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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 703(e) of the Telecommunications Act of 1996)	CS Docket No. 97-151
)	
Amendment of the Commission's Rules and Policies Governing Pole Attachments)	
)	

REPLY TO OPPOSITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association ("NCTA"), by its attorneys, submits the following Reply Comments in response to the Oppositions submitted May 12, 1998 in the above-captioned proceeding.

INTRODUCTION

NCTA submits the following Reply for the limited purpose of emphasizing the following three points:

- Internet access services delivered over a cable system qualify for the cable pole rate;
- The average number of attaching entities should be separately determined on the basis of location in urban, urbanized and rural areas; and
- Proposals for changes to third party overlashing policies should be rejected.
- Conduit users should not be required to pay for unusable space in conduits.

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I. INTERNET ACCESS SERVICES DELIVERED OVER A CABLE SYSTEM QUALIFY FOR THE CABLE POLE RATE

In its Opposition, NCTA endorsed the Commission's ruling under which the Section 224(d) pole rate will apply to connections for the provision of conventional cable services, Internet access and other non-telecommunications services including information services transmitted over a cable system. Application of the Section 224(e) rate, which will not become effective until February 8, 2001, is limited to connections for the provision of "telecommunications" services.

MCI, EEI/UTC and telephone utilities respond by arguing for an exceptionally restrictive interpretation of Section 224(d). They contend that only traditional cable services, as that term is strictly construed, are eligible for the lower rate. Cable companies providing commingled Internet access and video services must pay the higher rate.

The Commission should affirm its holding that cable companies will be required to pay the Section 224(e) pole attachment rate only when they provide "telecommunications services," and that commingled traditional cable and Internet access services will be subject to the Section 224(d) pole rate. As NCTA has explained previously, cable services encompass more than traditional video services. Internet access delivered over a cable system qualifies for the cable rate because it is a cable service. The Report and Order cites legislative history which 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."¹ As NCTA explained, "Section 224(b)(1) obligates the Commission to ensure that

¹ Pole Attachments Telecommunications Rate Order, FCC 98-20, rel. Feb. 6, 1998, at para.34 (Report and Order)

pole attachment rates are ‘just and reasonable,’”² and Section 224(a)(4) includes “any attachments by a cable television system.”³ Since attachments used for commingled cable and Internet access are “attachments by a cable television system,” the Commission or states are obligated to regulate the rates for attachments for commingled cable and Internet access in those circumstances in which private negotiations fail.

Moreover, the Commission properly employed its discretion to subject Internet access services commingled with traditional cable services to the Section 224(d) rate. The Commission reasoned that application of the Section 224(d) rate is consistent with the “pervasive purpose of the 1996 Act and the Commission’s *Heritage* decision, to encourage expanded services.”⁴ And, the agency noted, it is not prohibited “from determining 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.”⁵

Several parties focus upon Internet telephony and what they characterize as “data transport” as services that particularly warrant classification as telecommunications services. SBC argues “the Section 224(e) telecommunications attachment rate should be applied to a cable operator’s provision of Internet telephony or any other telecommunications-like non-cable service.”⁶ MCI maintains that “an attachment that commingles cable services and non-telecommunications internet services must also be commingled with a telecommunications

² Opposition of NCTA, CS Docket No. 97-151, May 12, 1998, at 4 citing 47 U.S.C. § 224(b)(1).

³ Id., citing 47 U.S.C. § 224(a)(4).

⁴ Supra n. 1, at para.34.

⁵ Id.

⁶ Comments of SBC Communications Inc., CS Docket No. 97-151, May 12, 1998, at 21 (citation omitted).

service in order to receive any regulated attachment rate--i.e. the telecommunications attachment rate.”⁷ Bell Atlantic asserts “a cable company that provides the underlying transmission services for access to the Internet is providing a ‘telecommunications service’ under the Act, and is subject to the section 224(e) rate for pole attachments used by telecommunications carriers.”⁸

The Commission should reject these arguments, too. Internet telephony, if provided as part of an Internet access service commingled with other cable services, legitimately qualifies for the Section 224(d) pole rate. The Commission appropriately reasoned that

