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Federal Communications Commission
Washington, D.C. 20554

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

FILED

In the Matter of ) CS Docket No. 97-151
Implementation of Section 703(e) of )
The Telecommunications Act of 1996 )

CONSOLIDATED PARTIAL ORDER ON RECONSIDERATION

Adopted: May 22, 2001

Released: May 25, 2001

By the Commission:

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## I. INTRODUCTION

1. In this Consolidated Partial Order on Reconsideration ("*Reconsideration Order*"), we consolidate two reconsideration proceedings raising similar and interrelated issues concerning the rates, terms and conditions of access for attachments by cable operators and telecommunications carriers to utility poles, ducts, conduits and rights-of-way pursuant to Section 224 of the Communications Act of 1934, *as amended* ("*Pole Attachment Act*")<sup>1</sup> and Subpart J of the Commission's Rules.<sup>2</sup> On February 6, 1998, we released a Report and Order, *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, FCC 98-20 ("*Telecom Order*"),<sup>3</sup> adopting rules implementing section 703(e) of the Telecommunications Act of 1996 ("*1996 Act*")<sup>4</sup> relating to pole attachments.<sup>5</sup> On April 3, 2000, we released a Report and Order, *Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, FCC 00-116 ("*Fee Order*")<sup>6</sup> addressing concerns about the application of our formula for determining reasonable rates for pole attachments. We have determined that it is in the interest of administrative efficiency and regulatory effectiveness to consolidate these two reconsideration proceedings.<sup>7</sup>

2. In the *Telecom Order*, we implemented Section 703(e) of the 1996 Act<sup>8</sup> by prescribing regulations,<sup>9</sup> effective February 8, 2001,<sup>10</sup> to ensure that a utility<sup>11</sup> complies with the Pole

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<sup>1</sup> 47 U.S.C. § 224.

<sup>2</sup> 47 C.F.R. §§ 1.1401-1.1418.

<sup>3</sup> 13 FCC Rcd 6777 (1998); *affirmed in part, reversed in part, Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000) ("*Gulf Power II*"), *motion for stay granted; petition for cert. granted January 22, 2001*.

<sup>4</sup> Pub. L. No. 104-104, 110 Stat. 61, 149-151.

<sup>5</sup> Section 703 of the 1996 Act amended § 224 of the Communications Act of 1934, *codified* at various subsections of 47 U.S.C. § 224. Section 703 codified at 47 U.S.C. ¶ 224(f) was challenged in court. *See Gulf Power, et al., v. FCC and USA*, 998 F. Supp. 1398 (N.D. Fla. 1998), *affirmed*, 187 F.3d 1324 (11th Cir. 1999) ("*Gulf Power I*").

<sup>6</sup> 15 FCC Rcd 6453 (2000).

<sup>7</sup> In deciding this matter, all of the petitions, comments in support or opposition to the petitions, and replies of all parties filed in both rulemaking reconsideration proceedings have been reviewed. We have determined that the two proceedings raise many of the same issues, cover the same statutory authority, 47 U.S.C. § 224, and involve the same industries (cable television systems, telecommunications systems and utilities). Many of the same industry representatives and parties submitted filings in both proceedings. *See* Appendix B and Appendix C for lists of all parties submitting filings. UTC/EEI suggest that the Commission should "... adopt all pole attachment-related regulations together so that the parties are given the ability to assess their rights and obligations." UTC/EEI *Telecom Order* Reconsideration Petition at 23.

<sup>8</sup> 47 U.S.C. § 224(e)(1-4); *see also*, 47 U.S.C. § 224(d)(3).

<sup>9</sup> *See Telecom Order* at Appendix A; 47 C.F.R. § 1.1401-1.1418.

<sup>10</sup> *See* 47 U.S.C. § 224(e)(4).

<sup>11</sup> A "utility" is defined as any person who is a local exchange carrier or an electric, gas, water, steam, or other public  
(...continued)

Attachment Act's requirements for just and reasonable rates, terms and conditions and nondiscriminatory access for pole attachments used to provide telecommunications services.<sup>12</sup> Among other things, the *Telecom Order* considered the 1996 Act, *Telecom Order* comments and *Telecom Order* reply comments filed in response to the *Telecom Order Notice*.<sup>13</sup> Increases in prescribed rates for telecommunications services attachers pursuant to section 224(e) of the Pole Attachment Act are to be phased in over five years beginning February 8, 2001.<sup>14</sup>

3. Appeals of the *Telecom Order* were consolidated in the United States Court of Appeals for the 11<sup>th</sup> Circuit and resulted in a decision, *Gulf Power, et al. v. FCC and USA* ("*Gulf Power II*").<sup>15</sup> That decision was stayed by the 11<sup>th</sup> Circuit Court of Appeals and the Commission filed a petition for certiorari with the United States Supreme Court which was granted. Because two issues, the application of the Pole Attachment Act to wireless telecommunications service providers and the effect of Internet service on pole attachments are the subject of the appeal of *Gulf Power II*, we decline to address those issues at this time, pending the issuance of a final mandate from the courts. In addition, the regulatory status of cable Internet access is the subject of an ongoing Notice of Inquiry ("NOI"),<sup>16</sup> the resolution of which may affect our determination of this issue. Therefore, we reserve review of our position that wireless telecommunications service providers are covered by the Pole Attachment Act and that Internet service is neutral for purposes of determining the character of the attachment as cable or telecommunications. However, these two issues remain open and will be the subject of a later order once we have received guidance from the courts and have had an opportunity to review the additional comments received in the NOI proceeding.

4. In the *Fee Order*, we adopted rules based on the comments filed in response to the *Fee Order Notice*.<sup>17</sup> We also considered the *Telecom Order* comments and reply comments when relevant to the issues addressed. Among other things, the *Fee Order* addressed the use of certain presumptions in our rate calculation methodology, the carrying charge rate elements used in our formulas, the use of gross versus net data in our formulas used to determine a maximum just and

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utility, and who owns or controls poles, ducts, conduit 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. 47 U.S.C. § 224(a)(1).

<sup>12</sup>47 U.S.C. § 224(e)(1). See also 47 U.S.C. § 224(a)(5) exempting pole attachments of telecommunications carriers who are also incumbent local exchange carriers ("ILECs").

<sup>13</sup> *Notice of Proposed Rulemaking, Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 12 FCC Rcd 11725 (1997).

<sup>14</sup> 47 U.S.C. § 224(e)(4); 47 C.F.R. § 1.1409(f).

<sup>15</sup> 208 F.3d 1263 (11 Cir. 2000).

<sup>16</sup> *Inquiry Concerning High-Speed Access to the Internet over Cable and other Facilities*, FCC 00-355 (released September 28, 2000).

<sup>17</sup> *Notice of Proposed Rulemaking, Amendment of Rules and Policies Governing Pole Attachments*, 12 FCC Rcd 7449 (1997).

reasonable rate for pole attachments, the regulatory accounts to be used in our formulas, and the formula used to determine a maximum rate for attachments to conduit.

5. In this *Reconsideration Order*, we grant in part and deny in part petitions for reconsideration and/or clarification of our *Telecom Order* ("*Telecom Order* petitions"). Nine *Telecom Order* petitions were filed, and in response 15 parties filed *Telecom Order* reconsideration comments and nine parties filed *Telecom Order* replies.<sup>18</sup> In this *Reconsideration Order*, we also grant in part and deny in part petitions for reconsideration and/or clarification of our *Fee Order* ("*Fee Order* petitions").<sup>19</sup> Five *Fee Order* petitions were filed and in response two parties filed *Fee Order* reconsideration comments and four parties filed *Fee Order* replies.<sup>20</sup>

6. In this *Reconsideration Order*, we

- (a) affirm our decision not to impose additional regulation on the negotiation process or on the rules for resolution of pole attachment complaints;<sup>21</sup>
- (b) affirm the continued use, in the pole attachment rate calculation formulas, of specific regulatory accounts maintained by utilities that identify the actual costs incurred by the utilities for the poles, ducts, conduits and rights-of-way that are the subject of the attachment;<sup>22</sup>
- (c) reconsider and clarify the way in which entities are counted for the purpose of allocating and apportioning costs of unusable space for telecommunications attachers after February 8, 2001;<sup>23</sup>
- (e) reconsider and clarify the geographic areas used to determine average numbers of attaching entities for use in calculations of the formulas for telecommunications pole attachment rates, and establish two presumptive averages that may be used in our formulas after February 8, 2001;<sup>24</sup>

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<sup>18</sup>See Appendix C.

