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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

MCI OPPOSITION

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May 12, 1998

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## **I. Introduction**

MCI takes this opportunity to comment on, and oppose, aspects of the Petitions for Reconsideration<sup>1</sup> filed by eight other parties in the above-captioned proceeding.<sup>2</sup> MCI first comments on substantive areas where petitioners were in broad agreement, *viz.*: 1) the Commission erred when it applied the cable attachment rate to facilities that commingle cable service with internet services; 2) the Commission's conduit formula is arbitrary and unworkable; 3) the Commission's treatment of "entities" is inconsistent; and 4) the Commission's method for developing an urban, urbanized, and rural attachment rates will not accomplish its stated goal. Then, MCI opposes EEI's requests to undermine the level playing field the Commission has established for pole attachment negotiations.

## **II. The Commission Erred When it Applied the Cable Attachment Rate to Facilities That Commingle Cable Service with Internet Services**

In its *Order*, the Commission determined that a cable operator whose facilities provide services other than cable service over its cable system would qualify for the cable attachment rate pursuant to § 224(d). Telecommunications and electric utilities agree that § 224(d)(3) invalidates the Commission's decision to apply the cable attachment rate to facilities that mingle cable and internet services.<sup>3</sup> USTA and Bell Atlantic limit their criticism to the argument that to the extent internet services are telecommunications services, cable attachments that commingle cable and

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<sup>1</sup>Petitions were submitted by: Bell Atlantic; NCTA; US West; SBC; Edison Electric Institute and UTC, the Telecommunications Association (EEI); USTA; ICG; and Teligent.

<sup>2</sup>In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments CS Docket No. 97-151, Report and Order (*Order*), FCC 98-20 (released February 6, 1998).

<sup>3</sup>EEI at fn 14; SBC at 3; USTA at 2; Bell Atlantic at 2; MCI at 4.

internet services may only receive the telecommunications attachment rate.<sup>4</sup> USTA and Bell Atlantic leave open the possibility that a facility that commingles cable and non-telecommunications internet services would receive the cable attachment rate. SBC goes further, and argues that the most favorable rate treatment a facility that commingles cable and non-telecommunications internet services may legally receive is the telecommunications attachment rate.<sup>5</sup>

However, § 224(d)(3) clearly prohibits a facility that carries cable and non-cable services from receiving the cable attachment rate; and § 224(e) limits the telecommunications attachment rate to “telecommunications carriers [that] provide telecommunications services.” Thus, an attachment that commingles cable service and non-telecommunications internet services must also be commingled with a telecommunications service in order to receive any regulated attachment rate — i.e. the telecommunications attachment rate.

### **III. The Commission’s Conduit Formula Is Arbitrary and Unworkable**

In its *Order*, the Commission defined unusable conduit space as “space involved in the construction of a conduit system, without which there would be no usable space, and maintenance ducts reserved for the benefit of all conduit users.”<sup>6</sup> Not being able to operationalize this definition, the Commission adopted Carolina Power’s approach, which defined usable space as the cost of the actual duct itself.<sup>7</sup> Most parties petitioning for reconsideration of this decision agree

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<sup>4</sup>USTA at 4; Bell Atlantic at 6.

<sup>5</sup>SBC at 5.

<sup>6</sup>47 U.S.C. § 1.1402(l).

<sup>7</sup>Carolina Power *et. al.*, Reply Comments at 10, cited in *Order* fn. 356.

that this definition does not make sense and would effectively assign far in excess of 90% of total conduit costs to unusable costs.<sup>8</sup>

SBC supports the Commission's abandonment of its definition of unusable conduit space, and its alternate definition of unusable costs as all costs except the cost of the duct, but appears incredulous that the Commission adopted a formula that effectively eliminates the allocation of costs to usable purposes.<sup>9</sup> USTA finds the Commission's definition of other-than-usable space unworkable, and proposes defining other-than-usable space as "...all spare or excess capacity not actually being used by the conduit owner or any attaching entity."<sup>10</sup> This is essentially the same definition as MCI proposed in its Petition for Reconsideration, except that MCI's definition of other-than-usable space would not include the space of deteriorated ducts or space of ducts not reserved for maintenance or emergency purposes.<sup>11</sup> The Commission correctly rejected including these sources of unused space in the definition of other-than-usable space.<sup>12</sup>

MCI believes its definition of other-than-usable space as space associated with duct(s) reserved for maintenance or emergencies, and space associated with hand holds, line holds and cable vaults, provides a reasonable allocation of costs associated with other-than-usable space, and is easily operationalized. MCI proposes modifying one aspect of its definition of usable

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<sup>8</sup>US West at 5; SBC at 17; MCI at 15; NCTA at 5; ICG at 5; USTA at 8.

