

ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

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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 REPLY COMMENTS TO OPPOSITIONS
TO PETITIONS FOR RECONSIDERATION

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List A B C D E

I. The Commission Has Failed to Take the Administrative Steps Necessary to Determine that the Cable Attachment Rate Should Apply 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) of the 1996 Act. The Commission reasoned that § 224(b)(1) required it to establish a just and reasonable rate for any pole attachment, and § 224(a)(4) includes any attachment by a cable television system as a pole attachment, even an attachment that provides neither cable, nor telecommunications services. Therefore, if any cable attachment must receive a just and reasonable rate, and if such a rate can only be obtained via a regulated attachment rate, a non-cable service provided over a cable facility must also receive a regulated rate.¹

The error in the Commission's reasoning occurs when it attempted to justify choosing the regulated cable attachment rate rather than the regulated telecommunications rate. The Commission ignored explicit Congressional direction to limit the cable attachment rate to facilities that exclusively carry cable services. The Commission attempted to justify the 224(d) rate by arguing that Congress did not "...bar the Commission 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."² But, the authority of the Commission to apply the cable attachment rate is not related in any way to the Commission's authority to apply the telecommunications rate to services provided over cable facilities. Even if it were prohibited from applying the telecommunications rate to cable companies, the Commission would still be

¹ 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); at ¶34.

² *Ibid.*

prohibited from applying the cable attachment rate to internet services. If the Commission believes that it must offer all cable attachments some regulated rate, its *only* choice is to offer the telecommunications attachment rate, since it is barred from applying the regulated cable attachment rate for non-cable services, but is not prohibited from applying the telecommunications attachment rate to information services carried over cable facilities.

Cable interests believe they defend the Commission's decision by arguing that "hybrid services" (internet services carried over cable facilities) are information services, not telecommunications services.³ MCI agrees that internet services are information services. In fact, as MCI argued in its Opposition Comments, it is precisely because the Commission has already determined internet services to be information services that they are not cable services.⁴ It is noteworthy, contrary to the intimations of NCTA, that the Commission did not determine that internet service becomes a cable service when offered (only) by a cable company.⁵ Until the Commission actually affirms that when information services are carried over cable facilities they also become cable services, it is legally prohibited from applying the cable attachment rate to these information services. Until then, if the Commission believes that it must offer all cable attachments some regulated rate, its only choice is to offer the telecommunications attachment rate.

MCI believes that encouraging the extension of a cable transmission path for information services that is not subject to any open access, or leased access, provisions for information service

³ Joint Opposition to Petitions for Reconsideration, Texas Cable and Telecommunications Association, et. al, (*Joint Cable*) at 15.

⁴ MCI Comments on Petitions for Reconsideration, CS Docket 97-151 at 8.

⁵ "Internet access delivered over a cable system qualifies for the 'cable' rate because Internet access is a cable service." See, NCTA Comments on Petitions for Reconsideration, CS Docket 97-151, at 6.

providers would be inimical to the full, free, and competitive development of the internet.⁶ Until the Commission makes non-affiliated access to capacity on a cable system a success story, it should refrain from determining that information services provided by cable companies become cable services. Thus, before being able to apply the cable attachment rate to internet information services provided over cable facilities, the Commission should first modify its commercial leased access rules, and also give parties an opportunity to discuss the public interest of defining internet provided over cable facilities to be a cable service rather than an information service. The Commission has taken neither of these administratively necessary steps. Consequently, if the Commission believes that it must now offer information service attachments provided over cable facilities a regulated rate, its *only* choice is to offer the telecommunications attachment rate.

