

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

OPPOSITION

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May 12, 1998

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**OPPOSITION**

The National Cable Television Association ("NCTA"), by its attorneys, hereby opposes certain petitions for reconsideration submitted April 13, 1998 in the above-captioned proceeding.

**INTRODUCTION AND SUMMARY**

With the limited exception of the two matters raised in NCTA's Petition for Reconsideration,<sup>1</sup> the Commission should affirm its decision establishing rules and policies that will apply, beginning February 8, 2001, to the provision by utilities of poles and conduits to telecommunications carriers. The adoption of the self-serving proposals advanced by the telephone and electric parties for changes to the Commission's carefully crafted regime threatens the pro-competitive goals of the Act.

The Section 224(d) rate will of course apply to poles used by cable systems to deliver "traditional" cable services. The "cable" rate should apply also to all other services of a cable

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<sup>1</sup> See NCTA Petition for Reconsideration, CS Docket No. 97-151, Apr. 13, 1998.

system that come within the definition of “cable service.” And, the Commission should use its discretion to apply the cable rate for poles used to deliver commingled cable and information services. Implementation of the lower cable rate will enhance competition by reducing the cost of the pole and conduit input, and thereby enable cable operators to bring advanced services to the market more promptly. The Commission should apply the telecommunications rate only to poles and conduits used to provide telecommunications services.

The Commission should reject the proposals by telephone parties to assign a greater portion of “other than usable” conduit space to any users except the pole owner. While a portion of other than usable space that benefits all users is properly assigned to all users, space in a conduit that has deteriorated and is rendered unused by the utility is not universally beneficial, and its cost should not be borne by all attachers.

In lieu of a pole-by-pole inventory, the Commission should require utilities to determine an average number of attaching entities in urban, urbanized and rural areas. Utilities argue this approach will be burdensome and at most it should be optional. But the Commission has found that the utilities possess the necessary information, and determining the number of attachers to establish presumptions for each utility is the most efficient way to develop appropriate shares of costs among users. Furthermore, the cost of establishing the presumptions should be borne by utilities as a reasonable cost of doing business. The presumptions should be in place by February 8, 2001.

The Commission should also reject the argument that an ILEC should not be counted as an “attaching entity” for purposes of calculating the cost of usable space. The Commission properly concluded an ILEC should be assigned a portion of the cost of unusable space because

Section 224 requires the assignment of these costs among all “attaching entities.” Since an ILEC is an “attaching entity,” it must bear a portion of the cost of unusable space.

Finally, the Commission should reject MCI’s proposals for revision of the policies regarding third party overlashing. The one-foot usable space presumption, which concerns the amount of space occupied by the host attacher on the pole owner’s pole, should not be changed to take account of third party overlashers. Third party overlashers do not stand in a direct relationship with the pole owner and therefore do not occupy space on the pole in the same sense as the host attacher. Rather, the third party overlasher’s principal relationship is with the host attacher.

**I. INTERNET ACCESS SERVICES DELIVERED OVER A CABLE SYSTEM QUALIFY FOR THE CABLE POLE RATE, NOT THE TELECOMMUNICATIONS RATE**

**A. The Report and Order**

In the Report and Order, the Commission held that the telecommunications pole rate would not apply to attachments used by a cable system to provide any service other than telecommunications.<sup>2</sup> Whether the service is a “cable service” or an “information service,” the Commission determined that the service will be treated as a “cable service” as provided for in Section 224(d)(3) for purposes of determining the pole attachment rate. The telecommunications rate will be applied only to “telecommunications services.”

The Commission found that where traditional cable services are commingled with Internet access, the cable rate will apply whether or not the commingled services constitute

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<sup>2</sup> Pole Attachments Telecommunications Rate Order, FCC 98-20, rel Feb. 6, 1998, at paras. 34-35. (Report and Order).

