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

In the Matter of	**)**	
	)	
Amendment of Rules and	**)**	**CS Docket No. 97-98**
Policies Governing Pole	**)**	
Attachments	**)**	

OPPOSITION
WORLDCOM, INC

1. Summary

WorldCom, Inc. ("WorldCom") takes this opportunity to respond to parties petitioning the Commission to reconsider various aspects of its "Cable Rate Order" implementing Section 224 of the 1996 Act.[1] Petitioning parties, mostly electric companies, but also the United States Telephone Association (USTA), find the Commission has failed to properly address constitutional takings issues; has failed to adopt the proper pricing methodology; and has failed to properly address spacing, height, and overlashing of pole and conduit attachments. Except for the

[1]Amendment of Rules and Policies Governing Pole Attachments, Report and Order ("Cable Rate Order"), CS Docket No. 97-98, Released April 3, 2000.

constitutional takings issues, the parties fail to raise any new issues or arguments not already addressed by competitive entrants or the Commission. The constitutional takings arguments are not ripe for consideration, since the rates have yet to be set on the basis of this Cable Rate Order. In any case, it is up to the courts, not the Commission, to determine whether an unjustified takings has occurred.[2] The Commission should therefore reject these petitions.

II. Takings Issues

[2]The Utilities have come before this Court seeking review of the constitutionality of a Congressional enactment, one which "determined" that telecommunications carriers shall have nondiscriminatory access to utilities' poles and conduits. 47 U.S.C. § 224(f). The Court's judicial review of that "determination" serves to ensure that Congress has not overstepped its authority. Judicial review of a just compensation determination guards against similar abuses. Gulf Power v. United States, 998 F. Supp. 1386, 1390 (N.D. Fla 1998).

The electric utilities argue, to varying degrees, that the Commission must,[3] or may,[4] adopt pricing rules based on the fair market value of the property in question when a government taking is involved. Alabama argues that once the Florida Appellate Court determined that Section 224 of the 1996 Act involved a taking of utility property, the Commission becomes required to refrain from using rate regulation to determine compensation and must rely only on fair market value to determine compensation.[5] Significantly, Alabama does not offer any citations supporting the claim that the Commission may not use rate regulation when a takings is involved. Alabama states that the best example that a compensation standard more favorable to the owning utility must be used in a takings case is the opinion of a dissenting Judge.[6] At best, it is hard to see how the Commission is bound by a dissenting opinion. Significantly, the Florida Appellate Court did not support the dissenting Judge. In Gulf I it stated that "...[a]ll that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking."[7]

AEP takes a less extreme position, arguing that the Commission may address the constitutionality of its pole attachment formulas in this reconsideration.[8] So far, none of the

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[3]Alabama Power, Georgia Power, Gulf Power, Mississippi Power, Savannah Electric and Power, and Southern Company, (Alabama) at 7.

[4]American Electric Power, Commonwealth Edison, and Duke Energy, (AEP) at 4.

[5]Alabama at 7.

[6]Alabama at 9.

[7]Gulf Power v. United States, 998 F. Supp. 1386, 1390 (N.D. Fla 1998).

[8]AEP et. al. at 3.

electric companies present convincing evidence that the Commission's rate formulas do not permit full compensation. AEP promises to provide this evidence at some point in the future.[9] Alabama purports to show the Commission's formula is non-compensatory because it yields an attachment rate one-third of the rate yielded by the formula for telecommunications attachments. Simple examination however, shows that the difference is due to the fact that the telecommunications rate formula allocates three times the pole space to a telecommunications attachment than a cable attachment.[10] The Commission can hardly be faulted for adhering to Congress' direction not to allocate costs of non-usable space to cable attachments.[11]

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[9]Id., at 3.

[10]Alabama Affidavit at 2,3

[11]Section 224(d)

III. Pricing Methodology

The electric utilities also contend that the Commission erred in adopting historic costs as the basis of its rate formula rather than opting for negotiated rates without a cost ceiling to guide negotiations.

Edison Electric Institute (EEI) argues that the Commission failed to respond to electric utility arguments in favor of a rate negotiated in the absence of a cost ceiling.[12] However, the Commission's Cable Rate Order did explicitly cite electric company arguments in favor of negotiated rates; identify that the justification of such rates depended on the presence of a competitive market; and cite record evidence showing the market for pole attachments was not competitive.[13] In any case, the Commission has consistently relied on negotiated rates. It has merely established an upper bound on attachment rates to speed negotiation and dispute resolution.[14]

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[12]EEI at 4.

[13]Order at ¶ 8.

[14]Amendment of Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking ("Notice"), CS Docket No. 97-98, Released March 14, 1997, at ¶ 4.

The electric companies also contend that the Commission failed to respond to the merits of their arguments in favor a formula based on forward looking cost, and defended its use of historical cost solely because this rate formula would reduce disputes and be administratively efficient.[15] First, the electric companies seriously understate the social benefits of administrative efficiency and efficient dispute resolution. Competitive entrants place a high value on being able to estimate with certainty their entry costs and the timing of their entry into a new market. An entity with a monopoly over an essential input can introduce enough uncertainty about cost and ability to serve a new customer in a timely way so as to significantly retard entry. The Commission's use of historic costs, based on accounting records that are instantaneously available to utilities, greatly enhanced competitive entry and provided a significant benefit to society. Second, the Commission did defend its use of historic cost as the most likely interpretation of Congress' intent.[16] Moreover, as WorldCom demonstrated in its Reply Comments, Section 224(i) prevented the Commission from adopting a forward looking cost methodology.[17]

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[15]Alabama at 7; AEP at 8; EEI at 8.

