

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

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

**REPLY TO OPPOSITIONS TO
PETITION FOR RECONSIDERATION
OF
AMERICAN ELECTRIC POWER SERVICE CORPORATION, COMMONWEALTH
EDISON COMPANY AND DUKE ENERGY CORPORATION**

Pursuant to Section 1.429 of the Commission's Rules, American Electric Power Service Corporation, Commonwealth Edison Company, and Duke Energy Corporation (the "Electric Utilities") respectfully submit the following Reply to Oppositions to Petition for Reconsideration of the FCC's *Report and Order (R&O)*¹ in the above-captioned matter. The *R&O* addresses implementation of the Pole Attachments Act ("PAA")² through the adoption of final rates, terms, and conditions governing pole attachments for telecommunications providers until February 8, 2001, and for cable television systems indefinitely. The Electric Utilities submitted a Petition for Reconsideration ("Petition") of the *R&O* on June 16, 2000, and Verizon Communications and WorldCom submitted oppositions on July 20, 2000.

¹ *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Report and Order, FCC 00-116 (rel. Apr. 3, 2000) ("*R&O*").

² 47 U.S.C. § 224.

Collectively, Verizon and WorldCom oppose the Electric Utilities' arguments regarding: (1) the constitutionality of the pole attachment formulas; (2) using forward-looking costs to determine rates; (3) factoring pole capacity into rates; and (4) the half-duct presumption for conduits. As shown below, Verizon's and WorldCom's arguments either merely reiterate statements already made by the FCC, miss the point of the Electric Utilities' arguments, or are simply wrong. Therefore, they fail to state any reasons for denying the Petition.

I. THE TAKINGS ISSUE IS RIPE FOR REVIEW AND THE COMMISSION IS AUTHORIZED TO CONSIDER IT

In the Petition, the Electric Utilities' contended that the Commission's pole attachment and conduit formulas cause takings in violation the Fifth Amendment of the U.S. Constitution because, on their face, they do not and cannot provide just compensation to the Electric Utilities.³ WorldCom asserts that a takings argument is not ripe for consideration because no rates have yet been set and, in any event, the FCC is not authorized to determine whether a taking has occurred.⁴

Not surprisingly, WorldCom offers no support for its arguments. Contrary to its contentions, in *Gulf Power II*, one of the primary pole attachment cases, the 11th Circuit observed that "the just compensation question, when raised in a facial challenge to the 1996 Act, was not ripe *unless* the plaintiffs could show that just compensation would be denied in all cases."⁵ In the instant case, the Electric Utilities specifically stated in the Petition that they will

³ Petition for Reconsideration at 2 ("Petition").

⁴ Opposition of WorldCom, Inc. at 2.

⁵ *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1272 (11th Cir. 2000) ("*Gulf Power II*") (citing *Gulf Power Co. v. FCC*, 187 F.3d 1324 (11th Cir. 1999) ("*Gulf Power I*") (emphasis added)).

submit an expert report demonstrating that the FCC's rate formulas deny just compensation in all cases.⁶ The presentation of that report to the FCC is imminent.

WorldCom also ignores legal precedent cited by the Electric Utilities which directly addresses the FCC's authority to rule on the just compensation issue. As the Electric Utilities pointed out, the Supreme Court has held that while "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies . . . [t]his rule is not mandatory . . ."⁷ The power of federal agencies to review the constitutionality of statutes and regulations was recently acknowledged by the Commission itself in a case involving a "takings" challenge to the Commission's "must carry" rules for cable operators. There, the FCC stated, "We recognize that the [Supreme Court decision] may provide administrative agencies an opportunity to consider the constitutionality of implementing statutes under certain circumstances . . . the Supreme Court has made clear that such a consideration is at the discretion of the agency involved."⁸ Therefore, the FCC clearly has the authority to review the constitutionality of a statute.

II. THE OPPOSING PARTIES FAIL TO PRESENT SUFFICIENT REASON TO REJECT THE ELECTRIC UTILITIES' FORWARD-LOOKING COST PROPOSAL

Although the Electric Utilities urged the Commission to find the current rate formulas unconstitutional and devise new formulas that provide just compensation, they also argued in the alternative for it to at least adopt a forward-looking cost approach.⁹ WorldCom voiced its opposition on the ground that "the electric companies seriously underestimate the social benefits

⁶ Petition at 2.

⁷ Petition at 3, citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994).

⁸ *Id.*, citing *In the Matter of WXTV License Partnership, G.P.*, 15 FCC Rcd. 3308, ¶ 30 (2000).