<sup>19</sup>*Fee Order* petitions were filed by: American Electric Power Services Corporation, and others (American Electric), Southern Company Services, Inc., et al., (Southern Co.), Texas Cable & Telecommunications Association (TxCTA), United States Telecom Association (formerly the United States Telephone Association)(USTA), United Telecom Council and the Edison Electric Institute (UTC/EEI). A full listing of all parties filing *Fee Order* petitions, *Fee Order* comments and *Fee Order* replies to *Fee Order* petitions and comments, as well as abbreviations used to identify these parties in this *Reconsideration Order*, is contained in Appendix B, hereto.

<sup>20</sup>See Appendix B.

<sup>21</sup>See *Telecom Order* at ¶¶ 10-21.

<sup>22</sup>See *Telecom Order* at ¶¶ 122-124; see also, *Fee Order* at ¶¶ 8-11.

<sup>23</sup>Cf. *Telecom Order* at ¶¶ 45-58.

<sup>24</sup>Cf. *Telecom Order* at ¶¶ 74-79.

- (f) affirm and clarify our decisions regarding third party overloading;<sup>25</sup>
- (g) affirm the presumption that a pole attachment occupies one foot of usable space occupied and that this presumption is rebuttable by either party;<sup>26</sup>
- (h) affirm that the formula adopted in the *Fee Order*, for calculating the rate for use of capacity in a conduit, is applicable to telecommunications systems; affirm the use in the formula of the actual percentage of the conduit capacity occupied, with a rebuttable presumption that an attacher occupies one-half duct;<sup>27</sup> affirm our decision that there is no unusable capacity in a conduit;<sup>28</sup> and affirm our decision that a utility may not exclude reserved capacity within a conduit system when calculating total capacity upon which the pole attachment rate in a conduit is based;<sup>29</sup>
- (i) affirm our position that complaints regarding nondiscriminatory access, rates, terms and conditions for non-traditional pole attachments, such as attachments to rights-of-way, wireless attachments and transmission facilities attachments, will be considered under our rules on a case-by-case basis;<sup>30</sup>
- (j) reconsider and clarify our methodology for calculating maximum pole attachment rates when the net pole investment becomes zero or negative.<sup>31</sup>
- (k) decline to reconsider at this time and reserve for later review, our decision that Internet service has a neutral affect on an attacher's classification as a cable system or telecommunications system;
- (l) decline to reconsider at this time and reserve for later review, our decision that providers of wireless telecommunications services are entitled to the benefits and protection of the Pole Attachment Act; and
- (m) amend our rules to reflect our decisions in this *Reconsideration Order*.

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<sup>25</sup>See and cf. *Telecom Order* at ¶¶ 65-73 regarding treatment of unusable space, ¶¶ 92-95 regarding treatment of usable space.

<sup>26</sup>Cf. *Telecom Order* at ¶¶ 83-91.

<sup>27</sup>Cf. *Telecom Order* at ¶ 115.

<sup>28</sup>Cf. *Telecom Order* at ¶¶ 107-111. *Fee Order* at ¶¶ 90-91 and n. 290.

<sup>29</sup>See *Telecom Order* at ¶ 110. *Fee Order* at ¶ 91.

<sup>30</sup>See *Telecom Order* at ¶¶ 117-121 and n. 390.

<sup>31</sup>*Fee Order* at ¶¶ 31, 33-34.

## II. BACKGROUND

7. In 1978, Congress enacted section 224 of the Communications Act<sup>32</sup> granting the Commission authority to regulate the rates, terms, and conditions governing pole attachments, requiring that such rates, terms and conditions be just and reasonable.<sup>33</sup> The Commission is authorized to adopt procedures necessary to hear and to resolve complaints concerning such rates, terms, and conditions.<sup>34</sup> Congress sought to constrain the ability of utilities to extract monopoly profits from cable television system operators in need of pole, duct, conduit or right-of-way space for pole attachments.<sup>35</sup>

8. Section 224(d)(1) of the Pole Attachment Act defines a just and reasonable rate as ranging from the statutory minimum based on the additional costs of providing pole attachments, to the statutory maximum based on fully allocated costs.<sup>36</sup> The additional, or incremental, costs are the costs that would not be incurred by the utility *but for* the pole attachments.<sup>37</sup> The maximum rate, identified as a percentage of fully allocated costs, refers to the portion of operating expenses and capital costs that a utility incurs in owning and maintaining pole attachment infrastructure that is equal to the portion of space on a pole,<sup>38</sup> or capacity of a duct, conduit, or right-of-way,<sup>39</sup> that is occupied by an attacher.<sup>40</sup> The Commission developed a methodology<sup>41</sup> to determine the

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<sup>32</sup>Pub. L. No. 95-234, 92 Stat. 33 ("Pole Attachment Act") codified at Communications Act of 1934, as amended ("Communications Act"), § 224, 47 U.S.C. § 224.

<sup>33</sup>The Commission's authority does not extend to pole attachment rates, terms, and conditions that a state regulates. 47 U.S.C. § 224(c)(1). Jurisdiction for pole attachments reverts to the Commission generally if the state has not issued and made effective rules implementing the state's regulatory authority over pole attachments. Reversion to the Commission, with respect to individual matters, also occurs if the state does not take final action on a complaint within 180 days after its filing with the state, or within the applicable period prescribed for such final action in the state's rules, as long as that prescribed period does not extend more than 360 days beyond the complaint's filing. 47 U.S.C. § 224(c)(3). See Public Notice, *States That Have Certified That They Regulate Pole Attachments*, 7 FCC Rcd 1498 (1992).

<sup>34</sup>47 U.S.C. § 224(b)(1).

<sup>35</sup>See S. Rep. No. 580, 95th Congress., 1st Sess. at 19-20 (1977) ("*1977 Senate Report*"), reprinted in 1978 U.S.C.C.A.N. 109; *FCC v. Florida Power Corp.*, 480 U.S. 245, 247-48 (1987) (Congress enacted this legislation as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service).

<sup>36</sup>47 U.S.C. § 224(d)(1).

<sup>37</sup>See *1997 Senate Report*. Congress expected pole attachment rates based on incremental costs to be low because utilities generally recover the make-ready or change-out charges directly from cable systems. *Report and Order, Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CC Dkt. 86-212, 2 FCC Rcd 4387, 4388 n.3 (1987) ("*Pole Attachment Order*"), recon. denied, 4 FCC Rcd 468 (1989).

<sup>38</sup>47 U.S.C. § 224(d)(1-2).

<sup>39</sup>47 U.S.C. § 224(d)(1).

<sup>40</sup>*1977 Senate Report* at 19-20.

<sup>41</sup>47 C.F.R. § 1.1404. See: *First Report and Order, Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Dkt. 78-144, 68 FCC 2d 1585 (1978) ("*First Report and Order*"); *Second Report and Order*, 72 (...continued)

maximum allowable pole attachment rate under section 224(d)(1) of the Pole Attachment Act which is referred to as the *Cable Formula*.<sup>42</sup>

9. Subsequently, Congress enacted the 1996 Act "to accelerate rapidly private sector deployment of advanced telecommunication and information technologies and services."<sup>43</sup> The 1996 Act amended section 224 in several important respects. Section 703(6) of the 1996 Act added a new subsection 224(d)(3),<sup>44</sup> that expanded the scope of section 224 by applying the *Cable Formula* to rates for pole attachments made by telecommunications carriers<sup>45</sup> in addition to cable systems,<sup>46</sup> until a separate methodology becomes effective for telecommunications carriers in 2001.<sup>47</sup> Section 703(7) of the 1996 Act added new subsections 224(e)(1-4), which set forth a separate methodology to govern charges for pole attachments used to provide telecommunications services beginning February 8, 2001 ("*Telecom Formula*").<sup>48</sup> Further, the 1996 Act gave cable operators and telecommunications carriers a right of nondiscriminatory access to utility poles, ducts, conduit and rights-of-way.<sup>49</sup> In the *Local Competition Order*, we adopted a number of rules implementing the new access provisions of section 224.<sup>50</sup>

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FCC 2d 59 (1979) ("*Second Report and Order*"); *Third Report and Order*, 77 FCC 2d 187 (1980) ("*Third Report and Order*"), *aff'd*, *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (*per curiam*); *see also*, *Pole Attachment Order*, 2 FCC Rcd 4387 (1987).

<sup>42</sup>*Pole Attachment Order*, 2 FCC Rcd 4384 (1987). The *Cable Formula* was codified in the *Telecom Order*, 13 FCC Rcd 6777 (1998), at 47 C.F.R. § 1.1409(e)(1)(1998). *See also* *Fee Order*, *in passim*.

<sup>43</sup>*House Conference Report* No. 104-458 to 1996 Act, *reprinted at* 1996 U.S.C.C.A.N. 124 (1996) ("*Conf. Rpt.*"), Joint Explanatory Statement of Conference Committee.

<sup>44</sup>47 U.S.C. § 224(d)(3).