Cable interests incredibly argue that the market is not distorted if cable companies are permitted to bundle internet service, the fastest growing communications service, with their core service at attachment rates much lower than telecommunications entrants can bundle internet service with their core service. Joint Cable argues that there is no discrimination since once "...a cable operator 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 the application of the cable TV rate to Internet services."⁷

This argument might have merit if the market under consideration were the market for telecommunications services. One could then argue the Commission's decision discriminates

⁶ The Commission's Cable Leased Access Rules, widely recognized as a failure, are limited to non-affiliated providers of video programming service. They do not afford any access rights to a non-affiliated information service provider.

⁷ *Joint Cable* at 19.

against all telecommunications companies equally. But the market under consideration is the market for internet services, not telecommunications services. By granting only cable companies a preferential attachment rate for their internet service offerings, the Commission has actually rewarded cable companies for their decision to abstain from competing for telecommunications customers.⁸

Equally discriminatory, the Commission has limited this preferential internet attachment treatment to cable companies. A company, that is not a cable company, perhaps an information service provider that wishes to bundle video programming with internet service, is not permitted the favorable cable attachment rate, even if it does not provide telecommunications service. This discriminatory decision by the Commission protects cable companies from competition from other types of video programming and rewards cable companies for eschewing entry into telecommunications markets. This outcome is contrary to the intent of Congress when it passed the 1996 Act.⁹

II. Cable Interests Fail to Address the Legal Implications of the Commission's Decision Granting Host Attaching Parties Control of Attachment Space for their Exclusive Use

In its Petition for Reconsideration, MCI showed that the Commission's decision to permit a host attaching party to deny a feasible third party request for overlashing permits the host attaching

⁸ *Joint Cable* at 19 makes clear that the cable industry has no intention of competing for telecommunications customers. "By far the more common configuration today is for cable operators to deliver Internet and video but no dialtone."

⁹ *Joint Cable*, at 16, argues that the Commission's Social Contract Regulation requiring cable companies to provide free internet access to schools would be undermined if these facilities were now required to pay the telecommunications attachment rate. The Commission may simply grandfather the cable attachment rate for these specific facilities. In any case, the application of the telecommunications attachment rate would only apply for pole attachment contracts that will be negotiated beginning 2001, and would not affect pole attachment agreements negotiated in the era of Cable Social Contract Regulation.

party to reserve space on the pole for its own future telecommunications use, and transforms that party into a utility company subject to Section 224 of the 1996 Act. Cable and ILEC interests reacted strongly to this argument, but none address the legal argument that if a host attaching party is a utility, denying a request for feasible overloading violates the new right, established in § 224(f)(1), not be discriminated against in terms of access. If the host attaching party is a utility, it is simply not permitted to determine who may attach, and when others may attach, to rights of way facilities over which it has control.

No party effectively responds to MCI's claim that local exchange companies¹⁰ that are host attaching parties have been transformed into utilities subject to Section 224 as a result of the Commission's decision permitting them to reserve unused attachment space for their exclusive use. NCTA simply asserts that a local exchange company that is a host attaching party does not control space on the pole, but completely fails to address the argument that this party has been granted control of pole space as a result the Commission's Order.¹¹

Joint Cable argues that because MCI did not raise the issue of a host attaching party being a utility in its Comments, this claim should now be rejected. MCI did not raise this issue in its September 26, 1997 Comments, because it only became an issue as a result of the Commission's Order on February 6, 1998. It was the Commission's Order that made this an issue, and it is entirely

¹⁰ MCI also recognized that as long as cable companies refrain from providing local exchange service, they are not utilities, and may reserve space on their pole attachments, but only for cable purposes. If they reserve space for telecommunications purposes they would be acting as local exchange companies, and would be subject to the prohibition against reserving space for future telecommunications use. Incumbent LECs are local exchange companies, and so would be immediately prohibited from reserving space on their attachments for future telecommunications use.

