997), *appeal pending*, *Detroit Edison Co et al. v. Michigan Public Service Comm'n et al.*, Nos. 203480 & 203421 (Mich. Ct. App. filed May 22, 1997) (rejecting reproduction cost pricing for poles).

Similarly, states have rejected efforts to "back door" a reproduction cost pricing model for poles through Section 251/271 proceedings conducted to determine ILEC ability to enter the market for long distance services.³⁶

In addition, this long-accepted and often re-affirmed view of pole pricing theory is well-founded because of the unique makeready pricing arrangements under which a pole is prepared for a third-party attachment: the attaching party pays all capital costs associated with his new attachment prior to attachment. Utilities pay no such costs. Cable is required to attach to surplus space on poles or pay for creation of such space in makeready. *Second Report & Order* in CC Docket 78-144, 72 FCC 2d 59, 72 ¶ 29 (1979). These payments are credited to the original cost and accumulated depreciation accounts. Cable operators, therefore, would be double charged unless the rates are premised on net book.

There is, furthermore, no economic basis for adopting reproduction costs. Reproduction costs are not needed to properly allocate resources, because a cable operator or other attaching party will occupy only the space that it needs for its particular service, and will not be inclined to pay either the rent, or the makeready costs necessary to occupy more than one foot of space. Under current pricing regulations, cable operators use one foot of space. Even if cable operators *were* somehow to overconsume pole space, they would have to pay makeready for making that space available for attachment. Utilities would not bear the cost of such

³⁶ See, e.g., *Review of Cost Studies, Methodologies, and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications Services*, Georgia Pub. Serv. Comm'n Docket 7061-U, October 21, 1997 (Rejecting use of reproduction cost for poles in a Section 251 case: "The Commission concludes that it is most appropriate to adopt the current pole rental rate according to the FCC formula, which produces a rate of \$4.20 The current FCC formula has proven to be a reasonable, cost-based approach to setting pole rates.").

overconsumption and are never at risk of over-investment. Likewise, current pricing has not led to under-investment in poles.³⁷ Indeed, the electric utilities themselves have invested in taller poles under current pricing regimes.³⁸

Moreover, moving to a reproduction-cost model for pole plant ignores practical realities. Cable operators already are attached to the poles. The economic costs (externalities) of dismantling installed plant on existing poles has not been accounted for in the utilities' presentation on reproduction costs. Because local franchising authorities forbid the erection of new poles, there are no market alternatives to pole plant. In addition, unlike switches, there is no ongoing re-investment in innovative "pole" technologies. Poles are very long-lived processed wood. In recognition of all these factors, pole owners themselves use embedded costs as the basis for their joint-use agreements.

Finally, even assuming that there remained some concern that use of embedded net book costs was did not contain sufficient "forward-looking" elements, this is not the case. Under the utility depreciation accounting practices for pole plant, utilities are entitled to recover their *future* costs of removal of the pole plant in the depreciation reserve for those accounts. (Even the basic depreciation itself is known to be overstated to accelerate recovery and cash flow.)³⁹ In addition, through tax normalization, the pole formula allows utility pole owners to collect, *in advance*, *future* tax payments not made on a current basis. Under the formula, the utilities are permitted to earn an overall return on their pole investment, the rate of which is set

³⁷ Comments of AEP, *et al.* at 30-32; Report of Reed Consulting Group (attached to AEP Comments) at 26-28 make this unsubstantiated claim.

³⁸ White Paper at 10.

³⁹ AT&T Comments at 12.

at a level to *attract* capital, not merely retain it. The utilities may update their underlying costs annually through a simple formula, rather than a complex rate case, and pick up *all* current investment—even in poles far taller and costlier than is required to meet cable needs.

The utilities have offered no evidence why the Commission's decision not to use reproduction costs should be reconsidered.⁴⁰

VI CABLE OPERATORS PROVIDING INTERNET-RELATED SERVICES SHOULD CONTINUE TO PAY THE RATE APPLICABLE TO CABLE TELEVISION SERVICES AFTER FEBRUARY 2001

USTA and Bell Atlantic argue that because there might be telecommunications-like elements buried within high-speed Internet services that cable television operators provide to their cable customers, this occurrence justifies charging cable operators the higher post-2001 telecommunications pole attachment rent.⁴¹ In addition, the utilities advocate burdensome reporting requirements (concerning services offered and customers served) applied to cable operators, under the cloak of learning when they are entitled to collect higher attachment rates, but in reality so that the utilities can track cable deployment of advanced services. MCI joins the chorus, claiming that cable operators will have an unfair advantage, absent reconsideration.

