

$$\text{Maximum Rate} = \frac{1 \text{ Duct}}{(\text{Avg. No. of Ducts} - \text{Adjustments for Reserved Ducts})} \times \frac{1}{2} \times \text{Net Linear Cost of Conduit} \times \text{Carrying Charge Rate}$$

80. This formula follows the same methodology that we use for determining just and reasonable rates for pole attachments on poles,²⁶⁴ and uses a half-duct rebuttable presumption for capacity used by a pole attachment in a conduit.²⁶⁵ The Commission first applied this adaptation, based on the unique characteristics of duct and conduit systems, in *Multimedia Cablevision, Inc. v. Southwestern Bell Telephone*, where the Commission concluded that it was a simple and efficient mechanism for establishing a conduit rate consistent with Section 224.²⁶⁶

$$\text{Maximum Rate} = \left[\frac{1}{\text{Number of Ducts (Percentage of Conduit Capacity)}} \times \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \right] \times \left[\frac{\text{No. of Ducts} \times \text{Net Conduit Investment}}{\text{System Duct Length (Net Linear Cost of a Conduit)}} \right] \times \text{Carrying Charge Rate}$$

B. Discussion

1. Conduit Formula Methodology

82. Just as we use the entire pole inventory for establishing a rate for pole attachments to poles, we believe it is appropriate to use system-wide data for establishing the maximum rate for conduit. Some electric utilities argue that, due to disparities in cost between urban and suburban conduit, using system-wide costs will not provide adequate compensation.²⁶⁷ We note, however, that the electric utilities that raise the issue have themselves proposed calculating the carrying charges on a system-wide basis.²⁶⁸ Similarly, as has been pointed out by Time-Warner and NCTA, calculating the cost of the conduit on a system-wide, or averaging, basis will adequately compensate the utilities.²⁶⁹

²⁶⁴Notice at ¶¶ 38-42.

²⁶⁵See *Greater Media, Inc., et al. v New England Telephone and Telegraph Co.*, No. DPU 91-218 (Mass. Dep't Pub Utils. April 17, 1992), applied in *Multimedia Cablevision*, 11 FCC Rcd 11202 (1996).

²⁶⁶*Multimedia Cablevision*, 11 FCC Rcd 11202 (1996).

²⁶⁷See, e.g., Carolina Power Comments at 66; Ohio Edison Comments at 35.

²⁶⁸See, e.g., Carolina Power Comments at 68-75; NCTA Reply at 48-50.

²⁶⁹Time Warner Reply at 10-11; NCTA Reply at 49, 55.

83. We are not persuaded by the electric utilities' contentions that they lack the detailed information necessary to apply the proposed formula.²⁷⁰ They assert that use of specific FERC accounts is inconsistent among utilities.²⁷¹ Necessary figures are available in underlying records filed to support claims in sworn FERC submissions, and only in rare instances would a utility lack detailed information because it has no records.²⁷² Where such records do not exist, other sources of information may be used.²⁷³ Electric utilities have demonstrated their ability to calculate a rate by applying the formula.²⁷⁴ Although the conduits which comprise a conduit system may vary widely from urban to suburban or rural locales,²⁷⁵ we will use the system-wide historical cost of the conduit in the formula.

2. Conduit Physical Characteristics

84. In the *Notice*, we asked whether there are physical differences between conduit owned and used by electrical or other utilities and conduit owned by cable systems or telecommunications carriers that would affect the rates for attachment to conduits.²⁷⁶ We hypothesized that there would be differences related to conduit construction, maintenance and safety. We asked whether these differences should affect the rate for these facilities.²⁷⁷

85. Some electric utilities comment that such differences do exist and should have an impact on the rate.²⁷⁸ Specifically, they assert that electric conduits have safety and reliability considerations that

²⁷⁰See, e.g., American Electric Comments at 80-96, Reply at 40-41; Carolina Power Reply at 38-39; ConEd Comments at 6; Edison Electric/UTC Comments at 19-20; Ohio Edison Comments at 36; Union Electric Comments at 9, 11.

²⁷¹See, e.g., Carolina Power Comments at 65; Edison Electric/UTC Comments at 17-18.

²⁷²See, e.g., MCI Reply at 44-45; NCTA Reply at 48.

²⁷³See, e.g., NCTA Reply at 49 (citing *Capital Cities Cable, Inc. v. Mountain States Telephone and Telegraph Co.*, File Nos. PA-81-0031, PA-81-0039, PA-82-0051, Mimeo 84786 at 4 (June 29, 1984); *Teleprompter Corp. v. Washington Water Power Co.*, 50 R. R. 2d 54 (1981)).

²⁷⁴See, e.g., Carolina Power Comments at 68-75.

²⁷⁵See, e.g., Carolina Power Comments at 62, 65-75; Duquesne Light Comments at 7; NCTA Comments at 40; Ohio Edison Comments at 43; Time Warner Comments at 27.

²⁷⁶*Notice* at ¶¶ 38-46.

²⁷⁷*Notice* at ¶ 36.

²⁷⁸See, e.g., Carolina Power Comments at 61, Reply at 38; ConEd Comments at 3; Edison Electric/UTC Comments at 18-19; Dayton Power and Light Comments at 3; Public Service Co. of New Mexico at 5.

warrant special caution due to potential dangers to untrained personnel, electric equipment, and high voltage requirements and that such concerns require special procedures and precautions.²⁷⁹ They argue that these necessary precautions translate into additional costs and, therefore, impact just and reasonable rates.²⁸⁰ These costs, however, are currently reflected in the rates. Infrastructure investment required to assure safety and reliability is captured in the accounts used to calculate the net book value of the respective types of conduit. Special precautions related to placement of communications cables in conduit are included in make-ready costs. All special precautions taken in maintenance of the system are reflected in the maintenance element of the carrying charge rate.

3. Factors of the Conduit Formula

86. The first factor of the formula, Conduit Capacity, is determined using the following variables:

"No. of Inner Ducts" is the number of inner ducts placed in the duct. If there are no inner ducts the value would be presumed to be two, reflecting the rebuttable presumption that not more than half of a duct is occupied.

"No. of Ducts" is the total number of ducts in the conduit system. This number does not include collapsed or otherwise damaged ducts that are not repairable. In general, this would be presumed to be the average number of ducts per conduit for the system.

87. The second factor of the formula, Net Linear Cost of Conduit, is determined using the following additional variables:

"Net Conduit Investment" is gross conduit investment less the accumulated depreciation and accumulated deferred taxes.

"System Duct Length" is the sum of the length of all ducts in the system minus the length of collapsed ducts and the length of ducts that for other reasons are physically unable to contain cable. The System Duct Length may be arrived at in one of three ways: First, it may be obtained from available records. Second, the length of the conduit in the system may be multiplied by an estimated average number of ducts per conduit. Third, the length of all ducts in the system is the sum of the products of the length of each conduit times the number of ducts in that conduit.²⁸¹

²⁷⁹Notice at ¶ 43.

²⁸⁰See, e.g., Carolina Power Reply at 38; ConEd Comments at 3; Edison Electric/ UTC Comments at 18-19; Union Electric Comments at 11.

²⁸¹To simplify calculation the Net Linear Cost of Conduit for the system may be used in lieu of the product of the No. of Ducts and the Net Linear Cost of a Duct. The Net Linear Cost of Conduit is the Net Conduit Investment divided by the System Conduit Length.

88. Calculation of the maximum rate may be simplified by using the presumptions and using the Net Linear Cost of a Conduit for the second term in the formula. The formula then is, essentially, our proposed formula:

$$\text{Maximum Rate (System - Wide)} = \frac{1/2 \text{ Duct}}{\text{Avg. No. of Ducts}} \times \frac{\text{Net Conduit Investment}}{\text{System Conduit Length}} \times \text{Carrying Charge Rate}$$

[Percentage of Conduit Capacity] [Net Linear Cost of a Conduit]

We discuss in greater detail below each of the factors within the formula.

- a. Percentage of Total Capacity Occupied
 - i. Total Duct or Conduit Capacity

89. The total capacity of a duct or conduit is the entire volume of available capacity in the conduit system.²⁸² All costs associated with the construction of the conduit system are considered in determining the cost of this total capacity.²⁸³ In the *Notice*, we sought comment on how to allocate capacity for various uses in a conduit,²⁸⁴ and whether a utility may eliminate some of its conduit capacity from the total capacity as used in the formula, by reserving some capacity for use for maintenance, future business needs, or for space set-aside for use by a state or local government.²⁸⁵ A utility may designate a maintenance duct so that if a cable in another duct fails, a temporary cable may be placed in the maintenance duct and spliced into the damaged cable.²⁸⁶ A duct so designated is usable in the event it is needed and, therefore, is part of the conduit capacity. Municipal ducts are those that may be allocated for the use of the local government as a condition in a franchise, license, right-of-way or other agreement.²⁸⁷

²⁸²See, e.g., Carolina Power Comments at 75; NCTA Reply at 52-54.

²⁸³This is a departure from our position in the *Telecommunications Report and Order*, in which we concluded that a certain portion of construction costs might not be associated with the system's capacity. *Telecommunications Report and Order* at ¶ 110. Based on the expanded record and *Petitions for Reconsideration and/or Clarification of the Telecommunications Report and Order*, we now believe that all costs associated with the construction of the conduit system are used in creating the system's capacity and are properly considered in the cost of that capacity.

²⁸⁴*Notice* at ¶¶ 38-46.

²⁸⁵*Notice* at ¶ 45; see also *Local Competition Order* at ¶¶ 1165-1170.

²⁸⁶See, e.g., AT&T Comments at 23; Carolina Power Comments at 63; Duquesne Light Comments at 7-8; Ohio Edison Comments at 35; SBC Comments at 30-31.

²⁸⁷See, e.g., SBC Comments at 32 (imposed as condition of granting right-of-way).