<sup>45</sup>47 U.S.C. § 153(44).

<sup>46</sup>47 U.S.C. § 153(8); 47 U.S.C. § 602(5).

<sup>47</sup>*See* 47 U.S.C. § 224(d)(3) (only to the extent that such carrier is not a party to a pole attachment agreement) and 47 U.S.C. § 224(e)(4).

<sup>48</sup>47 U.S.C. § 224(e)(1-4).

<sup>49</sup>47 U.S.C. § 224(a),(f).

<sup>50</sup>*Local Competition Order*, 11 FCC Rcd 15499, 16058-107 (1996) at ¶¶ 1119-1240, *aff'd* *Local Competition Access Reconsideration Order*, FCC 99-266, 14 FCC Rcd 18049 (1999). In August 1996, the Commission also issued a *Report and Order* in CS Dkt. 96-166 (Implementation of Section 703 of the Telecommunications Act of 1996), 11 FCC Rcd 9541 (1996), amending its rules to reflect the self-effectuating additions and revisions to Section 224 ("*Self-Effectuating Order*").

### III. ORDER ON RECONSIDERATION

#### A. COMPLAINT PROCEDURES AND NEGOTIATED AGREEMENTS

10. Our pole attachment rules were established in 1978, and have been refined through rulemakings and enforcement actions.<sup>51</sup> These rules apply when parties are unable to arrive at a negotiated agreement and an aggrieved party files a complaint.<sup>52</sup> Section 224 (e) (1) of the Pole Attachment Act indicates that application of the Commission's rules will apply only when the parties fail to resolve a dispute.<sup>53</sup> Our rules require that a complaint include a brief summary of the steps taken to resolve the problem prior to filing a complaint.<sup>54</sup>

11. Utilities must provide a cable television system<sup>55</sup> or telecommunications carrier<sup>56</sup> with nondiscriminatory access<sup>57</sup> to any pole, duct, conduit or right-of-way owned or controlled by it, at just and reasonable rates, terms and conditions.<sup>58</sup> In the *Telecom Order*, we concluded that the current complaint procedures are adequate to establish just and reasonable rates, terms, and conditions for pole attachments, and determined that the existing methodology for determining a presumptive maximum pole attachment rate for telecommunications carriers, as modified, facilitates negotiation because the parties can identify an anticipated range for the pole attachment rate.<sup>59</sup> We rejected proposals to require uniformity of terms in pole attachment agreements stating that "[w]hile we do not agree that all pole attachment agreements have to be identical, differing provisions must not violate the statutory requirement that terms be just, reasonable, and nondiscriminatory."<sup>60</sup>

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<sup>51</sup>See, e.g., *First Report and Order*, 68 FCC 2d 1585 (1978); see also *Second Report and Order*, 72 FCC 2d 59 (1979); *Third Report and Order*, 77 FCC 2d 187 (1980), *aff'd*, *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (*per curiam*); *Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985) (upholding challenge to the Commission's pole attachment formula relating to net pole investment and carrying charges); *Pole Attachment Order*, 2 FCC Rcd 4384 (1987).

<sup>52</sup>See 47 U.S.C. § 224(b)(1); 47 C.F.R. § 1.1401-1.1418.

<sup>53</sup> 47 U.S.C. § 224 (e) (1). In passing the 1996 Act, the Congress adopted a Conference Agreement which "... amend[ed] section 224 of the Communications Act by adding a new subsection (e)(1) to allow parties to negotiate the rates, terms, and conditions for attaching to poles, ducts, conduits, and rights-of-way." *Conf. Rpt.* at 221 (emphasis added).

<sup>54</sup> 47 C.F.R. § 1.1404 (l) (1998).

<sup>55</sup> 47 U.S.C. § 224; see also 47 U.S.C. §§ 522 (5-7).

<sup>56</sup> 47 U.S.C. § 224; see also 47 U.S.C. §§ 153 (43-46).

<sup>57</sup> 47 U.S.C. § 224(f)(1).

<sup>58</sup> 47 U.S.C. §§ 224(b),(d),(e).

<sup>59</sup> See *Telecom Order* at ¶¶ 16-21.

<sup>60</sup> *Telecom Order* at ¶¶ 20-21.

12. Electric utilities urge us to declare negotiated agreements for pole attachments inviolate, asserting negotiated market-based rates assure just compensation for pole attachments.<sup>61</sup> Electric utilities assert there is a robust and competitive free market for pole attachments and that utilities lack any incentive to discriminate against attaching entities.<sup>62</sup> UTC/EEI argues that a negotiated rate reflects an entire package of benefits that attaching entities reap from access to utility infrastructure: time-to-market, dispute avoidance, and maintenance, construction and partnership, as well as non-infrastructure opportunities such as service resale.<sup>63</sup> UTC/EEI continues to urge that we impose additional regulation on the negotiation process or, in the alternative, that we impose additional regulation on the complaint process that is favorable to a utility.<sup>64</sup>

13. Contrary to UTC/EEI's argument, the record as a whole does not demonstrate that the market for pole attachments is fully competitive or that the utilities now lack any incentive to discriminate against attaching entities. As the Court stated in *Gulf Power II*,<sup>65</sup> contrary to American Electric's assertions,<sup>66</sup> the original purpose of the Pole Attachment Act, to prevent utilities from charging monopoly rents to attach to their bottleneck facilities, did not change with the 1996 Act.<sup>67</sup> Nothing in the record demonstrates that the utilities' monopoly over poles has since changed. Upon consideration of the record, we affirm our decision not to impose additional regulation on either the negotiation process or the rules for resolution of complaints arising out of failed negotiations.<sup>68</sup> We reject assertions by utilities that our rules frustrate negotiations.<sup>69</sup> To the contrary, our experience has taught us, and the record gained through these proceedings demonstrates, that without our rules and the use of presumptions in a formula methodology, attaching entities would not be able to challenge any rate offered by a utility.<sup>70</sup> There would be no reasonable negotiation without a benchmark rate against which to compare the utility's proposed rate. We continue to reject arguments<sup>71</sup> by utilities that attaching parties should be required to take

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<sup>61</sup> UTC/EEI *Fee Order* petition at 3-6.

<sup>62</sup> UTC/EEI *Fee Order* petition at 5.

<sup>63</sup> UTC/EEI *Fee Order* petition at 5-6.

<sup>64</sup> UTC/EEI *Telecom Order* petition at 2-9, *Fee Order* petition at 3-8.

<sup>65</sup> 208 F.3d 1263 (11<sup>th</sup> Cir. 2000).

<sup>66</sup> See American Electric's February 15, 2001 *ex parte* presentation memorandum at n. 3 (utility poles and conduit are not bottleneck facilities).

<sup>67</sup> *Gulf Power II* at 1274-1275. See also, NCTA's *Fee Order* reply comments at 3-6 (direct-buried cable and wireless facilities do not provide the cable industry with realistic alternatives to pole attachments).

<sup>68</sup> See *Telecom Order* at ¶¶ 16-21.

<sup>69</sup> UTC/EEI *Telecom Order* petition at 2.

<sup>70</sup> See, e.g., Association of Local Telecommunications Services ("ALTS") *Telecom Order* comments at 2; Joint Cable Parties *Telecom Order* comments at 20-21; MCI *Telecom Order* comments at 7-81; NCTA *Telecom Order* comments 2-8 and *Fee Order* comments at 2-8, 44-48; Time Warner *Fee Order* comments at 2-4.

<sup>71</sup> See *Telecom Order* at ¶¶ 12-21.

exception to terms or conditions when the pole attachment agreement is negotiated or be estopped from filing a complaint about those issues.<sup>72</sup>

14. We do not suggest that good faith negotiations require use of identical rates, terms or conditions in pole attachment agreements.<sup>73</sup> We encourage, support and fully expect that mutually beneficial exchanges will take place between the utility and the attaching entity.<sup>74</sup> When utilities and attaching entities are innovative and provide mutually beneficial negotiated alternatives to the maximum rates, competition and the deployment of services to all communities will be fostered, resulting in the successful implementation of the 1996 Act. However, we do require that differences in rates, terms and conditions for pole attachments among attaching entities, be based on legitimate exchanges of consideration and not on discriminatory factors such as favoring an affiliated services provider over an unaffiliated entity. We will carefully scrutinize any differences in rates, terms and conditions in any complaint action, and the burden will be on the utility to demonstrate that any differences are nondiscriminatory.