Even if the provision of Internet service over a cable television system is deemed to be neither “cable service” nor “telecommunications service” under the existing definitions, the Commission is still obligated under Section 224(b)(1) to ensure that the “rates, terms and conditions [or pole attachments] are just and reasonable,” and, as Section 224(a)(4) states, a pole attachment includes “any attachments by a cable television system.” And we would, in our discretion, apply the subsection (d) rate as a “just and reasonable rate” for the pro-competitive reasons discussed above.... We note that in the one case where Congress affirmatively wanted a higher rate for a particular service offered by a cable system, it provided for one in section 224(e).⁹

For purposes of the pole attachment regulations, Internet telephony provided over a cable system is a component of Internet access. In contrast to services delivered by conventional telephone companies over the public switched telephone network, cable-provided Internet telephony is a component of cable-provided Internet access. As such, it is not a telecommunications service and the Commission was well within its authority when it concluded that the Section 224(d) rate should be applied.

⁷ MCI Opposition, CS Docket No. 97-151, May 12, 1998, at 2.

⁸ Comments of Bell Atlantic on Petitions for Clarification or Reconsideration, CS Docket No. 97-151, May 12, 1998, at 2-3.

⁹ Supra n. 1, at para. 34

On similar grounds, the Commission acted well within its discretion by treating the data transport component of Internet access, when part of an Internet access service commingled with cable service, as qualifying for the Section 224(d) rate. Data transport for Internet access, where Internet access is commingled with cable service, is part of “an attachment by a cable television system.” not the transport component of a telecommunications service. For the pro-competitive reasons identified in the Order, unless and until the Commission finds cable-provided data transport associated with Internet access and commingled with other cable services is a telecommunications service, its holding that commingled Internet access and traditional cable services qualify for the cable pole rate should stand.

II. THE COMMISSION SHOULD SEPARATELY DETERMINE EACH POLE OWNERS AVERAGE NUMBER OF ATTACHING ENTITIES ON THE BASIS OF ITS LOCATION

The Report and Order reasonably concludes that in lieu of a pole-by-pole inventory, each utility will be required to develop a presumptive average number of attaching entities based upon the location of poles in urban, urbanized and rural areas. Segregation of poles into these discrete categories is intended to take account of the different demand conditions in portions of a utility’s service areas. NCTA supports this reasonable approach.

Utilities argue this procedure is unworkable and unnecessary. Utilities further claim they do not possess---and it would be costly to develop--the necessary information and that it will be costly to develop. As an alternative, SBC, USTA and EEI/UTC, for example, contend that multiple geographic zones should not be mandatory. SBC calls for allowing utilities to establish state-wide presumptive average numbers of attachers. It further suggests “those utilities that opt to draw multiple rate zones should be

permitted to draw their own boundaries.”¹⁰ EEI/UTC asserts that if a “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.”¹¹

Many utilities serve urban, urbanized and rural areas. The demand for pole attachments and the number of entities requesting the use of pole attachments varies within these categories. In urban areas, increasing numbers of facilities-based providers are requesting attachments. Demand is not as intense in rural areas. If state-wide averages are employed, companies situated in urban areas that lease capacity on utility poles are likely to pay excessive rates, because the number of leasing parties in urban areas among whom costs should be shared are likely greater than the state-wide average. For similar reasons, the employment of state-wide averages in rural areas will result in an undercharge because the actual cost of a pole will be divided by a larger number of attaching entities than is reflected by the average.

The Commission’s decision to require utilities to establish separate categories of attachments to reflect the different circumstances in urban, urbanized and rural areas represents the best course. Utilities complain they lack the necessary information and that even if the information can be made available it will be too costly to develop and maintain. But this is surely not the case. Just as utilities regularly establish rate zones, charging different rates to customers for serving different areas, they will be able to account for the different numbers of attachments to poles in different areas. It should be a simple matter for a utility to review its records and to determine the number of entities attaching to its poles. In the case of large utilities, sampling may be employed in the place of actual counts. Furthermore, census

¹⁰ Id. at 4.

¹¹ Consolidated Comments of EEI/UTC, CS Docket No. 97-151, May 12, 1998, at 18-19.

information is available that will enable a utility to classify poles within categories. If conditions change over time, the utility will be able to adjust the number of attaching entities to take account of the new circumstances. In this case too, the utility is uniquely positioned to track the number of attachers on its poles, and to reflect the number of attachments in pole attachment rates.