Where a duct is required by the municipality to be set aside for potential future use, in the nature of consideration as a condition for a license, franchise, or permit, the costs attributable to that unused capacity are part of the total cost of the conduit. The utility is compensated for those costs as part of its net conduit investment and/or in the carrying charge rate. Ducts may be reserved, or kept unused to be available to the utility for expansion of its core business services.²⁸⁸

90. The question of reducing the amount of total capacity of a duct or conduit based on some theoretical or potential need, unduly complicates the conduit formula methodology.²⁸⁹ The clear language of the statute dictates that the amount of "total duct or conduit capacity" is to be used when calculating a percentage of capacity occupied by a pole attachment. We will not allow capacity designated for maintenance, future business plans, or municipal set-asides to be subtracted from the total duct or conduit capacity.²⁹⁰ The record supports our finding that capacity in a duct or conduit that is usable for any of these purposes is part of the "total duct or conduit capacity."²⁹¹ A methodology which attempts to account for any possible variations would require substantial oversight and regulation to prevent abuses or over recovery. Such regulation and complexity would be contrary to the clear language of the statute.²⁹²

91. Ducts which have collapsed or are otherwise damaged and are no longer available for pole attachments should not be included in the capacity of a conduit or duct.²⁹³ Some of these ducts can be repaired.²⁹⁴ Ducts that cannot be restored no longer provide capacity to the conduit and, by definition, do

²⁸⁸See ConEd Comments at 9-11; Duquesne Light Comments at 8; Ohio Edison Comments at 35.

²⁸⁹1977 Senate Report; 47 U.S.C. § 224(d)(1); see also, NCTA Comments at 43-44.

²⁹⁰This is also a departure from our position in the *Telecommunications Report and Order*, in which we said such reserved capacity would be designated as "unusable space" for purposes of calculating an unusable space factor. *Telecommunications Report and Order* at ¶ 110. Based on the expanded record and *Petitions for Reconsideration and/or Clarification of the Telecommunications Report and Order*, we now believe there is no unusable capacity in a conduit system. For whatever reason space may be reserved or designated for special uses and regardless of who may benefit from those uses, the space is capable of being used, and it remains part of the total capacity of the duct or conduit.

²⁹¹47 U.S.C. § 224(d)(1). See, e.g., AT&T Reply at 29 (municipal set aside is often put to commercial use); NCTA Comments at 43-44 (generally, dedicated ducts are not reserved for exclusive use by municipality), Reply at 51-54 (duct used by any party is usable, identity of the party is irrelevant to the duct's usability); Time Warner Comments at 28 (maintenance ducts should be considered usable).

²⁹²See 1977 Senate Report at 19-20; 1996 Act, Preamble, *Conf. Rpt.* at 113.

²⁹³See, e.g., NCTA CS Dkt. No. 97-151 Comments at 25-26; SBC Comments at 72-73.

²⁹⁴*Greater Media* at ¶ 69.

not constitute ducts.²⁹⁵

ii. Occupied Capacity, the Half-Duct Presumption

92. Presumptions are used in the *Cable Formula* to expedite the calculations of a just and reasonable rate so that complicated surveys, accounting and calculations may be avoided.²⁹⁶ We proposed and sought comment on a methodology that presumes rebuttably that an attachment in a conduit occupies one half of a duct, and invited additional proposals to make the methodology simple and administratively efficient.²⁹⁷

93. We retain the rebuttable presumption adopted in *Multimedia Cablevision* that an attacher occupies one half of a duct, and no more. There we accepted the findings of the Massachusetts Department of Public Utilities that a cable system attachment occupies only one-half of a duct, does not preclude the use of the other half of the duct, and that, therefore, the cable system should not be charged for the use of the entire duct.²⁹⁸ The record supports the retention of this presumption.²⁹⁹

94. Some electric utilities assert, however, that an electric supply cable cannot share a duct with a communications cable, and, therefore, from the electric utility point of view, the communications cable occupies the entire duct.³⁰⁰ Some of these utilities also point out that for certain electric supply cables, minimum spacing requirements do not permit a communications cable in an adjacent duct, and, therefore, from their point of view, the communications cable occupies the adjacent ducts as well.³⁰¹ The situation is somewhat analogous to the safety space on a pole although it does involve a NESC prescribed exclusion zone around the electric supply cable. Electric utilities do not dispute that the capacity is usable, but argue that the full capacity of the duct is occupied by the communications cable because the electric utility is prevented from using that capacity by the NESC.³⁰² Communications cables may, and often do, share a

²⁹⁵NESC § 2.

²⁹⁶*Second Report and Order*, 72 FCC 2d 59 (1979); *see also*, NCTA Reply at 46-47.

²⁹⁷*Notice* at ¶¶ 38-46.

²⁹⁸*Id.*, (referencing *Greater Media*, at ¶¶ 74-75).

²⁹⁹*See, e.g.*, Ameritech Comments at 7, Reply at 6; GTE Comments at 16, Reply at 17; SBC Reply at 14-15; USTA Comments at 20-22, Reply at 45; NCTA Comments at 40.

³⁰⁰*See, e.g.*, American Electric Comments at 85-87; ConEd Comments at 5-6; Duquesne Light Comments at 8; Edison Electric/UTC Comments at 20-21.

³⁰¹NESC, Rule 341A6 (1997 Ed.). *See* Edison Electric/UTC Comments at 21; Carolina Power Comments at 75.

³⁰²*See, e.g.*, ConEd Comments at 5-6; Duquesne Light Comments at 8; Edison Electric/UTC Comments at 20-21.

duct.³⁰³ The NESC requires that, where electric supply cables share a duct with communications cables, the cables be maintained by the utility.³⁰⁴ It cannot be said, therefore, that any given communications cable occupies a whole duct. If the electric supply cable excludes other cables from the duct it occupies, it is that electric supply cable that occupies the entire duct, not the communications cables it excludes. Similarly, if the electric supply cable cannot tolerate communications cables in adjacent ducts, then the electric utility's supply cable effectively occupies those adjacent ducts not the communications cable. Conversely, if the electric supply cable cannot be placed in a duct because the duct is partially occupied by a communications cable, the reason is that the duct contains less available capacity than the electric supply cable requires. The capacity is available to other communications cables and is, therefore, not occupied.

95. Some cable operators assert that even the application of the half-duct methodology will result in rates that are unreasonably high in light of current inner-duct technology.³⁰⁵ The term "inner-duct" generally refers to small diameter (1" or 1½") pipe or tubing placed inside a conventional duct to allow the installation of multiple wires or cables.³⁰⁶ Use of inner-duct is a common practice. Some electric utilities recommend that we require the first attacher in a previously unoccupied duct to install inner-duct.³⁰⁷ The cost of the inner-duct would, presumably, be considered a make-ready cost.³⁰⁸ Ameritech urges that a presumption of less than one half of a duct would reflect what is possible, but not what is currently in place and what is practical under existing conditions.³⁰⁹ We will not require installation of inner-duct. The half-duct presumption is rebuttable, and the presence of inner-duct is adequate rebuttal. We have made direct provision in the formula for that contingency. Where inner-duct is installed, either by the attacher or in a previous installation, the maximum rate will be reduced in proportion to the fraction of the duct occupied. That fraction will be one divided by the number of inner-ducts in the duct, so that a default presumption of capacity occupied is one-half duct, or the actual percentage of capacity occupied.

4. Net Linear Cost of Conduit

96. As indicated in the *Notice*, in the conduit context, we use the net linear cost of the conduit, as compared to the net cost of a bare pole, as one factor within the formula for determining the rate. The *Notice* presumed, without discussion and without specifically seeking comment, that utilities would be

³⁰³See ConEd Comments at 9; Duquesne Light Comments at 14.

³⁰⁴Edison Electric/UTC Comments at 20; Duquesne Light Comments at 8; MCI Reply at 42.

³⁰⁵See, e.g., NCTA Comments at 42; TCI Comments at 16; Time Warner Comments at 28.

³⁰⁶MCI Comments at 25; see also Edison Electric/UTC Comments at 22.

³⁰⁷See, e.g., ConEd Comments at 7-9; Duquesne Light Comments at 14; Edison Electric/UTC Comments at 22.

³⁰⁸ConEd Comments at 5-7.

³⁰⁹See Ameritech Reply at 6; see also, Bell Atlantic/NYNEX Reply at 15; NCTA Reply at 42-43.

capable of determining this figure. As the net cost of a bare pole reflects the total system investment for the above ground pole attachment infrastructure, to arrive at a system investment for use in the conduit formula we identify the net linear cost of the conduit system. To accomplish this, the utility must first establish the Net Conduit Investment as discussed below.

a. Net Conduit Investment

97. The formula requires the determination of the utility's net linear cost of its conduit system. The Net Conduit Investment is calculated as follows:

$$\text{Net Conduit Investment} = \text{Gross Conduit Investment} - \text{Accumulated Depreciation} - \text{Accumulated Deferred Taxes}$$

$$\text{(ARMIS Account 2441/ FERC Account 366)} \quad \text{(Conduit)} \quad \text{(Conduit)}$$

98. Gross Conduit Investment for the LEC consists of Part 32 Account 2441.³¹⁰ For the electric utility, Gross Conduit Investment is reflected in FERC Part 101 Account 366.³¹¹ For LECs, Accumulated Depreciation (Conduit) represents the share of ARMIS Account 3100 that corresponds to Account 2441.³¹² For electric utilities, Accumulated Depreciation (Conduit) represents the share of FERC Account 108 that corresponds to Gross Conduit Investment valuations included in Account 366.³¹³

99. In the *Notice*³¹⁴ we proposed a formula for the calculation of accumulated deferred income taxes for conduit. The formula is shown as:³¹⁵

$$\text{Accumulated Deferred Income Taxes (Conduit)} = \frac{\text{Gross Conduit Investment}}{\text{Total Gross Plant}} \times \text{Total Accumulated Deferred Income Taxes}$$

100. Total Accumulated Deferred Income Taxes for electric utilities are based on FERC

³¹⁰47 U.S.C. § 32.2441.

³¹¹See 18 C.F.R. Part 101 (stating the accounts associated with the conduit attachment formula for electric utilities); see also 47 C.F.R. Part 32 (stating accounts associated with the conduit formula for LECs).

³¹²*Part 32 Guidance Letter*, 5 FCC Rcd 3898 (1990). See ARMIS Report 43-02, row 0470.

³¹³18 C.F.R. Part 101.

³¹⁴12 FCC Rcd 7449 (1997) at Appendix C.

³¹⁵For regulatory accounts to be used in the formulas, see Appendix C-3 and C-4 for LEC and electric utility conduit, respectively.