## B. BASIC CONCEPTS USED IN THE FORMULA

### 1. Use of Actual Costs

15. In response to the *Telecom Order Notice* and the *Fee Order Notice*, several electric utilities submitted comments supporting a rate calculation methodology which would substitute replacement costs in the rate formula in lieu of the actual costs reflected in the utility's regulatory accounts.<sup>75</sup> There was also comment by attaching entities opposing the use of anything but historical costs to both the *Telecom Order Notice*<sup>76</sup> and the *Fee Order Notice*.<sup>77</sup> In the *Telecom Order*, we stated that we had not sought comment on this issue and we declined to address the utilities' proposals to do so.<sup>78</sup> In response to the *Fee Order Notice*, we adopted the *Fee Order* in which we rejected utilities' arguments that pole attachment rates should be based on replacement costs and we affirmed the use of historical costs in our pole attachment rate methodology.<sup>79</sup> We

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<sup>72</sup>See, e.g., UTC/EEI *Telecom Order* petition at 8-9; see also, GTE *Telecom Order* comments at 4-5. Cf. NCTA *Telecom Order* reply at 3-6; Southern New England Telephone *Telecom Order* comments at 2.

<sup>73</sup>See, e.g., UTC/EEI *Telecom Order* petition at 8.

<sup>74</sup>See, e.g., Joint Cable Parties *Telecom Order* comments at 20-21; MCI *Telecom Order* comments at 7-8; NCTA *Telecom Order* comments at 14-18.

<sup>75</sup>See, e.g., American Electric *Fee Order* comments at 14-95, American Electric *Telecom Order* comments at v, 13, 17-20, 39; Duquesne Light *Fee Order* comments at 12-13, *Telecom Order* comments at 13-17; UTC/EEI *Fee Order* comments at 14-15, *Telecom Order* comments at 8.

<sup>76</sup>12 FCC Rcd 11725 (1997). See, e.g., Comcast, et al., *Telecom Order* comments at 5; NCTA *Telecom Order* reply at 12-17; USTA *Telecom Order* reply at 1-6.

<sup>77</sup>See, e.g., NCTA *Fee Order* comments at 24-25; Time Warner *Fee Order* reply at 1-9.

<sup>78</sup>*Telecom Order* at ¶ 124.

<sup>79</sup>*Fee Order* at ¶ 10.

stated that the continued use of historical costs accomplishes key objectives of assuring, to both the utility and the attaching parties, just and reasonable rates; establishes accountability for prior cost recoveries; and accords with generally accepted accounting principles.<sup>80</sup>

16. Electric utilities continue to urge that we abandon our use of regulatory accounts based on historical costs.<sup>81</sup> Petitioners assert that pricing methodologies for use in pole attachment formulas should reflect replacement costs or the rates calculated are not constitutional because they cannot provide just compensation.<sup>82</sup> American Electric asserts that we should review the constitutionality of the rate methodology in light of the *Gulf Power I* decision, which held that the mandatory access provisions of the 1996 Act amendments to the Pole Attachment Act constitute a taking of property.<sup>83</sup> UTC/EEI asserts the proper measure of just compensation is the "fair market value" of the property at the time of the taking.<sup>84</sup> Southern Co. argues that in instances where there is no clear market value, several different proxies for market value have been used to determine just compensation, including replacement costs.<sup>85</sup> American Electric attempts to demonstrate that replacement costs are necessary to provide just compensation for pole attachments.<sup>86</sup>

17. We affirm our decision that the *Cable Formula*, which includes regulatory accounts maintained using historical costs, encompasses the statutory directive to provide just and reasonable rates for pole attachments,<sup>87</sup> adding certainty and clarity to negotiations.<sup>88</sup> We have been presented with no persuasive evidence<sup>89</sup> that utility owners do not recover a just and reasonable compensation<sup>90</sup> for pole attachments from use of the *Cable Formula*.<sup>91</sup> The application of the well-

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<sup>80</sup> *Fee Order* at ¶ 10.

<sup>81</sup> See, e.g., AEPSC *Telecom Order* petition at, UTC/EEI *Telecom Order* petition at 9-11, *Fee Order* petition at 8; Southern Co. *Telecom Order* petition at 8-11. But see, Joint Cable Parties *Telecom Order* comments at 10-15, *Telecom Order* reply at 8, NCTA *Fee Order* reply at 1; WorldCom *Fee Order* comments at 2-6.

<sup>82</sup> American Electric *Fee Order* petition at 2-7; UTC/EEI *Fee Order* petition at 7.

<sup>83</sup> American Electric *Fee Order* petition at 2-7.

<sup>84</sup> UTC/EEI *Fee Order* petition at 7.

<sup>85</sup> See, e.g., Southern Co. *Fee Order* recon. reply at 3.

<sup>86</sup> American Electric claims a report demonstrating that the *Cable and Telecom Formulas* deny the electric utilities just compensation in all cases, and that the report is "imminent." American Electric *Fee Order* recon. reply at 2-3. No report was received.

<sup>87</sup> *1977 Senate Report* at 19-21; 47 U.S.C. § 224(d)(1) and § 224(e)(1).

<sup>88</sup> See, e.g., Joint Cable Parties *Telecom Order* comments at 10-15; see also, Association of Local Telecommunications Services *Fee Order* comments at 14; AT&T *Fee Order* reply at 13-14; NCTA *Fee Order* comments at 24-25; TCI *Fee Order* reply at 3; Time Warner *Fee Order* reply at 1-9.

<sup>89</sup> See, e.g., Joint Cable Parties *Telecom Order* comments at 10-15; NCTA *Fee Order* recon. reply at 3-6; WorldCom *Fee Order* recon. opposition at 2-6. See, e.g., UTC/EEI *Telecom Order* petition at 9-11; see also, e.g., American Electric *Telecom Order* comments at 11-18, *Fee Order* comments at 14-95; UTC/EEI *Telecom Order* comments at 8.

<sup>90</sup> The U. S. Supreme Court held all that is required is that a "reasonable, certain and adequate provision for obtaining  
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established *Cable Formula*, with technical adjustments adopted from time to time, is consistent with establishing a just, reasonable, and nondiscriminatory maximum pole attachment rate as envisioned by Congress.<sup>92</sup> The statute requires the Commission to develop a methodology to compensate the pole owner for its actual costs associated with the amount of space used by an attachor.<sup>93</sup> Congressional intent to rely on existing regulatory accounts and avoid a prolonged rate making process is realized in the Commission's regulations.<sup>94</sup>

18. Both the decision in *Gulf Power I*<sup>95</sup> and *Gulf Power II*<sup>96</sup> support our analysis on the issue of just compensation. While the decisions recognize that the Pole Attachment Act and the Commission's rules invoke constitutional standards because of the mandatory access requirements, neither the statute nor the Commission's rules were found to be facially unconstitutional. In both cases, the 11<sup>th</sup> Circuit Court of Appeals held that the issue of just compensation was not ripe for review because the utilities had not shown that the 1996 Act nor the Commission's rules would operate to deny them just compensation in every case.<sup>97</sup> As the Court stated in *Gulf Power II*, "... we are not confident, given the record at hand, that the formula will deny just compensation in all cases."<sup>98</sup> Indeed, as the Supreme Court stated in *Duquesne Light Company v. Barasch*, ("*Duquesne Light*"),<sup>99</sup> "[f]orty-five years ago in the landmark case of [*Hope Natural Gas*]<sup>100</sup>, this Court . . . held

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compensation" exist at the time of the taking, stating: "[i]f the government has provided an adequate process for obtaining compensation, and if the resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985), quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n.21 (1984).

<sup>91</sup> Cf. § 224(d)(1) and § 224(e)(1).

<sup>92</sup> See, e.g., *1977 Senate Report; FCC v. Florida Power Corporation, et al.*, 107 S.Ct. 1107, 1113 (1987) (rate imposed [when] calculated according to the statutory formula for the determination of a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is [not] confiscatory); see also, *Gulf Power v. U.S.A.*, 998 F. Supp. 1398 (N.D. Fla. Mar. 1998)(just compensation provided by 47 U.S.C. § 224), *aff'd*, 187 F.3d 1324 (11th Cir. 1999).

<sup>93</sup> 47 U.S.C. § 224 (d) (1) ("... a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit or right-of-way.").

<sup>94</sup> *1977 Senate Report* at 20.

<sup>95</sup> 187 F.3d 1324 (11th Cir. 1999).

<sup>96</sup> 208 F.3d 1263 (11<sup>th</sup> Cir. 2000).

<sup>97</sup> See *Gulf Power I*, 187 F.3d 1324, 1338 (11th Cir. 1999).

<sup>98</sup> *Gulf Power II*, 208 F.3d 1263, 1272 (11<sup>th</sup> Cir. 2000).

<sup>99</sup> 488 U.S. 299 (1989).

