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ATTORNEY AT LAW
38 THIRD ST.
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(401) 289-0324
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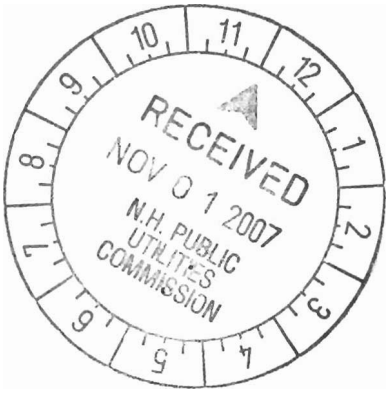


October 31, 2007

Debra A. Howland, Executive Director & Secretary
New Hampshire Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301

RE: VERIZON NEW ENGLAND INC. AND FAIRPOINT COMMUNICATIONS, INC. Joint Application for Approvals Related to Verizon's Transfer of Property and Customer Relations to Company to be Merged with and into FairPoint Communications, Inc., DOCKET NO. DT-07-011

Dear Ms. Howland:

This letter is to inform the Commission that the Town of Hanover and segTEL have agreed to stipulate to the admissibility of the prefiled testimony of Julia Griffin (premarked as Joint Municipalities Exh. 1P) and the Town of Hanover's responses to segTEL's data requests 1-4 (premarked as segTEL Exh. 2), without the need for cross examination at the hearing. Attached to this letter please find segTEL Exh. 2, which includes a copy of the Affidavit of Julia Griffin indicating that her testimony and the responses to data requests were prepared by her or under her supervision and are truthful and accurate. An original version of this Affidavit will be filed by Mr. Ciandella in the next day or two.

Thank you for your attention to this matter. Please do not hesitate to call if you have any questions.

Respectfully submitted,

Scott Sawyer

cc: Email service list

segTEL Exh. 2P

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION
DT 07-011

Verizon New England and FairPoint Communications

AFFIDAVIT OF JULIA GRIFFIN

I, Julia Griffin, having been duly sworn, do hereby depose and say:

1. My direct testimony in this matter and the Data Responses of the Municipal Intervenor, Town of Hanover, to the Data Requests posed by segTEL, were prepared under my direction, subject to the objections posed by legal counsel for the Town to segTEL 1-1 and segTEL 1-4, and to the best of my knowledge are truthful and accurate.

Further, the affiant sayeth naught.

Penelope L Hoisington
Witness

Julia Griffin

STATE OF NEW HAMPSHIRE
COUNTY OF Grafton, ss.

On this the 31st day of October, 2007, before me, Sue Girouard, the undersigned officer, personally appeared Julia Griffin, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within affidavit and swore to me that the facts contained in said affidavit are true and accurate to the best of her knowledge and belief.

In witness whereof, I hereunto set my hand and official seal.

Sue Girouard
Notary Public/ ~~Justice of the Peace~~
SUE E. B. GIROUARD, Notary Public
My Commission Expires September 22, 2009

segTEL Exh. 2P

New Hampshire Public Utilities Commission
Verizon New England, Inc.
Docket No. DT 07-011

Answers of Municipal Intervenor Hanover
to Data Requests of segTEL

QUESTIONS FOR TOWN OF HANOVER:

segTel 1-1 Please refer to your testimony at page 3 where it states "The Town has the exclusive right to mange the right-of-way by law." Please state in detail the basis for this assertion. Please identify and provide a copy of all rules, ordinances, statutes or other documents that you rely on to support your statement.

The Town of Hanover ("Town") previously objected to this request to the extent it sought a legal response or analysis. Without waiving that objection, the Town provides the following response:

The Town relies upon RSA 231:160, 161 and 163, pertaining to its exclusive authority over the erection of poles and the issuance of pole licenses, RSA 41:8 and RSA 49-D:3, I (a), pertaining to its exclusive authority to manage the right-of-way, and RSA 21-P:39, regarding its emergency management functions. Copies of those statutes are set out below.

RSA 231:160 Authority to Erect.

Telegraph, television, telephone, electric light and electric power poles and structures and underground conduits and cables, with their respective attachments and appurtenances may be erected, installed and maintained in any public highways and the necessary and proper wires and cables may be supported on such poles and structures or carried across or placed under any such highway by any person, copartnership or corporation as provided in this subdivision and not otherwise.

RSA 231:161 Procedure.

Any such person, copartnership or corporation desiring to erect or install any such poles, structures, conduits, cables or wires in, under or across any such highway, shall secure a permit or license therefor in accordance with the following procedure:

segTEL Exh. 2P

I. Jurisdiction.

(a) Town Maintained Highways. Petitions for such permits or licenses concerning town maintained highways shall be addressed to the selectmen of the town in which such highway is located; and they are hereby authorized to delegate all or any part of the powers conferred upon them by the provisions of this section to such agents as they may duly appoint.

(b) City Maintained Highways. Petitions for such permits or licenses concerning city maintained highways shall be addressed to the board of mayor and aldermen or board of mayor and council of the city in which such highway is located and they shall exercise the powers and duties prescribed in this subdivision for selectmen; and they are hereby authorized to delegate all or any part of the powers conferred upon them by the provisions of this section to such agents as they may duly appoint.

(c) State Maintained Highways. Petitions for such permits or licenses concerning all class I and class III highways and state maintained portions of class II highways shall be addressed to the commissioner of transportation who shall have exclusive jurisdiction of the disposition of such petitions to the same effect as is provided for selectmen in other cases, and also shall have like jurisdiction for changing the terms of any such license or for assessing damages as provided herein. The commissioner shall also have the same authority as conferred upon the selectmen by RSA 231:163 to revoke or change the terms and conditions of any such license. The commissioner is hereby authorized to delegate all or any part of the powers conferred upon him by the provisions of this section to such agent or agents as he may duly appoint in writing; he shall cause such appointments to be recorded in the office of the secretary of state, who shall keep a record thereof.

(d) The word "selectmen" as used in the following paragraphs of this section shall be construed to include all those having jurisdiction over the issuance of permits or licenses under paragraph I hereof.

II. Permits. The petitioner may petition such selectmen to grant a permit for such poles, structures, conduits, cables or wires. If the public good requires, the selectmen shall grant a permit for erecting or installing and maintaining such poles, structures, conduits, cables or wires. Such permit shall designate and define in a general way the location of the poles, structures, conduits, cables or wires described in the petition therefor. Such permit shall be effective for such term as they may determine, but not exceeding one year from the date thereof, and may, upon petition, be extended for a further term not exceeding one year. A permit shall not be granted to replace an existing utility pole on any public highway unless such replacement pole is

segTEL Exh. 2P

erected at least 20 feet from the surfaced edge or the edge of public easement therein, provided, however, that for good cause shown the selectmen may waive the 20-foot requirement.

III. Effect of Permit. Except as otherwise provided herein, the holder of such permit shall during the term thereof be entitled to have and exercise all the rights, privileges and immunities and shall be subject to all the duties and liabilities granted or imposed hereby upon the holder of a license hereunder.

IV. Licenses. The petitioner may petition such selectmen to grant a license for such poles, structures, conduits, cables or wires. If the public good requires, the selectmen shall grant a license for erecting and installing or maintaining the poles, structures, conduits, cables or wires described in the petition.

V. Provision of Licenses. The selectmen in such license shall designate and define the maximum and minimum length of poles, the maximum and minimum height of structures, the approximate location of such poles and structures and the minimum distance of wires above and of conduits and cables below the surface of the highway, and in their discretion the approximate distance of such poles from the edge of the traveled roadway or of the sidewalk, and may include reasonable requirements concerning the placement of reflectors thereon. Such designation and definition of location may be by reference to a map or plan filed with or attached to the petition or license.

VI. Effect of License. All licenses granted under the provisions hereof shall be retroactive to the date the petition therefor is filed. The word "license" as hereinafter used herein, except in RSA 231:164 shall be construed to include the word "permit". The holder of such a license, hereinafter referred to as licensee, shall thereupon and thereafter be entitled to exercise the same and to erect or install and maintain any such poles, structures, conduits, cables, and wires in approximately the location designated by such license and to place upon such poles and structures the necessary and proper guys, cross-arms, fixtures, transformers and other attachments and appurtenances which are required in the reasonable and proper operation of the business carried on by such licensee, together with as many wires and cables of proper size and description as such poles and structures are reasonably capable of supporting during their continuance in service; and to place in such underground conduits such number of ducts, wires and cables as they are designed to accommodate, and to supply and install in connection with such underground conduits and cables the necessary and proper manholes, drains, transformers and other accessories which may reasonably be required.

segTEL Exh. 2P

231:163 Changes.

Any such licensee or any person whose rights or interests are affected by any such license may petition the selectmen for changes in the terms thereof; and after notice to the parties and hearing, the selectmen may make such alterations therein as the public good requires. The selectmen, after notice to any such licensee and hearing, may from time to time revoke or change the terms and conditions of any such license, whenever the public good requires.

RSA 41:8 Election and Duties.

Every town, at the annual meeting, shall choose, by ballot, one selectman to hold office for 3 years. The selectmen shall manage the prudential affairs of the town and perform the duties by law prescribed. A majority of the selectmen shall be competent in all cases.

RSA 21-P:39 Local Organization for Emergency Management.

I. Each political subdivision of the state shall establish a local organization for emergency management in accordance with the state emergency management plan and program. Each local organization for emergency management shall have a local director who shall be appointed and removed by the county commissioners of a county, the city council of a city, or board of selectmen of a town, and who shall have direct responsibility for the organization, administration and operation of such local organization for emergency management, subject to the direction and control of such appointing officials. Each local organization shall have jurisdiction only within its respective political subdivision, and the director appointed by that political subdivision shall be responsible to his or her appointing authority. The appointing authority may appoint one of its own members or any other citizen or official to act as local director and shall notify the state director in writing of such appointment. If a local director is removed, the state director shall be notified immediately. Each local organization for emergency management shall perform emergency management functions within the territorial limits of the political subdivision within which it is organized.

II. Until a local director has been appointed, the chief elected official shall be directly responsible for the organization, administration, and operation of such local organization for emergency management.

III. In carrying out the provisions of this subdivision, each political subdivision in which any disaster as described in RSA 21-P:35, V occurs may enter into contracts and incur obligations necessary to combat such disaster, protecting the health and safety of persons and property, and providing emergency assistance to the victims of such disaster. Each political

segTEL Exh. 2P

subdivision may exercise the powers vested under this section in the light of the exigencies of the extreme emergency situation without regard to time-consuming procedures and formalities prescribed by law, excepting mandatory constitutional requirements, pertaining to the performance of public work, entering into contracts, the incurring of obligations, the employment of temporary workers, the rental of equipment, the purchase of supplies and materials, and the appropriation and expenditure of public funds.

IV. In carrying out the provisions of this subdivision, each political subdivision in which any disaster as described in RSA 21-P:35, V occurs may meet at any place within or without the territorial limits of such political subdivision and shall proceed to establish and designate by ordinance, resolution, or other manner, alternate or substitute sites or places as the emergency temporary location or locations of such government where all or any part of the public business may be transacted and conducted during the emergency situation. Such sites or places may be within or without the territorial limits of such political subdivision, but shall be within this state.

segTEL 1-2 Please refer to your testimony at page 4 where it discusses pole licenses. Please provide a copy of all town ordinances, agreements, procedures, forms and any other documents that describe the license procedures that utilities are to follow in Hanover.

The Town has no special ordinances, agreements, procedures, forms or other documents that describe the license procedures utilities are to follow. The Town follows the procedures outlined in RSA Chapter 231, as provided in response to segTEL 1-1.

segTEL 1-3 Please refer to your testimony at page 5 where it states "The conduit licenses also permit the Town to install fiber in the telephone conduit without charge." Please provide a copy of such license. When did the Town insert language in the conduit licenses to permit the Town to install fiber in telephone conduit without charge?

Provided separately are representative copies of conduit licenses from 1941, 1980 and 2000 showing the referenced language. This language appeared in licenses throughout this period and was not inserted by the Town after the licenses were issued.

segTEL Exh. 2P

segTEL 1-4 Please refer to your testimony at page 6 where it states "Hanover also maintains a municipal fiber connection network. Hanover was not required to obtain utility approval for this network and its expansion." Please state in detail the basis for your assertion that Hanover was not required to obtain utility approval for this network and its expansion. Please identify and provide a copy of all statues, ordinances, rules, opinion letters, contracts, agreements and other documents that you rely on to support your statement that Hanover was not required to obtain utility approval.

The Town previously objected to this request to the extent it sought a legal response or analysis. Without waiving that objection, the Town provides the following response:

The Town relies upon the statutes cited in response to segTEL 1-1, the licenses, representative samples of which are provided in response to segTEL 1-3, and the following order of the Federal Communications Commission ("FCC") regarding over-lashing optical fiber to the existing alarm cable attachments, to upgrade its emergency management capabilities: Report and Order, In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, FCC Docket No. 97-151. A copy of that Report and Order is submitted separately.

EXHIBIT
tabbies
segTEL 2P

PETITION FOR BURIED CABLE LOCATION

March 10 19 41 .

To The Board of Selectmen

of Hanover, New Hampshire.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY desires a license to install and maintain buried cable, manholes, handholes with the wires and cables therein, markers and other fixtures, together with underground laterals, manholes, handholes, cables and wires in and under the hereinafter named highways or intersecting highways for the purpose of making connections with such poles and buildings as said Company may deem necessary along, across and under the following highways in said municipality -

Locate

Ground wires to water mains on Reservoir Rd. and E. Wheelock St., as per attached plan

WHEREFORE it petitions that it be granted a license to install and maintain buried cables, manholes, handholes, with the wires and cables therein, markers and other fixtures, together with underground laterals, manholes, handholes, cables and wires in the above or intersecting public highways for the purpose of making connections with such poles and buildings for distributing purposes as said Company may deem necessary, said buried cable, manholes, handholes and markers to be installed approximately in accordance with plan filed herewith or attached hereto, marked " New England Tel. & Tel. Co. ", No. EHF-98-1 Dated 2-4-41 .

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY

By Lee Comerford
Plant Engineer

segTEL 1-3

EXHIBIT
tabbies
sgTEL 2P

LICENSE FOR BURIED CABLE LOCATION

_____ 19____.

In the Board of Selectmen of the town of Rowley of Rowley
New Hampshire, on _____ 19____.

Upon petition of NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, dated March 10, 1941, it appearing that the public good requires, it is hereby

O R D E R E D

That said petitioner be and hereby is granted a license to install and maintain buried cables, manholes, handholes, with wires and cables therein, markers and other fixtures in or under the surface of highways in said muniopality as follows -

Locate

Ground wires to water mains on Reservoir Rd. and E. Wheelock St., as per attached plan

together with a license to place and maintain underground laterals, manholes, handholes, cables and wires in the above or intersecting public highways for the purpose of making connections with such poles and buildings for distributing purposes as said Company may deem necessary.

The approximate location of underground conduits, cables, and wires is designated or defined as shown upon a plan marked "New England Telephone and Telegraph Co.", No. NEP-98-1, dated 8-1941 19____ attached to and made a part of this order. Underground conduits, wires and cables shall not be less than 2½ feet below the surface of the highway.

The foregoing license is subject to the following conditions.

1. The laterals, manholes, handholes and markers shall be of such material and construction and all work done in such manner as to be satisfactory to such municipal officers as may be appointed to the supervision of the work, and a plan showing the location of buried cable laid shall be filed with the City/Town when the work is completed.

2. Said Company shall file with the City/Town its agreement to indemnify and save the City/Town harmless against all damages, costs and expense whatsoever to which the City/Town may be subjected in consequence of the acts or neglect of said Company, its agents or servants, or in any manner arising from the rights and privileges granted it by the City/Town.

3. In addition to such agreement, said Company shall, before a public way is disturbed for the placing of its buried cable, execute a bond in a penal sum of Five Thousand Dollars, ($5000.00), conditioned for the faithful performance of said agreement and of its duties under this license. (Reference being had to bond already on file.)
4. Said Company shall comply with the requirements of existing ordinances, by-laws and such as may hereafter be adopted governing the construction and maintenance of buried cable, conduits, poles and wires so far as the same are not inconsistent with the laws of the State of New Hampshire.

Horace E. Hurlbutt)
Nils A. Lacoss) ~~Selectmen~~ _____
_____) ~~Citizens~~ _____
_____) ~~Attest~~ _____
~~Town Clerk~~

Selectmen of ~~Hanover~~ _____, New Hampshire.

Recorded in the Town records of the town/~~city~~ of ~~Hanover, New Hampshire~~ Book 1 Page 50.

Attest L. A. Blodgett
Town/~~City~~ Clerk

EXHIBIT
tabbies
SeqTEL 2P

PETITION AND LICENSE FOR CONDUIT LOCATION

PETITION

Laconia, New Hampshire March 20 1980

To the Board of Selectmen of Hanover, New Hampshire.

New England Telephone and Telegraph Company desires a license to install and maintain underground conduits and manholes, with the wires and cables therein, in or under, the hereinafter named highways or intersecting public highways in said municipality for the purpose of making connections with such poles and buildings for distributing purposes as said Company may deem necessary—

429' of conduit and one manhole replacement #2A on West Wheelock Street

245' of conduit on School Street

16' of conduit on Massachusetts Avenue

See attached sketch

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY

By Samuel M. Smith

O.P. Supervisor - R/W

LICENSE

Upon the foregoing petition and it appearing that the public good so requires, it is hereby

ORDERED

Date April 3, 1980

That New England Telephone and Telegraph Company be and hereby is granted a license to install and maintain underground conduits and manholes, with the wires and cables therein, in or under, the surface of the highways covered by said petition or intersecting public highways for the purpose of making connections with such poles and buildings for distributing purposes as said Company may deem necessary.

The approximate location of underground conduits, is designated or defined as shown upon a plan marked 'New England Tel. & Tel. Co.' No. PR135909
Dated 3-20-80, attached to and made a part of this order.

The foregoing license is subject to the following conditions —

1. The conduits and manholes shall be of such material and construction and all work done in such manner as to be satisfactory to such municipal officers as may be appointed to the supervision of the work, and a plan showing the location of conduits constructed shall be filed with the Town/City when the work is completed.