<sup>9</sup> "...the costs that are considered non-usable appears to encompass virtually all of the construction costs, it is not entirely clear what costs are considered usable." SBC at 17.

<sup>10</sup>USTA at 8.

<sup>11</sup>MCI at 21.

<sup>12</sup>*Order* at ¶ 109.

space. MCI originally proposed defining the percent of usable space as:

$$1 - \% \text{ other-than-usable space.}^{13}$$

This amount should be reduced by the percent of space that is deteriorated and not specifically reserved for maintenance or emergency purposes.<sup>14</sup>

#### IV. The Commission’s Treatment of “Entities” Must Include Electric Utility Companies

In its *Order*, the Commission includes ILECs and cable companies in the “entity count” used to apportion the costs associated with other-than-usable space, arguing that it is not necessary for an attachment to receive a rate regulated under §224(d) or (e) in order to benefit from its presence on the pole.<sup>15</sup> The Commission supports this decision by noting that the Conference Report directed the Commission to “...recognize that the entire pole, duct, conduit, or right of way other than the usable space is of equal benefit to all entities attaching to the pole and therefore apportion the cost of the space other than the usable space equally among all such attachments.”<sup>16</sup>

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<sup>13</sup>MCI at 22.

<sup>14</sup>Thus, the usable charge factor formula would appear as follows:

$$\begin{array}{ccccccc} & & & \text{Usable Charge Factor} & & & \\ & & & 1 - (\% \text{ of other-than-usable space} & & & \\ & & & + \% \text{ deteriorated space} + \% \text{ excess} & & & \\ \text{Usable} & & & \text{duct space)} & & & \\ \text{cost per} & = & \frac{1}{2} & & \times & \text{Net Linear} & \text{Carrying} \\ \text{duct} & & \times & & & \text{Cost of Total} & \text{Charge} \\ & & & & & \text{Conduit} & \text{Rate} \\ & & & & & & \\ & & & \text{Number of Conduits} & & & \end{array}$$

<sup>15</sup>Moreover, Section 224(e)(2) does not restrict the use of the term “entities” to those entities that pay rates under Section 224(e).

<sup>16</sup>*Order* at ¶ 47, citing Conference Report at 206.

Having concluded that ILECs are counted as entities even though they do not receive a regulated attachment rate, the Commission is obliged to apply the same logic to electric utility attachments. Even though electric attachments do not receive a regulated rate, there is no doubt they benefit equally from other-than-usable space on poles. In fact, electric attachments occupy more space than communications attachments. Moreover, the 1996 Act extended the protections of § 224(i) to all entities on the pole including electric companies. By not including electric utilities as an entity, the Commission has inadvertently denied them protection under § 224(i). Thus, according to the Commission's interpretation of "entity," any LEC could change a 35 foot pole for a 40 foot pole in response to additional demand for space from a telecommunications or cable company, and charge all additional costs to the electric company. This conclusion is clearly at odds with Congressional intent, and can only be rectified by including electric attachments in the entity count.

The electric companies and SBC argue that including entities in the count that do not receive regulated telecommunications rates denies them the opportunity to fully recover their pole costs.<sup>17</sup> They argue that including entities such as electric companies, ILECs, or cable companies in the entity count, but not permitting the owner to charge these entities for other-than-usable space denies them the opportunity to recover the two-thirds of unusable costs from those that are regulated under §224(e). However, *counting* the pole owner as an entity does not saddle the owner with additional costs, or inhibit their ability to recover unusable costs. In the absence of attachments by others, the owner recovers its pole costs from its regulated customers. The real effect of counting the owner as an entity only affects the distribution of cost recovery between its

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<sup>17</sup>EEI at 16; SBC at 9.

regulated customers and non-owning attaching entities.

**V. The Commission's Method for Developing an Urban, Urbanized, and Rural Attachment Rates Will Not Yield Cost-Based Rates**

In its Notice, the Commission sought comment on whether a utility should develop different presumptive number of attachments for urban, suburban, and rural areas.<sup>18</sup> Parties commenting on this issue generally recognized that a variety of conditions might cause average costs to differ between rural and urban areas. There might be more parties attaching to poles in urban areas — yielding lower attachment rates, but there might also be a need for a denser distribution network of poles in urban areas — yielding higher average costs and higher attachment rates.<sup>19</sup>

In its Order, the Commission required pole owners to develop a presumptive average number of pole attachments for the urban, urbanized, and rural areas they serve.<sup>20</sup> However, the Commission failed to require pole owners to segregate pole costs by geographic area. Instead, pole owners are required to use statewide costs. The result understates the average cost of pole attachments in urban areas and overstates average costs of pole attachments in rural areas. In order to ensure that its rules result in just and reasonable rates, the Commission must either require utility companies to segregate pole costs into urban, urbanized, and rural categories; or make the development of separate urban, urbanized, and rural attachment rates an option, not a

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<sup>18</sup>*Notice* at ¶ 26.