<sup>100</sup> *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

that the 'fair value rule' is not the only constitutionally acceptable method of fixing utility rates. In [*Hope Natural Gas*] we ruled that historical cost was a valid basis on which to calculate utility compensation."<sup>101</sup>

19. Several parties observe that the Commission applies a different methodology in the context of universal service requirements and interconnection agreements as opposed to pole attachments. They argue that consistency demands that the same pricing methodology be applied throughout the 1996 Act. We disagree that the Commission's continued use of a historical cost methodology in the pole attachment context is arbitrary and capricious. As explained in detail below, the Commission had a rational basis, amply supported by record evidence, for choosing different pricing methodologies in these different contexts.<sup>102</sup>

20. In the Universal Service Order<sup>103</sup> and Local Competition Order,<sup>104</sup> the Commission reasonably and in detail explained that, in connection with universal service requirements and interconnection agreements, ratemaking on the basis of forward-looking economic cost would best effectuate the new competitive objectives of the 1996 Act. These objectives were to stimulate direct competition in local telecommunications markets, to ensure the efficient use of existing telecommunications network facilities, and to encourage new entrants to make economically rational decisions about whether or how to enter a local telecommunications market.<sup>105</sup> The Commission found the use of a forward-looking cost methodology particularly important in this context because we determined that a firm compares forward-looking costs with existing market prices, in making decisions about entry, expansion, and price.<sup>106</sup>

21. By contrast, the predominant legislative goal for Congress in enacting the Pole Attachment Act was "to establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public."<sup>107</sup> Due to the local monopoly in ownership or control of poles, the legislative record indicated that some utilities had abused their superior bargaining position by demanding exorbitant rental fees and other unfair

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<sup>101</sup> *Duquesne Light* at 310.

<sup>102</sup> See *Federal Communications Commission, et al. v. National Citizens Committee for Broadcasting, et al.*, 436 U.S. 775, 803 (1978). See also, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) (the standard of review of an agency action for arbitrariness or capriciousness is a deferential standard by which a reviewing court will uphold an agency action if it has a rational basis).

<sup>103</sup> *Federal-State Joint Board on Universal Service*, FCC 96J-3, 12 FCC Rcd 87 (1997).

<sup>104</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC 96-325, 11 FCC Rcd 15499 (1996).

<sup>105</sup> *Local Competition Order*, 11 FCC Rcd at 15813, 15817, 15846 (¶¶ 620, 630, 679).

<sup>106</sup> *Local Competition Order*, 11 FCC Rcd at 15813, 15846 (¶¶ 620, 679).

<sup>107</sup> S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977), reprinted in 1978 U.S.C.C.A.N. 109.

terms in return for access by cable companies to their pole space.<sup>108</sup> This actual and potential anti-competitive behavior prompted Congress to pass the Pole Attachment Act. It was in this context that the Commission, guided by Congressional direction to use existing accounting measures to determine costs, decided to employ a historical cost based pole attachment formula in implementing the Pole Attachment Act.<sup>109</sup> There is nothing novel about the Commission's use of a historical cost methodology in the context of regulating monopoly rates. For example, to carry out the statutory goal of section 623(b) of the Communications Act – i.e., to ensure that individual retail subscribers of monopoly cable providers were not exploited -- the Commission, in addition to using a benchmark approach, also adopted a historical, cost-of-service alternative methodology for the cable television industry.<sup>110</sup>

22. Since 1978, the Commission has applied an embedded cost methodology, which has been upheld by the United States Supreme Court.<sup>111</sup> The Commission's continued use of a historical cost methodology in the pole attachment context is consistent with Congressional expectations. Specifically, while the Commission's pole attachment formula has been in place since 1978, Congress did not directly or by implication instruct the Commission to deviate from the use of historical costs when it amended the Pole Attachment Act in 1996.<sup>112</sup> By comparison, the local competition provisions of the Telecommunications Act of 1996 contemplated some degree of departure by the Commission from its past practice of setting rates on the basis of rate based/rate-of-return regulation.<sup>113</sup> Specifically, section 252(d)(1)(A)(i) requires that rates be based on the "cost" of providing the interconnection or network element "determined without reference to a rate-of-return or rate-based proceeding."<sup>114</sup>

23. In addition, the benefits of using a forward-looking cost methodology are less pronounced in the pole attachment context than in the universal service/interconnection context. The Pole Attachment Act protects cable and telecommunications attachers from monopoly prices set by utilities that are not necessarily in direct competition with the attachers, although there may be potential for direct competition.<sup>115</sup> The Pole Attachment Act does not set out a scheme for

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<sup>108</sup> *Id.*

<sup>109</sup> See *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, 68 FCC 2d 1585 (1978); *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Second Report and Order, 72 FCC 2d 59 (1979).

<sup>110</sup> 47 U.S.C. § 543(b); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulations*, 9 FCC Rcd 4527 (1994). See also *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 178-87 (D.C.Cir. 1995), *cert. denied*, 116 S.Ct. 911 (1996).

<sup>111</sup> See *First Report and Order*, 68 FCC Rcd 1585, ¶ 25; *aff'd*, *Second Report and Order*, 72 FCC 2d 59, ¶ 15; see also *FCC v. Florida Power Corporation*, 480 U.S. 245 (1987).

<sup>112</sup> See S. Conf. Rep. No. 104-230, 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1996).

<sup>113</sup> See *Local Competition Order*, 11 FCC Rcd at 15857 (¶ 704).

<sup>114</sup> 47 U.S.C. § 252(d)(1)(A)(i).

<sup>115</sup> We recognize that increasing convergence of services and electric utilities' entry into telecommunications may  
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attachers to access the network elements of a utility's core business. The majority of poles nationwide are owned or controlled by electric utilities, with the remaining poles owned or controlled by telephone companies.<sup>116</sup> Thus, while in some cases pole owner and attacher may both provide telecommunications services, most typically a cable attacher or telecommunications attacher is seeking relief under the Pole Attachment Act from the rates, terms and conditions imposed by an electric utility pole owner. In the telecommunications interconnection context, on the other hand, the statute sets out a scheme for determining rates solely between competing telecommunications carriers. Thus, rate regulation in the context of pole attachments is not focused primarily on the same concerns that predominate with interconnection.

24. In addition, the assets being regulated in the two contexts are very different. The Pole Attachment Act addresses access to poles, ducts, conduits and rights-of-way, in contrast to the unbundled elements of an incumbent's telecommunications network that are addressed in the interconnection context. These telecommunications network elements, in contrast to poles, ducts and conduits, are subject to a rapidly changing technology. A forward looking cost pricing methodology reflects the cost of replacing the functions of an asset using the most efficient technology available so as to appropriately capture the technological changes that are occurring.<sup>117</sup> As a result, new entrants are given the proper cost signals to decide whether to construct their own networks or to use the incumbent's. In the context of pole attachments, there has been significantly less change in the nature of the asset since their deployment decades ago, so it is not as critical to employ a formula that accounts for such factors. Indeed, given the nature of the pole attachment asset, the two methodologies – i.e., historical and forward looking -- may likely produce similar cost results in the pole attachment context.<sup>118</sup> In addition, cable attachers frequently do not have a realistic option of installing their own poles or conduits both because, in many cases, attachers are foreclosed by local zoning or other right of way restrictions from constructing a second set of poles of their own and because it would be prohibitively expensive for each attacher to install duplicative poles.<sup>119</sup> Thus, because attachers frequently do not face a realistic "make or buy" decision, the benefits of giving proper cost signals to new entrants are less pronounced in the pole attachment context. Moreover, the pole attachment formula does account for the costs incurred when poles are replaced by utilities in the normal course of their business because the formula uses actual year end

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change this situation in the future.

<sup>116</sup> See *1977 Senate Report*. In the *1977 Senate Report*, Congress also noted that poles owned by cable companies were less than 0.1 percent of the total number of poles nationwide. There is nothing in the record to suggest that this percentage has markedly changed.

<sup>117</sup> See 47 C.F.R. § 51.505(b)(1) (forward-looking cost "should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration").

<sup>118</sup> See *Local Competition Order*, 11 FCC Rcd at 1585 (¶ 705) (stating that it cannot be determined in the abstract whether a forward-looking cost approach or a historical approach will produce higher cost figures in a particular setting).