EXHIBIT
tabbies
reg TEL 2P

2. In every underground main line conduit constructed by said Company one duct not less than three inches in diameter shall be reserved and maintained free of charge for the use of the fire, police, telephone and telegraph signal wires belonging to the City/Town and used by it exclusively for municipal purposes.

3. Said Company shall indemnify and save the City/Town harmless against all damages, costs and expenses whatsoever to which the City/Town may be subjected in consequence of the acts of neglect of said Company, its agents or servants, or in any manner arising from the rights and privileges granted it by the said City/Town.

4. In addition said Company shall before a public way is disturbed for the laying of its wires, or conduits, execute its bond in a penal sum of Five Thousand, ($5,000.00) (Reference being had to bond already on file) conditioned for the faithful performance of its duties under this license.

5. Said Company shall comply with the requirements of existing by-laws/ordinances and such as may hereafter be adopted, governing the construction and maintenance of conduits, and wires so far as the same are not inconsistent with the laws of the State of New Hampshire.

Peter Thornton
.....
.....
Town / ~~City~~ Manager

By vote of Board of Selectmen
Town ~~City~~ of Hanover
Attest .....
Town ~~City~~ Clerk

of the Town of Hanover, New Hampshire.

Recorded in the Pole License records of the ~~city~~/town of Hanover
III, New Hampshire, Book III Page 12
Date April 4, 1980
Attest Frances G. Wales
~~City~~/Town Clerk

EXHIBIT
tabbies
DTE 2P

930111

PETITION AND LICENSE FOR CONDUIT LOCATION

PETITION

Manchester, New Hampshire Date: October 21, 2000

To the Town Clerk of Hanover, New Hampshire.

VERIZON NEW ENGLAND, INC., desires a license to install and maintain underground conduit and manholes, with the wires and cables therein, in or under the hereinafter named highways or intersecting public highways in said municipality for the purpose of making connections with such poles and buildings for distributing purposes as said Company may deem necessary.

Placement and licensing of approximately 595 feet of conduit, buried wire, and cable, and the associated handholes, on School Lane, in the Town of Hanover, New Hampshire, as per attached.

VERIZON NEW ENGLAND, INC.

by _____

Right-of-Way Department

LICENSE

Upon the foregoing petition and it appearing that the public good so requires, it is hereby

ORDERED

That VERIZON NEW ENGLAND, INC., be and hereby is granted a license to install and maintain underground conduits and manholes, with wires and cables therein, in or under, the surface of the highways covered by said petition or intersecting highways for the purpose of making connections with such poles and buildings for distributing purposes as said Company may deem necessary.

The approximate location of the underground conduit shall be shown on a plan marked VERIZON NEW ENGLAND, INC., number 930111, dated February 24, 1999, attached to and made a part of this order.

The foregoing license is subject to the following conditions-

1.) The conduit and manholes shall be of such material and construction and all work done in such manner as to be satisfactory to such municipal officers as may be appointed to the supervision of the work, and a plan showing the location of conduits constructed shall be filled with the Town when the work is completed.

2.) In every underground main line conduit constructed by said Company one duct not less than three inches in diameter shall be reserved and maintained free of charge for the use of the fire and police signal wires belonging to the Town and used by it exclusively for municipal purposes.

3.) Said Company shall indemnify and save the Town harmless against all damages, costs and expenses whatsoever to which the Town may be subjected in consequence of the acts of neglect of said Company, its agents or servants, or in any manner arising from the rights and privileges granted it by the said Town.

4.) In addition said Company shall, before a public way is disturbed for the laying of its wires or conduit, execute its bond in a penal sum of FIVE THOUSAND DOLLARS ($5,000.00) (Reference being had a bond already on file) conditioned for the faithful performance of its duties under this license.

5.) Said Company shall comply with the requirements of existing by-laws ordinances and such as may hereafter be adopted, governing the construction and maintenance of conduits and wires so far as the same are not inconsistent with the laws of the State of New Hampshire.

_____
Selectmen

By vote of _____

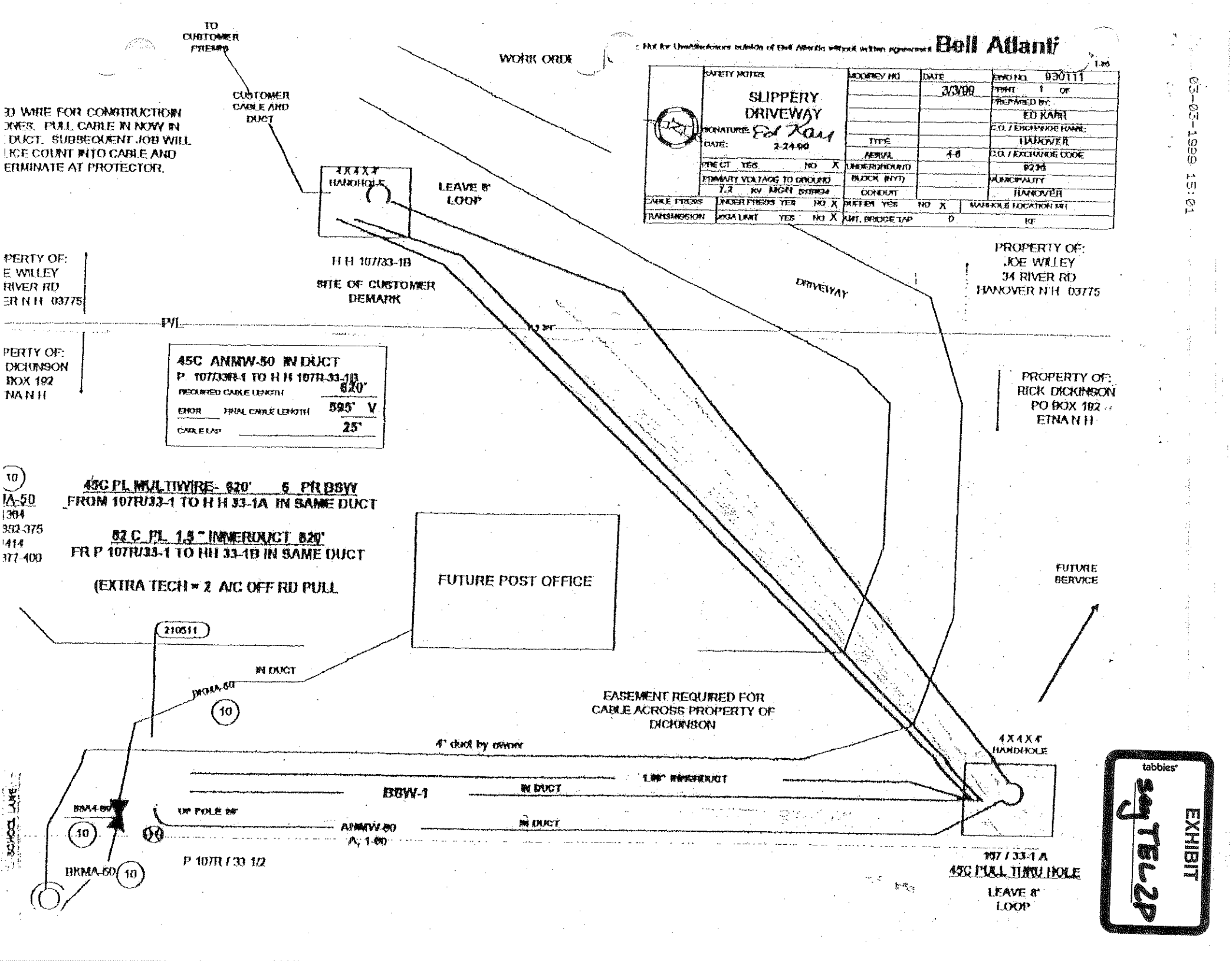
_____
Selectmen

Town of Hanover, New Hampshire

_____
Selectmen

Attest _____
Town Clerk

DTE 2P-1-3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CUSTOMER CABLE AND DUCT
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ERMINATE AT PROTECTOR.
SAFETY NOTES
SLIPPERY DRIVEWAY
SIGNATURE: Ed Kaar
DATE: 2-24-99
MODIFIED NO
DATE 3/3/99
ENG NO. 930111
PREPARED BY: ED KARR
C.O. / EXCHANGE NAME: HANOVER
C.O. / EXCHANGE CODE: 9236
MUNICIPALITY: HANOVER
MANHOLE LOCATION NH
TYPE
AERIAL 4-8
UNDERGROUND
BLOCK (NYD)
CONDUIT
PIC CT YES NO X
PRIMARY VOLTAGE TO GROUND 7.2 kV WYE SYSTEM
CABLE PRESS
UNDER PRESS YES NO X
BUTTER YES NO X
TRANSMISSION
SIGA UNIT YES NO X
JUNT. BRIDGE TAP 0
4 X 4 X 4' HANDHOLE
LEAVE 6' LOOP
H H 107/33-1B
SITE OF CUSTOMER DEMARK
DRIVEWAY
PROPERTY OF: JOE WILLEY 34 RIVER RD HANOVER N H 03775
PROPERTY OF: E WILLEY RIVER RD ER N H 03775
PROPERTY OF: DICKINSON BOX 192 NA N H
PROPERTY OF: RICK DICKINSON PO BOX 192 ETNA N H
PVL
45C ANMW-50 IN DUCT
P 107/33R-1 TO H H 107R-33-1B
REQUIRED CABLE LENGTH 620'
ERROR FINAL CABLE LENGTH 595' V
CABLE LAP 25'
45C PL MULTIWIRE- 620' 6 PR BSW
FROM 107R/33-1 TO H H 33-1A IN SAME DUCT
62 C PL 1.5" INNERDUCT 620'
FR P 107R/33-1 TO HH 33-1B IN SAME DUCT
(EXTRA TECH = 2 A/C OFF RD PULL
FUTURE POST OFFICE
FUTURE SERVICE
EASEMENT REQUIRED FOR CABLE ACROSS PROPERTY OF DICKINSON
210511
IN DUCT
DKMA-50
10
4" duct by owner
4 X 4 X 4' HANDHOLE
1.25" INNERDUCT
BBW-1
IN DUCT
UP POLE 99'
ANMW-50
IN DUCT
P 107R / 33 1/2
107 / 33-1 A
45C PULL THRU HOLE
LEAVE 8' LOOP
SCHOOL LANE
EXHIBIT
TEL2P
tabbies

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

In the Matter of	)	
	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	CS Docket No. 97-151
	)	
Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	
	)	

REPORT AND ORDER

Adopted: February 6, 1998 **Released: February 6, 1998**

By the Commission:

Table of Contents

I. INTRODUCTION

1.1 In this *Report and Order* ("*Order*"), the Commission adopts rules implementing Section 703 of the Telecommunications Act of 1996 ("1996 Act")[1] relating to pole attachments.[2] Section 703 requires the Commission to prescribe regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services.[3] Section 703 also requires that the Commission's regulations ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.[4] We adopt the rules set forth in Appendix A hereto based upon the comments and reply comments filed in response to the *Notice of Proposed Rulemaking* in this docket (the "*Notice*").[5] A list of commenters, as well as the abbreviations used in this *Order* to refer to such parties, is contained in Appendix B hereto. The commenters generally represent the interests of one of the following three categories: (1) utility pole owners;[6] (2) cable

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[1]Pub. L. No. 104-104, 110 Stat. 61, 149-151, codified at 47 U.S.C. § 224.

[2]Section 703 amended Section 224 of the Communications Act. Currently Section 224 defines "pole attachment" as any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit or right-of-way owned or controlled by a utility. 47 U.S.C. § 224(a)(4). Section 224 defines "utility" as any person who is a local exchange carrier or an electric, gas, water, steam or other public utility, and who owns or controls poles, ducts, conduits or rights-of-way used, in whole or in part, for any wire communications, not including 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).

[3]47 U.S.C. § 224(e)(1).

[4]*Id.*

[5]*Notice of Proposed Rulemaking*, CS Docket No. 97-151, 12 FCC Rcd 11725 (1997). In addition, to the extent relevant, we have considered the comments and reply comments filed in response to the *Notice of Proposed Rulemaking* in CS Docket No. 97-98 relating to the existing formula for pole attachments. *Notice of Proposed Rulemaking*, CS Docket No. 97-98 (Amendment of Rules and Policies Governing Pole Attachments), 12 FCC Rcd 7449 (1997) ("*Pole Attachment Fee Notice*"). The *Pole Attachment Fee Notice* specifically seeks comment on the Commission's use of the current presumptions, on carrying charge and rate of return elements of the formula, on the use of gross versus net data and on a conduit methodology.

[6]Commenting utility pole owners generally include American Electric, et al., Carolina Power, et al., Colorado Springs Utilities, New York State Investor Owned Electric Utilities, Dayton Power, Duquesne Light, Edison Electric/UTC, Ohio Edison, Texas Utilities and
Union Electric.

operators;[7] and (3) telecommunications carriers.[8]

[7]Commenting cable operator interests generally include Adelphia, et al., New York Cable Television Assn., Comcast, et al., NCTA, SCBA and Summit.

[8]Commenting telecommunications carrier interests generally include Ameritech, AT&T, Bell Atlantic, BellSouth, Champlain Valley Telecom, et al., GTE, ICG Communications, KMC Telecom, MCI, Omnipoint, RCN, SBC, Sprint, Teligent, USTA, U S West and Winstar.

II. BACKGROUND

1.2 The purpose of Section 224 of the Communications Act[9] is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers.[10] The rules we adopt in this *Order* further the pro-competitive goals of Section 224 and the 1996 Act by giving incumbents and new entrants in the telecommunications market fair and nondiscriminatory access to poles and other facilities, while safeguarding the interests of the owners of those facilities.

1.3 As originally enacted, Section 224 was designed to ensure that utilities' control over poles and rights-of-way did not create a bottleneck that would stifle the growth of cable television. Congress sought to prohibit utilities from engaging in "unfair pole attachment practices . . . and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public."[11] As mandated by Section 224, the Commission established a formula to calculate maximum rates that utilities could charge cable operators for the installation of attachments on utility facilities where such rates are not regulated by a state.[12] In subsequent proceedings the Commission amended and clarified its methodology for establishing rates and its complaint process.[13]

1.4 The 1996 Act amended Section 224 in several important respects. While

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[9]Pub. L. No. 95-234 ("1978 Pole Attachment Act") codified at Communications Act of 1934, as amended ("Communications Act"), § 224, 47 U.S.C. § 224.

[10]S. Rep. No. 580, 95th Cong., 1st Sess. 19, 20 (1977) ("*1977 Senate Report*"), *reprinted in* 1978 U.S.C.C.A.N. 109, 121.

[11]*Id.*

[12]*First Report and Order* (Adoption of Rules for the Regulation of Cable Television Pole Attachments), CC Docket No. 78-144, 68 FCC 2d 1585 (1978) ("*First Report and Order*"); *see also Second Report and Order*, 72 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); *Report and Order*, CC Docket No. 86-212 (Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles), 2 FCC Rcd 4387, 4387-4407 (1987) ("*Pole Attachment Order*"), *recon. denied*, 4 FCC Rcd 468 (1989).

[13]*Second Report and Order*, 72 FCC 2d 59; *Memorandum Opinion and Order* (Petition to Adopt Rules Concerning Usable Space on Utility Poles, RM 4556), FCC 84-325 (released July 25, 1984) ("*Usable Space Order*"); *see also 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). Following *Alabama Power*, the Commission revised its rules in the *Pole Attachment Order*, 2 FCC Rcd 4387.

previously the protections of Section 224 had applied only to cable operators, the 1996 Act extended those protections to telecommunications carriers as well.[14] Further, the 1996 Act gave cable operators and telecommunications carriers a mandatory right of access to utility poles, in addition to maintaining a scheme of rate regulation governing such attachments.[15] In the *Local Competition Order*, we adopted a number of rules implementing the new access provisions of Section 224.[16]

1.5 As amended by the 1996 Act, Section 224 defines a utility as one "who is a local exchange carrier or an electric, gas, water, steam, or other public utility and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communications."[17] The 1996 Act, however, specifically excluded incumbent local exchange carriers ("ILECs") from the definition of telecommunications carriers with rights as pole attachers.[18] Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though the ILEC has no rights under Section 224 with respect to the poles of other utilities. This is consistent with Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants.[19]

1.6 Section 224 contains two separate provisions governing maximum rates for pole attachments, one of which covers attachments used to provide cable service and one of which covers attachments for telecommunications services (including attachments used jointly for cable and telecommunications). Section 224(b)(1), which was not amended by the 1996 Act, grants the Commission authority to regulate the rates, terms, and conditions governing pole attachments for

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[14] 47 U.S.C. § 224.

[15] 47 U.S.C. § 224(a), (f).

[16] *First Report and Order*, CC Docket No. 96-98 (Implementation of the Local Competition Provisions in the Telecommunications Act of 1996), 11 FCC Rcd 15499, 16058-107, paras. 1119-1240 (1996) (the "*Local Competition Order*"), *rev'd on other grounds, Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom., AT&T Corp. v. Iowa Utilities Board*, 66 U.S.L.W. 3387, 66 U.S.L.W. 3484, 66 U.S.L.W. 3490 (U.S. Jan. 26, 1998) (No. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1411). In August 1996, the Commission also issued a *Report and Order* in CS Docket No. 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.

[17] 47 U.S.C. § 224(a).

[18] 47 U.S.C. § 224(a)(5).

[19] *Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference*, 104th Cong., 2d Sess. 98-100, 113 ("*Conf. Rpt.*").

cable service to ensure that they are just and reasonable.[20] Section 224(d)(1) defines a just and reasonable rate as ranging from the statutory minimum (incremental costs) to the statutory maximum (fully allocated costs).[21] Incremental costs include pre-construction survey, engineering, make-ready and change-out costs incurred in preparing for cable attachments.[22] Fully allocated costs refer to the portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles that is equal to the portion of usable pole space that is occupied by an attacher.[23]

1.7 Separately, Section 224(e)(1), the subject of this *Order*, governs rates for pole attachments used in the provision of telecommunications services, including single attachments used jointly to provide both cable and telecommunications service. Under this section, the Commission must prescribe, no later than two years after the date of enactment of the 1996 Act, regulations "to govern charges for pole attachments used by telecommunication carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges."[24] Section 224(e)(1) states that such regulations "shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for such pole attachments."[25] The section also sets forth a transition schedule for implementation of the new rate formula for telecommunications carriers. Until the effective date of the new formula governing telecommunications attachments, the existing pole attachment rate methodology of cable services is applicable to both cable television systems and to

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[20] *Cf.* 47 U.S.C. § 224(c)(1). The Commission does not have authority where a state regulates pole attachment rates, terms, and conditions. Section 224(c)(3) directs that 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 also occurs, with respect to individual cases, 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).