“solely cable services.” If the service qualifies as a cable service, then the Section 224(d)(3) rate will clearly apply.<sup>3</sup> But even if “the provision of Internet access is deemed neither ‘cable service’ nor ‘telecommunications service’ under the existing definitions, the Commission is still obligated to ensure ... [the reasonableness of pole attachment rates] ... by a cable television system.”<sup>4</sup> And in furtherance of this purpose, the Commission decided, in its discretion, to “apply the subsection (d) rate as a ‘just and reasonable rate’ for ... pro-competitive reasons.”<sup>5</sup>

The Commission’s holding is fully consistent with its ruling in *Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Company* (“*Heritage*”).<sup>6</sup> As the Order notes, in *Heritage*, “the Commission determined that the provision by a cable operator of both traditional cable services and nontraditional services on a commingled basis over a single network within the cable operator’s franchise area justified only a single, regulated pole attachment charge by the utility pole owner.”<sup>7</sup> The Commission reasoned that its jurisdiction to regulate pole attachments was not limited by definitions emanating from the 1984 Cable Act “because such definitions apply only for purposes of Title VI.”<sup>8</sup> The *Heritage* decision was affirmed by the Court of Appeals in *Texas Utilities Electric Co. v. FCC*.<sup>9</sup>

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<sup>3</sup> The Commission cited legislative history to support the proposition that Congress intended for commingled traditional cable and Internet access services to be subject to the cable rate. See Report and Order at n. 130.

<sup>4</sup> Id. at para. 34.

<sup>5</sup> Id.

<sup>6</sup> Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Company (“*Heritage*,” 6 FCC Rcd 7099 (1991), recon. dismissed, 7 FCC Rcd 4192 (1992), aff’d sub nom. Texas Utilities Electric Co. v. FCC, 977 F.2d 925 (D.C. Cir. 1993).

<sup>7</sup> Report and Order at para. 34.

<sup>8</sup> Id. (citation omitted)

<sup>9</sup> Texas Utilities Electric Co. v. FCC, 977 F.2d 925 (D.C. Cir. 1993).

The Commission further found, contrary to the assertions of utility commenters, that *Heritage* was not “overruled” by the Telecommunications Act of 1996. The Commission points out that the definition of “pole attachment” does not turn on the type of service--traditional cable, information services, or telecommunications--that a particular pole attachment is used to provide. Rather, Section 224(a)(4) defines a “pole attachment” as any attachment by a “cable television system.”<sup>10</sup> The Commission interprets Section 224 as requiring it to ensure that the rates, terms and conditions of pole attachments by a cable television system are just and reasonable.<sup>11</sup>

In sum, the Commission reasoned that its authority to ascertain just and reasonable pole rates under Section 224 (b)(1),<sup>12</sup> and the requirement that a pole attachment include “any attachment by a cable television system,”<sup>13</sup> provides the necessary statutory authority to apply the Section 224(d)(3) rate to attachments jointly used for traditional cable services and Internet access.

**B. The Commission, Acting Within Its Discretion, Appropriately Applied the “Cable” Pole Rate to Cable-Provided Internet Access**

SBC, MCI and Bell Atlantic argue that the Commission erred by applying the cable pole rate to Internet access. They contend Section 224(d)(3) limits the application of the cable pole rate solely to cable services and Internet access is not a cable service. SBC maintains, “If a cable operator uses its attachments to provide any service other than cable service, it is not entitled to

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<sup>10</sup> 47 U.S.C. §224(a)(4).

<sup>11</sup> Report and Order at para. 30

<sup>12</sup> 47 U.S.C. § 224(b)(1).

<sup>13</sup> 47 U.S.C. § 224 (a)(4).

the Section 224(d) rate.”<sup>14</sup> SBC further objects that the goal of encouraging expanded Internet service can be achieved under either rate. MCI similarly argues that the Commission is without statutory authority to apply the cable rate to pole attachments used for Internet access, and that the telecommunications rate must be applied.<sup>15</sup>

These objections are easily disposed of. The 1996 Act requires the application of the Section 224(e) rate, effective February 8, 2001, “for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute.”<sup>16</sup> The Section 224(d) rate is to apply to pole attachments “used by a cable television system solely to provide cable service.” Internet access delivered over a cable system qualifies for the “cable” rate because Internet access is a cable service. As the Report and Order notes, the legislative history to the 1996 Act establishes the intent of the conferees “to reflect the evolution of cable to interactive services such as cable channels and information services made available to subscribers by the cable operator.”<sup>17</sup> This legislative history is consistent with the concept of cable services as incorporating video programming and other programming services that “a cable operator makes available to all subscribers generally.”<sup>18</sup> The Commission’s determination that pole attachments used by a cable operator to provide commingled traditional

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<sup>14</sup> Petition for Reconsideration and Clarification of SBC Communications Inc., CS Docket No. 97-151, Apr. 13, 1997, at 3. (“SBC Petition”). See also Petition of Bell Atlantic for Clarification or for Reconsideration, CS Docket No. 97-151, Apr. 13, 1998.

