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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)
)
Amendments of the Commission's Rules)
and Policies Governing Pole Attachments)

CS Docket No. 97-151

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. ("SBC") hereby responds on behalf of Southwestern Bell Telephone Company ("SWBT"), Pacific Bell and Nevada Bell to certain comments filed on May 12, 1998 concerning the petitions for reconsideration and/or clarification of the Commission's Report and Order ("R&O")¹ in the above-captioned proceeding.

I. **A STATE-WIDE AVERAGE FOR THE ATTACHING ENTITIES COUNT SHOULD BE ALLOWED.**

Only the cable industry commenters oppose the challenges by petitioners, including SBC,² of the R&O's requirement that the average number of attaching entities be determined along the multiple irregular boundaries of the confusing urban, urbanized and rural Census Bureau areas.³ However, these commenters do not provide any rationale to justify the onerous burden that the R&O's requirement will impose. In light of the de-regulatory mandates of Section 11 of the 1996 Act,⁴ the Commission should not

¹ FCC 98-20, released February 6, 1998.

² SBC Petition at 10-16.

³ NCTA at 11-13; Texas Cable & Telecom Ass'n ("TXCTA") at 2-3.

⁴ 47 U.S.C. § 161.

adopt any new regulation unless its benefits clearly outweigh its costs. The cable industry commenters do not provide any evidence that this new regulation would provide any significant benefits. They also do not show how or to what degree these multi-zone averages are more beneficial than a state-wide average. Even if they could show some benefit in higher pole attachment rates outside the urban areas, this benefit would not be able to outweigh the onerous burden that development of multiple averages would impose.

In fact, on the subject of the relative value of the various options, NCTA simply says that "a broad national average . . . is inferior."⁵ However, it does not address SBC's proposal to use state-wide averages. The cable industry commenters also do not attempt to explain the rationale of the confusing geographic zones adopted in the R&O. Instead, they simply claim that utilities already possess all the information necessary⁶ and that utilities "exaggerate potential problems in developing presumptions for the three indicated Census areas."⁷ In its Petition, SBC explained in detail the problems presented by the multiple overlapping zones and the complex process that would be required to identify attachments in each of multiple zones throughout the state,⁸ but the cable industry has not addressed any of SBC's specific concerns. For example, the cable industry has not attempted to explain the logical basis for the geographic zones adopted in the R&O or how these zones would be applied given that one of the three geographic

⁵ NCTA at 12.

⁶ Id. at 12.

⁷ TXCTA at 2.

⁸ SBC Petition at 13-15.

categories is a subset of another one.⁹ Further, the cable industry has not provided any justification for the extremely complicated and burdensome process of counting attaching entities within the imaginary, irregular boundaries of over 400 urbanized areas and over 4,000 towns with a population over 2,500 that are “urban areas” outside of the urbanized areas.¹⁰ Instead, they summarily conclude that the utilities have exaggerated. Following their shallow analysis of the burden that this new regulation imposes, the cable industry commenters claim that the sole motive of those seeking “flexibility” is to recover the highest rate.¹¹ SBC is not seeking “flexibility”; instead, SBC wants to avoid the expense and burden of the complex process that multiple irregular rate zones would impose for little, if any, benefit in return. Rather than flexibility, SBC would be satisfied if a state-wide average were the only method it could use. Most important of all, the cable industry commenters do not explain how the complex process for counting attaching entities is consistent with the pole attachment rules’ long-standing preference for simple, expeditious and predictable procedures.¹² They claim that the process is not as complicated as the petitioners state, but they do not demonstrate that the process is simple or expeditious, as the Commission customarily requires of its pole attachment rules. A

⁹ See id.; SBC Comments at 1-2.

¹⁰ SBC Petition at 13-15 & Exhibit “A”. As SBC explained, it is not at all clear why the Commission distinguished these 4,000 large towns and small cities from the rural areas. Thus, the distinction is completely arbitrary. In fact, there is nothing that indicates that splitting a state into more than one zone will produce better results than a state-wide average or produce any benefits whatsoever.

¹¹ TXCTA at 3.

¹² See SBC Petition at 12-13.

simple, expeditious process is also consistent with Section 11 analysis of the benefits and burdens of this new rule.¹³

MCI recognizes another problem with the multi-zone averages: Multiple zones are inconsistent with the use of state-wide accounting data.¹⁴ The result is a mismatch between the attachment counts and cost data. Rather than imposing unnecessary costs, MCI concludes that multi-zone rates should be optional.

Given the problems and burdens presented by multi-zone rates and uncertain benefits that do not outweigh the burdens, the Commission should reconsider and allow utilities the simple, expeditious and predictable option of calculating a single state-wide rate under Section 224(e).