[21] 47 U.S.C. § 224(d)(1).

[22] "Make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. *See 1977 Senate Report* at 19. A pole "change-out" is the replacement of a pole to accommodate additional users. *Pole Attachment Order*, 2 FCC Rcd at 4405 n.3. 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. *See 1977 Senate Report* at 19.

[23] *Id.* at 19-20.

[24] 47 U.S.C. § 224(e)(1). The 1996 Act was enacted on February 8, 1996.

[25] *Id.*

telecommunications carriers.[26]

1.8 In the *Notice*, the Commission sought comment on implementing a methodology to ensure just, reasonable, and nondiscriminatory maximum pole attachment and conduit[27] rates for telecommunications carriers.[28] Under the present formula, a portion of the total annual cost of a pole is included in the pole attachment rate based on the portion of the usable space occupied by the attaching entity.[29] Under the 1996 Act's amendments, the portion of the total annual cost included in the pole attachment rate for cable systems and telecommunications carriers providing telecommunications services will be determined under a more delineated method. This method allocates the costs of the portion of the total pole cost associated with the usable portion of the pole and the portion of the total pole cost associated with the unusable portion of the pole in a different manner. The Commission also sought comment on how to ensure that rates charged for use of rights-of-way are just, reasonable, and nondiscriminatory.[30]

1.9 The rules we adopt today implement the plain language of Section 224. That section provides that the regulations promulgated will apply "when the parties fail to resolve a dispute over such charges."[31] Accordingly, and as discussed below, we encourage parties to negotiate the rates, terms, and conditions of pole attachment agreements. Although the Commission's rules will serve as a backdrop to such negotiations, we intend the Commission's enforcement mechanisms to be utilized only when good faith negotiations fail. Based on the Commission's history of successful implementation and enforcement of rules governing attachments used to provide cable service, we believe that the new rules we adopt today will foster competition in the provision of communications services while guaranteeing fair compensation for the utilities that own the infrastructure upon which such competition depends.

III.PREFERENCE FOR NEGOTIATED AGREEMENTS AND COMPLAINT RESOLUTION PROCEDURES

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[26]47 U.S.C. § 224(d)(3); 47 C.F.R. § 1.1401. Pursuant to Section 224(d)(3), the current formula will continue to be applicable to cable systems providing only cable service and, until February 8, 2001, to cable systems and telecommunications carriers providing telecommunications services. See Section VI below regarding the implementation and the effective date of the rules we adopt herein.

[27]A conduit is a pipe placed in the ground through which cables are pulled. FCC ARMIS Operating Data Report, FCC Report 43-08 (January 1992).

[28]*Notice*, 12 FCC Rcd at 11739-40, paras. 36-41.

[29]*See Third Report and Order*, 77 FCC 2d 187 (1980).

[30]*Notice*, 12 FCC Rcd at 11740, paras. 42-43.

[31]47 U.S.C. § 224(e)(1).

A. Background

1.10 The 1996 Act amended Section 224 by adding a new subsection (e)(1) to:

> . . . govern the charges for pole attachments used by telecommunications providers to provide telecommunications services when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable and nondiscriminatory rates for pole attachments.[32]

The statute,[33] legislative policy,[34] administrative authority,[35] and current industry practices[36] all make private negotiation the preferred means by which pole attachment arrangements are agreed upon between a utility pole owner and an attaching entity.[37] Pursuant to the Commission's authority to provide for just, reasonable, and nondiscriminatory rates, terms and conditions for pole attachments,[38] attaching entities have recourse to the Commission when unable to resolve a dispute with a utility pole owner. The Commission's rules establish a specific complaint process.[39] Under

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[32] 47 U.S.C. § 224(e)(1).

[33] 47 U.S.C. §§ 224(b)(1), (d)(1), (e)(1).

[34] *1977 Senate Report* at 19-20; *Conf. Rpt.* at 205-207.

[35] *First Report and Order*, 68 FCC 2d 1585 (setting initial rules for the complaint process, formula elements and the use of historical costs); *Second Report and Order*, 72 FCC 2d 59 (setting spatial presumptions and defined incremental and fully allocated costs for use in formula); *Third Report and Order*, 72 FCC 2d 187, *aff'd Monongahela Power Co. v. FCC*, 655 F.2d 1254; *Pole Attachment Order*, 2 FCC Rcd 4387, *recon. denied*, 4 FCC Rcd 468.

[36] *See, e.g.*, Carolina Power, et al., Comments at 11; NCTA Comments at 4-7; USTA Reply at 2.

[37] From 1979, when the first pole attachment complaint was filed with the Commission, to 1991, approximately 246 pole attachment complaints were filed. From 1991 through 1996, approximately 44 such complaints were filed. Currently, there are seven pole attachment complaints under review by the Commission's Cable Services Bureau. We view this number of complaints to the Commission, in light of the penetration of cable service in the nation's communities, to be indicative that most pole attachment rates are negotiated without resort to the Commission.

[38] 47 U.S.C. §§ 224(b)(1), (e)(1), (f)(1).

[39] 47 C.F.R. §§ 1.1401-1.1416.

the current rule, in reviewing a complaint about rates, the Commission will compare the utility's proposed rate to a maximum rate calculated using the statutory formula.[40]

1.11 In proposing a methodology to implement Section 224(e), the Commission stated in the *Notice* that the Commission's role is limited to circumstances when the parties fail to resolve a dispute and that negotiations between a utility and an attacher should continue to be the primary means by which pole attachment issues are resolved.[41] The Commission also indicated that Congress recognized the importance of access in enhancing competition in telecommunications markets and that parties in a pole attachment negotiation do not have equal bargaining positions.[42] To further Congressional intent to foster competition in telecommunications, the Commission proposed to apply to telecommunications carriers the Commission's existing complaint rules developed to resolve pole attachment rate disputes between cable operators and utilities.[43]

1.12 Some telecommunications carriers and utility pole owners agree that negotiations between a utility and an attaching entity will continue, under Section 224(e), to be the primary means by which pole attachment issues are resolved.[44] Several utility pole owners, however, suggest a number of changes to the complaint process, such as adding a mandatory negotiation period and establishing a statute of limitations and a minimum amount in controversy.[45] American Electric, et al., also contend that meaningful negotiations can occur "only when the default pricing mechanism established by the Commission is somewhere close to the price on which the parties would agree absent such regulation."[46] Attaching entities respond that the American Electric, et al.,

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[40] 47 U.S.C. § 224(d)(1).

[41] *Notice*, 12 FCC Rcd at 11731, para. 12.

[42] *Id.*

[43] *Id.* The current complaint rule provides that "[t]he complaint shall include a brief summary of all steps taken to resolve the problem prior to filing. If no such steps were taken, the complaint shall state the reason(s) why it believed such steps were fruitless." 47 C.F.R. § 1.1404(j).

[44] *See* Bell Atlantic Reply at 2 (negotiation is essential means to establish just and reasonable rates for pole attachments); Carolina Power, et al., Reply at 11 (private negotiations are the cornerstone of attachment agreements); GTE Comments at 4-5; USTA Reply at 2. *But see* MCI Comments at 2 (formula for maximum rate is a necessary condition to making negotiations, and therefore industry resolution of disputes, possible at all).

[45] *See* American Electric, et al., Reply at 30; Carolina Power, et al., Comments at 18-19; Duquesne Light Comments at 18-20; Edison Electric/UTC Comments at 7; GTE Reply at 4-5; USTA Comments at 2.

[46] American Electric, et al., Comments at 12-13. American Electric, et al., believe that any default pricing formula established pursuant to Section 224(e) should be based on

proposals would eliminate recourse to the Commission, contrary to the content and spirit of the law.[47]

1.13 The Association of Local Telecommunications Services ("ALTS")[48] asserted in its comments in response to the *Pole Attachment Fee Notice* that its members have experience attempting to obtain pole attachments from numerous utilities,[49] and many negotiations were unsatisfactory in part due to the intransigence by or blatant refusal of utilities to negotiate.[50] USTA, a national trade association representing over 1,000 LECs,[51] contends that while the most efficient manner to determine just and reasonable pole attachment rates is that of permitting pole owners and attachers to negotiate reasonable agreements,[52] the proposal by American Electric, et al., contravenes the statute.[53]

1.14 Electric utility pole owners oppose the continued use of the current negotiation process and complaint procedures established for cable operators, claiming the current regulatory scheme has resulted in government-sponsored unilateral contract modification and subsidization of the cable industry by the electric utility ratepayer.[54] American Electric, et al., contend that the Commission must recognize that the bargaining relationship between electric utilities and cable companies has changed since 1978 when Congress provided the cable television industry with access to the distribution poles of utilities at just and reasonable rates.[55] In asserting that attaching

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Forward-Looking Economic Pricing Model based on economic capital costs. American Electric, et al., Comments at 13,39 and CS Docket No. 97-98 Comments at 4, 42-46, 91-94.

[47] *See, e.g.,* NCTA Reply at 4; *see also* Association for Local Telecommunications Services CS Docket No. 97-98 Comments at 2; USTA CS Docket No. 97-98 Reply at 6.

[48] ALTS is a national trade association representing over 30 telecommunications carriers that are facilities based competitive local exchange carriers ("CLECs"). ALTS CS Docket No. 97-98 Comments at 1.

[49] ALTS CS Docket No. 97-98 Comments at 2.

[50] *Id.*

[51] USTA Comments at 1.

[52] USTA CS Docket No. 97-98 Comments at 2.

[53] USTA CS Docket No. 97-98 Reply at 5-6.

[54] *See, e.g.,* American Electric, et al., Comments at 18-20.

[55] American Electric, et al., CS Docket No. 97-98 Comments at 8 (stating that since 1977, the cable industry has grown to a 67% coverage of homes in America, citing *Third Annual Report*, CS Docket No. 96-133 (In the Matter of Annual Assessment of Status of

entities no longer represent an industry that needs rate regulation under Section 224,[56] American Electric, et al., acknowledge that in 1978 "Congress was concerned with the cable companies' inferior bargaining position vis-a-vis utilities and wanted to assist an industry in its infancy."[57] USTA interprets Congressional intent as expecting the Commission to intervene and rely on the statutory formula only in instances where negotiating parties are unable to reach a mutually acceptable agreement.[58] USTA further states that the Commission has established and maintained a case-by-case dispute resolution process since 1978, rather than adopting a uniform pole attachment rate prescription process in compliance with that Congressional mandate.[59] Cable and telecommunications carriers assert that potential and existing attaching entities do still need pole attachment rate regulation because they are still not able to bargain from a level position with utility pole owners.[60] Cable operators and telecommunications carriers urge the Commission to extend the existing negotiation and complaint resolution system to telecommunications carriers.[61]

1.15 Some attaching entities suggest that the Commission impose on itself a 90-day time frame in which to issue a decision on a pole attachment complaint.[62] Other cable and telecommunications carriers request that the Commission impose upon utility pole owners the

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Competition in the Market for Delivery of Video Programming), 12 FCC Rcd 4358, 4368, para. 14 (1997)); *see also* American Electric, et al., Reply at 5.

[56]American Electric, et al., CS Docket No. 97-98 Comments at 23.

[57]*Id.*

[58]USTA CS Docket No. 97-98 Comments at 2 (quoting the *1977 Senate Report* at 3 ("The basic design of S. 1547, as reported, is to empower the [Commission] to exercise regulatory oversight over the arrangements between utilities and [cable television] systems in any case where the parties themselves are unable to reach a mutually satisfactory arrangement")).

[59]USTA CS Docket No. 97-98 Comments at 2.

[60]*See* Comcast, et al., Reply at 16; NCTA Reply at 3-6; New York Cable Television Assn. at 2-3; Teligent Reply at 5-6.

[61]*See, e.g.,* AT&T Comments at 2, Reply at 4; Champlain Valley Telecom, et al., Reply at 6 (objecting to attitude of American Electric, et al., reminding the Commission that its authority is not plenary); Comcast, et al., Reply at 16; NCTA Reply at 3-6. *Cf.* New York Cable Television Assn. at 2-3 (current rule gives utility pole owner too much leverage); Teligent Reply at 5-6 (sole reliance on negotiations is not enough).

[62]*See* Ameritech Reply at 3-4 (complaint process should provide for expeditious resolution of disputes); KMC Telecom Comments at 5-6 (90 days for the Commission to resolve complaints as a means to workable solutions).

requirement that pole attachment agreements between private parties be on public record so that an attaching entity will have notice of: (1) the expectations of the utility; and (2) the terms provided to other attaching entities.[63] The result would be that the most favored provisions from various agreements would then be available to all attaching entities.[64] Pole owners assert that attaching entities have no legitimate expectation that all provisions be available to all attaching entities.[65]

B. Discussion

1.16 Our rules for complaint resolution will only apply when the parties are unable to arrive at a negotiated agreement.[66] We affirm our belief that the existing methodology for determining a presumptive maximum pole attachment rate, as modified in this *Order*, facilitates negotiation because the parties can predict an anticipated range for the pole attachment rate.[67] We further conclude that the current complaint procedures are adequate to establish just and reasonable rates, terms, and conditions for pole attachments.[68] No party has demonstrated that the Commission's time for resolution has been a problem in the past. While we will not impose a deadline for Commission action, we will continue to endeavor to resolve complaints expeditiously. An uncomplicated complaint process and a clear formula for rate determination are essential to promote the use of negotiations for pole attachment rates, terms, and conditions.[69] We are committed to an environment where attaching entities have enforceable rights, where the interests of pole owners are recognized, and where both parties can negotiate for pole attachment rates, allowing the availability of telecommunications services to expand.

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[63] *See* ICG Communications Comments at 16, Reply at 1-2; KMC Telecom Comments at 5-6.

[64] *See* ICG Communications Comments at 16.

[65] *See* American Electric, et al., Reply at 34; Duquesne Light Comments at 19; Edison Electric/UTC Comments at 6-7; Ohio Edison Comments at 18; Union Electric Comments at 17.

[66] *See* American Electric, et al., Comments at 15; AT&T Comments at 2; Bell Atlantic Reply at 2; Carolina Power, et al., Reply at 11; GTE Reply at 5; MCI Comments at 2; NCTA Comments at 3-4; New York State Investor Owned Electric Utilities Comments at 6; USTA Reply at 2.

[67] *See, e.g.*, AT&T Reply at 4; ICG Communications Comments at 11; MCI Comments at 2; NCTA Comments at 3-4; *see also* Ameritech Reply at 3-5 (favors transparent maximum rate determinations); GTE Reply at 4-5 (uniform and transparent rate formula facilitates private negotiations); KMC Telecom Reply at 1-2 (clear formula and complaint process supports negotiation).

[68] *See* AT&T Comments at 2; MCI Comments at 2; NCTA Comments at 3-4.

[69] *See* GTE Reply at 4-5.

1.17 We agree with attaching entities that time is critical in establishing the rate, terms, and conditions for attaching.[70] Prolonged negotiations can deter competition because they can force a new entrant to choose between unfavorable and inefficient terms on the one hand or delayed entry and, thus, a weaker position in the market on the other.[71] For these reasons, we reject a proposal by utilities that we mandate a 180-day negotiation period prior to filing a complaint with the Commission. We agree with cable and telecommunications carriers that such a requirement would not be conducive to a pro-competitive, deregulatory environment.[72] Such an extended period of time could delay a telecommunications carrier's ability to provide service and unnecessarily obstruct the process.[73]

1.18 We disagree with utilities suggesting that, in addition to the existing time frames, the pole owner should receive 30 days' notice by a cable operator or telecommunications carrier of any intention to file a complaint.[74] Such a notice requirement would be redundant under our rule and would unnecessarily prolong the resolution of disputes. The current rule provides for a 45-day period in which the utility pole owner must respond to the request for access filed by a cable operator or telecommunications carrier seeking to install an attachment.[75] A complaint to the Commission must be filed within 30 days of the denial of a request for access.[76] The utility then has an additional 30 days to respond to the complaint.[77] When a cable operator or a telecommunications carrier believes it has cause to complain that a pole attachment rate, term, or condition is not just or reasonable,[78] a detailed set of data and information is required under the

[70] *See* AT&T Reply at 4; Ameritech Reply at 3; ICG Communications Comments at 11; MCI Reply at 3.

[71] *See* AT&T Reply at 4 (time is of the essence in negotiation); Ameritech Reply at 3-4 (the Commission should provide for expeditious resolution so that market entry is not delayed); ICG Communications Comments at 11 (timing is important); MCI Reply at 3 (time to market is critical).

[72] *See* ICG Communications Reply at 2-3; KMC Telecom Reply at 4; MCI Reply at 2-3.

[73] *But see* Duquesne Light Comments at 18; Edison Electric/UTC Comments at 7; Carolina Power, et al., Comments at 18-19.

[74] *See* American Electric, et al., Reply at 30; Edison Electric/UTC Reply at 6; GTE Comments at 4-5; USTA Comments at 2, Reply at 4.

[75] 47 C.F.R. § 1.1403(b).

[76] 47 C.F.R. § 1.1404(k).

[77] 47 C.F.R. § 1.1407(a).

[78] 47 U.S.C. §§ 224(b)(1), (d)(1), (e)(1).

current rule.[79] A utility has 30 days in which to respond to an attaching entity's request for the data and information regarding the rate, term, or condition required for the complaint.[80] Under the present rules, the utility has had communication with the attaching entity prior to the filing of the complaint, to such a degree as is necessary to understand the issues in conflict outlined in the complaint. The utility has sufficient notice of the issues involved, making additional notice requirements unnecessary.