<sup>15</sup> MCI Petition for Reconsideration, CS Docket No. 97-151, Apr. 13, 1998, at 4-8 (“MCI Petition”).

<sup>16</sup> 47 U.S.C. § 224(e)(1).

<sup>17</sup> H.R. Conf. Rep. No. 458, 104 Cong., 2d Sess. 169 (1996).

<sup>18</sup> 47 U.S.C. §§ 602(6), 602 (14).

cable and Internet access qualifies for the Section 224(d) rate is well within the Commission's statutory discretion.

In particular, Section 224(b)(1) obligates the Commission to ensure that pole attachment rates are "just and reasonable," and Section 224(a)(4) includes "any attachments by a cable television system."<sup>19</sup> Since attachments used for commingled traditional cable and Internet access constitute attachments by a cable television system, it follows that the Commission must set the pole rate for attachments for commingled cable and Internet access where parties are unable to come to terms.

For pro-competitive reasons, the Commission used its discretion to apply the Section 224(d) rate to commingled cable and Internet access services. It found that the lower rate is consistent with the "pervasive purpose of the 1996 Act and the premise of the Commission's *Heritage* decision, to encourage expanded services."<sup>20</sup> The Commission properly concluded it is not barred "from determining that the Section 224(d) rate methodology also would be just and reasonable in situations where the Commission is not statutorily required to apply the higher Section 224(e) rate."

Moreover, contrary to SBC's unsupported claim that "either of the two regulated rates should be sufficient to encourage expanded Internet access,"<sup>21</sup> the Commission reasonably concludes that "a higher or unregulated rate deters this purpose."<sup>22</sup> The most basic principle of

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<sup>19</sup> Id., citing 47 U.S.C. §§ 224(b)(1), 224(a)(4).

<sup>20</sup> Report and Order at para. 34.

<sup>21</sup> SBC at 4.

<sup>22</sup> Report and Order at para. 34.

economic theory holds that a higher rate will tend to diminish demand, and this principle surely holds with respect to the pole attachment input to the cost of cable-provided Internet access. Application of the cable rate will tend to enhance consumer demand for cable-provided Internet access.

**C. Cable-Provided Internet Telephony and Data Transport, When Commingled With Traditional Cable Services, Qualify for the Cable Pole Attachment Rate**

Bell Atlantic contends the cable rate cannot be applied to the underlying transmission associated with cable-provided Internet access.<sup>23</sup> Bell Atlantic and USTA maintain that Internet telephony and the data transport for Internet services qualify for the Section 224(e) telecommunications pole rate. USTA does not dispute that “the Commission, pursuant to subsection 224(b)(1), has the authority to determine the just and reasonable pole attachment rate for cable services providers who commingle their traditional cable services with nontraditional cable services.”<sup>24</sup> But it argues “nontraditional” cable services that are “telecommunications services” do not qualify for the Section 224(d) rate and these services must be regulated pursuant to Section 224(e). Bell Atlantic argues that a cable operator is subject to the telecommunications pole rate to the extent it provides “an underlying transmission service for Internet access or other non-cable information services.”<sup>25</sup>

The Commission noted most recently in its Report to Congress in Federal-State Joint Board on Universal Service, FCC 98-67, rel. Apr. 10, 1998, that it had in this proceeding

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<sup>23</sup> Petition of Bell Atlantic for Clarification or For Reconsideration, CS Docket No. 97-151, Apr. 13, 1998, at 2-5. (“Bell Atlantic Petition”).

<sup>24</sup> USTA Comments at 4.

<sup>25</sup> Bell Atlantic Petition at 1 (emphasis in original).