Account 190.³¹⁶ However, LEC conduit owners object to this formula on the basis that the actual amount of Accumulated Deferred Income Taxes for conduit is available directly from the LEC's books.³¹⁷ BellSouth maintains that because it is required to keep separate and accurate records of accumulated deferred income taxes for poles and conduit, our formula will improperly introduce non-conduit related deferred taxes into rate calculations.³¹⁸ NCTA argues that LECs should not use accumulated deferred income taxes figures taken from the LEC's books because the information is not publicly available.³¹⁹

101. The *Pole Attachment Order* did not specifically require the use of proration as a method to be used in the calculation of the net costs of a bare pole,³²⁰ which we apply in this context for conduit, and only noted that accumulated deferred income taxes were to be used in calculations.³²¹ Our goal has always been to adopt a formula which set the maximum rate using publicly available data, in a fair and expeditious manner.³²² We also have a policy against requiring additional accounting procedures so long as the information is available from the utilities upon reasonable request.³²³ As the LEC conduit owner is required to keep this data precisely as required for the formula, we will allow them to use it in the rate calculation.³²⁴

102. To determine the net conduit investment for conduit owned by an electric utility, we base the gross conduit investment on Account 366. Edison Electric/UTC suggests that portions of Accounts 367 (Underground conductors and devices) and 369 (Services) should be included.³²⁵ We disagree. Conductors and related devices are part of the utility's core business services' infrastructure, and such capital expenses

³¹⁶18 C.F.R. Part 101, Description of Accounts, Account 190.

³¹⁷See, e.g., Bell South Comments at 8; GTE Comments at 14; SBC Comments at 20.

³¹⁸Bell South Comments at 8.

³¹⁹NCTA Reply at 33-34.

³²⁰*Pole Attachment Order*, 2 FCC Rcd 4387 (1987).

³²¹2 FCC Rcd 4387 (1987).

³²²*Pole Attachment Order*, 2 FCC Rcd 4387 (1987) at ¶ 37.

³²³*Second Report and Order*, 72 FCC 2d 59 at ¶ 32.

³²⁴See BellSouth Comments at 8. The subsidiary accounts for Accounts 4100 and 4340 are required to be maintained and reported to the Commission. See 47 C.F.R. §§ 43.21, 43.43, 32.4100 and 32.4340. See also, Biennial Regulatory Review, Review of Accounting and Cost Allocation Requirements, FCC 99-106 at ¶ 15 (rel. June 30, 1999) and Biennial Regulatory Review, Review of ARMIS Reporting Requirements, FCC 99-107 at ¶ 13 (rel. June 30, 1999).

³²⁵See, e.g., Edison Electric/UTC Comments at 25.

are not included in the *Cable Formula* for poles.³²⁶ Account 367 may include some costs of installed materials that provide support for the conduit system, but such a portion of that account is reflected in the maintenance element calculations. The electric utility has an opportunity to recover appropriate expenses reported in those accounts in the carrying charges.

103. We also reject electric utilities' suggestions that portions of Accounts 580 (Operation - Supervision and Engineering) and 583 (Operation - Overhead Line Expenses, Major Utilities Only) should be included, even if they may contain some expenses incurred with respect to the electric power distribution plant.³²⁷ The descriptions of the expenses included in FERC Part 101 Accounts 367, 369, 580 and 583, relate directly to the electric utilities' core business operations rather than "actual capital costs attributable to the entire pole, duct, conduit or right-of-way."³²⁸ The same appears true of FERC Accounts 357 (Underground Conduit), 358 (Underground Conductors and Devices), 371 (Installation on Customer Premises), and 373 (Street Lighting and Signal Systems) which are also not included in the formula.³²⁹

b. System Duct Length

104. The denominator for the Net Linear Cost of Conduit element within the formula is based on duct length. In the *Notice* we indicated that duct length could be stated as per linear meter or per linear foot.³³⁰ In response, some electric utilities argue that they are not capable of readily computing conduit investment on per linear foot or meter basis because FERC accounts associated with underground system only track dollar values and not linear measurement.³³¹ The record indicates that the utilities often have the data required for the calculations and, when they do not have the data they can estimate it from the data they have.³³² The net cost data is available from FERC reports and, although electric utilities are not required to report the linear footage of conduit deployed, we are informed that they routinely produce linear footage data during state conduit rate proceedings.³³³ Electric utility corporate or engineering departments have

³²⁶*Notice* at ¶ 42.

³²⁷See Carolina Power Comments at 50-52; see also 18 C.F.R. Part 101: descriptions of accounts and operating expense reporting instructions.

³²⁸47 U.S.C. § 224(d)(1).

³²⁹See 18 C.F.R. Part 101, Description of Accounts.

³³⁰*Notice* at ¶ 39 n.76.

³³¹See, e.g., Ohio Edison Comments at 42.

³³²See Time Warner Reply at 10; see also NCTA Comments at 48.

³³³NCTA Reply at 48-50; see also MCI Reply at 39-40.

records on installed plant.³³⁴ Moreover, as NCTA observes, when a utility is unable to obtain the requisite data, information from other sources may be used.³³⁵ A determination of the total length of duct and conduit in the system can be made with a precision comparable to that reached in determining the number of poles owned by the utility. The utility must, however, specify the method used for computing the duct length and must disclose this information to all attachers upon request.

5. Carrying Charge Rate (Conduit)

105. The elements of the carrying charge rate are: administrative, maintenance, depreciation, taxes and rate of return.³³⁶ In the *Pole Attachment Order*,³³⁷ the Commission identified the regulatory accounts to be used, where possible, in applying the *Cable Formula* to determine the maximum allowable rate for pole attachments on poles. The Commission addressed the pole attachment formula and accounts to be used for determining a pole attachment rate for LEC-owned conduit systems in *Multimedia Cablevision*.³³⁸ The accounts to be used for an attachment rate for a conduit system owned by an electric utility will be accounts reported to FERC that are comparable to the LEC accounts identified in *Multimedia Cablevision*,³³⁹ as discussed in this *Order*.³⁴⁰

106. To calculate the carrying charge rate, the Commission developed a formula that relates each of these elements to a utility's net plant investment appropriate to the location of the pole attachment (e.g., poles, conduit system, right-of-way).³⁴¹ That formula is:

$$\begin{array}{l} \text{Carrying} \\ \text{Charge Rate} \end{array} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Rate of Return}$$

107. The administrative, taxes, and rate of return elements will be the same for use in a formula for pole attachments in conduits and rights-of-way as on poles. We have already discussed those elements, and the appropriate accounts and methodologies to develop the figures to be used in the full formula in

³³⁴See, e.g., Carolina Power Comments at 66.

³³⁵NCTA Reply at 49.

³³⁶*Pole Attachment Order*, 2 FCC Rcd at 4387, 4391 (1987), ¶ 25.

³³⁷2 FCC Rcd 4387, 4402-03, Attachment B (1987); see also *American Cablesystems of Florida, Ltd.*, 10 FCC Rcd 10934 (1995).

³³⁸11 FCC Rcd 11202 (*rel.* Sep. 3, 1996).

³³⁹11 FCC Rcd 11202 (1996).

³⁴⁰See Appendix C-3 for LECs and Appendix C-4 for electric utilities.

³⁴¹*Pole Attachment Order*, 2 FCC Rcd at 4387, 4402-03, Attachment B (1987).

previous sections and will not repeat our discussion here. The maintenance and depreciation elements, with the accounts and methodologies specific to conduits, are discussed in this *Order*. The *Cable Formula* for application to attachments in conduits owned by LEC and electric utilities, with all components, elements and accounts used, are attached to this *Order* as Appendix C-3 and C-4, respectively.

a. Maintenance Element

108. In the *Pole Attachment Order*, the Commission adopted procedures to identify and calculate the maintenance expenses for use in the carrying charge rate as a ratio of expenses included in the utility's maintenance account, to net investment.³⁴² For purposes of the calculation of the maintenance element, the denominator is the net investment which equals the sum of gross investment, minus accumulated depreciation related to conduit systems, minus accumulated deferred income taxes related to conduit systems.³⁴³

i. LEC owned Conduit

109. In the *Notice*, we proposed the following methodology for the maintenance element of the carrying charge rates of the *Cable Formula* for LEC conduit owners:³⁴⁴

$$\text{Maintenance Element} = \frac{\text{Account 6441}}{\text{Account 2441} - \text{Accumulated Depreciation, conduit} - \text{Accumulated Deferred Income Taxes [Net Conduit Investment]}}$$

110. We affirm the use of our proposed formula to determine the maintenance carrying charge rate element for LEC owned underground conduit systems.³⁴⁵ Account 2441, which unlike Account 2411 (used as the gross pole investment to determine the net cost of a bare pole) includes no non-cable related investment that supports LEC operations exclusively and, consequently, does not require the application of an adjustment factor.³⁴⁶ Telecommunications carriers and LEC commenters support our conclusion that manhole costs included in Account 2441 are suitable for recovery as underground conduit system costs.³⁴⁷

³⁴²FCC Rcd 4387 (1987).

³⁴³*Multimedia Cablevision*, 11 FCC Rcd 11202 (1996).

³⁴⁴*Notice*, 12 FCC Rcd 7449, at Appendix C.

³⁴⁵MCI Comments at 23.

³⁴⁶*Notice* at ¶ 42.