¹¹ See, NCTA at 17: "...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..."

appropriate for MCI to raise this issue on Reconsideration.¹² In fact, short of a judicial appeal, this is MCI's only ability to comment on an issue that the Commission failed to raise in its Notice.¹³

NCTA attempts to counter the argument that overloading makes additional space available to the host attaching party by arguing that the full one foot of usable space is required for each telecommunications or cable attachment.¹⁴ Aside from the logical impossibility that overloading an existing attachment is possible if the original attachment required the full one foot of space, past comments by NCTA contradict its argument here. In its original Comments to this proceeding, NCTA submitted evidence that in many markets the 6 feet of usable space permitted as many as 9 or 10 communications attachments.¹⁵ If 9 separate attachments are located in 6 feet of usable space, the average attachment only requires $\frac{2}{3}$ foot of usable space, according to NCTA.

Finally, cable interests allege that regulated, mandatory, third party overloading complicates the negotiating process. This argument is laughable given cable's long support for the view that

¹² See, 47 U.S.C. §1.429(b)(1).

¹³ *Joint Cable* also raises the irrelevant issue that most spare capacity on cable systems is offered as a dark fiber lease. See, *Joint Cable* at 9.

¹⁴ NCTA contends at 15 that MCI has not "offered any basis for a different usable space presumption." NCTA is not required to read MCI's Comments, but then it should refrain from making claims about those Comments. Throughout the cable and telecommunications pole attachment proceedings MCI offered extensive evidence concerning all the pole attachment presumption. See e.g., MCI Comments, Amendment of Rules and Policies Governing Pole Attachments, CS Docket No 97-98, June 27, 1997 2-6, 10-14; MCI Reply Comments, Amendment of Rules and Policies Governing Pole Attachments, CS Docket No 97-98, August 11, 1997, 26-37, Attachment 4; MCI Comments, Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-15, September 26, 1997, 6-12, 17-20; MCI Reply Comments, Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151. MCI Petition for Reconsideration, Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, April 13, 1998, at 8.

¹⁵ See, Comments of NCTA, CS Docket No. 97-151, at 20-22; Comments of Comcast Corp., 8, Exhibit 2 at 1.

presumptive rate regulation and regulated remedies are a necessary condition for efficient pole attachment negotiations. It is true that third party overlashing may impose some additional make-ready costs on the host attaching party in the event the host wishes to rearrange its cables, or overlash itself at a later date. It is simple to write a contract so that the third party is liable for these sorts of make ready costs. MCI made this very recommendation in its original comments.

III. Conduit Owners Fail to Respond to Criticisms of the Commissions Treatment of Conduit Space

One of the more contentious issues in this proceeding has been the appropriate definition of other-than-usable conduit space. Numerous parties¹⁶ have documented the absurd, unimplementable, and anticompetitive aspects of the Commission's decision to define unusable conduit space as "space involved in the construction of a conduit system, without which there would be no usable space..."¹⁷ Conduit owners have failed to respond to these criticisms about the definition of unusable conduit space.

Instead, they defend the Commission's attempt to directly identify usable and unusable costs, lending unspoken corroboration to the argument that the Commission's definition does not make sense.¹⁸ Conduit owners attempt to defend the notion that unusable conduit costs may be directly identified, by showing that the concept works for poles. SBC writes that "...the cost of the portion of the pole one must climb to reach usable space is considered unusable."¹⁹ What is the cost

¹⁶ US West at 5; MCI at 15; NCTA at 5; ICG at 5; USTA at 8.

¹⁷ 47 U.S.C. §1.1402(l).

¹⁸ SBC writes that "[i]t is true, as NCTA explains, that it is difficult to draw analogies between poles and conduit, but the Commission has finessed this difficulty by using the types of costs instead of spatial considerations." See, SBC Comments to Petitions for Reconsideration at 7.

¹⁹ SBC fn 21 at 8.

of the space one must climb before reaching usable space? In order to calculate the cost of unusable space under this definition, one would take the annual cost of the pole times the share of pole space one must climb to reach usable space. This definition actually does not identify unusable pole costs. One must actually first calculate the share of unusable space and then apply that share to total annual pole costs. Of course, this is the correct method for calculating unusable costs, and does not rely on a direct identification of unusable costs.