“expressly declined to rule” on the regulatory classification of Internet services provided over cable facilities.<sup>26</sup> But it held in this proceeding that “cable operators providing traditional cable services and Internet access services over the same facilities were entitled to the 47 U.S.C. § 224(d)(3) pole attachment rate without regard to the regulatory classification of their Internet based services.”<sup>27</sup>

The Commission should reaffirm its holding that commingled traditional cable and Internet access service transmitted over the same (cable) facilities are entitled to the cable pole rate. The Commission has not reached the question of the regulatory classification of Internet telephony included as part of a commingled Internet access/traditional cable offering. It has certainly not found it to be “telecommunications.” Unless and until the Commission resolves the regulatory classification of Internet telephony and data transport, its holding that all commingled Internet access and traditional cable services qualify for the cable pole rate for purposes of Section 224 should stand for the pro-competitive reasons identified in the Order.

## **II. CONDUIT USERS SHOULD NOT BE REQUIRED TO PAY FOR UNUSABLE CONDUIT SPACE**

The Commission finds that “unusable space on a pole is largely attributed to safety and engineering concerns, adherence to which benefits the pole owner and attaching entities.”<sup>28</sup> And, a portion of “other than usable” conduit space “without which there would be no usable space”<sup>29</sup>

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<sup>26</sup> Report to Congress, Federal-State Joint Board on Universal Service, FCC 98-67, at n.140, citing Pole Attachments Telecommunications Rate Order, FCC 98-20, rel. Feb. 6, 1998, at paras. 32-34.

<sup>27</sup> Id., n. 140, citing Report and Order at paras. 32-34.

<sup>28</sup> Report and Order at para. 111.

<sup>29</sup> Id. at para. 110.

is properly assigned to all conduit users. But “[s]pace in a conduit that has deteriorated serves no benefit to the existing rate-paying attaching entities. Deteriorated duct creates space that has been rendered unused by the utility.”<sup>30</sup>

SBC, USTA and Bell Atlantic ask the Commission to further specify the costs to be charged to utility conduits. SBC asks for “general guidance on this distinction between usable and non-usable conduit space, so that utilities will be able to avoid future disputes generated by the potential vagaries of the R&O [Report and Order] as applied to some LEC facilities.”<sup>31</sup>

USTA endorses a Bell Atlantic proposal under which “other than usable” conduit space includes excess capacity to meet future demand, maintenance ducts reserved for emergency use and ducts reserved for municipal use.”<sup>32</sup>

The Commission should reaffirm its proposed approach and reject proposals by USTA, Bell Atlantic and SBC to assign a greater portion of the costs of other than usable conduit space to any user except the utility conduit owner. As NCTA stated in its Petition for Reconsideration, the fairest way of adhering to Congress’ guidelines is to have no special assignment of conduit costs.<sup>33</sup>

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<sup>30</sup> Id. In a Petition for Reconsideration filed April 13, 1998, NCTA called for the elimination of the charge for unusable conduit space. See NCTA Petition for Reconsideration, CS Docket No. 97-151, Apr. 13, 1998, at 2-5.

<sup>31</sup> SBC at 18.

<sup>32</sup> USTA at 8-9, citing Comments of Bell Atlantic, CS Docket No. 97-151, Sept. 26, 1997, at 8-9.

<sup>33</sup> Supra n.35 at 5.

### **III. THE AVERAGE NUMBER OF ATTACHING ENTITIES SHOULD BE SEPARATELY DETERMINED ON THE BASIS OF URBAN, URBANIZED AND RURAL AREAS**

In lieu of a pole-by-pole inventory, the Report and Order requires each utility to develop a presumptive average number of attaching entities based upon the location of poles in urban, urbanized and rural areas. The Commission requires utilities to segregate poles by these categories to reflect the different conditions in portions of their service areas.

USTA argues the development of a presumptive average number of users should be permissive, not mandatory. It further contends that utilities electing to employ averages by location should be accorded “the latitude to choose the location or area definitions that are most appropriate for their service areas.”<sup>34</sup> SBC proposes that utilities be given the option of determining a presumptive number of attaching entities on a state-wide basis.<sup>35</sup>

The Joint Petition of Edison Electric Institute and UTC, The Telecommunications Council (“EEI/UTC”) asserts that “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.”<sup>36</sup> EEI/UTC also request rulings that utilities be permitted to charge attaching entities up front “for the potential substantial costs of developing ...

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<sup>34</sup> USTA Comments at 11.

<sup>35</sup> SBC Comments at 10-16.