II. "ATTACHING ENTITIES" SHOULD EXCLUDE ILECs AND ELECTRIC UTILITIES.

MCI contends that if ILECs are counted "even though they do not receive a regulated attachment rate, the Commission is obliged to apply the same logic to electric utility attachments."¹⁵ SBC agrees with MCI that ILECs and electric utilities should be treated the same, but SBC would not count either one as an attaching entity. Not counting either one would be most consistent with Section 224, as it would only count those carriers and cable operators that are capable of having attachments that are subject to Section 224.¹⁶ Further, consistent with Congressional intent to recognize that the

¹³ See SBC Petition for Section 11 Biennial Review, filed May 8, 1998, at 3-6.

¹⁴ MCI at 6-7. Accord, SBC Reply Comments, CS Docket No. 97-151, filed October 21, 1997, at 24.

¹⁵ MCI at 5.

¹⁶ See SBC Petition at 8-10.

unusable space provides an "equal benefit" to all entities that have pole attachments,¹⁷ this interpretation avoids giving ILECs multiple shares of the unusable space.

III. THE COUNTING OF GOVERNMENT ATTACHMENTS SHOULD BE CLARIFIED.

Opposing SBC's request that the Commission clarify when to count government attachments, Sprint claims that not counting private government networks would provide an "untoward" advantage to ILECs in bidding for government contracts due to the allegedly resulting cross-subsidy.¹⁸ SBC was not seeking any unfair advantage; rather, SBC merely wants to know when to count a government attachment for purposes of Section 224(e), as the R&O was not entirely clear.¹⁹ It is most consistent with the reasoning of the R&O to count only those attachments used to provide telecommunications or cable services. That is apparently the logic used in deciding not to count electric utilities; the same logic should be applied consistently to government attachments. Also, as Ameritech points out, it would be especially improper to count a government agency when allocation of free space is mandated by state or local requirements that are a common "cost" of the pole.²⁰

Not counting certain government attachments would not have any material impact on rates. Thus, a decision one way or the other would not have the consequences argued by Sprint. For example, contrary to Sprint's belief, not counting government agencies' private networks would make no difference at all in ILECs' bidding on those networks in

¹⁷ See R&O, ¶49.

¹⁸ Sprint at 2-3.

¹⁹ SBC Petition at 10.

²⁰ Ameritech at 3-4.

the future because those agencies' attachments are not subject to the rate regulation of Section 224.

The Commission should provide the clear guidance necessary for utilities to know when to count government agencies for purposes of Section 224(e).

IV. CABLE OPERATOR ATTACHMENTS USED TO ACCESS THE INTERNET DO NOT QUALIFY FOR SECTION 224(D)'S CABLE-ONLY RATE.

The cable industry commenters find a variety of ways of attempting to rationalize the application of the Section 224(d) rate to any Internet services that a cable operator may provide along with its cable service "regardless of whether such commingled services constitute 'solely cable services' under Section 224(d)(3)."²¹ The Commission should not apply Section 224(d) in disregard of the limiting phrase "solely cable service" or the impact of grandfathering virtually any service that a cable operator may provide.

The most significant reason for applying Section 224(e), rather than Section 224(d), to cable operator attachments used for Internet connections is the absence of any similar limiting phrase in Section 224(e).²² Unlike Section 224(d), Section 224(e) does not say it is limited to "solely" telecommunications services. Adelphia states that this difference is merely intended to reflect that "Congress intended different rates for pole attachments carrying 'telecommunications' and 'cable' services."²³ If that was all Congress intended, then it could have accomplished that without saying "solely" cable service in Section 224(d)(3). Congress clearly intended that Section 224(d) rates should

²¹ R&O, ¶ 34. Adelphia/Lenfest at 2-11; NCTA at 3-9; TXCTA at 15-19.

²² SBC Petition at 4-5; SBC Comments at 21. MCI agrees that the limitation in Section 224(d)(3) invalidates the Commission's decision to apply the Section 224(d) rate to commingled provision of Internet and cable services. See MCI at 1.

²³ Adelphia/Lenfest at 3-4.

be strictly limited to cable service; while Section 224(e) was not so strictly limited. Thus, as between the two methods of determining rates, Section 224(e) contains the only method that one could even consider applying to a non-cable service attachment.

Taking a different approach, NCTA claims that "Internet access is a cable service."²⁴ Under this line of reasoning, "solely cable service" becomes a bottomless container through which virtually every service provided via a cable system would freely flow at the most favorable rate; while telecommunications carriers providing the same or functionally equivalent services would be disproportionately burdened by the higher Section 224(e) rate. In contrast to NCTA's all-encompassing view of "cable service," Adelphia recognizes that "the precise regulatory classification of Internet service offered over cable remains unclear . . ."²⁵

²⁴ NCTA at 6. The R&O did not reach this issue. R&O, ¶ 34.