⁹ *Id.* at 2.

of administrative efficiency and efficient dispute resolution."¹⁰ The Electric Utilities did not underestimate those factors; rather, they concluded that it is much more important for rate formulas to ensure a competitive market paradigm consistent with the Telecommunications Act of 1996 than it is to ensure that proceedings before the FCC are as quick and easy as possible.

As an initial matter, the PAA does not specify the precise method for calculating "operating expenses" and "actual capital costs." Rather, the Commission has authority to interpret the PAA to include forward-looking costs, and it implicitly acknowledges that in the *R&O*.¹¹ Nonetheless, WorldCom claims that Section 224(i) of the PAA prevents the FCC from adopting a forward-looking cost methodology, because it "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."¹²

WorldCom is incorrect in several respects. First, Section 224(i) only prevents upgrade costs from being allocated to current attaching parties if the upgrade cost is due to *another party's* addition or modification of an attachment.¹³ Furthermore, Section 224(i) only speaks to one-time costs associated with pole modifications. It has nothing to do with the rate formulas the FCC has imposed pursuant to Section 224(d) and (e). The Electric Utilities proposals regarding forward-looking costs relate to the cost basis for yearly rental rates, not one-time costs incurred

¹⁰ Opposition of WorldCom, Inc. at 6.

¹¹ *R&O* at ¶¶ 7-9.

¹² Opposition of WorldCom, Inc. at 6.

¹³ As the Electric Utilities demonstrated in the Petition, a current attacher's own additions or modifications, especially with regard to burdensome overlashing, can result in a pole needing to be upgraded. Moreover, when current attachers so burden a pole with their own additions and modifications that the next party seeking to attach equipment has no choice but to request the utility to upgrade the pole, the current attachers have in reality significantly contributed to the need for the upgrade. In that circumstance, Section 224(i) arguably should not prevent upgrade costs from being allocated to them. Thus, Section 224(i) does not bar the use of a forward-looking cost methodology.

when poles must be changed out. WorldCom misunderstands the Electric Utilities' argument in regard to forward-looking costs.

WorldCom's argument implies that a forward-looking cost methodology would be highly burdensome and administratively inefficient.¹⁴ There is no evidence that that is the case. While a forward-looking cost methodology would involve a change in methodology, there is no indication that it would be *unduly* cumbersome. In fact, the Electric Utilities presented evidence of a straightforward approach which could be used to incorporate forward-looking costs in the FCC's rate formula.¹⁵ Therefore, this approach cannot be dismissed out-of-hand as being too administratively inefficient.

Given that adoption of a highly accurate, market reflecting forward-looking cost methodology is feasible, the mere fact that the FCC's current rate formulas may allow for more administrative ease of use *cannot* stand as an excuse for continuing to produce unfair and inaccurate cost determinations. As the Electric Utilities described in their Petition and Comments in this proceeding, the Commission's current formulas result in rates that bear no relationship to the current market value of attachments, not to mention result in economic inefficiencies and misallocate resources.¹⁶ This blatantly and inequitably favors cable television operators and communications companies over utilities. Moreover, the Supreme Court has emphatically disclaimed the use of historical cost in situations analogous to this, observing that "[o]riginal cost is well termed the 'false standard of the past' [citations omitted] where, as here,

¹⁴ Petition at 9-11.

¹⁵ Reed Consulting Group, *Pricing for Utility Pole Attachments and Conduit Access: Recommended Analytical Guidelines*, pp. 44-47 (submitted with Electric Utilities' Comments).

¹⁶ *Id.* at 6-9; Comments at 29-34.

present market value in no way reflects that cost."¹⁷ Thus, administrative ease should not be an overriding factor in determining an appropriate pole attachment and conduit rate formula.

III. THE OPPOSING PARTIES FAIL TO PRESENT SUFFICIENT REASON TO REJECT THE ELECTRIC UTILITIES' PROPOSAL REGARDING POLE CAPACITY

The current Commission rules for determining the allocation of usable space on a pole are based purely on the height of the pole. The Electric Utilities have urged the Commission to consider the actual pole capacity utilized by an attaching entity (*e.g.*, taking into account wind loading, icing, and temperature changes).¹⁸ WorldCom attacks that proposal, stating "[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."¹⁹ It then reiterates what the Commission said in the *R&O*, stating that such costs should be addressed only in the initial make-ready charge for a pole, not the recurring annual rates.²⁰

As did the FCC, WorldCom entirely misses the point of the Electric Utilities' position. The Electric Utilities are not contending that the *initial costs* of preparing a pole should be recovered on an annual, recurring basis. Rather, their position is that the *amount of capacity used by attachers* should be considered to determine how much of the pole attachers use on an annual, recurring basis. *This is necessary to encourage attachers to make efficient use of poles.* Without such incentive, attachers have no reason to remove obsolete or unused cable; instead,

¹⁷ *United States v. Toronto, Hamilton & Buffalo Navigation Property*, 338 U.S. 396, 403 (1949). *See also* 8 Sackman, Nichols on Eminent Domain, Ch 14A-20 ("original cost is . . . largely regarded as unsatisfactory as a measure of value in eminent domain").