<sup>36</sup> Joint Petition for Clarification and/or Reconsideration of the Edison Electric Institute and UTC, The Telecommunications Association,” CS Docket No. 97-151, Apr. 13, 1998, at 22.

presumptions,”<sup>37</sup> and whether a utility needs to have presumptions in place prior to the receipt of requests under the new procedures effective in 2001.<sup>38</sup>

The Commission should reject each of these proposals. The Report and Order concludes utilities not only possess the information necessary to implement company-by-company/area-by-area presumptions, but also that they “have familiarity and expertise to structure it properly.”<sup>39</sup> USTA’s proposal of a broad national average number of attachers is inferior because a national average will not properly account for the particular circumstances applicable to individual cases.

The EEI/UTC proposals should also be rejected. Disclosure by a utility of its methodology is no substitute for the clarity of a simple declaration by the utility of the number of attaching entities in communities satisfying fixed characteristics. Adoption of the EEI/UTC approach would place an intolerable burden on pole users.

The Commission should also reject the other procedural proposals advanced by EEI/UTC. Pole users should not be forced to bear the cost of developing the presumptions. The development of this information is a reasonable cost of doing business that is properly borne by the pole owner.

Finally, the new presumptions should be in place by February 8, 2001. By that date, EEI/UTC will have sufficient information regarding the demand for attachments within the Commission-established categories to develop presumptions. There is no justification for the

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<sup>37</sup> Id. at 22-23.

<sup>38</sup> Id. at 23.

<sup>39</sup> Report and Order at para. 77.

inordinate delay that will result if the presumption are not in place prior to the effective date of the new rules.

#### **IV. INCUMBENT LECS SHOULD BE COUNTED AS ATTACHING ENTITIES**

The Report and Order affirmed the Commission's tentative conclusion that "any pole owner providing telecommunications services, including an ILEC, should be counted as an attaching entity for the purposes of allocating the costs of unusable [pole] space."<sup>40</sup> The Commission bases this conclusion on Section 224(e)(2), which requires that the allocation of the costs of unusable space on the basis of "all attaching entities,"<sup>41</sup> and on Section 224(g), which calls for the imputation by a utility to its costs of providing service "of an amount equal to the rate for which it would be liable under Section 224."<sup>42</sup>

SBC argues that ILECs should not be counted as "attaching entities" for purposes of Section 224. It claims counting ILECs as attaching entities would force ILECs to pay more than what it characterizes as an "equal share" of pole costs. Including ILECs as attaching entities, according to SBC, would require ILECs to bear a greater share of pole costs than was intended by Congress.

SBC's so-called equitable claim does not hold water. As the Commission properly concludes, ILECs should be assessed a portion of the cost of unusable pole space because the Act requires these costs to be assigned to all "attaching entities" for purposes of Section 224, and an ILEC is an "attaching entity" for purposes of Section 224. Furthermore, Section 224(g)

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<sup>40</sup> Report and Order at para. 50.

<sup>41</sup> Id. at para. 53.

<sup>42</sup> Id. (citation omitted).

requires that an ILEC pay an imputed amount equal to the rate for which it would be liable, as an attaching entity, under Section 224(g).

**V. THE COMMISSION SHOULD REAFFIRM ITS POLICIES CONCERNING THIRD PARTY OVERLASHING**

MCI seeks reconsideration of three aspects of the Commission's procedures relating to third party overlashing. First, it calls for a reduction in the presumptive amount of usable space to account for overlashing. Second, it argues once a cable company offers telecommunications services it becomes a utility and thereby must make pole attachments available on a nondiscriminatory basis. Finally, MCI contends that the host attaching entity, as a utility, "may not charge an unregulated rate to a third party seeking to overlash its attachment."<sup>43</sup> The Commission should reject each of these proposals.

**A. The One-Foot Usable Space Presumption Should Be Retained**

MCI argues the presumption of one-foot of usable space is excessive because a single attachment may accommodate one or more overlashings.<sup>44</sup> According to MCI, if overlashing is possible, it follows that a single attachment must be presumed to require less than one-foot of usable space.

MCI's proposal should be rejected for several reasons. First, the one-foot presumption is intended to cover the payment by the host attacher to the pole owner. It does not take account of the relationship of overlashers to the host attacher.

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<sup>43</sup> MCI Petition at 13.

<sup>44</sup> *Id.* at 8.