ILECs attempt to defend the Commission's determination that each conduit has a presumptive number of two attachments. They agree that new entrants typically pull three or more innerducts through a conduit, but argue that presumptive number of attachments have historically been based on averages of the conditions of embedded plant.²⁰ However, the Commission has actually calculated the presumptive number of attachments according to the type of attachment being placed by the *new* entrant. In developing its presumptions for the attachment of cable facilities, the Commission did not determine the number of attachments that could fit in the 6 feet of usable space in reference to the size of electric cables that were already on utility poles. Rather, it based its presumptive number of attachments according to the typical size of a cable attachment.

The Commission should apply the same principle to conduit attachments. The purpose of determining a presumptive number of conduit attachments is to establish just and reasonable conduit rates for cable and telecommunications entrants. ILECs whose conduit systems are occupied with copper cable that may only permit 2 attachments per duct may not avail themselves of regulated conduit rates. So, ILEC attachments should not be used as a reference in determining

²⁰ See, Comments of SBC on Petitions for Reconsideration, at 9. "Just because it is possible today to place more than two inner ducts in some locations that have four-inch duct does not mean that more than two inner ducts is the average condition throughout the conduit system."

the presumptive number of conduit attachments. If the Commission uses a presumption of 2 attachments per conduit, but the conduit owner requires the entrant to pull 3 innerducts, the new entrant will be paying 50 percent too much for the space it actually occupies.²¹

EEI argues for a one-duct presumption for electric conduit. EEI contends that the Commission justified two ducts per conduit by assuming that the electric company would perform all installation and maintenance within the conduit. EEI further argues that this presumption conflicts with the Local Competition Order which prohibits electric utilities from controlling the installation and maintenance work within the conduit.²² The purpose of the NESC rule permitting the commingling of electric and fiber cables in the same conduit is based on the recognition that electric conductors are more hazardous and must be handled by a qualified electrical contractor approved by the electric conduit owner. The Commission does not remove control over the quality or safety standards used to install cables in electric conduit. The Commission clearly stated that a "...utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own workers..."²³

IV. The Commission Need Not Develop a Record on Presumptive Number of Attachments to Require Good Faith Negotiations

EEI also opposes MCI's request that the Commission declare telecommunications carriers seeking to attach to electric transmission towers are entitled to the same good faith negotiations the

²¹ Conduit owners typically require the new entrant to pull innerduct, or pay for innerduct to be pulled, but the attachment rate covers only the occupation of one innerduct. The owner retains the remaining innerducts even though they were paid for by the new entrant. The Commission's conduit attachment rules were supposed to correct this abuse of market power, but the one-half duct convention perpetuates this inequity.

²² EEI Comments on Petitions for Reconsideration at 14.

²³ Local Competition Order at ¶ 1182.

Commission has required in the case of wireless attachments to utility facilities. EEI contends that a sufficient record to determine the presumptive amount of usable and unusable space and the presumptive number of attachments on electric transmission facilities has not been established. MCI agrees, but noted in its Petition for Reconsideration, that a record had similarly not been developed for wireless attachments, yet the Commission required good faith negotiations between utility companies new entrants seeking to attach their wireless facilities. Because the Commission has determined that electric transmission facilities should not be excluded from being considered as poles, there is no legal basis for denying new entrants that wish to attach to transmission facilities the same rights and privileges as new wireless entrants.²⁴

VII. Conclusion

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

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²⁴ Local Competition Order at ¶1184.

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 22, 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 **Reply Comments to Petitions for Reconsideration** has been sent by United States first class mail, postage prepaid, hand delivery, to the following parties on this 22nd May, 1998.

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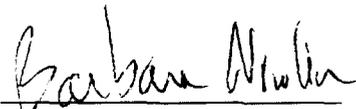
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