<sup>119</sup> In addition, it is not clear that a policy which would encourage the erection of multiple duplicative poles in the public right of way is consistent with the Pole Attachment Act.

asset and expense data from records maintained and publicly reported as part of the utilities' regulated core electric or telephone business services. In fact, if a utility is required to replace a pole in order to provide space for an attacher, the attacher pays the full cost of the replacement pole.<sup>120</sup>

25. We have recognized that the continued use of the historical cost based pole attachment formula brings certainty to the regulatory process. For more than two decades,<sup>121</sup> the pole attachment formula has provided a stable and certain regulatory framework, which may be applied "simply and expeditiously" requiring "a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."<sup>122</sup> We have found that switching to a methodology based on forward-looking economic costs would significantly change and burden the Commission's processes, requiring the Commission to develop a new formula, which would necessitate a protracted rulemaking proceeding involving complicated pricing investigations.<sup>123</sup> We have acknowledged that, in certain contexts, setting prices on the basis of forward-looking economic costs has advantages, such as giving the appropriate signal for new entrants to invest in network facilities; but, as explained above, these advantages are less pronounced in the pole attachment context because pole attachers are less likely to build, or may be prohibited from building, their own poles and conduit.<sup>124</sup> We have concluded and continue to find that, in the context of pole attachments, the continued use of historical costs accomplishes the key objectives of assuring just and reasonable rates to both the utility and the attaching parties, establishing accountability for prior cost recoveries, and encouraging negotiation among the parties by providing regulatory certainty.<sup>125</sup> For the reasons stated above, we will continue to calculate maximum pole attachment rates under the Pole Attachment Act using regulatory accounts based on historical costs.

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<sup>120</sup> If there is not adequate space on an existing pole for an attacher, the attacher is usually required to pay up front to replace the pole with a larger pole. The Commission has never held that the Pole Attachment Act, which anticipates a range of reasonable rates, prohibits a utility from being directly compensated by an attacher for such incremental, non-recurring costs. Alternatively, a utility could include an allocated portion of these costs in its annual rental rate, but most utilities prefer to recover up front, the full amount of make-ready or pole change out costs. Such costs are required to be excluded from the annual rate calculation to avoid a double recovery by the utility. *See Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, 15 FCC Rcd 6453 at ¶ 28 (2000).

<sup>121</sup> *See Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, 15 FCC Rcd 6453 at ¶ 9 (2000).

<sup>122</sup> *See 1977 Senate Report* at 21 (stating that it was the desire of the drafters "that the Commission institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation").

<sup>123</sup> *See Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, 15 FCC Rcd 6453 at ¶ 9 (2000).

<sup>124</sup> *Id.*

<sup>125</sup> *See Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, 15 FCC Rcd 6453 at ¶ 10 (2000).

## 2. When Net Pole Investment is Zero or Negative

26. In enacting the Pole Attachment Act, Congress directed the Commission to institute an expeditious program for determining just and reasonable pole attachment rates that would necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation.<sup>126</sup> Congress determined that the rates should permit the utility to recover its fully allocated costs, as defined by Section 224(d)(1). Congress stated that although there may be some difficulty in determining certain components of a utility's operating expenses and actual capital costs, special accounting measures or studies should not be necessary because the majority of cost and expense items attributable to utility pole plant were already established and reported to various regulatory bodies and therefore the information was already a matter of public record.<sup>127</sup> Congress did not expect the Commission to re-examine the reasonableness of the cost methodologies that various regulatory agencies had sanctioned; it recognized that the Commission would have to "make its best estimate" of some of the less readily identifiable costs.<sup>128</sup>

27. Under Section 224(d)(1), fully allocated costs refer to the portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles that are associated with the space occupied by pole attachments.<sup>129</sup> The Commission originally derived the formulas for determining maximum allowable pole attachment rates under the Pole Attachment Act by applying the legislative direction in individual complaint cases.<sup>130</sup> These cases led to a generally applicable formula for calculating the maximum just and reasonable rate:<sup>131</sup>

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<sup>126</sup>1977 Senate Report at 21.

<sup>127</sup>*Id.* at 19-20. Incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs") are regulated by the Commission Rules at 47 U.S.C. Title II. Electric, gas, water, steam and oil utilities are regulated by FERC, an independent regulatory agency within the Department of Energy under authority from the Federal Power Act of 1935, 49 Stat. 847; the Natural Gas Act of 1938, 52 Stat. 821; the Natural Gas Policy Act of 1978, 92 Stat. 3350, Pub. L. No. 95-621; the Public Utility Regulatory Policies Act of 1978, 92 Stat. 3117, Pub. L. No. 95-617; and the Energy Policy Act of 1992, 106 Stat. 2776, Pub. L. No. 102-486.

<sup>128</sup>*Id.* at 20.

<sup>129</sup>*Id.* at 19-20. 47 U.S.C. § 224 (d)(1) states that a rate is just and reasonable if it assures a utility the recovery of not more than "an amount determined by multiplying the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way."

<sup>130</sup>*See, e.g., Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia*, PA 79-0029, 79 FCC 2d 232 (1980); *Continental Cablevision of New Hampshire, Inc. v. Concord Electric Co.*, Mimeo No. 5536 (Com. Car. Bur., July 3, 1985).

<sup>131</sup>*Pole Attachment Order*, 2 FCC Rcd 4387 (1987) at ¶ 6; 47 U.S.C. §§ 224(b)(1), (d).

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

The second component of the overall formula is the net cost of a bare pole. This net cost equals a factor, 0.85 for electric utilities or 0.95 for telephone companies,<sup>132</sup> multiplied by the net investment per pole, as shown in the following formula:

$$\text{Net Cost of a Bare Pole}^{133} = \frac{\text{Factor} \times \text{Net Pole Investment}}{\text{Number of Poles}}$$

28. The final component of the pole attachment formula is the carrying charge rate. Carrying charges are the costs incurred by the utility in owning and maintaining poles regardless of the presence of pole attachments. The carrying charges include the utility's administrative, maintenance, and depreciation expenses, a return on investment, and associated income taxes. To help calculate the carrying charge rate, we developed formulas that relate each of these components to the utility's *net* pole investment.

29. The pole attachment formulas rely on the investment and expense data utilities maintain in, or derive from, their accounting records. The investment data take two forms: "gross" data, which provide the original cost of the plant being considered; and "net" data, which adjust the gross data to reflect accumulated depreciation and deferred income taxes associated with that plant. The pole attachment formulas generally allocate the costs of owning and maintaining poles on the basis of net pole or net plant investment.<sup>134</sup> In the *Fee Order*, we affirmed our long practice of calculating pole attachment rates using net book costs, continuing to allow the use of gross book costs if all parties agreed to that usage.<sup>135</sup> We concluded that the important goal is to ensure that like figures are used, whether net or gross. We affirm our continued use of net figures in the formulas unless the parties agree otherwise, with the following limited exception.

<sup>132</sup>The two factors reflect the differences between telephone companies' and electric utilities' investment in crossarms and other non-pole investment that is recorded in the pole accounts. Electric utilities typically have more investment in crossarms than telephone companies have. The 0.85 factor for electric utilities recognizes this fact. *See Pole Attachment Order*, 2 FCC Rcd at 4390.

<sup>133</sup>*See Pole Attachment Order*, 2 FCC Rcd at 4402, Appendix A. This formula rearranges the *Pole Attachment Order's* net cost of a bare pole formula for presentation purposes. Net pole investment is defined as the gross investment in poles less accumulated depreciation and accumulated deferred income taxes with respect to pole investment.

<sup>134</sup>Net pole investment is defined as the gross investment in poles less accumulated depreciation and accumulated deferred income taxes with respect to pole investment. Net plant investment is defined as the gross plant in service less accumulated depreciation and accumulated deferred income taxes with respect to plant in service.

<sup>135</sup>*See, e.g., Capital Cities Cable, Inc. v. Southwestern Public Service Co.*, Mimeo No. 5431 (June 28, 1985); *Booth American Co. v. Duke Power Co.*, Mimeo 3064 (Com. Car. Bur., Mar. 22, 1984); *Teleprompter of Greenwood, Inc. v. Duke Power Co.*, Mimeo 001866 (Com. Car. Bur., July 6, 1981).

30. In certain cases, negative net asset values for poles may occur as a result of the way the Commission calculates depreciation rates. We generally prescribe depreciation rates at levels sufficient to give a telecommunications utility an opportunity to recover its plant investment, including poles, on a straight-line basis over the life of the associated plant. In order to accomplish this, we calculate depreciation rates by using the following formula:

$$\text{Depreciation Rate} = \frac{100\% - \text{Accumulated Depreciation \%} - \text{Future Net Salvage \%}}{\text{Average Remaining Life}}$$

The depreciation rate determined by this formula is then applied to the gross pole value. In the above formula, accumulated depreciation is the portion of the pole investment that has been charged to depreciation expense in previous periods. Future net salvage is the estimated difference between the amount the utility would receive as salvage for sale of retired poles and the utility's estimated cost of removal. Average remaining life is the estimated future life expectancy of the investment.