³⁴⁷*See, e.g.*, GTE Comments at 17 n.24; Sprint Comments at 10.

ii. Electric Utility Owned Conduit

111. The formula and accounts to be used for the maintenance element of the carrying charge rate of the *Cable Formula* for electric utility conduit owners is determined by applying FERC accounts analogous to those LEC accounts used in *Multimedia Cablevision*, as follow:

$$\text{Maintenance Element} = \frac{\text{Account 594 (Maintenance of Underground Lines)}}{\left[\begin{array}{c} \text{Investment in} \\ \text{Accounts 366, 367, \& 369} \end{array} \right] - \left[\begin{array}{c} \text{Depreciation} \\ \text{Related to} \\ \text{Accounts 366, 367, \& 369} \end{array} \right] - \left[\begin{array}{c} \text{Deferred Income Taxes} \\ \text{Related to} \\ \text{Accounts 366, 367, \& 369} \end{array} \right]}$$

112. FERC Account 366 contains capital costs for installed underground conduit and tunnels used for housing distribution cables or wires.³⁴⁸ For electric utilities, Accounts 367 (Underground Conductors and Devices) and 369 (Services), and corresponding maintenance expenses are included in Account 594 (Maintenance of underground lines).³⁴⁹ Some electric utilities suggest inclusion of Accounts 580 (Operation and Supervision), 584 (Operation of Underground Lines), 588 (Miscellaneous Distribution Operation Expenses), 590 (Maintenance Supervision and Engineering-Major Only), and 598 (Maintenance of Miscellaneous Distribution Plant).³⁵⁰ Accounts 580, 584, 588 are operational accounts which report expenses relating to the utility's core business services and not pole attachments.³⁵¹ We have addressed inclusion of Account 590 above and do not include that account in the *Cable Formula* for poles.³⁵² Account 598 is a miscellaneous account related generally to maintenance of equipment on customer premises and is not associated with pole attachments in conduit.³⁵³ We will not include any portion of Accounts 580, 584, 588, 590 or 598 in the denominator of the maintenance element because the costs or expenses reported to these accounts do not reflect "operating expenses and actual capital costs of the utility attributable to the . . . conduit."³⁵⁴

b. Depreciation Element

³⁴⁸18 C.F.R. Part 101, Description of Accounts.

³⁴⁹*Id.*

³⁵⁰See Edison Electric/UTC Comments at 26; Carolina Power Comments at 68-75; Ohio Edison Comments at 42-45.

³⁵¹18 C.F.R. Part 101, Description of Accounts.

³⁵²See discussion at ¶¶ 61-65 of this *Order*.

³⁵³18 C.F.R. Part 101, Description of Accounts.

³⁵⁴47 U.S.C. § 224(d)(1).

113. In the *Notice*,³⁵⁵ we proposed a formula to determine the depreciation element for conduit as follows:

$$\text{Depreciation Carrying Charge Factor} = \frac{\text{Depreciation Rate for Conduit}}{\text{Gross Conduit Investment (Part 32 Account 2441 / FERC Accounts 366, 367, 369)}} \times \text{Net Conduit Investment}$$

114. Consistent with our discussions and conclusions above, we are excluding FERC Accounts 367 and 369 from the numerator for this equation for electric utility conduit owners.³⁵⁶ Therefore, only FERC Account 366 will be used as a basis for Gross Conduit Investment under the formula for electric utilities. For LECs, ARMIS Account 2441 represents the corresponding Gross Conduit Investment account under the formula. We adopt our proposed formula, as modified, as follows:

$$\text{Depreciation Element} = \frac{\text{Gross Conduit Investment (ARMIS Account 2441 / FERC Accounts 366)}}{\text{Net Conduit Investment}} \times \text{Depreciation Rate for Conduit}$$

VII. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

115. As required by the Regulatory Flexibility Act ("RFA"),³⁵⁷ an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice*.³⁵⁸ The Commission sought written public comment on the proposals in the *Notice* including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.³⁵⁹

1. Need for, and Objectives of, the Order

116. In 1987, the Commission adopted its current pole attachment formula for calculating the maximum just and reasonable rates utilities may charge cable systems for pole attachments. Since then the Commission replaced its accounting system for telephone companies, creating Part 32. This created a need to advise telephone companies about how the new system should be used in the pole attachment formula. The Telecommunications Act of 1996 made pole attachment rules applicable to telecommunications

³⁵⁵12 FCC Rcd 7449 at Appendix C.

³⁵⁶See discussion regarding FERC Account 367 and 369 at ¶¶ 119-121 of this *Order*.

³⁵⁷See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

³⁵⁸*Notice of Proposed Rulemaking*, CS Docket No. 97-98, 12 FCC Rcd 7449, ¶¶ 49-79 (1997).

³⁵⁹See 5 U.S.C. § 604.

providers. The existing pole attachment formula applies to them until February 8, 2001. This gave rise to a need to ensure that the pole attachments rules would appropriately accommodate these new attachers. The use of conduit by cable systems and had not yet been addressed in detail by the Commission. This needs to be done in light of the anticipated number of new attachers whose entry into the marketplace the Commission wishes to facilitate. We recognize that a significant number of new attachers might be small businesses.

117. The objectives of the rules adopted herein are consistent with Congressional intent to provide a clear methodology to determine just and reasonable pole attachment rates in a manner that uses publicly available and verifiable data whenever possible. The objectives of the rules adopted herein change the formula methodology used to determine a just and reasonable pole attachment rate to reflect the present Part 32 accounting system for telephone companies that replaced the former Part 31 rules in 1988. Finally, the objectives of the rules adopted herein are to identify a conduit methodology that will determine the maximum just and reasonable rates utilities may charge cable operators and telecommunications carriers for pole attachments to conduit systems. Although our rules do not differentiate between large and small businesses, our use of presumptions and publicly available data in our methodology ensures that small businesses will not be discouraged from seeking recourse with the Commission against the imposition of unreasonable pole attachment rates.

2. Summary of Significant Issues Raised by Public Comments In Response to the IRFA

118. Small Cable Business Association ("SCBA") filed comments in response to the IRFA contained in the *Notice*, and, to the extent they are relevant to the issues in this proceeding, we incorporate them herein by reference.³⁶⁰ SCBA claims in its IRFA comments that, because of the statutory exclusion of cooperatives from the definition of utility, Section 224 does not minimize market entry barriers for small cable operators.³⁶¹ According to SCBA, the IRFA in the *Notice* fails to consider this issue.³⁶² SCBA claims that small cable systems will be particularly hurt by the statutory exemption of cooperatives from the definition of utility because small cable systems often operate in rural areas and therefore necessarily attach their plant to rural telephone and electric cooperatives.³⁶³ In its Reply to the SCBA's comments, the National Telephone Cooperative Association responded that ". . . the exemption [of cooperatives from Section] 224 does not deprive SCBA members of available legal remedies in connection with pole

³⁶⁰*Cf.* discussion *infra* at ¶ 174. Section 224 only applies to utilities not excluded by the statute. Market entry barriers for small operators, seeking pole attachments to utility infrastructure over which Section 224 jurisdiction applies, will be minimized as we outline in ¶ 174.

³⁶¹SCBA IRFA Comments at 2.

³⁶²*Id.*

³⁶³SCBA IRFA at 2.

attachment agreements negotiated with exempt electric or telephone cooperatives."³⁶⁴ We note that the SCBA does not appear to be claiming that our rules will disproportionately burden small cable systems, but that where our rules do not apply, small cable system operators will be disproportionately harmed. Because the exemption for cooperatives was set forth by Congress clearly in Section 224(a)(1), the Commission is left no discretion to address SCBA's concerns in this regard. In general comments, the National Cable Television Association ("NCTA") acknowledged that:

The benefits [of the Commission's current pole attachment regulatory regime] are most vivid in the case of small cable operators. Small operators are peculiarly vulnerable to pole rent overcharges, because of the nature of their service areas. The Commission has recognized that small systems serve areas that are far less densely populated areas than the areas served by large operators. A small rural operator might serve half of the homes along a road with only 20 homes per mile, but might need 30 poles to reach those 10 subscribers. A pole rent increase creates an enormous push on [cable] rates, and frequently makes rural line extensions uneconomical. These same small operators are often the very parties without the budgets to litigate expensive document-intensive rate cases.³⁶⁵

The NCTA's comments recognize that the Commission's chosen methodology does not excessively burden small businesses.

3. Description and Estimate of the Number of Small Entities To Which Rules Will Apply

119. The RFA generally defines a "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."³⁶⁶ In addition, the term "small business" has the same meaning as the term small business concern under the Small Business Act.³⁶⁷ A "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its

³⁶⁴National Telephone Cooperative Association Reply at 2-3. A national association of approximately 500 local exchange carriers that provide service primarily in rural areas, the National Telephone Cooperative Association reports that its members are small local exchange carriers that are "rural telephone companies" as defined in the Telecommunications Act of 1996, and about half of its members are organized as cooperatives. *Id.* at 1.

³⁶⁵NCTA Comments at 5-6.

³⁶⁶5 U.S.C. § 601(6).

³⁶⁷5 U.S.C. § 601(3) (incorporating by reference the definitions of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more 'definitions' of such term which are appropriate to the activities of the agency and publishes such definitions in the Federal Register."

field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").³⁶⁸ For many of the entities described below, the SBA has defined small business categories through Standard Industrial Classification ("SIC") codes.

a. Utilities

120. Many of the decisions and rules adopted herein may have a significant effect on a substantial number of utility companies. Section 224 defines a "utility" as "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State." The SBA has provided the Commission with a list of utility firms which may be effected by this rulemaking. Based upon the SBA's list, the Commission concludes that all of the following types of utility firms may be affected by the Commission's implementation of Section 224.

(1) *Electric Utilities (SIC 4911, 4931 & 4939)*

121. *Electric Services (SIC 4911)*. The SBA has developed a definition for small electric utility firms.³⁶⁹ The Census Bureau reports that a total of 1379 electric utilities were in operation for at least one year at the end of 1992. According to SBA, a small electric utility is an entity whose gross revenues did not exceed five million dollars in 1992.³⁷⁰ The Census Bureau reports that 447 of the 1379 firms listed had total revenues below five million dollars.³⁷¹

122. *Electric and Other Services Combined (SIC 4931)*. The SBA has classified this entity as a utility whose business is less than 95% electric in combination with some other type of service.³⁷² The Census Bureau reports that a total of 135 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small electric and other services combined utility is a firm whose gross revenues did not exceed five million dollars in 1992.³⁷³ The Census Bureau reported that 45 of the 135

³⁶⁸Small Business Act, 15 U.S.C. § 632.

³⁶⁹Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987).

³⁷⁰13 C.F.R. § 121.201.

³⁷¹U.S. Department of Commerce, Bureau of the Census, 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D (Bureau of Census data under contract to the Office of Advocacy of the SBA).

³⁷²See *supra* note 369.