A. Hybrid Internet Services Are Not Telecommunications Services

First, as a legal matter, high-speed cable television Internet access is not

⁴⁰ EEI/UTC's novel claim that following the clear statutory mandate and consistent congressional and agency reaffirmation of use of net book costs somehow denotes Commission bias and violates equal protection is without merit. EEI/UTC Petition at 11. Pole attachment regulation, generally, and use of book costs, explicitly, is pure economic regulation of a monopoly essential facility, irrespective of whether the pole owner is a power company or a telephone company.

⁴¹ USTA Petition at 5-7; Bell Atlantic Petition at 1-3; SBC Petition at 4-7.

"telecommunications" within the pole attachment context, for reasons that have been explained previously.⁴² Indeed, Congress amended the Act to steer Internet access away from being classified as telecommunications services.⁴³

The Commission has specifically found that the activities of Internet Service Providers ("ISPs") are not telecommunications carriers for the purposes of requiring companies to make contributions to the universal service fund.⁴⁴ Concluding that such hybrid services are *not* telecommunications is necessary to apply Section 224 in harmony with rest of Act. One example of this harmonious application would be cable rate regulation social contracts between the FCC and cable operators which require cable-operator delivery of Internet access to schools. In the social contract rate regulation settlements into which the Commission has entered with cable MSOs, commitments to deliver high-speed Internet services are treated as part of Title VI cable services regulation. To suddenly erect the economic barrier here that the pole owners and other competitors advocate would be contrary to pre-existing Title VI rate regulation arrangements to which the Commission is a party.⁴⁵

⁴² See, e.g., Comments of Comcast Cablevision, *et al.* at 18-20.

⁴³ See, e.g., Cong. Rec. of January 31, 1996, at H1123. This definition was to "reflect the evolution of cable to include interactive services such as game channels and *information services* made available to subscribers by the cable operator, as well as *enhanced services*. This amendment is not intended to affect Federal or State regulation of telecommunications service offered through cable system facilities, or to cause dial-up access to information services over telephone lines to be classified as a cable service." *Id.* (emphasis added).

⁴⁴ Federal-State Board on Universal Service, Report and Order, FCC 97-157, ¶ 789 (May 8, 1997).

⁴⁵ Even BellSouth agrees that Internet and Internet-related services should be treated as cable services.

Where a cable operator offers other programming services such as

The Commission's own findings in the April 10, 1998 Report to Congress⁴⁶

confirm that hybrid Internet services are not telecommunications services.

[H]ybrid services are information services, and are not telecommunications services. Because information services are offered "via telecommunications," they necessarily require a transmission component in order for users to access information. Accordingly, if we interpreted the statute as breaking down the distinction between information services and telecommunications services, so that some information services were classed as telecommunications services, it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category. As noted [previously], we find strong support in the text and legislative history of the 1996 Act for the view that Congress intended "telecommunications service" and "information service" to refer to separate categories of services.⁴⁷

In other words, just because use of Internet services may require some telecommunications-like functionalities, this is not sufficient to automatically convert these services into telecommunications services. And while we understand that there may be some future efforts

access to the Internet and Internet-related services over the capacity of a cable television systems, to all of its subscribers as part of an elected Title VI cable offering, and where the cable operator consistently treats such services as being subject to Title VI cable regulation, such as paying fees on the revenues generated from such services pursuant to a cable franchise, such services are indeed "cable services"

Reply Comments of BellSouth at 4-5.

⁴⁶ Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (Report to Congress), 1998 FCC LEXIS 1741 (Apr. 10, 1998).

⁴⁷ *Id.* ¶ 57.

to use the Internet to bypass traditional local and long distance voice telephone,⁴⁸ we are not at that stage today and there is no basis for turning experimentation with IP telephony applications into an immediate barrier to the deployment of high speed networks.

In addition, USTA claims, without support, that there is an emerging market distortion because data transport is "migrating to Internet networks because of regulatory exemptions accorded to Internet networks that provide them with cost advantages over traditional telecommunications carriers."⁴⁹ While it is true that use of the Internet is increasing, there is no evidence that such increase is the result of migration from "traditional" telecommunications networks to those Internet networks. The increase in Internet use is due principally to the fact that the Internet provides users with far greater functionality and other advantages than those available from "traditional" telecommunications networks. What USTA and its members appear to be complaining about is not that there is a "migration" from their "traditional" networks, but that usage of the Internet is growing *faster* than is usage of those ILEC "traditional" networks.⁵⁰ This is not a reason to reflexively hamper Internet development over "non-traditional" networks through higher pole rents—particularly when ILECs are simultaneously aggressively pursuing their own ISP strategies.