III. THE COMMISSION SHOULD REJECT PROPOSALS FOR CHANGES TO ITS THIRD PARTY OVERLASHING POLICIES

A cable operator that overlashes its own or a third party's facilities to the host attachment does not by so doing become either a utility or a pole owner for purposes of the pole attachment regulations. It follows that since the host attaching entity is not a utility, its charges to third parties for overlashing are not subject to regulation. NCTA has called, therefore, for the rejection of proposals by MCI and others to revise the announced policies relating to overlashing of a cable operator's attachments by a third party. The presumption that each host attacher accounts for one foot of usable space on the pole should not be revised to take account of third party overlashing.

MCI contends that third party overlashers and host attachers, and host attachers and pole owners, stand in virtually identical relationships. But this claim is demonstrably false. Congress has long recognized that regulation of cable attachments is needed because cable systems require utility pole in order to provide their services to subscribers. Pole owners are, therefore, statutorily required to offer pole attachments under reasonable rates, terms and conditions. These rates, terms and conditions are subject to state or federal regulation.

The relationship between the host attacher and overlashers is very different. There is no statutory requirement that a host attacher provide attachments to an overlasher. The

Commission expects, however, that relationships between host attachers and overlashers will be worked out through private negotiation. Since multiple host attachers are generally present on poles, and host attachers have an economic incentive to make excess capacity available so as to reduce their attachment costs, it is reasonable to expect that the attachment requirements of overlashers will be accommodated.

In short, Congress set forth no statutory imperative by which either the Commission or the states would intervene in the relationship between host attachers and overlashers. And, there is no basis for anticipating that marketplace forces will not induce host attachers and overlashers to reach reasonable private arrangements for the use of the host attacher's facilities.

IV. UTILITIES FAIL TO DEMONSTRATE THAT COSTS OF UNUSABLE CONDUIT SHOULD BE BORNE BY ATTACHING ENTITIES

In its Petition for Reconsideration, NCTA asserted that the fairest way of adhering to Congress's guidelines on the allocation of conduit costs was to have no special assignment of unusable conduit costs to attaching entities. NCTA explained:

Unusable space exists as a cost allocation technique because *the pole itself* can be divided into usable and unusable components *and* is easily allocable according to actual pole space used for such separation. No such application can be made in the conduit context.¹²

NCTA further noted that large owners of conduit systems claimed in the record that all space is usable.

In response, utilities fail to make the case for an assignment of costs to attaching entities. Bell Atlantic, for example, asks the Commission to "classify about half of the conduit costs as other than usable, . . . which would be apportioned among all users according to Section

¹² NCTA Petition for Reconsideration, CS Docket No. 97-151, April 13, 1998, at 4.

224(d)(2).”¹³ EEI/UTC proposes non-usable conduits be priced on the basis of forward-looking costs (FLC) because conduits appreciate in value.¹⁴ SBC contends it can develop unusable space costs based upon “recent invoices.”

None of these parties provide a sound basis for assigning unusable conduit costs to attaching entities. Bell Atlantic’s one-half conduit cost proposal is grounded on thin air. There is no rational basis for this assignment. EEI/UTC plan to premise unusable conduit costs on FLC is totally unrelated to actual costs incurred and may enable utilities to reap windfalls. SBC’s assertion that costs can be determined on the basis of invoices seems unlikely because many utility conduit systems are decades old. Utilities, collectively, have failed to make the case that they are due compensation for unusable conduit costs based upon practical record evidence of actual costs incurred.

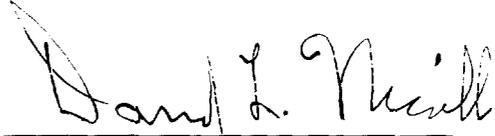
¹³ Comments of Bell Atlantic on Petition for Clarification or Reconsideration, CS Docket No. 97-151, May 12, 1998, at 7.

¹⁴ Consolidated Comments of EEI/UTC on Petition for Reconsideration, CS Docket No. 97-151, May 12, 1998 at 13.

CONCLUSION

For the foregoing reasons, the Commission should adopt rules and policies consistent with NCTA's filings in this proceeding.

Respectfully submitted,

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May 28, 1998

CERTIFICATE OF SERVICE

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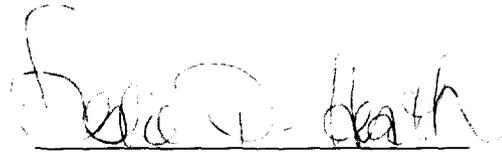
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