31. As accumulated depreciation rises, for plant with high removal costs such as poles, the application of the depreciation rate formula can lead to a net asset value becoming negative. This is because, in computing the net pole investment, the formula subtracts from gross pole investment an accumulated depreciation that includes both a recovery of original investment and a recovery of costs of removal (less salvage). Because gross pole investment only includes the original cost of the poles, subtracting both components from the gross pole investment may lead to a zero or negative net pole investment. The carrying charge formulas compute percentages for each element (administrative, maintenance, and depreciation expenses, taxes, and rate of return) which are added and then multiplied against the net pole investment. For example, if the carrying charge formulas yield 10% for each element, the carrying charge rate would be 50%. This rate would then be multiplied by net pole investment (expressed on a per pole basis as net cost of a bare pole) and the percentage of usable pole space occupied by the attachment, to determine the maximum just and reasonable rate per pole. When the net pole investment is zero or negative, the formula cannot be calculated properly. In those instances, our pole attachment formula, using net figures, cannot be used to calculate a maximum rate based on fully allocated costs.

32. In the *Fee Order*, we affirmed the calculation of net cost of a bare pole as total investment in poles less accumulated depreciation<sup>136</sup> for poles and less accumulated deferred income taxes.<sup>137</sup> We also affirmed our adjustment to a utility's net pole investment of 15% for electric utilities and 5% for LECs to eliminate the investment in crossarms and other non-pole

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<sup>136</sup> The *Pole Attachment Order*, used the term "depreciation reserve" in this formula. We updated our terminology to reflect Generally Acceptable Accounting Principles (GAAP) and now use the term "accumulated depreciation." See *Pole Attachment Order*, 2 FCC Rcd 4387 (1987) at ¶¶ 10-19 & Appendix B; see also *Fee Order* at ¶ 31, n. 127.

<sup>137</sup> *Fee Order* at ¶¶ 34-35 (LECs), ¶¶ 41-42 (electric utilities); see also *Pole Attachment Order*, 2 FCC Rcd 4287, at ¶¶ 10-19 & Appendix B.

related items.<sup>138</sup> In the *Fee Order*, we attempted to adjust the formula for application in situations that involve negative net pole investment by eliminating the cause of the negative results. We concluded that the accumulated depreciation attributable to removal costs should be removed from the total accumulated depreciation when calculating net pole investment. We redefined net pole investment in those cases involving negative net pole investment as follows:

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

where Accumulated Depreciation (Poles) includes *only* that portion of Account 3100 which arises from the depreciation of Account 2411.

33. *Fee Order* petitioners urge us to modify or clarify our methodology for avoiding negative pole cost. TxCTA and USTA urge us to review paragraphs 62-70 of the *Fee Order* in which we sought to adjust the formula for application to a negative rate base.<sup>139</sup> USTA asserts that our correction for the alleged negative rate situation assumed a level of accounting detail that may not exist.<sup>140</sup> USTA asserts that LECs do not keep that level of detail in the accounting records.<sup>141</sup> USTA further explains that if we eliminate the removal costs from accumulated depreciation in Account 3100 we must also do the same in the application of accumulated deferred income taxes in Accounts 4100 and 4340. USTA adds that they have been working with the Commission to reduce the accounting burdens on LECs and that in the foreseeable future, the reporting requirements may be even less comprehensive than they are today.<sup>142</sup> In the alternative, TxCTA again calls on us to set the maximum rate at the last point a positive valuation existed under the current formula.<sup>143</sup> Verizon supports USTA's alternative method for estimating the amount of removal costs when calculating net pole investment.<sup>144</sup>

34. NCTA asserts USTA's solution would not effectuate the Commission's intention to "unbundle accumulated depreciation so that the amounts already recovered through advance

<sup>138</sup> See *Fee Order* at ¶¶ 31, 33-34; see also *Pole Attachment Order*, 2 FCC Rcd at 4387, 4390, (1987) at ¶ 19. The two factors reflect the differences between LECs' and electric utilities' investment in crossarms and other non-pole investment that is recorded in the pole accounts. Electric utilities typically have more investment in crossarms than LECs. The 0.85 factor for electric utilities recognizes this difference. These adjustment factors are rebuttable.

<sup>139</sup> TxCTA *Fee Order* petition at 1; USTA *Fee Order* petition at 6-9.

<sup>140</sup> USTA *Fee Order* petition at 7.

<sup>141</sup> *Id.*; see also Verizon *Fee Order* recon. comments at 3.

<sup>142</sup> USTA *Fee Order* petition at 6-9.

<sup>143</sup> TxCTA *Fee Order* petition at 1.

<sup>144</sup> Verizon *Fee Order* recon. comments at 3.

expensing of anticipated net salvage would be removed."<sup>145</sup> According to NCTA, the negative net salvage associated with additions to the depreciation reserve varies substantially over time and necessary records do not appear to be publicly available.<sup>146</sup>

35. On reconsideration of this matter, we modify and clarify our guidance to utilities and attaching entities on how to apply the formula in those cases where the net pole investment is zero or negative. Our proposal in the *Fee Order* was predicated on a belief that the depreciation attributable to removal costs was identifiable. *Fee Order* petitioners and other parties request clarification or reconsideration of our adopted solution on this issue.<sup>147</sup> We also have received inquiries outside of the reconsideration proceedings concerning implementation of our solution. Many parties representing LECs as well as attaching entities have observed that the records of LECs are not sufficiently detailed for identifying the portion of accumulated depreciation that represents pole removal costs.<sup>148</sup> Furthermore, they observe that adjustments to the accumulated deferred taxes reported in Accounts 4100 and 4340 would also need to be modified to the extent that they arose from the depreciation of removal costs.

36. As an alternative, USTA proposes a method of estimating the amount of pole removal costs that should be excluded from the rate formula.<sup>149</sup> Specifically,

The FCC should allow LECs to identify the portion of accumulated depreciation that is 'attributable to poles' by subtracting the 'future net salvage' component from the pole depreciation rate. For example, if the depreciation rate for poles is 7 percent, and 3 percent represents future net salvage, the portion 'attributable to poles' would be 4 percent. The LEC would then calculate net pole investment by subtracting 4/7ths of the balance in the Accumulated Depreciation Account 3100 (Poles) from Gross Pole Investment in Account 2411.<sup>150</sup>

37. This approach raises concern because it suggests that only the current relative relationship between gross pole investment and future net salvage value should be considered as a basis for the proration necessary to calculate the required data. This overlooks the dramatic change in the relative relationship between gross pole investment and future net salvage value over the period for which depreciation adjustments are needed; because future net salvage value now

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<sup>145</sup> NCTA *Fee Order* recon. reply at 2-3.

<sup>146</sup> *Id.*

<sup>147</sup> TxCTA *Fee Order* petition at 1-2; USTA *Fee Order* petition at 6-9; see also, Cole, Raywid, et al. *Ex parte* on *Fee Order* reconsideration, November 2000; Verizon *Fee Order* recon. comments at 3.

<sup>148</sup> See, e.g., USTA CS *Fee Order* petition at 6-9; TxCTA *Fee Order* petition at 1-2; Cole, Raywid, et al. *Ex parte* on *Fee Order* recon., November 2000.

<sup>149</sup> USTA *Fee Order* petition at 6-9.

<sup>150</sup> *Id.*

comprises a far greater percentage of gross pole investment than in the past, an adjustment on this basis would be overstated. The same would be true of any corresponding adjustment to deferred income taxes. Therefore, on this basis, we disagree with USTA's claim that this approach provides a reasonable estimate of the amount of removal costs that should be removed from the formula.<sup>151</sup>

38. Some commenters continue to advocate relying upon the last rate calculated using a positive net pole investment.<sup>152</sup> This calculation is readily achievable based on publicly available data. However, this calculation would not reflect subsequent changes in the carrying charges. While we encourage parties to negotiate rates using this method if they choose, we do not at this time believe that it is the most reasonable method for addressing the problem.

39. On reconsideration, we find that our approach in the *Fee Order* failed to acknowledge that the utilities' recovery through depreciation of the future costs of removing poles should be reflected in the rate. Moreover, because utilities install poles over time at various original costs and because net salvage estimates vary over time, the extraction of depreciation due to net salvage costs from accumulated depreciation would be exceedingly difficult. Current ARMIS and FERC accounting reports do not provide information with respect to the net salvage effect. Due to the limitations of available data and the complex relationships between rate calculation factors, we believe that the solution we prescribe must be simple yet equitable and produce consistent results. We have determined that the most reasonable and efficient method is to apply the formula using gross figures rather than net figures, with the exception of the rate of return element of the carrying charges which is always a net calculation. For example, we currently allocate administrative expenses by dividing total administrative and general expenses by net plant investment. This yields a percentage that is applied against the net cost of a bare pole. In contrast, a gross approach to allocation would, for example, divide total administrative and general expenses by gross plant investment.