1.19 GTE suggests that we impose a one year statute of limitations on the filing of a complaint and suggests an amount in controversy threshold of $5,000.[81] We view these proposals as unnecessarily restrictive as they could foreclose remedy of an unjust or unreasonable rate, term, or condition of pole attachments, especially for small enterprises.[82] There is no provision in the statute for such restrictions. Establishing a threshold of any dollar amount could preclude relief to small entities and would be inconsistent with Section 257 and the pro-competitive goals of the 1996 Act.[83]

1.20 Utility pole owners must provide access to attaching entities on a non-discriminatory basis.[84] While 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. We believe that these statutory standards are enforceable under the current rule.

1.21 We believe it is implicit in our current rule[85] that all parties must negotiate in good faith for non-discriminatory access at just and reasonable pole attachment rates.[86] In the *Local*

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[79] 47 C.F.R. §§ 1.1404(g)(1-12), (h), (i).

[80] 47 C.F.R. § 1.1404(h).

[81] *See* GTE Comments at 4-5.

[82] *See generally*, SCBA Reply.

[83] 47 U.S.C. § 257. This section requires the Commission to eliminate market entry barriers for entrepreneurs and other small businesses in the provision or ownership of telecommunication services or in the provision of parts or services to telecommunications providers.

[84] 47 U.S.C. § 224(f)(1).

[85] 47 C.F.R. § 1.1404.

[86] In furtherance of our original mandate to institute an expeditious procedure for determining pole attachment rates with a minimum of administrative costs and consistent with fair and efficient regulation, we adopted a program for non-discriminatory access to poles, ducts, conduits and rights-of-way in the *Local Competition Order*. 11 FCC Rcd at 16059, para. 1122 (citing the *1977 Senate Report* at

Competition Order, the Commission addressed the requirement of Section 251 that requires an ILEC to provide interconnection and other rights to new entrants, and observed that new entrants have little to offer the incumbent.[87] Rather, these new competitors seek to reduce the incumbent's subscribership and weaken the incumbent's dominant position in the market. An ILEC is likely to have scant, if any, economic incentive to reach agreement.[88] In the *Local Competition Order*, the Commission determined that a utility stood in a position vis-a-vis the competitive telecommunications provider seeking pole attachment agreements that was virtually indistinguishable from that of the ILEC with respect to a new entrant seeking interconnection agreements under Sections 251 and 252 of the 1996 Act.[89] We find that a utility's demand for a clause waiving the licensee's right to federal, state, or local regulatory relief would be per se unreasonable and an act of bad faith in negotiation. In particular, a request that a pole attachment agreement include a clause waiving statutory rights to file a complaint with the Commission is per se unreasonable.[90]

IV. CHARGES FOR ATTACHING

A. Poles

1. Formula Presumptions

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19). In the *Notice*, the Commission affirmed its interpretation of Congressional intent that negotiations between a utility and an attacher should continue to be the primary means by which pole attachment issues are resolved. *See Notice*, 12 FCC Rcd at 11731, para. 12; *see also* 47 U.S.C. § 224(f)(1).

[87] 11 FCC Rcd at 15570, para. 141.

[88] *Id.* The Commission continued, determining that a request by an incumbent that a new entrant contractually waive its legal rights or remedies could constitute a violation of the duty to negotiate in good faith imposed by Sections 251(c)(1) and 252, stating "We reject the general contention that a request by a party that another party limit its legal remedies as part of a negotiated agreement will in all cases constitute a violation of the duty to negotiate in good faith. A party may voluntarily agree to limit its legal rights or remedies in order to obtain a valuable concession from another party. . . . [W]e find that it is a per se failure to negotiate in good faith for a party to refuse to include in an agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules. Refusing to permit a party to include such a provision would be tantamount to forcing a party to waive its legal rights in the future." *Id.* at 15576, para. 152.

[89] *See id.* at 15570, para. 141.

[90] *See* Letter from Meredith J. Jones, Chief, Cable Services Bureau to Danny E. Adams, Esq., Kelley Drye & Warren LLP, DA No. 97-131 (January 17, 1997).

1.22 In determining a just and reasonable rate, two elements of the pole are examined: usable space and other than usable space. The costs relating to these elements are allocated to those using the pole. In the *Second Report and Order*, consistent with Section 224(d)(2), the Commission defined total usable space as the space on the utility pole above the minimum grade level[91] that is usable for the attachment of wires, cables, and related equipment.[92] This determination was based upon survey results, consideration of the National Electric Safety Code ("NESC"), and practical engineering standards used in constructing utility poles. The Commission found that "the most commonly used poles are 35 and 40 feet high, with usable spaces of 11 to 16 feet, respectively."[93] The Commission recognized the NESC guideline that 18 feet of the pole space must be reserved for ground clearance[94] and that six feet of pole space is for setting the depth of the pole.[95] To avoid a pole by pole rate calculation, the Commission adopted rebuttable presumptions of an average pole height of 37.5 feet, an average amount of usable space of 13.5 feet, and an average amount of 24 feet of unusable space on a pole. The Commission established a rebuttable presumption of one foot as the amount of space a cable television attachment occupies.[96] These presumptions serve as the premise for calculating pole attachment rates under the current formula.

1.23 A group of electric utilities filed a white paper ("*White Paper*") in anticipation of the *Notice* and the *Pole Attachment Fee Notice*[97] in which they suggest that an increase in the current presumptive pole height is appropriate. The *White Paper* asserts that over time, and with increased demand, the average pole height has increased to 40 feet. At the same time, the *White Paper* contends that the usable space presumption should be reduced from 13.5 feet to 11 feet.[98] The Commission sought comment on these presumptions in the *Pole Attachment Fee Notice* and sought further comment in the *Notice* to establish a full record for attachments made by

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[91] In this context, minimum grade level generally refers to the ground level or elevation above which distances are measured for determining required clearances.

[92] *See* 72 FCC 2d at 69; 47 C.F.R. § 1.1402(c).

[93] 72 FCC 2d at 69.

[94] *Id.* at 68, n.21.

[95] *Id.*

[96] *Id.* at 69-70.

[97] *See White Paper* filed by the law firm of McDermott, Will and Emery on August 28, 1996, on behalf of the American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Florida Power and Light Company, Northern States Power Company, The Southern Company and Washington Water Power Company.

[98] *Id.* at 11.

telecommunications carriers under the 1996 Act.[99]

1.24 We will address changing the existing presumptions in the *Pole Attachment Fee Notice* rulemaking.[100] Until resolution of that proceeding, we will apply our presumptions as they presently exist and proceed with the implementation under the 1996 Act of a methodology used in the provision of telecommunications services by telecommunications carriers and cable operators.

1.25 The *Notice* also sought comment on an issue raised by Duquesne Light in its reconsideration petition of the Commission's decision in the *Local Competition Order* proceeding.[101] Duquesne Light advocates that the number of physical attachments of an attaching entity is not necessarily reflective of the burden on the pole, and therefore of the costs relating to the attachment. Duquesne Light states that varying attachments place different burdens on the pole and proposes that any presumption include factors addressing weight and wind loads.[102] We will address whether any presumptions should reflect these factors in the *Pole Attachment Fee Notice* rulemaking.

2. Restrictions on Services Provided over Pole Attachments

1.26 In the *Notice*, we sought comment on whether the Commission's decision in *Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Company* ("*Heritage*")[103] should be extended.[104] In *Heritage*, a cable operator provided traditional cable services as well as nontraditional services through its facilities. Those facilities consisted of coaxial cable lashed to aerial support strands and fiber optic cable overlashed to the aerial support strands.[105] The

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[99] *Notice*, 12 FCC Rcd at 11733, para. 17.

[100] *See Pole Attachment Fee Notice*, 12 FCC Rcd at 7458-59, paras. 18-20. We reserve decision on issues regarding the 37.5 ft. presumptive pole height, the 13.5 ft. presumptive amount of usable space, the minimum ground clearance amount, the allocation of the 40-inch safety space, and the exclusion of 30 ft. poles from the calculation of costs of a bare pole and the determination as to whether such poles lack a sufficient amount of usable space to accommodate multiple attachments.

[101] *Notice*, 12 FCC Rcd at 11733, para. 18 (citing *Local Competition Order*, 11 FCC Rcd at 16058-107, paras. 1119-1240); *see also* Duquesne Light CC Docket No. 96-98 Comments at 17-18.

[102] Duquesne Light CC Docket No. 96-98 Comments at 17-18.

[103] 6 FCC Rcd 7099 (1991), *recon. dismissed*, 7 FCC Rcd 4192 (1992), *aff'd sub nom. Texas Utilities Electric Co. v. FCC*, 977 F.2d 925 (D.C. Cir. 1993).

[104] *Notice*, 12 FCC Rcd at 11731, para. 13.

[105] *Heritage*, 6 FCC Rcd at 7100.

nontraditional services provided by the cable operator consisted of non-video broadband communications services, including data transmission services.[106] The pole owner attempted to charge the cable operator an additional, unregulated rate for those poles with pole attachments supporting the facilities transmitting both video signals and data.[107]

1.27 In *Heritage*, which was decided prior to the 1996 Act, the Commission determined that the provision by a cable operator of both traditional cable services and nontraditional services on a commingled basis over a single network within the cable operator's franchise area justified only a single, regulated pole attachment charge by the utility pole owner.[108] The Commission affirmed its longstanding view of cable as a provider of video and nonvideo broadband services and determined that its pole attachment authority includes nonvideo broadband services under Section 224. The Commission stated that its jurisdiction under Section 224 was not limited by definitions emanating from the Cable Communications Policy Act of 1984 ("Cable Act of 1984")[109] because such definitions apply only for purposes of Title VI.[110] Further, it stated that, even when Section 224 is read in conjunction with the Cable Act of 1984, the Cable Act of 1984 and its legislative history indicate that a cable system providing both video and nonvideo broadband services is not excluded from the benefits of Section 224.[111]

1.28 Whether *Heritage* continues to apply raises significant issues as cable operators expand into new service areas, such as Internet services. Generally, commenters disagree as to the applicability of *Heritage* since the passage of the 1996 Act amendments to Section 224. Some utility pole owners contend that *Heritage* has been overruled by the 1996 Act, but they do not agree as to the effect of the overruling. Some of the utility pole owners argue that the new Sections 224(d)(3) and 224(e) create a new regime requiring new rules,[112] and therefore *Heritage* is no longer applicable. Some of these commenters also argue that, after the year 2001, a cable company is entitled to the old incremental rate under Section 224(d)(3) if the pole attachment is used solely

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[106] *Id.*

[107] *Id.*

[108] *Id.* at 7107.

[109] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (Oct. 30, 1984).

[110] *Heritage*, 6 FCC Rcd at 7103-04.

[111] *Id.* at 7104. The U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission's decision on appeal because it was "consistent with the congressional purpose to avoid abusive pole attachment practices by utilities for the FCC to regulate any attachment by a cable operator within its franchise area and within its cable television system." *Texas Utilities v. FCC*, 977 F.2d at 936.

[112] Texas Utilities Reply at 2; GTE Comments at 8; USTA Comments at 4.

to provide cable services. They contend that the use of a cable attachment to provide nonvideo services in addition to video would not be an attachment used solely for cable service and such attachment would be subject to the Section 224(e) telecommunications services rate.[113] Other utility pole owners argue that the provision of services other than cable and telecommunications services are outside the scope of Section 224 and are therefore not subject to the Commission's jurisdiction.[114] They contend that such services will be subject to market place negotiations.[115]

1.29 Cable operators generally contend that *Heritage* has not been overruled by the 1996 Act. They also contend that high speed Internet access is a cable service and an operator offering such service should not be assessed the Section 224(e) telecommunications services rate.[116] Telecommunications carriers generally agree that *Heritage* has not been overruled, and therefore the pre-1996 Act rules continue to provide that a utility should not charge different pole attachment rates based on the type of service provided by the cable operator, and further that a utility should be prohibited from placing unreasonable restrictions on the use of pole attachments by permitted attachers.[117] Some of the telecommunications carriers, however, oppose any extension of *Heritage*, arguing that such extension would provide preferential treatment for cable operators.[118] At least one telecommunications carrier argues that the distinctions established by Congress effectively overrule *Heritage* and that cable operators providing additional services besides video service are to be treated as telecommunications carriers under Section 224.[119]

1.30 We disagree with the utility pole owners who assert that the *Heritage* decision has been "overruled" by the passage of the 1996 Act insofar as it held that a cable system is entitled to a Commission-regulated rate for pole attachments that the cable system uses to provide commingled data and video. The definition of "pole attachment" does not turn on what type of service the attachment is used to provide. Rather, a "pole attachment" is defined to include any attachment by

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[113]Edison Electric/UTC Comments at 9.

[114]American Electric, et al., Comments at 11 (citing *Report and Order*; CC Docket No. 96-45 (In the Matter of Federal-State Joint Board on Universal Service), 12 FCC Rcd 8776 ("*Universal Service Order*"), 9176, para. 781); Duquesne Light Comments at 21; Ohio Edison Comments at 20; Union Electric Comments at 19.

[115]Duquesne Light Comments at 21; Ohio Edison Comments at 20; Union Electric Comments at 19.

[116]Comcast, et al., Comments at 18; NCTA Comments at 6-7, n.9; New York Cable Television Assn. Comments at 8.

[117]RCN Comments at 5-6; Sprint Comments at 2, Reply at 1-2 (citing MCI Comments at 4-5); U S West Comments at 4-5.

[118]MCI Comments at 6.

[119]*See* Ameritech Comments at 4.

a "cable television system."[120] Thus, the rates, terms and conditions for all pole attachments by a cable television system are subject to the Pole Attachment Act.[121] Under Section 224(b)(1), the Commission has a duty to ensure that such rates, terms, and conditions are just and reasonable.[122] We see nothing on the face of Section 224 to support the contention that pole owners may charge any fee they wish for Internet and traditional cable services commingled on one transmission facility.

1.31 The history of Section 224 further supports our conclusion. The purpose of the amendments to Section 224 made by the 1996 Act was similar to the purpose behind Section 224 when it was first enacted in 1978, *i.e.*, to remedy the inequitable position between pole owners and those seeking pole attachments.[123] The nature of this relationship is not altered when the cable operator seeks to provide additional service. Thus, it would make little sense to conclude that a cable operator should lose its rights under Section 224 by commingling Internet and traditional cable services. Indeed, to accept contentions that cable operators expanding their services to include Internet access no longer are entitled to the benefits of Section 224 would penalize cable entities that choose to expand their services in a way that will contribute "to promot[ing] competition in every sector of the communications industry," as Congress intended in the 1996 Act.[124]

1.32 Having decided that cable operators are entitled to the benefits of Section 224 when providing commingled Internet and traditional cable services, we next turn to the appropriate rate to be applied. We conclude, pursuant to Section 224 (b)(1), that the just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate. In specifying this rate, we intend to encourage cable operators to make Internet services available to their customers.[125] We believe that specifying a higher rate might deter an operator from providing non-traditional services. Such a result would not serve the public interest. Rather, we believe that specifying the Section 224(d)(3) rate will encourage greater competition in the provision of Internet service and greater benefits to consumers.

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[120] 47 U.S.C. § 224(a)(4).

[121] 47 U.S.C. § 224(b)(1).

[122] *Texas Utilities v. FCC*, 977 F.2d at 934-35.

[123] *1977 Senate Report* at 19, 20.

[124] Preamble to the 1996 Act; *see also* 142 Cong. Rec. S687-01, S687 (daily ed. February 1, 1996) (Statement of Sen. Hollings).

[125] We have, through social contracts, encouraged cable operators to provide Internet services to their customers. *See Social Contract for Continental Cablevision*, 10 FCC Rcd 299 (1995), *amended by* 11 FCC Rcd 11118 (1996); *Social Contract for Time Warner*, 11 FCC Rcd 2788 (1995), *amended by* FCC Rcd 3099 (1995), *further amended by* 12 FCC Rcd 14881(1996).

1.33 We emphasize that our decision to apply the Section 224(d)(3) rate is based on our regulatory authority under Section 224(b)(1). Several commenters suggested that cable operators providing Internet service should be required to pay the Section 224(e) telecommunications rate.[126] We disagree. The *Universal Service Order* concluded that Internet service is not the provision of a telecommunications service under the 1996 Act.[127] Under this precedent, a cable television system providing Internet service over a commingled facility is not a telecommunications carrier subject to the revised rate mandated by Section 224(e) by virtue of providing Internet service. We note, however, that Congress has directed the Commission to undertake a review of the implementation of the provisions of the 1996 Act relating to universal service, and to submit a report to Congress no later than April 10, 1998.[128] That report is to provide a detailed description of, among other things, the extent that the Commission's definition of "telecommunications" and "telecommunications

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[126] *See, e.g.,* Ameritech Comments at 4; Edison Electric/UTC Comments at 9-10; GTE Comments at 6; MCI Comments at 6.

[127] *See* Federal-State Joint Board on Universal Service, *Report and Order*; CC Docket No. 96-45, 12 FCC Rcd 8776, at 9180-81, para.789 (rel. May 8, 1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *appeal pending in Texas Office of Public Utility Counsel* v. *FCC and USA*, No. 97-60421 (5th Cir. 1997); Federal-State Joint Board on Universal Service, *Order on Reconsideration*, CC Docket No. 96-45, 12 FCC Rcd 10095 (rel. July 10, 1997); Changes to the Board of Directors of the National Exchange Carrier Association Inc., Federal-State Joint Board on Universal Service, *Report and Order and Second Order on Reconsideration*, CC Docket Nos. 97-21, 96-45, FCC 97-253 (rel. July 18, 1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket No. 96-45, DA 97-2477 (rel. Dec. 3, 1997); Changes to the Board of Directors of the National Exchange Carrier Association Inc., Federal-State Joint Board on Universal Service, *Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket Nos. 97-21, 96-45, FCC 97-292, 12 FCC Rcd 12437 (rel. Aug. 15, 1997); Federal-State Joint Board on Universal Service, *Third Report and Order*; CC Docket No. 96-45, (rel. Oct. 14, 1997), as corrected by Federal-State Joint Board on Universal Service, *Erratum*, CC Docket Nos. 96-45 and 97-160 (rel. Oct. 15, 1997); Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, *Second Order on Reconsideration in CC Docket 97-21*, CC Docket Nos. 97-21, 96-45, FCC 97-400 (rel. Nov. 26, 1997); Federal-State Joint Board on Universal Service, *Third Order on Reconsideration*, CC Docket No. 96-45, FCC 97-411 (rel. Dec. 16, 1997); Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge, *Fourth Order on Reconsideration*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, FCC 97-420 (rel. Dec. 30, 1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, DA 98-158 (rel. Jan 29, 1998).