³⁷³13 C.F.R. § 121.201.

firms listed had total revenues below five million dollars.³⁷⁴

123. *Combination Utilities, Not Elsewhere Classified (SIC 4939)*. The SBA defines this utility as providing a combination of electric, gas, and other services which are not otherwise classified.³⁷⁵ The Census Bureau reports that a total of 79 such utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small combination utility is a firm whose gross revenues did not exceed five million dollars in 1992.³⁷⁶ The Census Bureau reported that 63 of the 79 firms listed had total revenues below five million dollars.³⁷⁷

(2) *Gas Production and Distribution*
(SIC 4922, 4923, 4924, 4925 & 4932)

124. *Natural Gas Transmission (SIC 4922)*. The SBA's definition of a natural gas transmitter is an entity that is engaged in the transmission and storage of natural gas.³⁷⁸ The Census Bureau reports that a total of 144 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small natural gas transmitter is an entity whose gross revenues did not exceed five million dollars in 1992.³⁷⁹ The Census Bureau reported that 70 of the 144 firms listed had total revenues below five million dollars.³⁸⁰

125. *Natural Gas Transmission and Distribution (SIC 4923)*. The SBA has classified this entity as a utility that transmits and distributes natural gas for sale.³⁸¹ The Census Bureau reports that a total of 126 such entities were in operation for at least one year at the end of 1992. The SBA's definition of a small natural gas transmitter and distributor is a firm whose gross revenues did not exceed five million dollars.³⁸² The Census Bureau reported that 43 of the 126 firms listed had total revenues below five million dollars.³⁸³

³⁷⁴See *supra* note 371.

³⁷⁵See *supra* note 369.

³⁷⁶13 C.F.R. § 121.201.

³⁷⁷See *supra* note 371.

³⁷⁸See *supra* note 369.

³⁷⁹13 C.F.R. § 121.201.

³⁸⁰See *supra* note 371.

³⁸¹See *supra* note 369.

³⁸²13 C.F.R. § 121.201.

³⁸³See *supra* note 371.

126. *Natural Gas Distribution (SIC 4924)*. The SBA defines a natural gas distributor as an entity that distributes natural gas for sale.³⁸⁴ The Census Bureau reports that a total of 478 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small natural gas distributor is an entity whose gross revenues did not exceed five million dollars in 1992.³⁸⁵ The Census Bureau reported that 267 of the 478 firms listed had total revenues below five million dollars.³⁸⁶

127. *Mixed, Manufactured, or Liquefied Petroleum Gas Production and/or Distribution (SIC 4925)*. The SBA has classified this entity as a utility that engages in the manufacturing and/or distribution of the sale of gas. These mixtures may include natural gas.³⁸⁷ The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small mixed, manufactured or liquefied petroleum gas producer or distributor is a firm whose gross revenues did not exceed five million dollars in 1992.³⁸⁸ The Census Bureau reported that 31 of the 43 firms listed had total revenues below five million dollars.³⁸⁹

128. *Gas and Other Services Combined (SIC 4932)*. The SBA has classified this entity as a gas company whose business is less than 95% gas, in combination with other services.³⁹⁰ The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small gas and other services combined utility is a firm whose gross revenues did not exceed five million dollars in 1992.³⁹¹ The Census Bureau reported that 24 of the 43 firms listed had total revenues below five million dollars.³⁹²

(3) *Water Supply (SIC 4941)*

129. The SBA defines a water utility as a firm who distributes and sells water for domestic,

³⁸⁴See *supra* note 369.

³⁸⁵13 C.F.R. § 121.201.

³⁸⁶See *supra* note 371.

³⁸⁷See *supra* note 369.

³⁸⁸13 C.F.R. § 121.201.

³⁸⁹See *supra* note 371.

³⁹⁰See *supra* note 369.

³⁹¹13 C.F.R. § 121.201.

³⁹²See *supra* note 371.

commercial and industrial use.³⁹³ The Census Bureau reports that a total of 3,169 water utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small water utility is a firm whose gross revenues did not exceed five million dollars in 1992.³⁹⁴ The Census Bureau reported that 3065 of the 3169 firms listed had total revenues below five million dollars.³⁹⁵

(4) *Sanitary Systems (SIC 4952, 4953 & 4959)*

130. *Sewerage Systems (SIC 4952)*. The SBA defines a sewage firm as a utility whose business is the collection and disposal of waste using sewage systems.³⁹⁶ The Census Bureau reports that a total of 410 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sewerage system is a firm whose gross revenues did not exceed five million dollars.³⁹⁷ The Census Bureau reported that 369 of the 410 firms listed had total revenues below five million dollars.³⁹⁸

131. *Refuse Systems (SIC 4953)*. The SBA defines a firm in the business of refuse as an establishment whose business is the collection and disposal of refuse "by processing or destruction or in the operation of incinerators, waste treatment plants, landfills, or other sites for disposal of such materials."³⁹⁹ The Census Bureau reports that a total of 2287 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small refuse system is a firm whose gross revenues did not exceed six million dollars.⁴⁰⁰ The Census Bureau reported that 1908 of the 2287 firms listed had total revenues below six million dollars.⁴⁰¹

132. *Sanitary Services, Not Elsewhere Classified (SIC 4959)*. The SBA defines these firms as engaged in sanitary services.⁴⁰² The Census Bureau reports that a total of 1214 such firms were in operation

³⁹³See *supra* note 369.

³⁹⁴13 C.F.R. § 121.201.

³⁹⁵See *supra* note 371.

³⁹⁶See *supra* note 369.

³⁹⁷13 C.F.R. § 121.201.

³⁹⁸See *supra* note 371.

³⁹⁹See *supra* note 369.

⁴⁰⁰13 C.F.R. § 121.201.

⁴⁰¹See *supra* note 371.

⁴⁰²See *supra* note 369.

for at least one year at the end of 1992. According to SBA's definition, a small sanitary service firms gross revenues did not exceed five million dollars.⁴⁰³ The Census Bureau reported that 1173 of the 1214 firms listed had total revenues below five million dollars.⁴⁰⁴

(5) *Steam and Air Conditioning Supply (SIC 4961)*

133. The SBA defines a steam and air conditioning supply utility as a firm who produces and/or sells steam and heated or cooled air.⁴⁰⁵ The Census Bureau reports that a total of 55 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a steam and air conditioning supply utility is a firm whose gross revenues did not exceed nine million dollars.⁴⁰⁶ The Census Bureau reported that 30 of the 55 firms listed had total revenues below nine million dollars.⁴⁰⁷

(6) *Irrigation Systems (SIC 4971)*

134. The SBA defines irrigation systems as firms who operate water supply systems for the purpose of irrigation.⁴⁰⁸ The Census Bureau reports that a total of 297 firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small irrigation service is a firm whose gross revenues did not exceed five million dollars.⁴⁰⁹ The Census Bureau reported that 286 of the 297 firms listed had total revenues below five million dollars.⁴¹⁰

b. Telephone Companies (SIC 4813)

135. Many of the decisions and rules adopted herein may have a significant effect on a substantial number of small telephone companies. The SBA has defined a small business for SIC code 4813 (Telephone Communications, except Radiotelephone) to be a small entity when it has no more than 1500 employees.⁴¹¹ The Census Bureau reports that, at the end of 1992, there were 3497 firms engaged in

⁴⁰³13 C.F.R. § 121.201.

⁴⁰⁴See *supra* note 371.

⁴⁰⁵See *supra* note 369.

⁴⁰⁶13 C.F.R. § 121.201.

⁴⁰⁷See *supra* note 371.

⁴⁰⁸See *supra* note 369.

⁴⁰⁹13 C.F.R. § 121.201.

⁴¹⁰See *supra* note 371.

⁴¹¹13 C.F.R. § 121.201.

providing telephone services, as defined therein, for at least one year.⁴¹² This number contains a variety of different categories of carriers, including local exchange carriers ("LECs"), interexchange carriers ("IXCs"), competitive access providers ("CAPs"), cellular carriers, mobile service carriers, operator service providers, pay telephone operators, personal communications service ("PCS") providers, covered SMR providers and resellers. Some of those 3497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."⁴¹³ We therefore conclude that fewer than 3497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this *Order*. Below, we estimate the potential number of small entity telephone service firms or small incumbent LEC's that may be affected by the rules adopted herein in this service category.

(1) *Wireline Carriers and Service Providers*

136. The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that, there were 2321 such telephone companies in operation for at least one year at the end of 1992.⁴¹⁴ According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1500 persons.⁴¹⁵ Of the 2321 non-radiotelephone companies listed by the Census Bureau, 2295 were reported to have fewer than 1000 employees. Thus, at least 2295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs, or small entities based on these employment statistics. Although some of these carriers are likely not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions or rules adopted in this *Order*.

(2) *Local Exchange Carriers*

137. Neither the Commission nor SBA has developed a definition of small providers of local exchange services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813).⁴¹⁶ The most reliable source of information regarding the number of LECs nationwide appears to be the data that the Commission publishes

⁴¹²United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) ("*1992 Census*").

⁴¹³15 U.S.C. § 632(a)(1).

⁴¹⁴*1992 Census, supra* at Firm size 1-123.

⁴¹⁵13 C.F.R. § 121.201.

⁴¹⁶*Id.*

annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service ("TRS"). According to "*TRS Worksheet*" data released in November 1997, there are 1371 companies reporting that they categorize themselves as LECs.⁴¹⁷ Although some of these carriers are likely not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1371 small incumbent LECs that may be affected by the rules adopted herein.

(3) *Interexchange Carriers*

138. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 143 companies reported that they were engaged in the provision of interexchange services.⁴¹⁸ Although some of these carriers are likely not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 143 small entity IXCs that may be affected by the decisions and rules adopted in this *Order*.

(4) *Competitive Access Providers*

139. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 109 companies reported that they were engaged in the provision of competitive access services.⁴¹⁹ Although some of these carriers are likely not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 109 small entity CAPs that may be affected by the decisions and rules adopted herein.

(5) *Cellular Service Carriers*

⁴¹⁷Federal Communications Commission, *Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997)* ("*TRS Worksheet*" data).

⁴¹⁸TRS Worksheet.

⁴¹⁹*Id.* This *TRS Worksheet* category also includes Competitive Local Exchange Carriers ("CLECs").

140. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4812). The most reliable source of information regarding the number of cellular service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. The *TRS Worksheet* places cellular licensees and Personal Communications Service ("PCS") licensees in one group. According to the most recent data, there are 804 carriers reporting that they categorize themselves as either PCS or cellular carriers.⁴²⁰ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 804 small entity cellular service carriers that may be affected by the decisions and rules adopted in this *Order*.

(6) *Mobile Service Carriers*

141. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 172 companies reported that they were engaged in the provision of mobile services.⁴²¹ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under SBA's definition. Consequently, we estimate that there are fewer than 172 small entity mobile service carriers that may be affected by the decisions and rules adopted in this *Order*.

(7) *Broadband Personal Communications Services ("PCS") Licensees*

142. The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years. For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁴²² These regulations defining "small entity" in the context of broadband

⁴²⁰*Id.*

⁴²¹*Id.*

⁴²²See *Report and Order* (Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS

PCS auctions has been approved by the SBA.⁴²³ No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auction. A total of 93 small and very small business bidders won approximately 40% of the 1479 licenses for Blocks D, E, and F.⁴²⁴ However, licenses for blocks C through F have not been awarded fully, therefore there are few, if any, small businesses currently providing PCS services. Based on this information, we conclude that the number of broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small PCS providers as defined by the SBA and the Commission's auction rules. We note that the *TRS Worksheet* data track PCS licensees in the reporting category "Cellular or Personal Communications Service Carrier." As noted *supra* in the paragraph regarding cellular carriers, according to the most recent data, there are 804 carriers reporting that they place themselves in this category.

(8) *Specialized Mobile Radio ("SMR") Licensees*

143. Pursuant to 47 C.F.R. §§ 90.814(b)(1) and 90.912(b)(1), the Commission has defined small entity in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than \$15 million in the three previous calendar years. This definition of a small entity in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.⁴²⁵ The rules adopted in this *Order* may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than \$15 million. We assume, for purposes of this FRFA, that all of the extended implementation authorizations may be held by small entities which may be affected by the decisions and rules adopted in this *Order*. We note that the *TRS Worksheet* data track SMR licensees in the reporting category "Paging and Other Mobile Carriers." According to the most recent data, there are 172 carriers, including SMR carriers, reporting that they place themselves in this category.

Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap), WT Docket No. 96-59, FCC 96-278 (1996) at ¶ 60, 61 FR 33859 (July 1, 1996).

⁴²³See *Fifth Report and Order* (Implementation of Section 309(j) of the Communications Act -- Competitive Bidding), PP Docket No. 93-253, 9 FCC Rcd 5532, 5581-84 (1994).

⁴²⁴FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (*rel.* January 14, 1997).

⁴²⁵See *Second Order on Reconsideration and Seventh Report and Order* (Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool), PR Docket No. 89-583, 11 FCC Rcd 2639, 2693-702 (1995); *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking* (Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band), PR Docket No. 93-144, 11 FCC Rcd 1463 (1995).

144. In April 1997, the Commission held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders that qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of 900 MHz geographic area SMR licensees affected by the rules adopted in this *Order* includes these 60 small entities. In December 1997, the Commission also held auctions for the 525 licenses for the upper 200 channels in the 800 MHz SMR band. There were 10 winning bidders that qualified as small entities in that auction. Based on this information, we conclude that the number of geographic area SMR licensees that may be affected by the rules adopted in this *Order* also includes these 10 small entities. However, the Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1000 employees and that no reliable estimate of the number of prospective 800 MHz licensees for the lower 230 channels can be made, we conclude, for purposes of this FRFA, that some or all of the licenses could conceivably be awarded to small entities that may be affected by the decisions and rules adopted in this *Order*.

(9) *Resellers*

145. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for all telephone communications companies (SIC 4812 and 4813). The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 339 companies reported that they were engaged in the resale of telephone services.⁴²⁶ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 339 small entity resellers that may be affected by the decisions and rules adopted in this *Order*.

c. Wireless (Radiotelephone) Carriers (SIC 4812)

146. Pursuant to the terms of the 1996 Act, wireless carriers are entitled to affix their equipment to utility poles with rates consistent with the Commission's rules discussed herein. SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1176 such companies in operation for at least one year at the end of 1992.⁴²⁷ According to SBA's definition, a small business radiotelephone company is one employing no more than 1500 persons.⁴²⁸ The Census Bureau also reported that 1164 of those radiotelephone companies had fewer than 1000 employees.

⁴²⁶TRs Worksheet.

⁴²⁷See 1992 Census.

⁴²⁸13 C.F.R. § 121.201.

Thus, even if all of the remaining 12 companies had more than 1500 employees, there would still be 1164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although some of these carriers are likely not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1164 small entity radiotelephone companies that may be affected by the rules adopted herein.

d. Cable System Operators (SIC 4841)

147. The SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than \$11 million in revenue annually.⁴²⁹ This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1423 such cable and other pay television services generating less than \$11 million in revenue.⁴³⁰

148. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.⁴³¹ Based on our most recent information, we estimate that there were 1439 cable systems that qualified as small cable system operators at the end of 1995.⁴³² Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable systems. Consequently, we estimate that there are fewer than 1439 small entity cable system operators that may be affected by the decisions and rules adopted in this *Order*.

149. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."⁴³³ The Commission found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined

⁴²⁹13 C.F.R. § 121.201.

⁴³⁰See *supra* note 369.

⁴³¹47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of \$100 million or less. *Sixth Report and Order and Eleventh Order on Reconsideration* (Implementation of Sections of the 1992 Cable Act: Rate Regulation), 10 FCC Rcd 7393.

⁴³²Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

⁴³³47 U.S.C. § 543(m)(2).

with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.⁴³⁴ Based on available data, we find that the number of cable systems serving 617,000 subscribers or less totals 1450. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable systems under the definition in the Communications Act.

e. Municipalities

150. The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than 50,000."⁴³⁵ There are 85,006 governmental entities in the United States.⁴³⁶ This number includes such entities as states, counties, cities, utility districts and school districts. We note that Section 224 specifically excludes any utility which is cooperatively organized, or any person owned by the Federal Government or any State. For this reason, we believe that Section 224 will have minimal if any affect upon small municipalities. Further, there are 18 states and the District of Columbia that regulate pole attachments pursuant to Section 224(c)(1). Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states. Of the 38,978 counties, cities and towns, 37,566 or 96%, have populations of fewer than 50,000.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

151. The rules adopted in this *Order* may require a change in certain recordkeeping requirements for conduit systems. A utility will now have to maintain specific records relating to the number of linear meters, or feet, of conduit for the purpose of determining the net cost of conduit and the amount of conduit linear measurement in which a pole attachment exists. Although this requirement affects both large and small businesses equally, we believe that through the use of presumptions, specific accounts and publicly available data in our methodology, we have avoided a more extensive regulatory scheme which might have burdened small entities. We conclude that our rules will not disproportionately burden small entities.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

152. Section 703 of the 1996 Act amended Section 224 in several important ways to provide access to and rate regulation for pole attachments by cable operators and telecommunications carriers in

⁴³⁴47 C.F.R. § 76.1403(b).

⁴³⁵5 U.S.C. § 601(5).

⁴³⁶United States Dept. of Commerce, Bureau of the Census, *1992 Census of Governments*.

order that they might compete in the market place to provide their respective services. The 1996 Act established a pole attachment rate methodology for telecommunications carriers that would not become effective until February 8, 2001. Until that time, pole attachments by telecommunications carriers will be regulated in the same manner as pole attachment rates for cable operators under Section 224(d). Prior to the 1996 Act, access to pole attachments was available only to cable operators and only under their franchise pursuant to Section 621. With the legislative expansion of access and rate regulation, small entities have greater opportunity to develop the infrastructure necessary to compete in the cable and telecommunications marketplaces. We have been mindful to maintain simplicity whenever possible, and to provide methodologies consistent with availability to publicly verifiable data. In the *Notice*, we sought comment to re-evaluate the formula methodologies used or proposed, to update our rules for accounting used in the formulas, and to provide a methodology for determining just and reasonable rates for pole attachments in conduit.

153. In accordance with the RFA, the Commission has endeavored to minimize significant impact on small entities. To minimize the burden on utility pole owners, including those that qualify as small entities, and to promote certainty and efficiency in determining the pole attachment rate for cable operators and telecommunications carriers, we have maintained our formula presumptions, including our one-foot presumption of space occupied by a pole attachment, and the presumptive amount of usable space on a pole.⁴³⁷ We have adopted a conduit methodology based on publicly available data and a half-duct presumption of capacity occupied by a pole attachment in a conduit system, to simplify the process of determining a just and reasonable pole attachment rate and to provide certainty for small entities preparing to enter the competitive marketplace. We have formalized the use of part 32 accounting for LECs. We have consolidated all formula elements, and accounts specified for use in the formulas, in this one document in order to provide ease of application by all parties.

154. **Report to Congress:** The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). A copy of the *Order* and this FRFA (or summary thereof) will also be published in the Federal Register, *see* 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

155. The requirements adopted in this *Order* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and found to impose modified information collection requirements on the public. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to take this opportunity to comment on the information collection requirements contained in this *Order*, as required by the 1995 Act. Public comments are due 60 days from date of publication of this *Order* in the Federal Register. Comments should address: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether

⁴³⁷See Section V.A above.

the information shall have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

156. As stated above, written comments by the public on the modified information collection requirements are due 60 days from date of publication of this *Order* in the Federal Register. Comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, NW, Washington, DC 20554, or via the Internet to jboley@fcc.gov. For additional information on the information collection requirements, contact Judy Boley at 202-418-0214 or via the Internet at the above address.

IX. ORDERING CLAUSES

157. IT IS ORDERED that, pursuant to Sections 1, 4(i), 224 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 224 and 303(r), the Commission's rules are hereby amended as set forth in Appendix A.

158. IT IS FURTHER ORDERED that Section 1.1402 of the Commission's rules, as amended in Appendix A hereto, will become effective 30 days after the date of publication of this *Report and Order* in the Federal Register, and that Sections 1.1404 and 1.1409 of the Commission's rules, as amended in Appendix A hereto, will become effective 140 days after the date of publication of this *Report and Order* in the Federal Register, unless the Commission publishes a notice before that date stating that the Office of Management and Budget ("OMB") has not approved the information collection requirements contained in the rules.

159. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

APPENDIX A

Revised Rules

Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 — PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r) and 309.

2. Amend § 1.1402 to revise paragraphs (c), (i), (j) and (l) and add paragraph (n) to read as follows:

§ 1.1402 Definitions.

* * * * *

(c) With respect to poles, the term usable space means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility. With respect to conduit, the term usable space means capacity within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable and associated equipment for telecommunications or cable services, and which includes capacity occupied by the utility.

* * * * *

(i) The term conduit means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.

(j) The term conduit system means a collection of one or more conduits together with their supporting infrastructure.

* * * * *

(l) With respect to poles, the term unusable space means the space on a utility pole below the usable space, including the amount required to set the depth of the pole.

* * * * *

(n) The term inner-duct means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.

* * * * *

3. Amend § 1.1404 to remove paragraph (k), and redesignate old paragraphs (l) (m) and (n) as (k), (l), and (m), respectively; revise the first sentence of paragraph (g), paragraphs (g)(10), (g)(13), the last (unnumbered) paragraph of paragraph (g); revise paragraph (h); and revise paragraph (j), to read as follows:

§ 1.1404 Complaint.

* * * * *

(g) For attachments to poles, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim. * * *

* * * * *

(10) The rate of return authorized for the utility for intrastate service. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which establishes this authorized rate of return if the rate of return is at issue in the proceeding and shall note the section which specifically establishes this authorized rate and whether the decision is subject to further proceedings before the state regulatory body or a court. In the absence of a state authorized rate of return, the rate of return set by the Commission for local exchange carriers shall be used as a default rate of return.

* * * * *

(13) Reimbursements received from CATV operators and telecommunications carriers for non-recurring costs; and

Data and information should be based upon historical or original cost methodology, insofar as possible. Data should be derived from ARMIS, FERC 1, or other reports filed with state or federal regulatory agencies (identify source). Calculations made in connection with these figures should be provided to the complainant. The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.

* * * * *

(h) With respect to attachments within a duct or conduit system, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim. The data and information shall include, where applicable:

- (1) The gross investment by the utility for conduit;
- (2) The accumulated depreciation from the gross conduit investment;
- (3) The system duct length or system conduit length and the method used to determine it;
- (4) The length of the conduit subject to the complaint;
- (5) The number of ducts in the conduit subject to the complaint;
- (6) The number of inner-ducts in the duct occupied, if any. If there are no inner-ducts, the attachment is presumed to occupy one-half duct.

(7) The annual carrying charges attributable to the cost of owning conduit. These charges may be expressed as a percentage of the net linear cost of a conduit. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which determines the treatment of accumulated deferred taxes if it is at issue in the proceeding and shall note the section which specifically determines the

treatment and amount of accumulated deferred taxes.

(8) The rate of return authorized for the utility for intrastate service. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which establishes this authorized rate of return if the rate of return is at issue in the proceeding and shall note the section which specifically establishes this authorized rate and whether the decision is subject to further proceedings before the state regulatory body or a court. In the absence of a state authorized rate of return, the rate of return set by the Commission for local exchange carriers shall be used as a default rate of return; and

(9) Reimbursements received by utilities from CATV operators and telecommunications carriers for non-recurring costs; and

Data and information should be based upon historical or original cost methodology, insofar as possible. Data should be derived from ARMIS, FERC 1, or other reports filed with state or federal regulatory agencies (identify source). Calculations made in connection with these figures should be provided to the complainant. The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.

* * * * *

(j) ***A utility must supply a cable television operator or telecommunications carrier the information required in paragraph (g), (h) or (i) of this section, as applicable, along with the supporting pages from its ARMIS, FERC Form 1, or other report to a regulatory body, within 30 days of the request by the cable television operator or telecommunications carrier.***

(k) The complaint shall include a brief summary of all steps taken to resolve the problem prior to filing. If no such steps were taken, the complaint shall state the reason(s) why it believed such steps were fruitless.

(l) Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(m) In a case where a cable television system operator or telecommunications carrier claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. § 224(f), the complaint shall be filed within 30 days of such denial. In addition to meeting the other requirements of this section, the complaint shall include the data and information necessary to support the claim, including:

(1) The reasons given for the denial of access to the utility's poles, ducts, conduits and rights-of-way;

(2) The basis for the complainant's claim that the denial of access is improper;

(3) The remedy sought by the complainant;

(4) A copy of the written request to the utility for access to its poles, ducts, conduits or rights-of-way; and

(5) A copy of the utility's response to the written request including all information given by the utility to support its denial of access. A complaint alleging improper denial of access will not be dismissed if the complainant is unable to obtain a utility's written response, or if the utility denies the complainant any other information needed to establish a prima facie case.

* * * * *

4. Amend § 1.1409 to revise paragraph (e)(1); add new paragraph (e)(3) and redesignate old paragraph (e)(3) as paragraph (e)(4); and revise paragraph (f) to read as follows:

§ 1.1409 Commission consideration of the complaint.

(e)***

(1) The following formula shall apply to attachments to poles by cable operators providing cable services. This formula shall also apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate}$$

(3) The following formula shall apply to attachments to conduit by cable operators providing cable services. This formula shall also apply to attachments to conduit by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\text{Maximum Rate} = \left[\frac{1}{\text{Number of Ducts}} \times \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \right] \times \left[\frac{\text{No. of Ducts}}{\text{Ducts}} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length}} \right] \times \text{Carrying Charge Rate}$$

(Percentage of Conduit Capacity) (Net Linear Cost of a Conduit)

If no inner-duct is installed the fraction, "1 Duct divided by the No. of Inner-Ducts" is presumed to be 1/2.

(4) Subject to paragraph (f) the following formula shall apply to pole attachments within a conduit system beginning on February 8, 2001:

$$\text{Maximum Conduit Rate} = \text{Conduit Unusable Space Factor} + \text{Conduit Usable Space Factor}$$

For purposes of this formula, the conduit unusable space factor, as defined under Section 1.1417(c), and the conduit usable space factor, as defined under Section 1.1418(c), shall apply to each linear foot occupied.

(f) Paragraphs (e)(2) and (e)(4) of this section shall become effective February 8, 2001 (i.e., five years after the effective date of the Telecommunications Act of 1996). Any increase in the rates for pole attachments that result from the adoption of such regulations shall be phased in over a period of five years beginning on the effective date of such regulations in equal annual increments. The five-year phase-in is to apply to rate increases only. Rate reductions are to be implemented immediately. The determination of any rate increase shall be based on data currently available at the time of the calculation of the rate increase.

APPENDIX B**List of Commenters**

Note: If no abbreviation appears in parentheses following the full name of the party, the full name is used in this *Order*.

Comments in CS Docket No. 97-98

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation and Florida Power and Light Company (American Electric)

Ameritech

Association for Local Telecommunications Services

AT&T Corp. (AT&T)

Bell Atlantic & NYNEX (Bell Atlantic/NYNEX)

BellSouth Corporation (BellSouth)

Carolina Power & Light Company, Delmarva Power & Light Company, Atlantic City Electric Company, Entergy Services, Florida Power Corporation, Pacific Gas and Electric Company, Potomac Electric Power Company, Public Service Company of Colorado, Southern Company, Georgia Power, Alabama Power, Gulf Power, Mississippi Power, Savannah Electric, Tampa Electric Company and Virginia Power, including North Carolina Power (Carolina Power)

Consolidated Edison Company of New York, Inc. (ConEd)

Duquesne Light Company (Duquesne Light)

Edison Electric Institute and UTC, the Telecommunications Association (Edison Electric/UTC)

GTE Service Corporation (GTE)

MCI Telecommunications Corporation (MCI)

National Cable Television Association, Cable Telecommunications Association, Texas Cable & Telecommunications Association, Cable Television Association of Georgia, South Carolina Cable Television Association, Cable Television Association of Maryland, Delaware and the District of Columbia, Mississippi Cable Telecommunications Association, Mid-America Cable Telecommunications Association, Kansas Cable Telecommunications Association, Jones Intercable, Inc., Charter Communications, Greater Media, Inc., Prime Cable, Rifkin & Associates, TCA Cable TV, Inc., and The Helicon Corporation (NCTA)

Ohio Edison Company (Ohio Edison)

Public Service Company of New Mexico (Public Service of New Mexico)

SBC Communications Inc. (SBC)

Small Cable Business Association (SBCA)

Southeastern Indiana Rural Electric Membership Cooperative (Southeastern Indiana REMC)

Southern New England Telephone Company (SNET)

Sprint Local Telephone Companies (Sprint)

Tele-Communications, Inc. (TCI)

Time Warner Cable (Time Warner)

Union Electric Company (Union Electric)

United States Telephone Association (USTA)

U S West, Inc. (U S West)

WorldCom, Inc. (WorldCom)

Reply Comments in CS Docket No. 97-98

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation and Florida Power and Light Company (American Electric)

Ameritech

AT&T Corp. (AT&T)

Bell Atlantic & NYNEX (Bell Atlantic/NYNEX)

Carolina Power & Light Company, Delmarva Power & Light Company, Atlantic City Electric Company, Entergy Services, Florida Power Corporation, Pacific Gas and Electric Company, Potomac Electric Power Company, Public Service Company of Colorado, Southern Company, Georgia Power, Alabama Power, Gulf Power, Mississippi Power, Savannah Electric, Tampa Electric Company and Virginia Power, including North Carolina Power (Carolina Power)

Chugach Electric Association (Chugach)

Edison Electric Institute and UTC, the Telecommunications Association (Edison Electric/UTC)

GTE Service Corporation (GTE)

KMC Telecom Inc. (KMC Telecom)

MCI Telecommunications Corporation (MCI)

National Cable Television Association, Cable Telecommunications Association, Texas Cable & Telecommunications Association, Cable Television Association of Georgia, South Carolina Cable Television Association, Cable Television Association of Maryland, Delaware and the District of Columbia, Mississippi Cable Telecommunications Association, Mid-America Cable Telecommunications Association, Kansas Cable Telecommunications Association, Jones Intercable, Inc., Charter Communications, Greater Media, Inc., Prime Cable, Rifkin & Associates, TCA Cable TV, Inc., and The Helicon Corporation (NCTA)