40. With the exception of the maintenance component, the expense accounts upon which the pole attachment rates rely are not kept by type of plant. Because utilities cannot directly measure the amount of administrative expenses or taxes that are incurred because of poles, we must allocate administrative expenses and taxes to poles on some rational basis. In the Pole Attachment Order, we determined that allocation of expenses based on net pole investment was reasonable. We continue to agree with the Pole Attachment Order that the appropriate figures to use in the normal situation are the net figures. However, in the unusual situations where net pole investment is zero or negative, we find application of the formula using gross figures, with the noted net adjustment to the return element, to be appropriate.

41. In proposing this methodology, we acknowledge that only the administrative and tax elements of the carrying charges are affected by the change. The maintenance, depreciation and return elements yield the same maximum rate whether net or gross figures are used. The

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<sup>151</sup> See USTA *Fee Order* petition at 6-9.

<sup>152</sup> See, e.g., TxCTA *Fee Order* petition at 1; see also NCTA *Fee Order* comments at 24.

administrative and tax elements may be higher or lower due to the different ratios of accumulated depreciation and accumulated deferred taxes to gross total plant as opposed to gross pole plant. The rate of return element will be negative and is subtracted from the positive elements of the carrying charge. We believe this result is reasonable because the utility has, in effect, already recovered more than the original cost of its pole plant through depreciation charges. While this "over-recovery" is necessary to defray the costs of disposing of the poles when they are retired from service, the utility has the use of any "over-recovered" amounts throughout the poles' useful lives. Our conclusion that the utility's pole attachment rates should reflect the over-recovery in the form of a negative rate of return carrying charge properly recognizes this fact.

42. The formula using the gross approach yields the following calculation:

|   |  |
|---|--|
| (A). Gross Plant (Poles) <sup>153</sup> | (G). Administrative Expenses (Total)   |
| (B). Net Plant (Poles)                  | (H). Taxes (Total)   |
| (C). Depreciation Rate (Poles)          | (I). Gross Plant (Total)   |
| (D). Maintenance Expense (Poles)        | (J). Net Plant (Total)   |
| (E). Quantity of Poles                  | (K). Usable Space Factor (.074)  |
| (F). Authorized Rate of Return          | (L). Bare Pole Factor (.85 or .95)   |
| Maintenance Element                     | = Maintenance Expense (Poles) ÷ Gross Plant (Poles)<br>= (D) ÷ (A)   |
| Depreciation Element                    | = Depreciation Rate (Poles)<br>= (C)   |
| Return Element                          | = Rate of Return x Net Plant (Poles) ÷ Gross Plant (Poles)<br>= [(F) x (B)] ÷ (A)  |
| Administrative Element                  | = Administrative Expenses (Total) ÷ Gross Plant (Total)<br>= (G) ÷ (I)   |
| Tax Element                             | = Taxes (Total) ÷ Gross Plant (Total)<br>= (H) ÷ (I)   |
| Total Carrying Charge                   | = Sum of Maint., Depr., Ret. (-), Admin. and Tax Elements  |
| Max Rate                                | = Space Factor x Bare Pole Factor x Gross Plant (Poles) x Total Carrying Charges ÷ Quantity of Poles<br>= [(K) x (L) x (A) x Total Carrying Charges] ÷ (E) |

<sup>153</sup> Gross pole plant should not include costs for pole change-outs or other make-ready costs that were paid by the attacher.

We reiterate that in all other cases, where the net pole investment is positive, the appropriate figures to use in the formula continue to be the net figures, unless the parties agree otherwise.

### 3. Case by Case Applications

43. Teligent urges us to adopt more specific rules regarding pole attachments in rights-of-way and wireless pole attachments, rather than consider those complaints on a case by case basis.<sup>154</sup> MCI petitions us to adopt specific rules for addressing complaints concerning rates for access to electric utility transmission facilities rather than considering such complaints on a case by case basis.<sup>155</sup>

44. In the *Telecom Order*, we stated that the record was not sufficient to enable us to adopt detailed standards that would govern all of these situations.<sup>156</sup> We believe our basic rate methodology is adaptable to attachments that fit these categories.<sup>157</sup> A complaint involving a dispute about these attachments would be treated as any other pole attachment complaint.<sup>158</sup> In the *Telecom Order*<sup>159</sup> and the *Local Competition Order*,<sup>160</sup> we recognized guiding principles based on the Pole Attachment Act to be used in determining rates for pole attachments, including attachments to rights-of-way, wireless attachments and transmission facilities attachments. Guiding principles include the congressionally mandated methodology,<sup>161</sup> preference for publicly available records when available,<sup>162</sup> and an acceptable range of just and reasonable rates.<sup>163</sup> We stated that we believed it prudent to gain experience through case-by-case adjudication of disputes to determine whether additional "guiding principles" or presumptions were necessary or appropriate

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<sup>154</sup>Teligent *Telecom Order* petition at 7-9.

<sup>155</sup>MCI *Telecom Order* petition at 24-25.

<sup>156</sup>*Telecom Order* at ¶¶ 120-121. *See also, Local Competition Access Reconsideration Order*, FCC 99-266 (1999) at n. 5.

<sup>157</sup>*See, e.g., GTE Telecom Order* comments at 1-3 (case-by-case only way to go for wireless attachments). *But see, Teligent Telecom Order* petition at 7-12 (without clear specific guidelines, providers of wireless telecommunications services will be disadvantaged).

<sup>158</sup>47 C.F.R. § 1.1401-1.1418.

<sup>159</sup>*See generally, the Telecom Order.*

<sup>160</sup>*See Local Competition Order*, 11 FCC Rcd 15499 (1996) at ¶¶ 1143-1186; *see also, Local Competition Access Reconsideration Order*, FCC 99-266 at ¶¶ 23-46.

<sup>161</sup>47 U.S.C. §224(d),(e).

<sup>162</sup>1977 *Senate Report* at 19-21.

<sup>163</sup>*Pole Attachment Order*, 2 FCC Rcd 4387 (1978).

for non-traditional situations.<sup>164</sup> We concluded that complaints will be considered on a case by case basis.<sup>165</sup>

45. On reconsideration, we will not adopt separate or detailed regulations at this time for considering complaints about rates, terms and conditions for nondiscriminatory access for non-traditional attachments.<sup>166</sup> We have not been persuaded that our current rules are not satisfactory to provide all parties a process by which they may seek appropriate remedies when negotiations for attachments fail. We continue to believe it prudent to gain experience through case by case adjudication to determine whether additional guiding principles or presumptions are necessary or appropriate, and this will be accomplished through our existing complaint procedures.<sup>167</sup> We will continue to address complaints about just and reasonable rates, terms and conditions, and nondiscriminatory access for non-traditional attachments on a case-by-case basis.

### C. THE SPACE FACTOR

46. In the *Fee Order*, we affirmed the use of the *Cable Formula* to set rates in disputed pole attachment cases.<sup>168</sup> As indicated above, the basic *Cable Formula* can be stated as follows:

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

In order to facilitate the negotiation of just and reasonable rates and the resolution of pole attachment complaints, we make use of rebuttable presumptions in the *Cable Formula*.<sup>169</sup> In the *Fee Order*, we reviewed the continued applicability of various factors and elements within the *Cable Formula*, including certain presumptions used to determine the total usable space or capacity occupied by a pole attachment.<sup>170</sup>

<sup>164</sup>*Telecom Order* at ¶ 121 n.390

<sup>165</sup>*Telecom Order* at ¶ 121. See also *Promotion of Competitive Networks in Local Telecommunications Markets, First Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 99-217, *Fifth Report and Order and Memorandum Opinion and Order*, CC Docket No. 96-98, and *Fourth Report and Order and Memorandum Opinion and Order*, CC Docket No. 88-57, 15 FCC Rcd 22983, 23024, ¶ 91(2000) (adopting case by case approach to determine rates for access to in-building ducts and conduit).

<sup>166</sup>See, e.g., *Teligent Telecom Order* petition at 7-9; see also *WinStar Telecom Order* comments at 13-16.

<sup>167</sup>47 C.F.R. §§ 1.1401-1.1418.

<sup>168</sup>*Fee Order* at ¶ 14; see also, *Pole Attachment Order*, 2 FCC Rcd 4387 (1987) at ¶ 6; 47 U.S.C. §§ 224(b)(1), (d).

<sup>169</sup>To avoid a pole by pole rate calculation, the Commission adopted rebuttable presumptions such as an average pole height of 37.5 feet, and an average of 13.5 feet of usable space on a pole. See *Second Report and Order*, 72 FCC 2d at 69-72; see also, *Telecom Order*, 13 FCC Rcd 6777 (1998).

<sup>170</sup>*Fee Order* at ¶ 19; see *Fee Order Notice*, 12 FCC Rcd at 7449, ¶¶ 17-37.