[128] Pub. L. 105-119, 111 Stat. 2440 (1997), sec. 623.

service," and its application of those definitions to mixed or hybrid services, are consistent with the language of the 1996 Act.[129] We do not intend, in this proceeding, to foreclose any aspect of the Commission's ongoing examination of those issues.

1.34 We need not decide at this time, however, the precise category into which Internet services fit. Such a decision is not necessary in order to determine the pole attachment rate applicable to cable television systems using pole attachments to provide traditional cable services and Internet services. Regardless of whether such commingled services constitute "solely cable services" under Section 224(d)(3), we believe that the subsection (d) rate should apply. If the provision of such services over a cable television system is a "cable service" under Section 224(d)(3), then the rate encompassed by that section would clearly apply.[130] Even if the provision of Internet service over a cable television system is deemed to be neither "cable service" nor "telecommunications service" under the existing definitions, the Commission is still obligated under Section 224(b)(1) to ensure that the "rates, terms and conditions [for pole attachments] are just and reasonable," and, as Section 224(a)(4) states, a pole attachment includes "any attachments by a cable television system." And we would, in our discretion, apply the subsection (d) rate as a "just and reasonable rate" for the pro-competitive reasons discussed above. We again emphasize the pervasive purpose of the 1996 Act and the premise of the Commission's *Heritage* decision, to encourage expanded services, and that a higher or unregulated rate deters this purpose.[131] We note that in the one case where Congress affirmatively wanted a higher rate for a particular service offered by a cable system, it provided for one in section 224(e). In requiring that the Section 224(d) rate apply to any pole attachment used 'solely to provide cable service,' we do not believe Congress intended to bar the Commission from determining that the Section 224(d) rate methodology also would be just and reasonable in situations where the Commission is not statutorily required to apply the higher Section 224(e) rate.

1.35 We also disagree with utility pole owners that submit that all cable operators should be "presumed to be telecommunications carriers" and therefore charged at the higher rate unless the cable operator certifies to the Commission that it is not "offering"[132] telecommunications

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[129] *Id.*

[130] The legislative history of the 1996 Act may be read to support such a conclusion. See Conf. Rpt. at 206 which indicates that, "to the extent that a company seeks pole attachment for a wire used solely to provide cable television services (as defined by Section 602(6) of the Communications Act), that cable company will continue to pay the rate authorized under current law (as set forth in subparagraph (d)(1) of the 1978 Act)." Further, the Conference Report states that "[t]he conferees intend the amendment to reflect the evolution of cable to interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services," but was not intended to "cause dial-up access to information services over telephone lines to be classified as a cable service." *Conf. Rpt.* at 169.

[131] *See also Texas Utilities v. FCC*, 977 F.2d at 931-933.

[132] Telecommunications services means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to

services.[133] We think that a certification process would add a burden that manifests no benefit. We believe the need for the pole owner to be notified is met by requiring the cable operator to provide notice to the pole owner when it begins providing telecommunication services. The rule we adopt in this *Order* will reflect this required notification. We also reject the suggestions of utility pole owners that the Commission should be responsible for monitoring and enforcing a certification of cable operators regarding their status.[134] The record does not demonstrate that cable operators will not meet their responsibilities. If a dispute arises, the Commission's complaint processes can be invoked.

3. Wireless Attachments

a. Background

1.36 In the *Notice*, the Commission stated that, although wireless carriers have not historically affixed their equipment to utility poles, the 1996 Act gives them the right to do so and entitles them to rates consistent with Commission rules.[135] The *Local Competition Order* held that Section 224 does not describe the specific type of telecommunications equipment that an entity may attach, and that establishing an exhaustive list of equipment is not advisable or even possible.[136]

1.37 Some utility pole owners argue for limiting the type of equipment that a party may attach to facilities and assert that wireless carriers should not have the benefit of Section 224. They rely on legislative history accompanying the 1978 Pole Attachment Act[137] and the failure of Section 224 to include the word "wireless" in its language.[138] According to the pole owners, Congress

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the public, regardless of the facilities used. 47 U.S.C. § 153(43).

[133] *See* American Electric, et al., Comments at 46-47; Bell Atlantic Comments at 3; Colorado Springs Utilities Comments at 3; ICG Communications Comments at 27; MCI Comments at 6-9.

[134] *See* American Electric, et al., Comments at 46-47; Bell Atlantic Comments at 3; Colorado Springs Utilities Comments at 3; ICG Communications Comments at 27; MCI Comments at 6-9.

[135] *Notice*, 12 FCC Rcd at 11741, para. 61.

[136] 11 FCC Rcd at 16085, para. 1186.

[137] *1977 Senate Report.*

[138] *See, e.g.*, American Electric, et al., Comments at 11; Edison Electric/UTC Reply at 8; Petition for Reconsideration by Consolidated Edison Company of NY in CC Docket No. 96-98 at 11-12; Petition for Reconsideration by Duquesne Light Co. in CC Docket No. 96-98 at 17-18; Petition for Reconsideration by American Electric Power, et al., in CC Docket No. 96-98 at 1-18, 26-29; Petition for Reconsideration by Florida Power & Light

intended to cover pole attachments only for wire communications, and would have explicitly expanded that scope in the 1996 Act if it wanted to do so.[139] These interests cite the *1977 Senate Report* stating, "Federal involvement in pole attachment matters will occur only where space on a utility pole has been designated and is actually being used for communications services by wire or cable."[140] In contrast, wireless providers assert that they are telecommunications carriers entitled to the protection of Section 224.[141] These parties cite Section 3(44), which defines "telecommunications carrier" as "any provider of telecommunications services," and Section 3(46), which defines "telecommunications service" as "the offering of telecommunications for a fee . . . regardless of the facilities used."[142] Wireless providers contend they do not have easy alternatives for placing their equipment because they have had difficulty getting permits to erect antennas.[143] They argue that telecommunications competition arises in many forms and the Commission's regulations should not deter any particular method of delivering services.[144] In short, they ask the Commission to decide that Section 224 "unambiguously affords all telecommunications providers a legal right of access to poles."[145]

1.38 Telecommunications carriers and the utility pole owners acknowledge that determining an appropriate formula for wireless attachments is difficult.[146] Some utility pole owners assert it is beyond the scope of this rulemaking.[147] Some telecommunications carriers and utility pole owners agree that previous and proposed rate formulas do not lend themselves to the requirements of wireless attachments.[148] On the other hand, wireless interests emphasize that pole

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in CC Docket No. 96-98 at 24-26; *see also* Carolina Power, et al., CS Docket 97-98 Reply at 34-37; Edison Electric/UTC CS Docket No. 97-98 Comments at 3-7.

[139] *Id.*

[140] *1977 Senate Report* at 15; *see, e.g.*, Petition for Reconsideration by American Electric Power, et. al., in CC Docket No. 96-98 at 10-11.

[141] *See, e.g.*, Bell Atlantic Reply at 6-9; Omnipoint Reply at 2-3; Teligent Comments at 2.

[142] 47 U.S.C. § 3(44), (46); *see, e.g.*, Bell Atlantic Reply at 6-9; Omnipoint Reply at 3.

[143] *See, e.g.*, Bell Atlantic Reply at 6-9.

[144] *See, e.g.*, Teligent Comments at 2.

[145] Omnipoint Reply at 3.

[146] *See, e.g.*, Bell Atlantic Reply at 6-9; Edison Electric/UTC Reply at 2.

[147] *See, e.g.*, American Electric, et al., Comments at 5-6; Carolina Power, et al., Reply at 17-18; Edison Electric/UTC Reply at 2-3.

[148] *See, e.g.*, Bell Atlantic Reply Comments at 6-9; Comments at Edison Electric/UTC

attachment fees are assessed for the use of space, and should not depend primarily on what type of equipment occupies that space.[149] These parties contend that rates for wire and wireless attachments should be the same so that discriminatory pricing does not occur.[150]

b. Discussion

1.39 Wireless carriers are entitled to the benefits and protection of Section 224. Section 224(e)(1) plainly states: "The Commission shall . . . prescribe regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services."[151] This language encompasses wireless attachments.

1.40 Statutory definitions and amendments by the 1996 Act demonstrate Congress' intent to expand the pole attachment provisions beyond their 1978 origins. Section 224(a)(4) previously defined a pole attachment as "any attachment by a cable television system," but now states that a pole attachment is "any attachment by a cable television system *or provider of telecommunications service.*"[152] Moreover, in Section 224(d)(3), Congress applied the current pole attachment rules as interim rules for "any telecommunications carrier . . . to provide any telecommunications service."[153] In both sections, the use of the word "any" precludes a position that Congress intended to distinguish between wire and wireless attachments. Section 224(e)(1) contains three terms whose definitions support this conclusion. Section 3(44) defines telecommunications carrier as "any provider of telecommunications services."[154] Section 3(46) states that telecommunications services is the "offering of telecommunications for a fee directly to the public . . . regardless of the facilities used," and Section 3(43) specifies telecommunications to be "the transmission, between or among points specified by the user, or information of the user's choosing, without change in the form or content of the information as sent and received."[155] The use of "any" in Section 3(44) precludes limiting telecommunications carriers only to wireline providers. Wireless companies meet the definitions in Sections 3(43) and 3(46). In fact, the Commission has already recognized that cellular telephone, mobile radio, and PCS are

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Comments at 3; GTE Reply at 18.

[149] *See, e.g.,* Teligent Comments at 9-10.

[150] *See, e.g.,* AT&T Reply at 21; Omnipoint Reply at 3; Teligent Comments at 9; Winstar Comments at 2.

[151] 47 U.S.C. § 224(e)(1).

[152] 47 U.S.C. §224(a)(4) (emphasis added).

[153] 47 U.S.C. §224(d)(3).

[154] 47 U.S.C. §153(44).

[155] 47 U.S.C. §§ 153(46), (43).

telecommunications services.[156]

1.41 There are potential difficulties in applying the Commission's rules to wireless pole attachments, as opponents of attachment rights have argued. They note that previous and proposed rate formulas do not account for the unusual requirements of wireless attachments.[157] These parties assert that such attachments are usually more than a traditional box-like device and cable wires strung between poles. They include an antenna or antenna clusters, a communications cabinet at the base of the pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service. One commenter noted that there are "far greater costs and operational considerations" for wireless attachments.[158]

1.42 There is no clear indication that our rules cannot accommodate wireless attachers' use of poles when negotiations fail. When an attachment requires more than the presumptive one-foot of usable space on the pole, or otherwise imposes unusual costs on a pole owner, the one-foot presumption can be rebutted. In addition, when wireless devices do not need to use every pole in a utility's inventory, the parties can agree on some reasonable percentage of poles for developing a presumptive number of attaching entities. If parties cannot modify or adjust the formula to deal with unique attachments, and the parties are unable to reach agreement through good faith negotiations, the Commission will examine the issues on a case-by-case basis.

4. Allocating the Cost of Other than Usable Space

a. Method of Allocation

1.43 To determine the rate that a telecommunications carrier must pay for pole attachments, Section 224(e)(2) provides that:

> A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.[159]

This statutory language requires an equal apportionment of two-thirds of the costs of providing other than usable ("unusable") space among all attaching entities. The Commission proposed a methodology to apportion these costs which translates to the following formula:

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[156] *See, e.g., Universal Service Order*, 12 FCC Rcd at 9175; *Local Competition Order*, 11 FCC Rcd at 15997.

[157] *See, e.g.,* Edison Electric/UTC Comments at 4; *see also* Petition for Reconsideration filed by Duquesne Light in CC Docket No. 96-98 at 17-18.

[158] Edison Electric/UTC Comments at 5.

[159] 47 U.S.C. § 224(e)(2).

$$\text{Unusable Space Factor} = \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{Pole Height}} \times \frac{\text{Net Cost of a Bare Pole}}{\text{Number of Attachers}} \times \text{Carrying Charge Rate}$$[160]

1.44 We adopt our proposed methodology to apportion the cost of unusable space. We believe this formula most accurately determines the apportionment of cost of unusable space. As mandated by Congress, it equally apportions two-thirds of the costs of unusable space among attaching entities.

b. Counting Attaching Entities

(1)Telecommunications Carriers, Cable Operators and Non-Incumbent LECs

1.45 Under Section 224(e)(2), the number of attaching entities is significant because the costs of the unusable space assessed to each entity decreases as the number of entities increases. Therefore, determining which entities are attachers and which are not has a substantial effect on the proper apportionment of the costs of unusable space. The Commission proposed in the *Notice* that any telecommunications carrier, cable operator, or LEC attaching to a pole be counted as a separate entity for the purposes of the apportionment of two-thirds of the costs of the unusable space.

1.46 We will count as separate entities any telecommunications carrier, any cable operator, and any non-incumbent LEC.[161] This approach is consistent with the language of the statute and comports with Congress' intent to count all attaching entities when allocating the costs of unusable space.[162] The statute uses the term "entities" not "telecommunications carriers" when indicating how the costs of unusable space should be allocated. We interpret this use to indicate the inclusion of cable operators as well as telecommunications carriers when allocating the cost of unusable space.

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[160]The final component of the overall 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 taxes. To help calculate the carrying charge rate, we developed a formula that relate each of these components to the utility's pole investment. *See Pole Attachment Fee Notice* at Appendix A.

[161]*See* Adelphia, et al., Comments at 6; American Electric, et al., Comments at 40; AT&T Comments at 9; AT&T Reply at 9; Comcast, et al., Reply at 12; KMC Telecom Comments at 6; NCTA Comments at 17-18; New York Cable Television Assn. Comments at 22; Summit Comments at 2-3; U S West Comments at 6-7.

[162]*See Conf. Rpt.* at 206.

1.47 Some commenters argue that cable operators providing only cable service should not be counted because it would result in requiring the incumbent LEC that owns a pole, but not the competitors of the incumbent LEC, to subsidize "pure" cable attachments.[163] Similarly, other commenters argue that cable operators that solely provide cable service should not be included in the count because their attachments are not subject to rate regulation under Section 224(e)(2). We find these arguments unpersuasive. The statutory language compels a different conclusion. The statute states that the cost of unusable space shall be allocated under an equal apportionment "among all attaching entities."[164] While the cable operator rate is different, Congress made no indication that it intended to exclude any attaching entity when apportioning the costs of unusable space. On the contrary, the legislative history of the 1996 Act states that all attaching entities should be counted.[165] Congress explicitly provided for a different formula when determining pole attachment rates for cable operators providing cable services, but it made no such provision for the exclusion of those operators in the allocation of costs for unusable space. Moreover, Section 224(e)(2) does not restrict the use of the term "entities" to those entities that pay rates under Section 224(e).

(2) Pole Owners Providing Telecommunications Services and Incumbent LECs

1.48 In the *Notice*, the Commission tentatively concluded that, where a pole-owning utility is providing telecommunications services, the utility would also be counted as an attaching entity for the purposes of allocating the costs of unusable space under Section 224(e).[166] The Commission also tentatively concluded that an ILEC with attachments on a pole should be counted for the purposes of apportionment of the costs of unusable space. The Commission sought comment on how these two definitions impact its tentative conclusion.[167] The Commission noted that the definition of telecommunications carrier under Section 224 excludes ILECs, and a pole attachment is defined as any attachment by a cable television system or a provider of telecommunications service.

1.49 American Electric, et al., oppose counting an ILEC with attachments on the pole because the definition of a telecommunications carrier excludes ILECs and the definition of pole attachments specifically includes only attachments made by telecommunications carriers or cable operators.[168] Inclusion of ILECs in the apportionment of costs of unusable space, they conclude,

[163] Ameritech Comments at 11; Duquesne Light Comments at 39; MCI Comments at 14; Ohio Edison Comments at 37; Union Electric Comments at 34.

[164] 47 U.S.C. § 224(e)(2).

[165] *Conf. Rpt.* at 206.

[166] *Notice*, 12 FCC Rcd at 11734, para. 22.

[167] *Id.* at 11735, para. 23.

[168] American Electric, et al., Comments at 41.

would improperly extend the scope of Section 224 and contradict Congressional intent.[169] We disagree. The exclusion in Section 224(a)(5) of ILECs from the term telecommunications carrier is directed to the purpose of amended Section 224, to provide an important means of access. ILECs generally possess that access and Congress apparently determined that they do not need the benefits of Section 224.[170] The fundamental precept of the 1996 Act was to enhance competition, and the amendments to Section 224, like many of the amendments to the 1996 Act,[171] are directed to new entrants.[172] In contrast, Section 224(e), which delineates a new means to allocate costs, does not refer to "telecommunications carriers," but to "attaching entities."[173] Moreover, the term pole attachment is defined in terms of attachments by a "provider of telecommunications service" not as an attachment by a "telecommunications carrier."[174] The Conference Report confirms that Congress concluded that the unusable space "is of equal benefit to all entities attaching to the pole" and intended that the associated costs be apportioned "equally among all such attachments."[175] We thus think the statute draws a clear distinction between those entities that may invoke Section 224 and those entities that count for purposes of allocating the costs of unusable space.[176]

1.50 We affirm our tentative conclusion that any pole owner providing telecommunications services, including an ILEC, should be counted as an attaching entity for the purposes of allocating the costs of unusable space under Section 224(e)(2).[177] This includes pole owners that use only a part of their physical plant capacity to provide these services and is consistent with our recognition that pole attachments are defined in terms of attachments by a

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[169] *Id.*

[176] *See, e.g.*, Section 224(f)(1) (requiring utilities to afford telecommunications carriers non-discriminatory access).

[171] *See Conf. Rpt.* at 113 ("Preamble to the 1996 Act").

[172] *Local Competition Order*, 11 FCC Rcd at 15543, para. 83.