National Telephone Cooperative Association

Qwest

SBC Communications Inc. (SBC)

Tele-Communications, Inc. (TCI)

Time Warner Cable (Time Warner)

United States Telephone Association (USTA)

U S West, Inc. (U S West)

WorldCom, Inc. (WorldCom)

Ex Parte Communications by Parties Not Previously Filing Comments

New England Electric Systems (NEES)

APPENDIX C - 1
Pole Attachment Formulas (Poles) For
Local Exchange Carrier (LEC) Pole Owners
Using FCC ARMIS Part 32 Accounts

$$\text{Maximum Rate per Pole} = \frac{\text{Space Occupied}}{\text{Usable Space}} \times \frac{\text{Net Pole Investment}}{\text{Total Number of Poles}} \times 0.95 \times \text{Carrying Charge Rate}$$

Where:

Space Occupied = 1 foot (presumed, but rebuttable)

Usable Space = 13.5 feet (presumed, but rebuttable)

$$\text{Net Pole Investment} = \frac{\text{Gross Pole Investment}}{\text{(Account 2411)}} - \frac{\text{Accumulated Depreciation}}{\text{(Account 3100)(Poles)}} - \frac{\text{Accumulated Deferred Income Taxes}}{\text{(Account 4100 + 4340)(Poles)}}$$

Carrying Charge Rate = Administrative + Maintenance + Depreciation + Taxes + Return

$$\text{Administrative Element} = \frac{\text{Total General and Administrative (Accounts 6710 \& 6720)}}{\frac{\text{Gross Plant Investment}}{\text{(Account 2001)}} - \frac{\text{Accumulated Depreciation}}{\text{(Account 3100)}} - \frac{\text{Accumulated Deferred Taxes (Plant) (Accounts 4100 + 4340)}}{\text{(Account 4100 + 4340)}}$$

$$\text{Maintenance Element} = \frac{\text{Account 6411} - \text{Rental Expense (Poles)}}{\text{Net Pole Investment}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Pole Investment (Account 2411)}}{\text{Net Pole Investment}} \times \text{Depreciation Rate for Gross Pole Investment}$$

$$\text{Taxes Element} = \frac{\text{Operating Taxes (Account 7200)}}{\frac{\text{Gross Plant Investment}}{\text{(Account 2001)}} - \frac{\text{Accumulated Depreciation}}{\text{(Account 3100)}} - \frac{\text{Accumulated Deferred Taxes (Plant) (Accounts 4100 + 4340)}}{\text{(Account 4100 + 4340)}}$$

Return Element = Applicable Rate of Return (default = 11.25%)

Appendix C - 2
Pole Attachment Formulas (Poles) For
Electric Utility Pole Owners Using FERC Part 101 Accounts

$$\text{Maximum Rate per Pole} = \frac{\text{Space Occupied}}{\text{Usable Space}} \times \frac{\text{Net Pole Investment}}{\text{Total Number of Poles}} \times 0.85 \times \text{Carrying Charge Rate}$$

Where:

Space Occupied = 1 foot (presumed, but rebuttable)

Usable Space = 13.5 feet (presumed, but rebuttable)

Net Pole Investment = $\frac{\text{Gross Pole Investment (Account 364)} - \text{Accumulated Depreciation (Account 108)(Poles)} - \text{Accumulated Deferred Income Taxes (Account 109)(Poles)}}{\text{Total Number of Poles}}$

Carrying Charge Rate = Administrative + Maintenance + Depreciation + Taxes + Return

Administrative Element = $\frac{\text{Total General and Administrative (FERC Form 1, p. 323, line 168, col. b.)}}{\text{Gross Plant Investment (FERC Form 1, p. 200, col. b.)} - \text{Accumulated Depreciation (Account 108)} - \text{Accumulated Deferred Taxes (Plant) (Account 190)}}$

Maintenance Element = $\frac{\text{Account 593}}{\text{Pole Investment in Accounts 364, 365, \& 369} - \text{Depreciation (Poles) Related to Accounts 364, 365, \& 369} - \text{Accumulated Deferred Income Taxes related to Accounts 364, 365, \& 369}}$

Depreciation Element = $\frac{\text{Gross Pole Investment (Account 364)}}{\text{Net Pole Investment}} \times \text{Depreciation Rate for Gross Pole Investment}$

Taxes Element = $\frac{\text{Accounts 408.1 + 409.1 + 410.1 + 411.4 - 411.1}}{\text{Gross Plant Investment (FERC Form 1, p. 200, col. b.)} - \text{Accumulated Depreciation (Account 108)} - \text{Accumulated Deferred Taxes (Plant) (Account 190)}}$

Return Element = Applicable Rate of Return (default = 11.25%)

APPENDIX C -3
Pole Attachment Formulas (Conduit) For
Local Exchange Carrier (LEC) Conduit Owners
Using FCC ARMIS Part 32 Accounts

$$\text{Maximum Rate} = \frac{\text{Percentage of Conduit Capacity Occupied}}{\text{Occupied}} \times \frac{\text{Net Linear Cost of Conduit}}{\text{of Conduit}} \times \frac{\text{Carrying Charge Rate}}{\text{Rate}}$$

Where:

$$\frac{\text{Percentage of Conduit Capacity Occupied}}{\text{Occupied}} = \frac{1}{\text{Number of Inner Ducts } (\geq 2)} \times \frac{1}{\text{Number of Ducts in Conduit}}$$

$$\frac{\text{Net Linear Cost of Conduit}}{\text{of Conduit}} = \frac{\text{Number of Ducts in Conduit}}{\text{in Conduit}} \times \frac{\text{Net Conduit Investment}}{\text{Total Conduit System Duct Length (ft. or m.)}} \text{ OR } = \frac{\text{Net Conduit Investment}}{\text{Total Length of Conduit in System}}$$

$$\text{Net Conduit Investment} = \frac{\text{Gross Conduit Investment (Account 2441)}}{\text{(Account 2441)}} - \frac{\text{Accumulated Depreciation (Account 3100)(Conduit)}}{\text{(Account 3100)(Conduit)}} - \frac{\text{Accumulated Deferred Income Taxes (Account 4100 + 4340)(Conduit)}}{\text{(Account 4100 + 4340)(Conduit)}}$$

$$\text{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

$$\text{Administrative Element} = \frac{\text{Total General and Administrative Expenses (Accounts 6710 \& 6720)}}{\frac{\text{Gross Plant Investment (Account 2001)} - \text{Accumulated Depreciation (Account 3100)} - \text{Accumulated Deferred Taxes (Plant) (Accounts 4100 + 4340)}}{\text{(Account 2001)} - \text{(Account 3100)} - \text{(Accounts 4100 + 4340)}}$$

$$\text{Maintenance Element} = \frac{\text{Conduit Maintenance Expense (Account 6441)}}{\text{Net Conduit Investment}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Conduit Investment (Account 2441)}}{\text{Net Conduit Investment}} \times \frac{\text{Depreciation Rate for Conduit}}{\text{for Conduit}}$$

$$\text{Taxes Element} = \frac{\text{Operating Taxes (Account 7200)}}{\frac{\text{Gross Plant Investment (Account 2001)} - \text{Accumulated Depreciation (Account 3100)} - \text{Accumulated Deferred Taxes (Plant) (Accounts 4100 + 4340)}}{\text{(Account 2001)} - \text{(Account 3100)} - \text{(Accounts 4100 + 4340)}}$$

$$\text{Return Element} = \text{Applicable Rate of Return (default } \cong 11.25\%)$$

APPENDIX C - 4
Pole Attachment Formulas (Conduit) For
Electric Utility Conduit Owners
Using FERC Part 101 Accounts

$$\text{Maximum Rate} = \frac{\text{Percentage of Conduit Capacity Occupied}}{\text{Conduit Capacity}} \times \frac{\text{Net Linear Cost of Conduit}}{\text{of Conduit}} \times \frac{\text{Carrying Charge Rate}}{\text{Rate}}$$

Where:

$$\frac{\text{Percentage of Conduit Capacity Occupied}}{\text{Occupied}} = \frac{1}{\text{Number of Inner Ducts } (\geq 2)} \times \frac{1}{\text{Number of Ducts in Conduit}}$$

$$\frac{\text{Net Linear Cost of Conduit}}{\text{of Conduit}} = \frac{\text{Number of Ducts in Conduit}}{\text{in Conduit}} \times \frac{\text{Net Conduit Investment}}{\text{Total Conduit System Duct Length (ft. or m.)}} \text{ OR } = \frac{\text{Net Conduit Investment}}{\text{Total Length of Conduit in System}}$$

$$\text{Net Conduit Investment} = \frac{\text{Gross Conduit Investment (Account 366)}}{\text{(Account 366)}} - \frac{\text{Accumulated Depreciation (Account 108)(Conduit)}}{\text{(Account 108)(Conduit)}} - \frac{\text{Accumulated Deferred Income Taxes (Account 109)(Conduit)}}{\text{(Account 109)(Conduit)}}$$

$$\text{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

$$\text{Administrative Element} = \frac{\text{Total General and Administrative Expenses (FERC Form 1, p.323, line 168, col. b)}}{\text{Gross Plant Investment (FERC Form 1, p.200, col. b) - Accumulated Depreciation (Account 108) - Accumulated Deferred Taxes (Plant) (Account 190)}}$$

$$\text{Maintenance Element} = \frac{\text{Account 594}}{\text{Conduit Investment in Accounts 366, 367, \& 369 - Depreciation (Poles) in Accounts 366, 367, \& 369 - Accumulated Deferred Income Taxes related to Accounts 366, 367, \& 369}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Conduit Investment (Account 366)}}{\text{Net Conduit Investment}} \times \frac{\text{Depreciation Rate for Conduit}}{\text{for Conduit}}$$

$$\text{Taxes Element} = \frac{\text{Accounts 408.1 + 409.1 + 410.1 + 411.4 - 411.1}}{\text{Gross Plant Investment (FERC Form 1, p.200, col. b) - Accumulated Depreciation (Account 108) - Accumulated Deferred Taxes (Plant) (Account 190)}}$$

$$\text{Return Element} = \text{Applicable Rate of Return (default } \approx 11.25\%)$$