<sup>19</sup>MCI Comments at 16; RCN Comments at 7; USTA Comments at 14; AEP Comments at 44; New York State Investor Owned Electric Utility Comments at 24; Electric Utilities Coalition Comments at 7.

<sup>20</sup>*Order* at ¶ 77.

requirement. Given the additional cost associated with segregating costs into geographic categories, MCI recommends the Commission make geographic attachment rates an option rather than a requirement.

#### **VI. MCI Opposes EEI's Requests to Undermine the Level Playing Field the Commission Has Established for Successful Pole Attachment Negotiations**

In its *Order* the Commission extended the general features of its cable attachment rules to telecommunications attachments. This involved extending its current complaint resolution rules,<sup>21</sup> and continuing to use historical costs to set attachment rates.<sup>22</sup> EEI notes that the "...plain language of Section 224(e)(1) and the accompanying Conference Committee Report evidence the clear intent of Congress that voluntary negotiations must be the fundamental means for setting the rates for telecommunications carrier attachments to utility poles, ducts, conduits and rights-of-way."<sup>23</sup> EEI interprets this language to mean that Congress intended the regulation of telecommunications attachments to proceed under significantly different complaint resolution and costing methodologies.

This is not a reasonable interpretation. Congress expected negotiations to play an important role for parties seeking access to utility poles and conduits. But Congress expected negotiations to succeed only because it directed the Commission to "...provide that [attachment] rates, terms, and conditions are just and reasonable, and ...adopt procedures necessary and

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<sup>21</sup>Order at ¶ 16;

<sup>22</sup>*Ibid.*, at ¶ 123.

<sup>23</sup>EEI at 4.

appropriate to hear and resolve complaints concerning such rates, terms, and conditions.”<sup>24</sup> The Conference Report makes clear that Congress expected that the rules the Commission would adopt to implement § 224(e)(1) were preconditions necessary for successful negotiations.<sup>25</sup> Congress recognized that simply relying on negotiations in the absence of applying the cable attachment procedures and remedies to telecommunications regulations would not yield equitable results.<sup>26</sup>

## VII. Conclusion

For the above-mentioned reasons, MCI encourages the Commission to adopt the recommendations made herein.

Respectfully submitted,  
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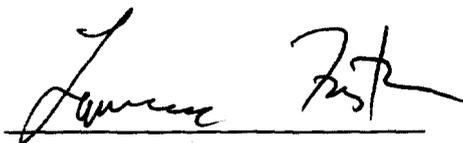
<sup>24</sup>47 U.S.C. § 224(a)(4).

<sup>25</sup>"The conference agreement amends section 224 of the Communications Act by adding new subsection (e)(1) to allow parties to negotiate the rates, terms and conditions for attaching to poles, ducts, conduits, and rights-of-way owned or controlled by utilities." Conference Report at 207.

<sup>26</sup>"Section 105 of the House amendment is intended to remedy the inequity of charges for pole attachments among providers of telecommunications services. First, it *expands* the scope of the coverage of section 224 of the Communications Act.... Second, it amends section 224 to direct the Commission...to *prescribe regulations for ensuring* that utilities charge just and reasonable and nondiscriminatory rates..." (emphasis added). Conference Report at 206.

**STATEMENT OF VERIFICATION**

I have read the foregoing and, to the best of my knowledge, information and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on May 12, 1998.

A handwritten signature in black ink, appearing to read "Lawrence Fenster", written over a horizontal line.

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## CERTIFICATE OF SERVICE

I, Barbara Nowlin, do hereby certify that a copy of the foregoing **Petition for Reconsideration** has been sent by United States first class mail, postage prepaid, hand delivery, to the following parties on this 12th day of May, 1998.

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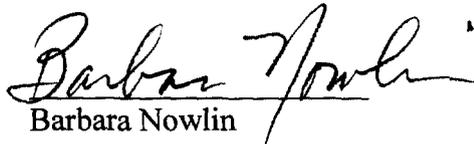
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