[173] 47 U.S.C. § 224(e).

[174] 47 U.S.C. § 224(a)(4).

[175] *Conf. Rpt.* at 206.

[176] 47 U.S.C. § 224.

[177] *See* Adelphia, et al., Comments at 6; AT&T Comments at 9; AT&T Reply at 9; Comcast, et al., Reply at 12; KMC Telecom Comments at 6; MCI Comments at 12; NCTA Comments at 17-18; Summit Comments at 2-3; U S West Comments at 5-6. *But see* American Electric, et al., Comments at 41 (the definition of a telecommunications carrier excludes incumbent ILECs and the definition of pole attachments specifically includes only attachments made by telecommunications carriers or cable operator).

"provider of telecommunication service." Section 224(e)(2) states that the costs of unusable space shall be allocated on the basis of "all attaching entities."[178] There is no indication from the statutory language or legislative history that any particular attaching entity should not be counted.

1.51 We also believe this conclusion is supported by Section 224(g) which requires that a utility providing telecommunications services impute to its costs of providing service an amount equal to the rate for which it would be liable under Section 224.[179] This section reflects Congress' recognition that as a provider of telecommunications services, a pole owner uses and benefits from the unusable space in the same way as the other attaching entities. Section 224(g) also directs the utility to impute the costs relating to these services to the appropriate affiliate, making clear that another entity is using the facility and should be counted as an attaching entity. We will count any pole owner providing telecommunications services, including an ILEC, as an attaching entity for the purpose of allocating costs of unusable space.

(3) Government Attachments

1.52 The *Notice* proposed that government entities with attachments, like other entities present on the utility pole, be counted as entities on the pole for purposes of allocating the costs of unusable space. A utility may be required under its franchise or statutory authorization to provide certain attachments for public use, such as traffic signals, festoon lighting, and specific pedestrian lighting. Often the responsible government agency does not directly pay for the attachment. The Commission proposed that, since the government agency is using space on the pole, its attachments be counted for purposes of allocating the cost of unusable space. This cost would be borne by the pole owner, since it relates to a responsibility under its franchise or statutory authorization.

1.53 Some cable operators and telecommunications carriers agree with our proposal to count as a separate attaching entity government agencies that have attachments to the pole.[180] Utility pole owners and other telecommunications carriers disagree, stating that the utilities would be responsible for a cost that should be shared by all users of the pole because all parties benefit from the existence of the pole as allowed by the government.[181] Since the agencies do not pay fees

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[178] 47 U.S.C. § 224(e)(2).

[179] 47 U.S.C. § 224(g) states:

> A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

[180] *See, e.g.,* AT&T Reply at 9 & 12; Comcast, et al., Reply at 12; KMC Telecom Comments at 6; MCI Comments at 12; NCTA Comments at 19.

[181] *See, e.g.,* Ameritech Comments at 12; Dayton Power Comments at 2; Duquesne Light Comments at 42; ICG Communications Comments at 35; New York State Investor Owned Electric Utilities Comments at 22-23; Ohio Edison Comments at 36,40, Reply at 9-11;

to the pole owner, the commenters continue, the utility must unfairly absorb the government agency's share of the cost of unusable space, in addition to the one-third share of the cost for which the pole owner is automatically liable. Still other utility pole owners disagree, asserting that government attachments are not wire attachments, do not provide telecommunications or cable services and are not included in the definition of "pole attachment."[182] In defending its recommendation not to count government attachments, ICG Communications adds that government attachments are normally installed in the pole's unusable space so as to avoid interference with other parties' use of the pole space.[183]

1.54 To the extent that government agencies provide cable or telecommunications service, we affirm our proposal that they be included in the count of attaching entities for purposes of allocating the cost of unusable space. We will not include government agencies in the count as a separate entity if they only provide certain attachments for public use, such as traffic signals, festoon lighting, and specific pedestrian lighting. We conclude that, where a government agency's attachment is used to provide cable or telecommunications service, the government attachment can accurately be described as a "pole attachment" within the meaning of Section 224(a)(4) of the 1996 Act.[184] Like a private pole attachment, it benefits equally from the unusable space on the pole and the costs for this benefit are properly placed on the government entity or the pole owner. Since the government attacher and the pole owner have a relationship that benefits both parties, we are not persuaded that the pole owner is unfairly absorbing the cost of the government's telecommunications attachments to the extent the pole owner's franchise so provides. We will not include a government agency with an attachment that does not provide cable or telecommunications service as an entity in the count when apportioning the costs of unusable space because such an attachment is not a "pole attachment" within the meaning of Section 224(a)(4).[185]

(4) Space Occupied on Pole

1.55 The *Notice* sought information on alternative methodologies to apportion costs of unusable space, such as by allocating to each entity a proportion of the unusable space equal to the proportion of usable space occupied by the entity's attachment.[186] Specifically, the Commission sought comment on an alternate approach that counts any telecommunications carrier as a separate attaching entity for each foot, or partial increment of a foot, it occupies on the pole. The Commission also asked whether such a methodology is consistent with the statutory requirement in Section 224(e)(2) for equal apportionment among all attaching entities.

Union Electric Comments at 33 & 37, Reply at 9-11.

[182] *See, e.g.,* American Electric, et al., Comments at 41-42; Carolina Power, et al., Comments at 5-6; New York State Investor Owned Electric Utilities Comments at 22-23.

[183] *See* ICG Communications Comments at 35.

[184] 47 U.S.C. § 224(a)(4).

[185] *Id.*

[186] *Notice*, 12 FCC Rcd at 11735, para. 23.

1.56 Based on the record, we reject this alternate proposal. U S West, in opposing the alternate method, argues that if Congress had intended to allocate the costs of unusable space based on space occupied, it would not have distinguished between usable and unusable space.[187] RCN supports the alternative method because, it argues, not all attaching entities benefit to the same degree from the unusable space and those using more space should be allocated more of the costs of unusable space.[188] Similarly, SBC argues that we should consider the amount of space occupied when allocating the costs of unusable space because an attaching entity that occupies two spaces on the pole should be allocated twice as much costs as an attaching entity that only occupies one space.[189]

1.57 In suggesting the alternative approach that entities using more than one foot be counted as a separate entity for each foot or increment thereof, we sought to ensure that entities be allocated the costs of the unusable space through a means reflecting their relative use. The record does not indicate whether use of more than one foot by an entity will be a pervasive or occasional circumstance. We agree with those parties that state that allocating space in such a manner will add a level of complexity, and not necessarily produce a fairer allocation of the cost of unusable space. We are also convinced that the alternative proposal is inconsistent with the plain meaning of Section 224(e) which apportions the cost of unusable space "under an equal apportionment of such costs among all attaching entities."[190]

1.58 As another alternative method to apportioning cost equally, MCI argues that the apportionment of two-thirds of the costs of unusable space should be based on the number of attachments rather than the number of attaching entities.[191] Allocating costs by the number of entities, it argues, would not allocate any unusable space to overlashings and will result in an incentive for "speculative" overlashing by existing attachers. We also will not adopt MCI's proposal to count attachments instead of attaching entities. The record does not demonstrate that overlashing leads to distortion of the allocation of the costs of the pole.

c. Overlashing

(1) Background

1.59 Overlashing, whereby a service provider physically ties its wiring to other wiring already secured to the pole, is routinely used to accommodate additional strands of fiber or coaxial

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[187] *See* U S West Comments at 7-8.

[188] RCN Comments at 3-4.

[189] SBC Comments at 24-25.

[190] 47 U.S.C. § 224(e)(2).

[191] MCI Comments at 12.

cable on existing pole attachments.[192] The Commission sought information in the *Notice* on how each attaching and overlashing entity should be treated for purposes of allocating the costs of unusable and usable space.[193] We observed that each possible "host attachment" may be overlashed with wiring providing other types of services or owned by other types of providers.[194] The Commission also requested that commenters discuss whether and to what extent overlashing facilitates the provision of services other than cable service by cable operators.[195]

1.60 In addressing overlashing in the cable operator context, the Commission issued a public notice in January 1995 (the "*Overlashing Public Notice*")[196] cautioning owners of utility poles against restricting cable operators from overlashing their own pole attachments with fiber optic cable. The Commission noted the serious anti-competitive effects of preventing cable operators from adding fiber to their systems by overlashing. The Commission believed improper constraints were being placed on cable systems that sought to overlash fiber optic lines to their existing coaxial cable lines in order to build out their facilities. While recognizing concerns regarding engineering specifications and arranging for access and notification in cases of emergencies or modification, the Commission affirmed its commitment to ensure that the growth and development of cable system facilities are not hindered by an unreasonable denial of overlashing by a utility pole owner.[197] Overlashing capability continues to be a facet of a pro-competitive market because it maximizes the usable capacity on a pole.[198]

(2) Discussion

(a) Overlashing One's Own Pole Attachment

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[192] *See* Comcast, et al., Reply at 8 (cable operators have routinely overlashed for 30 years); NCTA Comments at 5 (overlashing has been a critical component of cable industry's construction strategy for decades).

[193] *Notice*, 12 FCC Rcd at 11732, para. 15.

[194] For example, the utility pole owner, an ILEC, a cable operator, and a telecommunications carrier that already have attachments on the pole may expand their services through overlashing their existing lines, or a third party attachment may overlash any existing attachment, under certain circumstances which we will address in this *Order*.

[195] *Notice*, 12 FCC Rcd at 11732, para. 15.

[196] *Common Carrier Bureau Cautions Owners of Utility Poles, Public Notice*, DA 95-35 (January 11, 1995).

[197] *Id.*

[198] *Local Competition Order*; 11 FCC Rcd at 16075, para. 1161.

1.61 The 1996 Act ushered in an era of transition from regulation to competition in telecommunications markets. The 1996 Act is grounded in the belief that competition will bring the greatest benefits to consumers and the greatest diversity of telecommunications services to communities. These broad aims include those expressed in Section 1 of the Communications Act, to "make available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide . . . communication service,"[199] and those expressed in the 1996 Act, to establish a "pro-competitive, de-regulatory national policy framework designed to accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[200] To implement this framework, the 1996 Act made numerous amendments to the Communications Act, including the expansion of Section 224 jurisdiction to pole attachments for telecommunications carriers and expanded access to utility poles for the purposes of providing cable and telecommunications services.[201] As the Commission has made clear, determining whether actions enhance competition requires examining those actions in light of the significant changes to the laws governing the provision of telecommunications services made by the 1996 Act.[202]

1.62 We believe overlashing is important to implementing the 1996 Act as it facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities. Overlashing promotes competition by accommodating additional telecommunications providers and minimizes installing and financing infrastructure facilities.[203] We think that overlashing is an important element in promoting the policies of Sections 224 and 257[204] to provide diversity of services over existing facilities, fostering the availability of telecommunications services to communities,[205] and increasing opportunities for competition in the marketplace.[206]

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[199] 47 U.S.C. § 151. These goals date to the original passage of the Communications Act of 1934. *See* H.R. Rep. No. 1918, 73rd Cong., 2d Sess. 1 (1934).

[200] *See* Preamble to 1996 Act.

[201] 1996 Act § 703.

[202] *Memorandum Opinion and Order* (In the Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries), FCC 97-286 (released August 14, 1997) at para. 32, 38.

[203] *See* ICG Communications Comments at 20; NCTA Comments at 7; RCN Comments at 6-7.

[204] Section 257 provides that the Commission shall seek to promote policies that eliminate market entry barriers for small business and others. 47 U.S.C. § 257.

[205] *See* New York Cable Television Assn. Comments at 7-8; NCTA Comments at 6-7.

[206] *See* Preamble to 1996 Act.

1.63 Utility pole owners oppose overlashing as an expansion of their obligation to provide for pole attachments and, further, as an unsupervised burden on the poles.[207] Cable operators and telecommunications carriers assert that overlashing is a routine construction practice that has gone on for decades without interference from the pole owners until the utilities began entering competitive businesses.[208] Some telecommunications carriers urge the Commission to bar utility pole owners from prohibiting overlashing.[209]

1.64 We have been presented with no persuasive reason to change the Commission's policy that encourages overlashing, and we agree with representatives of the cable and telecommunications industries that, to the extent that it does not significantly increase the burden on the pole, overlashing one's own pole attachment should be permitted without additional charge.[210] To the extent that the overlashing does create an additional burden on the pole, any concerns should be satisfied by compliance with generally accepted engineering practices.[211] We note that we have deferred decision on the issue of the effect any increased burden may have on the rate the utility pole owner may charge the host attacher. As stated above, we believe that the *Pole Attachment Fee Notice* rulemaking is a more appropriate forum for resolution of this issue.[212] As also stated above, we affirm our current presumptions for the time being. We also do not believe that overlashing is an expansion of a pole owners' obligation. Overlashing has been in practice for

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[207] *See* American Electric, et al., Comments at 46; Carolina Power, et al., Comments at 8-9; Colorado Springs Utilities Comments at 3; Dayton Power Comments at 1; Duquesne Light Comments at 26-27; Edison Electric/UTC Comments at 11; New York Investor Owned Electric Utilities Comments at 9-10; Ohio Edison Comments at 24-26; SBC Comments at 8-12; Sprint Comments at 2-3; Texas Utilities Comments at 6; Union Electric Comments at 23-24; USTA Comments at 8. *Cf.* Ameritech Comments at 6-7; AT&T Comments at 5; New York Cable Television Assn. Comments at 4-5; Comcast, et al., Comments at 3-4; ICG Communications Comments at 21; MCI Comments at 8; NCTA Comments at 7.

[208] *See, e.g.,* Comcast, et al., Comments at 3-5; NCTA Comments at 7; New York Cable Television Assn. Comments at 4-5.

[209] *See, e.g.,* ICG Communications Comments at 21; New York Cable Television Assn. Comments at 4.

[210] *See* AT&T Comments at 6; Comcast, et al., Comments at 3-4, 11; New York Cable Television Assn. Comments at 4-5. *But see* ICG Communications Comments at 20-21.

[211] *See* 47 U.S.C. § 224(f)(2) (permitting a pole owner to deny access for reasons of safety, reliability and generally applicable engineering purposes).

[212] *See* Section IV.A.1. above (Duquesne Light proposes that any presumptions include weight and wind load factors).

many years.[213] We believe utility pole owners' concerns are addressed by Section 224's assurance that pole owners receive a just and reasonable rate and that pole attachments may be denied for reasons of safety, reliability, and generally applicable engineering purposes.

(b) Third Party Overlashing

1.65 Telecommunications carriers seeking expeditious means to gain access to poles have begun contracting with existing attaching entities to overlash to existing attachments.[214] In the *Notice*, the Commission inquired whether a third party should be permitted to overlash an existing cable system or telecommunications carrier's attachment without the agreement of the pole owner.[215]

1.66 As stated above, NCTA reports that it is current practice for cable operators routinely to overlash their existing attachments without specific prior notification to the pole owners outside of provisions for major modification contained in their pole attachment agreements.[216] Attaching entities assert that pole owners can exert a veto to market entry if allowed to restrict overlashing of the pole attachment facilities.[217] Utility pole owners object to overlashing by third parties unless the pole owner is compensated for what they view as an additional infringement on their property, but comment that, if third party overlashing is permitted without additional compensation, pole owners should have notice of the nature and engineering requirements of the overlasher.[218]

1.67 Utility pole owners assert that overlashed attachments must occupy the same amount of space as the initial attachment, be considered a separate attachment, and that the overlasher should be required to pay the same rate as though it were an initial attaching entity.[219]

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[213] *See* NCTA Comments at 5.

[214] *Local Competition Order*, 11 FCC Rcd at 16075-77, paras. 1161-64.

[215] *Notice*, 12 FCC Rcd at 11732, para. 15.

[216] *See* NCTA Comments at 6.

[217] *See* AT&T Comments at 6; Comcast, et al., Comments at 3-4, 11; New York Cable Television Assn. Comments at 4-8; NCTA Comments at 7.

[218] *See* American Electric, et al., Comments at 46; Bell Atlantic Comments at 2; Dayton Power Comments at 1; Colorado Springs Utilities Comments at 3; GTE Comments at 7; New York State Investor Owned Electric Utilities Comments at 8-9; SBC Comments at 10-12; Sprint Comments at 2-3; USTA Comments at 6-7.

[219] *See, e.g.*, American Electric, et al., Comments at 46-50. Also commenting that an overlashing entity should be considered an original attaching entity were: Colorado Springs Utilities Comments at 2-3; Edison Electric/UTC Comments at 11; New York State Investor Owned Electric Utilities Comments at 9-10; Sprint Comments at 2; Texas

Cable operator and telecommunications carrier interests voice varying opinions on if and how a third party overlasher should be counted as an attaching entity,[220] indicating that cross interests are at stake in facilitating competitive access to the pole, minimizing disruption to existing attachments, and reducing pole attachment fees for the existing attachers.[221]

1.68 The record does not indicate that third party overlashing adds any more burden to the pole than overlashing one's own pole attachment. We do not believe that third party overlashing disadvantages pole owners in either receiving fair compensation or in being able to ensure the integrity of the pole. Facilitating access to the pole is a tangible demonstration of enhancing competitive opportunities in communications.[222] Allowing third party overlashing will also reduce construction disruption (and the expense associated therewith) which would otherwise likely take place by third parties installing new poles and separate attachments. Accordingly, we will allow third party overlashing subject to the same safety, reliability, and engineering constraints that apply to overlashing one's own pole attachment. Concerns that third party overlashing will increase the burden on the pole can be addressed by compliance with generally accepted engineering practices.

1.69 We believe that when a host attaching entity allows an overlashing attachment to be installed to its own pole attachment by a third party for the purposes of that third party offering and providing cable or telecommunications services to the public, that third party overlashing entity should be classified as a separate attaching entity for purposes of allocating costs of unusable and usable space[223] because Congress indicated that the unusable space was of equal benefit to all

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Utilities Comments at 6.