Furthermore, the one-foot presumption is only a presumption. If MCI has grounds for some other calculation of usable space, it may make its case in appropriate administrative proceedings. While complaining about the existing presumption, it has not, to this point, offered any basis for a different usable space presumption.

**B. A Cable Operator That Overlashes Its Own or a Third Parties' Facilities Does Not Become Either a Utility or a Pole Owner for Purposes of the Pole Attachment Regulations**

MCI argues that if a cable operator already on a pole offers telecommunications service but denies to a third party the ability to overlash, the host is effectively reserving space on the pole for its own future telecommunications use.<sup>45</sup> In support of this proposition, it cites the *Local Competition Order*, to the effect that “An electric utility may not reserve or recover reserved space to provide telecommunications or video programming service...”<sup>46</sup> MCI further points out that the *Local Competition Order* provides for nondiscriminatory treatment of pole users by pole owners.

In advancing this argument, MCI is confusing the roles of the utility pole owner, cable and telecommunications attachers, and overlashers. Section 224(f) obligates a “utility” to “provide a cable television system or any telecommunications carrier with nondiscriminatory access to its poles, ducts, conduit, or right-of-way owned or controlled by it.”<sup>47</sup> A “utility” is defined as “any person who is a local exchange carrier or ... other public utility, *and who owns or*

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<sup>45</sup> Id. at 9.

<sup>46</sup> Id., citing Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Local Competition Order, First Report and Order, rel. Aug. 8, 1996, FCC 96-325, at para. 1169.

<sup>47</sup> 47 U.S.C. § 224 (f)(1).

*controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.*"<sup>48</sup>

A cable system that leases capacity from a pole owner does not qualify as a utility for purposes of the pole attachment law. Even if it were to offer local exchange service and qualify as a local exchange carrier under Section 251(b),<sup>49</sup> it does not own or control poles, ducts, conduits or rights-of-way as an attachor to a utility's facilities, since a cable operator does not own or control poles, ducts, conduits or rights-of-way as an attachor to a utility's facilities over which it provides telecommunications, it is not a utility even in those circumstances in which it overlashes its own lines or the lines of a third party to poles, ducts or conduits which it leases from the utility pole owner. A cable operator, in this sense, is very different from an electric utility that owns and controls poles, ducts and conduits.

**C. Since the Host Attaching Entity is Not a Utility for Purposes of Pole Attachment Regulation, Its Charges to Third Parties for Overlapping Are Not Subject to Rate Regulation**

MCI posits that "Since the Commission has now transformed the host attaching party into a utility company for the purposes of applying the pole attachment requirements, the host attaching party may not charge an unregulated rate to a third party seeking to overlash its attachment."<sup>50</sup> MCI contends that the host attaching entity may be compensated only for "those costs associated with the useable space occupied by the third party overlasher."<sup>51</sup> It further

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<sup>48</sup> MCI Petition at 10, quoting Local Competition Order at para. 1170 (emphasis supplied).

<sup>49</sup> 47 U.S.C. § 251(b).

<sup>50</sup> MCI Petition at 13 (citation omitted).

<sup>51</sup> Id.

argues that “The Commission must either adjust its presumption regarding the amount of space required for a pole attachment downward to account for overlashing, or mandate attaching utilities to make their attachments available to third parties on a nondiscriminatory basis.”<sup>52</sup>

MCI’s premise is simply wrong: the host attaching party has not been transformed into a utility. As explained above, the host attaching party is not a utility because, under the Act, a utility must own or control poles, ducts, conduits or rights-of-way. Since a cable company does not exercise this control, even where it is offering local exchange service, it is not a utility as defined in Section 224(a)(1).<sup>53</sup>

The Commission, acting within its discretion, left the amount of the payment by an overlasher to a host attacher up to private negotiation. It anticipated that the combination of an adequate supply of pole capacity, multiple providers of such capacity and the incentives of the host to obtain additional compensation for attachment costs would achieve a pro-competitive marketplace result. MCI offers nothing to rebut this wholly reasonable expectation.

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<sup>52</sup> Id.

<sup>53</sup> 47 U.S.C. § 224(a)(1).

**CONCLUSION**

For the foregoing reasons, the Commission should affirm its decision and reject the Petitions for Reconsideration submitted by the utilities and MCI herein referenced.

Respectfully submitted,



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