²⁵ Adelphia/Lenfest at 5 (citing Universal Service Report to Congress, CC Docket No. 96-45, FCC 98-67, released April 10, 1998, n. 154). Adelphia questions SBC's reliance on the Commission's previous analysis of certain Internet access services offered by Bell Operating Companies ("BOCs") that include a bundled, interLATA transmission component. Adelphia/Lenfest at 5. SBC merely intended to show that the two services, a BOC's Internet access service and a cable operator's Internet access service, could be functionally equivalent to the customer. That is, these two services could both include a bundled transmission component that provides a connection to the Internet service. This discrete one-to-one transmission component goes beyond the provision of video programming and other programming services that "a cable operator makes available to all subscribers generally." Conference Report No. 104-458, 104th Cong., 2d Sess., at 169. Rather than being broadcast to all subscribers generally, the Internet connection is a private path within the cable operator's network. The Commission should recognize that this transmission component goes beyond the provision of cable service and involves telecommunications, or at least telecommunications-equivalent functions, that should be subject to the Section 224(e) rate. See also SBC Reply Comments, CS Docket No. 97-151, filed October 21, 1997, at 34-36.

Given that the Commission has postponed deciding how to treat Internet service provided via cable systems, it may be premature to decide how to treat attachments used for such Internet services.²⁶ However, at this time, the Commission cannot properly assume that "cable service" includes Internet and other nontraditional services and connections offered via a cable system to individual subscribers. This result would prejudice the outcome of the Commission's Internet decision and place telecommunications carriers at an unfair disadvantage in providing Internet and other non-cable services.

Cable operators will still be protected from excessive rates, even if Section 224(e), rather than Section 224(d), is applied to Internet services. NCTA claims that the lower rate needs to be applied "for pro-competitive reasons"²⁷ and because a higher rate will diminish demand.²⁸ However, NCTA ignores the supply side of the coin: as Adelphia observes, cable systems can provide Internet connections at speeds up to fifty times faster than conventional telephone lines.²⁹ So, even if it would be consistent with Section 224(d), it is not necessary to apply the most preferential rate to encourage deployment; performance advantages will provide all the incentives that an entrepreneur needs. Besides, applying the preferential rate to cable operators, but not carriers providing the same services, is hardly pro-competitive. Instead, this preferential treatment would favor one group of competitors over another.

²⁶ See Universal Service Report to Congress, CC Docket No. 96-45, FCC 98-67, released April 10, 1998, n. 140).

²⁷ NCTA at 7.

²⁸ Id. at 8.

²⁹ Adelphia/Lenfest at 11 n. 41.

While NCTA and Adelphia claim that the higher regulated rate will be a disincentive to the deployment of Internet services over cable systems, they do not show that this difference truly would be a material factor in the deployment decision. Further, there is no reason to give cable operators a greater incentive than that which telecommunications carriers will receive under Section 224(e). In fact, the cable industry has already deployed their cable networks passed over 97% of all households,³⁰ whereas, a telecommunications carrier planning to provide these services might have only just begun to deploy its network.

V. THIRD-PARTY OVERLASHERS ARE LIABLE FOR UNUSABLE SPACE COST.

In the R&O, the Commission decided that a third-party overlasher should not be liable to the utility for any additional usable space fees beyond those paid by the host attacher on the theory that the overlashed cables generally do not occupy additional space on the pole.³¹ However, the R&O does consider the third party overlasher to be a separate attaching entity responsible for a separate share of the unusable space costs.³² In response to US West's request for clarification of one seemingly inconsistent statement within this ruling, AT&T suggests an entirely different approach. According to AT&T, since third-party overlashers generally do not occupy any additional space, AT&T suggests they should only owe compensation to the host attacher.³³ SBC is opposed to

³⁰ Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket 97-141, Fourth Annual Report, 13 FCC Rcd 1034 ¶ 14 (1998).

³¹ R&O, ¶ ¶ 68-69, 94.

³² Id., ¶ 94.

³³ AT&T at 4-5.

AT&T's proposed change in the R&O's ruling on third-party overlashers. AT&T's sole rationale is that third-party overlashers do not occupy additional space, but allocation of unusable space cost is based on the number of attaching entities, not the amount of space occupied.³⁴ Accordingly, the Commission should reject AT&T's suggestion that third-party overlashers are not responsible for a share of the unusable space costs.

VI. CONCLUSION.

For the foregoing reasons, the FCC should reject the objections to SBC's Petition and grant the relief and provide the clarification sought by SBC as well as other petitioners whose positions SBC has supported herein and in its Comments.

Respectfully submitted,

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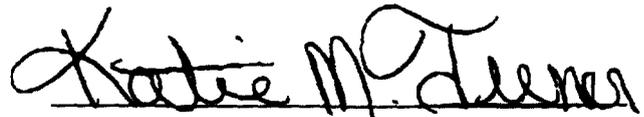
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May 28, 1998

³⁴ R&O, ¶ 55-58.

CERTIFICATE OF SERVICE

I, Katie M. Turner, hereby certify that the foregoing, "REPLY COMMENTS OF SBC COMMUNICATIONS INC." in CS Docket No. 97-151 has been filed this 28th day of May, 1998 to the Parties of Record.

A handwritten signature in black ink that reads "Katie M. Turner". The signature is written in a cursive style with a horizontal line underneath the name.

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