¹⁸ Petition at 9-10.

¹⁹ Opposition of WorldCom, Inc. at 7.

²⁰ *Id.* at 7; R&O at ¶ 28.

they may simply overlash new cable, thus increasing the amount of capacity they use. That increase results in, for example, greater wind loading and icing concerns.

WorldCom also states that "[t]he 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 the attaching entities should be charged on the basis of less than one foot of usable space."²¹ The Electric Utilities are not entirely clear on what WorldCom is trying to say here, but it appears to take their arguments out of the context in which they were originally presented. The Electric Utilities note that their arguments regarding overlashing are clearly set forth in *their* pleadings submitted to the FCC, including herein. Thus, they request that the FCC disregard WorldCom's statement.

IV. THE OPPOSING PARTIES FAIL TO JUSTIFY THE HALF-DUCT PRESUMPTION'S BIAS AGAINST UTILITIES

In their Petition, the Electric Utilities contended that because the sharing of duct space is precluded by the National Electric Safety Code ("NESC"), the Commission should not have adopted a half-duct presumption under which communications cables are presumed to use only half the space in a duct, but electric cables are presumed to use the entire duct.²² Rather, the FCC should forgo arbitrary distinctions and treat communications and electric cables as if each takes up an entire duct.²³ Both WorldCom and Verizon oppose that position and urge the FCC to affirm the half-duct presumption.²⁴

In support of their assertions, WorldCom and Verizon reiterate the reasoning in the *R&O* that because communications cables can share ducts with each other, they occupy only half-

²¹ Opposition of WorldCom, Inc. at 8.

²² Petition at 11-12.

²³ *Id.*

²⁴ Opposition of WorldCom, Inc. at 10-11; Opposition of Verizon at 1-2.

ducts.²⁵ The Electric Utilities set forth their arguments in this regard in their Petition, Comments, and Reply Comments.²⁶ The reasoning in the *R&O* (and by adoption of WorldCom and Verizon) however, ignores the fact that utilities are equally entitled to expect access to their ducts for electric cable, but because the NESC precludes communications cables from sharing ducts with electric cables²⁷, the communications cables necessarily occupy the entire ducts. Accordingly, basing a presumption only on a communications cable/communications cable comparison and not giving weight to a communications cable/electric cable comparison arbitrarily discriminates against utilities.

The Commission's claim that it is not communications cables that exclude electric cables, it is electric cables that exclude communications cables, is like arguing about whether a glass is half empty or half full. Of course, it is both. While a communications cable is excluded from ducts that already contain electric cables, electric cables are excluded from ducts that already contain communications cables. The owners of both types of cables equally bear the brunt of the NESC requirement. Thus, there is no logical or rational reason for favoring one over the other; they should be treated equally, with each being presumed to occupy an entire duct.

WorldCom asserts that the Electric Utilities' argument is inconsistent with their pole capacity argument, in which they contend that the specific amount of pole capacity used by an attacher should be a factor in computing the attacher's annual rate.²⁸ WorldCom argues that the Electric Utilities should not be heard to argue against a presumption of space occupation in one instance but not the other.²⁹ That argument, however, erroneously draws a comparison between

²⁵ Opposition of WorldCom, Inc. at 10-11; Opposition of Verizon at 1-2; *R&O* at ¶¶ 92-95.

²⁶ Petition at 11-12; Comments at 85-87; Reply Comments at 40-41.

²⁷ Unless under the same company's control.

²⁸ Opposition of WorldCom, Inc. at 10-11.

²⁹ *Id.*

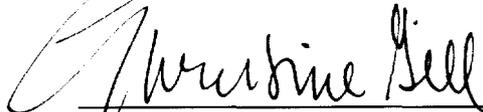
policies that apply to completely different things for completely different purposes. The Electric Utilities' proposed pole capacity policy is designed to encourage the efficient use of poles. Their proposed conduit presumption policy is designed to reconcile a limitation imposed by an NESC requirement. Therefore, comparisons between the two are inherently inapposite.

V. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, American Electric Power Service Corporation, Commonwealth Edison Company, and Duke Energy Corporation urge the Commission to consider this Reply to Oppositions to Petition for Reconsideration and proceed in a manner consistent with the views expressed herein.

Respectfully Submitted,

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I, Jane Aguilard, Legal Secretary with the law firm of McDermott, Will & Emery, hereby certify that on July 31, 2000, copies of the foregoing Reply to Oppositions were served as indicated on the following:

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