Finally, there is no "unfair market distortion" as USTA alleges. We know of no CLEC which delivers Internet which does not also deliver dialtone. Where a cable operator

⁴⁸ See, e.g., USTA Petition at 4-5.

⁴⁹ USTA Petition at 6.

⁵⁰ See, e.g., Bell Atlantic Petition at 3-6. In addition, many of the major ILEC members of USTA themselves are Internet service providers who are direct beneficiaries of this trend that USTA here tries to attribute solely to regulatory distinctions.

delivers Internet and dialtone, as many CLECs are positioning themselves to do, it will be in *exactly* the same position as those competitors claiming here that they are somehow harmed by application of the cable TV rate to Internet services. By far the more common configuration today is for cable operators to deliver Internet and video but no dialtone. Utility and CLEC arguments that cable operator provision of Internet services should be charged the higher attachment rate is dog-in-the-manger advocacy by competitors seeking to handicap cable from diversifying, not to obtain equal treatment.

B. The Commission Should Reject Utility Efforts To Secure Competitively Sensitive Data From Cable Operators

Finally, the Commission should reject the utilities' claims that cable operators be required "to make information available to utilities about their provision of Internet or Internet access services with sufficient specificity to allow a determination as to whether a telecommunications service is being provided as part of any Internet service."⁵¹ Apart from begging the question at issue, this request is a thinly disguised effort to troll cable operator files for the kind of sensitive information to which the Commission now *twice* has denied utility access,⁵² and which, at a minimum, is a burden without a benefit.⁵³ The petitioners have advanced no new reason or basis for the Commission to consider this finding.

⁵¹ USTA Petition at 8. *See also*, EEI/UTC Petition at 11-12 (advocating a certification that cable operators are providing only one-way video services).

⁵² Order ¶ 35. *Marcus Cable Associates, L.P. v. Texas Utilities Electric Co.*, 8 CR 1293 (July 21, 1997). The New York Public Service Commission similarly refused to adopt this utility presumption in a 1997 pole attachment rulemaking order. *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, New York Pub. Serv. Comm'n. Case No. 95-C-0341, 1997 N.Y. PUC LEXIS 364 (issued and effective June 17, 1997), recon. denied, 1997 N.Y. PUC LEXIS 639 (October 7, 1997).

⁵³ Order ¶ 35.

VII. THE COMMISSION RULES ENCOURAGE AND SET THE GROUND RULES FOR MEANINGFUL NEGOTIATION

Some utilities have argued on reconsideration—as they have in every step of every pole proceeding since the adoption of the 1996 Act—that the Commission's rules discourage or "frustrate" negotiation.⁵⁴ They argue that the "entire thrust" of the Telecommunications Act is deregulatory, and that the Commission's implementation of Congress' 1996 supplements to pole regulation are contrary to the deregulatory purposes of the Act.⁵⁵ As cable operators and others time and again have shown, there are certain predicates to a free-functioning telecommunications market, such as regulated access to unbundled network elements, reasonably priced resale capacity and functionality, and, poles, conduits and rights-of-way, which the utilities seek to supplant with their mantra of "market-based" and "negotiated" rates, terms and conditions. These terms are utility code for contracts of adhesion, monopoly rents, and unreasonable demands serving as the *quid pro quo* for access. Indeed, the Commission need look no farther than its own complaint files to see the utilities view of "market" forces at work.⁵⁶

The Commission's rules are neither "lip service" nor a charade of negotiation, but the bedrock for meaningful negotiation between pole owners and attaching parties. And these requirements are working. Certain utilities appear to be taking their obligations to administer the

⁵⁴ EEI/UTC Petition at 1-9.

⁵⁵ A companion tactic to the utility claim that adoption of these rules frustrate negotiation is EEI/UTC's request that the Commission suspend the effective date of the regulations adopted in this docket until *all* pending pole proceeding are completed. This, of course, is contrary to the purposes of pole regulation and a transparent attempt to delay the onset of competition.

⁵⁶ *Omnipoint v. PECO Energy Corp.*, PA No. 97-0022 (filed Apr. 1, 1997) (access complaint brought by wireless PCS provider for utility denial of just and reasonable access to utility poles and towers); *Danny E. Adams*, 6 CR 58 (Jan. 17, 1997).