[220] *See* Comcast, et al., Comments at 11 (attaching entity will likely charge the telecommunications overlasher a charge to reflect the unusable space so the overlasher would not be a separate attaching entity); KMC Telecom Comments at 7-8 (no separate payment to pole owner); Summit Comments at 2-3 (charging by number of strands on an attachment would be futile, anti-competitive, and ignore the utility's monopoly obligation to operate for the common good). *But see* Bell Atlantic Reply at 21 (consider overlasher an entity for unusable costs); ICG Communications Comments at 21-22 (consider overlasher an entity for unusable space only); NCTA Comments at 19-20 (if a third party conductor is overlashed to the strand, count that as an entity but charge it only a portion of the support space shared); USTA Comments at 7-8 (overlasher should pay host attacher for the unusable space portion but not usable space portion of pole attachment fee).

[221] The more entities that are counted as attaching entities, generally the lower the pole attachment fee for existing attaching entities is.

[222] *See* Preamble to 1996 Act.

[223] *See* Bell Atlantic Comments at 2-3; Edison Electric/UTC Comments at 14; Carolina Power, et al., Comments at 11; Colorado Springs Utilities Comments at 2-3; Dayton Power Comments at 1; Duquesne Comments at 28; GTE Comments at 7; New York

attaching entities.[224] In order to implement the allocation of unusable space, the third party overlasher will necessarily need to have some understanding or agreement with the pole owner, and an agreement with the host attaching entity. Commenters assert that overlashing under these circumstances should be classified as a separate attachment.[225] We agree.

(c) Lease and Use of Excess Capacity/Dark Fiber

1.70 Recent technological advances have made it possible for excess capacity within a fiber optic cable, known as "dark fiber," to be leased from an attaching entity by a third party. Dark fiber consists of the bare capacity and does not involve any of the electronics necessary to transmit or receive signals over that capacity. It thus differs from dim or lit fiber by which the carrier provides some or all of the electronics necessary to power the fiber. The Commission requested comment on whether a third party using dark fiber should be counted as a separate pole attaching entity for purposes of establishing the number of attaching entities on a pole among whom to apportion the costs of unusable space.[226]

1.71 SBC asserts that the Commission should not address the issue of dark fiber because it is the subject of a remand from the U. S. Court of Appeals for the D.C. Circuit.[227] In *Southwestern Bell*, LECs challenged a series of Commission orders finding that the LECs were offering dark fiber on a common carrier basis and prescribing tariffed rates for the service. The petitioners claimed that the Commission exceeded its jurisdiction because they had offered dark fiber only on an individualized basis, thereby placing this service beyond the Commission's authority over common carrier offerings under Title II of the Communications Act.[228]

1.72 We believe that our jurisdiction to consider the leasing and use of dark fiber to the extent it is used to provide telecommunications services is consistent with the court's holding in *Southwestern Bell*. The court concluded that the Communications Act delegates broad authority to the Commission to regulate constantly evolving communications facilities that have transcended in

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Investor Owned Utilities Comments at 7-9; Ohio Edison Comments at 26; SBC Comments at 18, Reply at 19; Sprint Comments at 2-3; Texas Utilities Comments at 6; Union Electric Comments at 24. *But see* Ameritech Comments at 6-7.

[224] *Conf. Rpt.* at 206.

[225] *See* Bell Atlantic Comments at 2-3; Edison Electric/UTC Comments at 13-14; Carolina Power, et al., Comments at 8-9; GTE at 7; Sprint Comments at 2-3; Texas Utilities Comments at 5. *But see* Ameritech Comments at 6-7.

[226] *Notice*, 12 FCC Rcd at 11735, para. 25.

[227] *See* SBC Comments at 12-13 (citing *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994)).

[228] *Southwestern Bell*, 19 F.3d at 1484.

complexity and power far beyond the specific technologies known to its drafters in 1934.[229] Section 224 gives the Commission the mandate and the jurisdiction to regulate pole attachment rates for facilities over which cable television or telecommunications services are provided, and therefore our consideration of dark fiber in this context is appropriate for this proceeding.

1.73 There is general consensus among cable operators and telecommunications carriers that the leasing and use of dark fiber by third parties places no additional spatial or physical requirements on the utility pole.[230] Cable operators, telecommunications carriers, and utility pole owners all contend that the use of dark fiber is a pro-competitive, environmentally sound and economical use of existing facilities.[231] We agree and conclude that the leasing of dark fiber by a third party is not an individual pole attachment separate from the host attachment. Such use will not require payment to the pole owner separate from the payment by the host attaching entity.[232] We also agree with cable operators, telecommunications carriers, and utility pole owners[233] that, if an attachment previously used for providing solely cable services would, as a result of the leasing of dark fiber, also be used for providing telecommunications services, the rate for the attachment would be determined under Section 224(e), consistent with our discussion regarding restrictions on services provided over pole attachments.[234]

d. Presumptive Average Number of Attaching Entities

1.74 The Commission presently uses rebuttable presumptions in the context of establishing reasonable pole attachment rates. These presumptions help to reduce reporting

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[229] *Id.*

[230] *See* Ameritech Comments at 6; AT&T Comments at 6; Comcast, et al., Comments at 18; ICG Communications Comments at 21; KMC Telecom Comments at 7-8; MCI Comments at 9; NCTA Comments at 7; RCN Comments at 5.

[231] *See, e.g.,* AT&T Comments at 6; Edison Electric/UTC Comments at 13, Reply at 15; GTE Comments at 7-8; KMC Telecom Comments at 7-8; NCTA Comments at 7; New York Cable Television Assn., Comments at 7-8; New York Investor Owned Electric Utilities Comments at 11; U S West Comments at 10.

[232] *See* AT&T Comments at 6; New York Cable Television Assn. Comments at 7-8; Edison Electric/UTC Comments at 13; GTE Comments at 7; ICG Communications Comments at 17-19; KMC Telecom Comments at 7-8; MCI Comments at 6; NCTA Comments at 7; RCN Comments at 5; U S West Comments at 10.

[233] *See, e.g.*, Colorado Springs Utilities Comments at 3; Duquesne Light Comments at 29; Edison Electric/UTC Comments at 13; GTE Comments at 7; NCTA Reply at 12; New York Cable Television Assn., Comments at 7-8; SBC Reply at 6; USTA Reply at 15. *But see* AT&T Comments at 5-6; Comcast, et al., Comments at 18; Sprint Reply at 2-6.

[234] *See* Section IV.A.2 above.

requirements and record-keeping, and are more efficient so there is less administrative burden on all parties. The use of presumptions provides a level of predictability and efficiency in calculating the appropriate rate. Fairness is preserved because the presumptions may be overcome through contrary evidence. We seek to maintain predictability, efficiency and fairness in determining the costs of unusable space on a pole. In the *Notice*, the Commission stated that a pole-by-pole inventory of the number of entities on each pole would be too costly. The Commission proposed that each utility develop, through the information it possesses, a presumptive average number of attachers on one of its poles. The Commission also proposed that telecommunications carriers be provided the methodology and information underlying a utility's presumption. The *Notice* sought comment on this proposal and on whether any parameters should be established in developing the presumptive average. The *Notice* also sought comment on whether a utility should develop averages for areas that share similar characteristics relating to pole attachments and whether different presumptions should exist for urban, suburban, and rural areas. The *Notice* sought comment on the criteria to develop and evaluate any presumption.[235]

1.75 The Commission asked whether, as an alternative to pole-by-pole inventory by the facility owners, the Commission should determine the average number of attachments. The Commission inquired as to whether it should initiate a survey to develop a rebuttable presumption regarding the number of attachments. The Commission also sought comment on the difficulties of administering a survey, any additional data required, and parameters of accuracy and reliability required for fair rate determination.[236]

1.76 Generally, commenters agree with the idea that a presumptive average number of attachers should be developed, but disagree on how this should be accomplished. The utilities generally support developing their own average as the most efficient method.[237] Several attaching entities support the Commission's development of the presumptive average and encourage the establishment of a rebuttable presumption of at least three attachers.[238] Comcast, et al., in particular, encourages a presumptive average of six attaching entities as supported by the Commission's Fiber Deployment Update End of Year 1996 ("*Fiber Deployment Update*").[239] U S West indicates that having the Commission develop the presumptive average will serve efficiency, minimize complaints, and place the burden of rebuttal on the pole owner.[240]

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[235] *Notice*, 12 FCC Rcd at 11735, para. 26.

[236] *Id.* at 11735, para. 27.

[237] *See* American Electric, et al., Comments at 44; Ameritech Comments at 13; Edison Electric/UTC Comments at 24; Carolina Power, et al., Comments at 7; KMC Telecom Comments at 7; MCI Comments at 15; NCTA Comments at 20; New York State Investor Owned Electric Utilities Comments at 24; USTA Comments at 13.

[238] AT&T Comments at 14; Comcast, et al., Comments at 8-10.

[239] Jonathan Kraushaar, *Fiber Deployment Update - End of Year 1996* released by the Common Carrier Bureau of the Federal Communications Commission on August 29, 1997 ("*Fiber Deployment Update*"); *see also* Comcast, et al., Comments at 8-10.

[240] U S West Comments at 9 n.25.

1.77 We believe that the most efficient and expeditious manner to calculate a presumptive number of attaching entities is for each utility to develop its own presumptive average number of attaching entities. Utilities not only possess this information but have familiarity and expertise to structure it properly. Based on the record, we think the alternative of the Commission undertaking a survey is too cumbersome and would not necessarily enhance accuracy. We do not believe that the *Fiber Deployment Update* is an appropriate resource from which to develop the presumptive average. The *Fiber Deployment Update* presents data about fiber optic facilities and capacity built or used by interexchange carriers, Bell operating companies, and other LECs and competitive access providers. These data are inadequate for the purposes of creating a presumptive average number of attaching entities because it does not include data pertaining to cable operators. Our decision providing that the utility will establish a presumptive number of attaching entities is also premised on the information developed reflecting where the service is being provided, instead of a broad national average. We think there will be a range of presumptive averages depending on rural, urban, or urbanized areas. To ensure that rates are appropriately representative, each utility shall determine a presumptive average for its rural, urban, and urbanized service areas as defined by the United States Census Bureau.

1.78 We will require each utility to develop, through the information it possesses, a presumptive average number of attaching entities on its poles based on location (urban, rural, urbanized) and based upon our discussion herein regarding the counting of attaching entities for allocating the costs of unusable space. A utility shall, upon request, provide all attaching entities and all entities seeking access the methodology and information by which a utility's presumption was determined. We expect a good faith effort by a utility in establishing its presumption and updating it when a change is necessitated. For example, when a new attaching entity has a substantial impact on the number of attaching entities, the utility's presumptive average should be modified. This method should be consistent with present practice, as we understand most pole attachment agreements "provide for periodic field surveys, generally once every three to seven years, to determine which entities have attached what facilities to whose poles."[241]

1.79 Challenges to the presumptive average number of attaching entities by the telecommunications carrier or cable operator may be made in the same manner as challenges presently are undertaken. The challenging party will initially be required to identify and calculate the number of attachments on the poles and submit to the utility what it believes to be an appropriate average. Where the number of poles is large, and complete inspection impractical, a statistically sound survey should be submitted. The pole owner will be afforded an opportunity to justify the presumption. Where a presumption is successfully challenged, the resulting figure will be deemed to be the number of attaching entities.

5. Allocating the Cost of Usable Space

a. Background

1.80 Section 224(e)(3) provides that a utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.[242] The Commission has defined usable space as the space on the utility pole above the minimum

[241] ICG Communications at 37.

[242] 47 U.S.C. § 224(e)(3).

grade level[243] that is usable for the attachment of wires, cable, and related equipment.[244] In the *Second Report and Order*,[245] the Commission considered comment regarding the amount of usable space for various size poles in different service areas. The Commission subsequently adopted a rebuttable presumption that a pole contains 13.5 feet of usable space.[246] The usable space presumption has been contested in complaint proceedings before the Commission.[247] In 1986, the Commission revisited the usable space issue and upheld the presumption.[248] In 1997, the Commission sought comment on the presumptive amount of usable space in the *Pole Attachment Fee Notice*.[249] In the *Notice*, we sought comment on the usable space presumption to establish a full record for attachments made by telecommunications carriers under the 1996 Act.[250] The Commission also proposed to modify the current methodology to reflect only the cost associated with usable space to arrive at a factor for apportioning the costs of usable space for telecommunications carriers under Section 224(e)(3).[251] For allocating the costs of usable space to telecommunications carriers, the following basic formula was proposed:

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

1.81 In the *Notice*, the Commission sought comment on the amount of usable space occupied by telecommunications carriers and on whether the presumptive one foot used for cable

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[243]In this context, minimum grade level generally refers to ground level or elevation above which distances are measured for determining required clearances.

[244]47 C.F.R. § 1.402(c).

[245]72 FCC 2d 59.

[246]*Id.* at 69; *Third Report and Order*, 77 FCC 2d at 191-193.

[247]*See, e.g., Cable Information Services, Inc. v. Appalachian Power Co.*, 81 FCC 2d 383 (1980); *Television Cable Service, Inc. v. Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981).

[248]*Pole Attachment Order*, 2 FCC Rcd 4387.

[249]*Pole Attachment Fee Notice*, 12 FCC Rcd at 7458-59, para. 18.

[250]*Notice*, 12 FCC Rcd at 11733, para. 17.

[251]*Id.* at 11737, para. 33.

attachments should be applicable to telecommunications carriers generally.[252] Currently, each attaching entity is presumed to use a specific amount of space, and costs are allocated on the proportion of this space to the overall costs of the usable space. The *1977 Senate Report* evidenced Congress' intent that cable television providers be responsible for 12 inches of usable space on a pole, including actual space on a pole plus clearance space.[253] In 1979, the Commission established the rebuttable presumption that a cable television attachment occupies one foot.[254] The Commission subsequently refined its methodology for determining the amount of usable space and made the one foot presumption permanent.[255] The Commission found this result to be consistent with the legislative history of Section 224, as expressed in the *1977 Senate Report*.[256]

1.82 Determining the presumptive amount of usable space attributable to each attacher directly impacts the allocation of costs. Section 224(d)(1), which predates the 1996 Act, specifies that the maximum just and reasonable pole rate shall be determined by multiplying the percentage of the total usable space that is occupied by the pole attachment by the sum of the operating expenses and actual capital costs attributable to the entire pole.[257] Each factor is individually determinable, and in some cases has been assigned a presumptive average value for purposes of resolving complaints in an expeditious manner. The current pole attachment rate methodology consists of a usable space factor that is the result of dividing the space occupied on the pole, or the presumptive one foot assigned to a cable attachment, by 13.5 feet or the total amount of usable space.[258]

b. Discussion

(1)Applying the 13.5 Foot Presumption and the One Foot Presumption to Telecommunications Carriers

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[252] *Id.* at 11733, para. 19.

[253] *1997 Senate Report* at 20.

[254] *Second Report and Order*, 72 FCC 2d at 69-70.

[255] *Id., see also Usable Space Order* at para. 10.

[256] *Usable Space Order* at para. 10.

[257] 47 U.S.C. § 224(d)(1).

[258] *See Notice*, 12 FCC Rcd at 11736, para. 29. The current methodology is represented by the following formula:

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

1.83 The law provides a method for the allocation of costs associated with the usable space. We believe that the information we received in this proceeding regarding calculation of usable space is more appropriately addressed in the *Pole Attachment Fee Notice* proceeding and we will thus reserve our decision on the total amount of usable space issue until the resolution of that proceeding. For the present time, the presumption that a pole contains 13.5 feet of usable space will remain applicable. We adopt our proposed methodology to apportion the cost of the usable space. We believe this formula most accurately determines the apportionment of the cost of usable space. As mandated by Congress, it incorporates the principle of apportioning the cost of such space according to the percentage of space required for each entity.

1.84 The Commission's one foot presumption has been in place since 1979. The Commission initially assigned the one foot presumption to cable television operators based on congressional intent, as expressed in the legislative history of Section 224, that cable television was to be assigned only one foot of space, the electric utilities' use of safety space, and an analysis of replacement costs that utilities impose on cable television companies.[259] The Commission concluded in the *Usable Space Order* that several years of experience in regulating pole attachments had not indicated that cable attachments occupy more space than the one foot of usable space as originally contemplated by Congress.[260] Neither the 1996 Act's amendments to Section 224 nor the record in this proceeding suggest that a different presumption should be applicable to telecommunications carriers. Circumstances that are unique or that clearly warrant a departure from the formula may be used to rebut the presumption. We affirm our practice of assigning a presumptive one foot of usable space and find that the presumptive one foot used for cable attachments should be applied to attachments by telecommunications carriers generally. We believe that the one foot presumption remains reasonable and continues to provide an expeditious and equitable method for determining reasonable rates.

1.85 Some utility pole owners and telecommunications carriers suggest changes to the one foot presumption and express other concerns.[261] Some electric utilities have sought to alter the presumptive amount of usable space allocated when fiber optic cable is involved. For example, Duquesne Light and Ohio Edison contend that, in their service areas, tightly pulled fiber optics will be at the same height at the mid span of the pole as a cable television attachment above it that is hung with the normal required sag.[262] They argue that this is in violation of the NESC code which

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[259] *Usable Space Order* at para. 10.

[260] *Id.*

[261] Adelphia, et al., Comments at 8; Duquesne Light Comments at 35-36; Ohio Edison at 33; New York State Investor Owned Electric Utilities Comments at 5 (one foot presumption found appropriate for span wire attachments occupying no more than one foot of space on the pole, but inappropriate for attachments occupying more than one foot of usable space); New York Cable Television Assn. Comments at 7 (parties with separately stranded attachments occupying their own (one foot) are responsible for their proportionate share of such space, but where facilities are affixed by additional strands, then the party should be responsible for two feet of usable space); RCN Comments at 7-8.

[262] *See* Duquense Light Comments at 35-36; Ohio Edison Comments at 33. *But see* AT&T

requires parallel attachments to be separated by appropriate distances between the spans of the poles as well as on the poles themselves.[263] Duquesne Light and Ohio Edison further maintain that, because the tensioned fiber optic cable cannot be easily sagged except by cutting and rerunning the cable, the fiber optic cable must be relocated higher on the pole.[264] They recommend that the Commission adopt a rebuttable presumption that fiber optic cable requires, and should be charged for, two feet of usable space to account for the communications companies' practice of pulling fiber optic cables tightly.[265]

1.86 The impact of deploying fiber optic cable is dependent upon how the fiber is attached. The rebuttable nature of the one foot presumption offers an opportunity for the presentation of information in situations outside of the norm. The record does not contain sufficient information to base a decision on the impact of the practice of pulling fiber optics cable tightly, and therefore we will not presume that fiber optics require two feet of usable space.