[16]Order at ¶¶ 8,9.

[17]A forward looking methodology would base attachment rates for those already on the pole on an estimated need for short term pole upgrades. However, Section 224(i) prevents upgrade costs from being allocated to current attaching parties. See WorldCom Reply Comments at 19.

IV. Spacing, Height, Overlashing

1. Pole Space

1. Wind Loading

Electric utilities contend that the Commission improperly accounted for wind loading and other stress factors in non-recurring make ready costs, rather than recover these costs in a recurring rate.[18] As a matter of economics, costs associated with maximum stress placed on a pole are fixed costs and therefore more efficiently recovered as a non-recurring cost. The electric utilities fail to understand that make ready costs include the costs associated with upgrading and/or replacing a pole if additional attachments, or overlashings, stress the pole to the point that it would need to be replaced. The Commission explicitly cites the possibility of pole upgrades as a result of additional wind or ice stress.[19] In that case, according to Section 224(i), the party seeking to place that attachment or overlash would be fully responsible for the pole replacement cost.

2. Ground Clearance

Electric companies also complain that their request to decrease the amount of usable pole space by inflating the amount of average line sage fell on deaf ears.[20] The Commission and other parties certainly addressed the electric utility company arguments in this proceeding. The Commission clearly and correctly points out the ground clearance requirements in the National

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[18]AEP at 10; EEI at 10.

[19]Order at ¶28.

[20]EEI at 10.

Electric Safety Code (NESC) include an average amount of sag, which is what it relied on to reject the electric companies' reliance on higher, weakly documented, sag estimates.[21]

3. Overlashing

The electric companies are correct that the Commission did not address their point that the feasibility of overlashing means the presumptive one foot amount of space required for an attachment is excessive, and that attaching entities should be charged on the basis of less than one foot of usable space.[22]

[21]Order at ¶23.

[22]AEP at 10.

4. Pole Height

Alabama argues that it has presented "overwhelming evidence" that 30 foot poles should not be included in the calculation of average pole height. However, WorldCom and others, including other electric utilities, presented even more overwhelming evidence that 30 foot poles were regularly used to make cable and telecommunications attachments.[23] The Commission explicitly referenced this substantial evidence in its Order.[24]

5. Safety Space

EEI argues that the Commission dismissed or ignored the NESC guidelines which established a 40 inch safety space between electric and cable pole attachments.[25] This statement is a gross misinterpretation. The Commission did not ignore the NESC. It merely reaffirmed long-established policy that identified this safety space as space in which cable attachments may not be placed, but in which electric attachments are often placed.[26] The electric companies persist in raising the same arguments first offered and rejected 20 years ago.

2. Conduit Space

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[23]WorldCom Reply Comments at 26.

[24]Order at ¶ 26.

[25]EEI at 9.

[26]Order at ¶¶ 20-22.

Electric companies also ask the Commission to reconsider its half-duct presumption. First they argue that the Commission misinterpreted the NESC guideline permitting an electric and communication cable to occupy the same duct when the cables are maintained by the same utility.[27] The Commission used this guideline to conclude that a communications cable does not require a whole duct, even if the duct is already partly occupied by an electric cable.[28] If the duct is not already occupied by an electric cable, there is room for an electric cable, or at least one other communication cable. This is not a misinterpretation. It is clear evidence that a communications cable does not occupy the whole of a duct, and that other cables, of all types, may occupy the remaining space at another time. In these same petitions, the Electric companies ask the Commission to recognize that the feasibility of overlashings on a pole show that the one foot presumption pole attachments is excessive. They ask the Commission to allocate only the space required by the attachment.[29] The issue is the same with regard to conduit space. Attaching entities should only be allocated the minimum amount needed for their attachment. It is inconsistent at best to now ask the Commission to "...treat communications and electric cables as

[27]AEP at 11.

[28]Order at ¶ 94.

[29]They take this position to in effect prohibit free overlashings.

if each is occupying an entire duct," even when they are not occupying an entire duct.[30]

[30]EEI at 12.

USTA asks the Commission to reconsider its decision to consider maintenance ducts as usable conduit space.[31] USTA directs its arguments to the Commission's statements that the costs of maintenance ducts are recovered through net investment accounts and/or carrying charge rate. The key argument though, is that so-called maintenance ducts are regularly used not for maintenance purposes, but on an ongoing basis by incumbent local exchange companies.[32] WorldCom's Reply Comments also explained how repairs are accomplished without the use of a permanent reserve duct.[33]

22. Conclusion

For the reasons discussed above, WorldCom urges the Commission to adopt its recommendations.

Respectfully submitted,

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[31]USTA at 5.

[32]Order at ¶ 90, fn 291.

[33]WorldCom Reply Comments at 48.

Statement of Verification

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

Executed on July 20, 2000

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CERTIFICATE OF SERVICE

I, Tabitha P. Broady, do hereby certify that copies of the foregoing Reply Comments has been sent by United States first class mail, postage prepaid, hand delivery, to the following parties on this 20th July, 2000.

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