1.87 We disagree with ICG Communications' position that the Commission's one foot presumption is outdated and should be abandoned.[266] ICG Communications maintains that most communications attachments should only be allocated six inches of usable space.[267] ICG Communications notes that the NESC does not distinguish between cable used for cable operators and cable used for telecommunications carriers.[268] Based on accepted engineering and governmentally-required standards, it advocates six inches of usable space for simple communications attachments below the safety space.[269] ICG Communications notes that where

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Comments at 23 (if the fiber optic is properly deployed, the presumption should remain the same for fiber or any other type cable); Comcast, et al., Reply at 20 (such an approach is an attempt to tax and penalize third party fiber deployment).

[263] *See* Duquense Light Comments at 35-36; Ohio Edison Comments at 33.

[264] *Id.*

[265] *Id.*

[266] ICG Communications Comments at 39.

[267] *Id.* (maintaining that overlashed cable combinations below the safety space should be allocated nine inches of usable space); ICG Communications Reply at 22 (if the Commission makes six inches of usable space the basis for Section 224(e) rates, utilities may stop imposing unnecessary make-ready costs on attaching parties and instead increase their pole attachment revenues by permitting more attaching parties on each pole).

[268] *Id.* at 21.

[269] ICG Communications Comments at 40-43 (concluding that a utility should charge a telecommunications carrier for a foot of usable space only upon agreement of the carrier

communications lines have been installed in electric supply space, especially fiber optic cables, more than one foot of usable space is required and an allocation of 16 inches of usable space should be made.[270]

1.88 Bell Atlantic contends that there is no factual support for ICG Communications' claims.[271] Bell Atlantic points to Bellcore's Manual of Construction procedures as demonstrating that clearance at the pole between communications cables supported on different strands of suspension must be at least 12 inches.[272] SBC maintains that ICG Communications' proposals are based on improper assumptions, especially regarding overlashing.[273] SBC maintains that the one foot presumption is still valid today.[274] We agree that ICG Communications has not adequately supported its suggested allocation of six inches of space for most communications attachments or 16 inches for fiber optic cables.

1.89 Adelphia, et al., express concern regarding the validity of assigning the cost of a vertical one-foot of pole space to cable systems and/or other telecommunications providers without considering the horizontal uses of the pole by the pole owner.[275] Adelphia, et al., also suggest that the particular side of the pole on which the attachment is located is of significance.[276] RCN observes that the one foot presumption should not apply where extension arms or boxing[277] is used by the attaching entity to install its facilities.[278] RCN suggests that where extension arms are used,

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or by establishing that an applicable governmental requirement dictates a one foot clearance between communications lines and suggesting that utilities be permitted to seek different usable space allocations in their negotiation of pole attachment agreements).

[270] *Id.*

[271] Bell Atlantic Reply at 17.

[272] *Id.* (citing Bellcore, Blue Book - Manual of Construction Procedure, § 3.2 (Issue 2 1996)).

[273] SBC Reply at 26.

[274] *Id.*; *see also* Edison Electric/UTC Comments at 25-26, Reply at 25.

[275] Adelphia, et al., Comments at 8.

[276] *Id.*

[277] RCN describes boxing or "b-bolting" as a process by which an attachment is bolted through the back of a pole, opposite from an existing attachment. RCN Comments at 8.

[278] *Id.* at 7-8. *But see* Comcast, et al., Reply at 20.

the communications cable is located not on the pole itself, but farther out on the extension arm. RCN states that this will lead to a situation where an entity's physical attachment may occupy as little as six inches of usable space.[279] RCN claims that this configuration will still satisfy the 12-inch clearance required between communications attachments, if the cable is positioned a certain distance along the extension.[280]

1.90 Sufficient record has not been presented to change our presumption as a general matter, although parties are free to challenge the presumption on a case-by-case basis. In striking the proper balance, we must weigh any of the suggested modifications against the advantages of procedures and calculations remaining simple and expeditious.[281] We agree with GTE that changing the usable space presumption would add another layer of complexity to the pole attachment rate formula. As GTE suggests, surveys of the actual space occupied by each attacher would be necessary.[282]

1.91 We agree with those commenters who have found the presumptive one foot applicable.[283] We further affirm our decision to continue using the current methodology, modified to reflect only costs associated with usable space.[284] Commenters have not persuaded us that the rationale originally used in assigning the one foot of space to cable television operators should not be equally applicable to telecommunications carriers generally. We continue to see the need and basis for the one foot presumption due to the impracticality of developing sufficient information applicable to all situations.[285] Where use of the one foot presumption would not encourage just and

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[279]RCN Comments at 7-8.

[280]*Id.*; *see also* Bell Atlantic Reply at 18 n.43.

[281]*See* 72 FCC 2d at 69 (citing *1977 Senate Report* at 21-22).

[282]GTE Reply at 15.

[283]Carolina Power, et al., Comments at 12-13; GTE Comments at 13, n.29; MCI Comments at 17 (fiber cable and coaxial cable share the same vertical separation requirements in the NESC, therefore there is no need to treat them differently for space allocation purposes); Ameritech Comments at 9 (there are no differences between cable system facility attachments and telecommunications attachments to warrant different presumptions in the formula for the space required for each); NCTA Comments at 13; Adelphia, et al., Comments at 7; U S West Comments at 5.

[284]*Notice*, 12 FCC Rcd at 11737, para. 33 & n.60 (referencing paras. 15-19 regarding comments sought involving the Commission's usable space presumptions); *see also* Carolina Power, et al., Comments at 15 (asserting that the current formula should be used to establish presumptively applicable maximum charges, provided that the formula is further modified for purposes of Section 224(e)); Ameritech Comments at 10; U S West Comments at 5.

[285]*Notice*, 12 FCC Rcd at 11733, para 19.

reasonable rates, any party may rebut the presumption.

(2) Overlashing and Dark Fiber

1.92 Consistent with our above discussion regarding overlashing, we find that the one foot presumption shall continue to apply where an attaching entity has overlashed its own pole attachments.[286] We also determine that facilities overlashed by third parties onto existing pole attachments are presumed to share the presumptive one foot of usable space of the host attachment.[287] To the extent that the overlashing creates an additional burden on the pole, any concerns should be satisfied by compliance with generally accepted engineering practices. We again note that we have deferred decision to the *Pole Attachment Fee Notice* proceeding on the issue of the effect any increased burden may have on the rate the utility pole owner may charge the host attacher. As stated above, we believe that that proceeding is a more appropriate forum for resolution of this issue.[288] As also stated above, we affirm our current presumptions for the time being.

1.93 Some commenters have suggested that the third party overlasher should be responsible for some portion of the costs associated with overlashing and be responsible for paying a portion of the costs to the pole owner.[289] Carolina Power, et al., argue that because the third party has a statutory right under Section 224(f) to make a separate attachment of its own, overlashing should be left to negotiation.[290] They maintain that the Commission should recognize that each overlashed wire equals a separate attachment for which the overlasher may be charged a just and reasonable rate.[291] KMC Telecom asserts that the allocation of usable space should be one-half to the original attacher and the remaining one-half to the third party overlasher.[292] ICG Communications advocates the allocation of four and one-half inches of usable space to each party

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[286]See Section IV.A.

[287]*See* Ohio Edison/Union Electric Reply at 11-13; Edison Electric/UTC Comments at 25; USTA Comments at 7-8.

[288]*See* Section IV.A.1. above (Duquesne Light proposes that any presumptions include weight and wind load factors).

[289]*See, e.g.,* Duquesne Light Comments at 28. *But see* USTA Comments at 8 and SBC Comments at 9-13 (maintaining that the Commission should not establish any requirements regarding third party overlashing and that an attacher allowing a third party to overlash is sublicensing or sharing space to be occupied by the facilities owned by the third party).

[290]Carolina Power, et al., Comments at 10.

[291]*Id.* at 11.

[292]KMC Telecom Reply at 7-8.

when one party overlashes another's cable.[293] MCI recommends sharing the presumptive one foot of space assigned to cable operators' and telecommunications carriers' pole attachments with overlashers.[294] MCI argues that because overlashing expands usable space, there should be a presumptive number of two overlashings per original attachment as an estimate of the number of overlashings.[295] MCI asks the Commission to further presume that there will be four attachments: one for a cable operator; one for the ILEC; one for an independent competitive LEC; and one for a LEC affiliated with the incumbent electric company.[296] It alleges that if there are four non-electric attachments, and two overlashings per original attachment, the same 6.5 feet of space can presumptively accommodate 12 attachments.[297] Ohio Edison and Union Electric argue that there is no rational basis for adopting such an approach under Section 224(e)(3) because the utility pole owner is entitled to charge the attaching entity for one foot of usable space regardless of whether the original attachment is overlashed.[298]

1.94 We disagree with these comments suggesting that the Commission must establish the rate and the allocation of cost between the third party overlasher and the host for the use of one foot of usable space. The benefit of third party overlashing as an expeditious means for providers, including new entrants, to gain access to poles would be undermined by such procedures. Unlike the pole owner, the host attaching party generally will not have market power vis-a-vis the overlasher since the overlasher has a statutory right to make an independent attachment. Accordingly, we conclude that it is reasonable to allow the host attaching entity to negotiate the sharing of costs of usable space with third party overlashers. In such circumstances the host attaching entity will remain responsible to the pole owner for the use of the one foot of usable space but may collect a negotiated share from the third party overlasher. We have already addressed the counting of third party overlashers as a separate entity and established that if such third party provides cable or telecommunications service it will be required to pay its share of the costs of the unusable space. Further, we find that the record in this proceeding is not sufficient to embrace MCI's proposal. While overlashing is frequent, we cannot determine from the record that it is as prevalent as MCI proposes. We are reluctant to conclude that its presumptions are generally applicable. No other party has advocated a similar proposal. Moreover, we see no need to adopt MCI's proposal given our determination that there is no need to regulate the sharing of costs between the host attaching entity and the overlashing entity.

1.95 Regarding the leasing of dark fiber, to the extent that dark fiber is used to provide a telecommunications service within an existing attachment generally, the majority of commenters do

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[293] ICG Communications Comments at 21-22.

[294] MCI Comments at 6; MCI CS Docket No. 97-98 Comments at 13.

[295] *Id.*

[296] MCI Comments at 9.

[297] MCI Comments at 10, Table 1.

[298] Ohio Edison/Union Electric Reply at 14-15.

not believe that such activity constitutes a separate attachment under Section 224.[299] As stated above in Section IV.A.4.c., we agree. The one foot presumption is therefore only applicable to the host attacher.

B. Application of Pole Attachment Formula to Telecommunications Carriers

1. Background

1.96 To implement the 1978 Pole Attachment Act, the Commission developed a methodology and implementing formula to determine a presumptive maximum pole attachment rate.[300] The Commission regulates pole attachment rates by applying this formula ("*Cable Formula*")[301] to disputes between cable operators and utilities. The *Cable Formula* is based on Section 224(d)(1) that stipulates 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 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.[302]

Currently, application of the *Cable Formula* results in a rate that is in the range between the incremental and fully allocated costs of providing pole attachment space.[303]

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[299] *See, e.g.*, Edison Electric/UTC Reply at 26 (leasing of dark fiber has no impact on the amount of usable space); New York State Investor Owned Electric Utilities Comments at 10; NCTA Comments at 8 (rental of dark fiber is not an attachment).

[300] 47 U.S.C. § 224(d)(1); 47 C.F.R. §1.1409(e); *see Second Report and Order*, 72 FCC 2d at 67-75, *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). Under the current methodology, cable operators providing only cable services pay a portion of both usable and unusable space on the pole. The cable cost of the usable space is directly assigned in proportion to the usable space on a pole. The cost of the unusable space is treated as an indirect cost and is assigned in the same manner as direct costs.

[301] 47 U.S.C. §§ 224(b)(1), (d).

[302] 47 U.S.C. § 224(d)(1).

[303] In the pole attachment context, incremental costs are those costs that the utility would not have incurred "but for" the pole attachments in question. 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.

1.97 Section 703(6) of the 1996 Act amended Section 224 by adding a new subsection (d)(3). This amendment expanded the scope of Section 224 by applying the *Cable Formula* to telecommunications carriers in addition to cable systems[304] until a separate methodology is established for telecommunications carriers.[305] We invited further comment on this issue in the *Notice*.[306]

1.98 Congress directed the Commission to issue a new pole attachment formula under Section 224(e) relating to telecommunications carriers within two years of the effective date of the 1996 Act, to become effective five years after enactment.[307] In the 1996 Act, Section 224(e)(1) provided:

> The Commission shall . . . prescribe regulations in accordance with this subsection to govern charges for pole attachments used by telecommunication carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.[308]

1.99 In the *Notice*, the Commission proposed to modify the *Cable Formula* to accommodate the two statutory components added by the 1996 Act[309] and to develop a maximum pole attachment rate for telecommunications carriers.[310] These components dictate separate calculations for the equal apportionment of unusable space[311] and the allocation of a percentage of

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[304] 47 U.S.C. § 224(a)(4).

[305] *See* 47 U.S.C. § 224(d)(3) (only to the extent that such carrier is not a party to a pole attachment agreement).

[306] *Notice*, 12 FCC Rcd at 11737, para. 33. In the *Pole Attachment Fee Notice*, the Commission inquired about certain technical changes proposed for the *Cable Formula*. *Pole Attachment Fee Notice*, 12 FCC Rcd 7449, generally. Certain changes, if adopted, may require technical corrections to the *Cable Formula* and new formula. We will examine these issues in the separate rulemaking.

[307] 47 U.S.C. § 224(e)(1).

[308] 47 U.S.C. § 224(e)(1).

[309] *See* 47 U.S.C. § 224(e)(2), (e)(3).

[310] *Notice*, 12 FCC Rcd at 11737, para. 33.

[311] 47 U.S.C. § 224(e)(2).

usable space.[312]

1.100 In paragraphs 41 and 78 above, the Commission affirms its proposals to use certain formulas implementing Section 224(e)(2) and Section 224(e)(3) respectively. The formula for Section 224(e)(2) establishes the unusable space factors for telecommunications carriers,[313] premised on an equal apportionment of two-thirds of the costs of providing unusable space on the utility facility.[314] The formula for Section 224(e)(3) establishes the usable space factors for cable operators and telecommunications carriers providing telecommunications services,[315] premised on the percentage of usable space required for the attachment on the utility facility.[316]

1.101 AT&T observes that there was almost unanimous support from cable operators and telecommunications carriers for the Commission's proposed telecommunications carrier pole attachment rate formula.[317] Several utility pole owners support the Commission's use of its proposed modified formula, but advocate the use of gross book instead of net book costs.[318] American Electric, et al., advocate that when applied the formula should use forward-looking/replacement costs.[319] Attaching entities urge the Commission to reject the pole owners' call

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[312] 47 U.S.C. § 224(e)(3).

[313] For allocating the cost of unusable space to telecommunications carriers, see discussion at paragraphs 43-44 above for the following basic formula:

$$\text{Unusable Space Factor} = \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{Pole Height}} \times \frac{\text{Net Cost of Bare Pole}}{\text{Number of Attachers}} \times \text{Carrying Charge Rate}$$

[314] See discussion on Unusable Space at Section IV above.

[315] For allocating the cost of usable space for telecommunications carriers, see discussion at paragraphs 80-82 above for the following basic formula:

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

[316] See discussion on Usable Space at Section IV above.

[317] *See* AT&T Reply at 15.

[318] *See, e.g.,* Bell Atlantic Comments at 4; Colorado Springs Utilities Comments at 4; SBC Comments at 29-30; USTA Comments at 10.

[319] *See* American Electric, et al., CS Docket No. 97-98 Comments at 42-45.

for replacement costs designed to maximize pole attachment rates.[320]

2. Discussion

1.102 We agree with cable operators and telecommunications carriers that the continued use of a clear formula for the Commission's rate determination is an essential element when parties negotiate for pole attachment rates, terms and conditions.[321] We think that a formula encompassing these statutory directives of how pole owners should be compensated adds certainty and clarity to negotiations as well as assists the Commission when it addresses complaints. We conclude that the addition of the unusable and usable space factors, developed to implement Sections 224(e)(2) and (e)(3), is consistent with a just, reasonable, and nondiscriminatory pole attachment rate for telecommunications carriers. We affirm the following formula, to be used to determine the maximum just and reasonable pole attachment rate for telecommunications carriers, including cable operators providing telecommunications services, effective February 8, 2001, encompassing the elements enumerated in the law:

Maximum Rate = Unusable Space Factor + Usable Space Factor

C. Application of Pole Attachment Formula to Conduits

1. Background

1.103 Conduit systems are structures that provide physical protection for cables and also allow new cables to be added inexpensively along a route, over a long period of time, without having to dig up the streets each time a new cable is placed. Conduit systems are usually multiple-duct structures with standardized duct diameters. The duct diameter is the principal factor for determining the maximum number of cables that can be placed in a duct. Conduit is included in the definition of pole attachments,[322] therefore, the maximum rate for a pole attachment[323] in a conduit for telecommunications carriers must be established through separate allocations relating to unusable space[324] and usable space.[325] In the *Notice*, the Commission sought comment on the differences between conduit owned and/or used by cable operators and telecommunications carriers

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[320] *See, e.g.,* ICG Communications Reply at 26-27, NCTA Reply at 6-8.

[321] *See, e.g.,* USTA Reply at 2; *But see* GTE Reply at 4-5.

[322] 47 U.S.C. § 224(a)(4).

[323] 47 U.S.C. § 224(e)(1).

[324] 47 U.S.C. § 224(e)(2).

[325] 47 U.S.C. § 224(e)(3).

and conduit owned and/or used by electric or other utilities[326] to determine if there are inherent differences in the safety aspects or limitations between the two which should affect the rate for these facilities as discussed below.[327] The Commission sought comment on the distribution of usable and unusable space within the conduit or duct and how the determination for this space is made.[328] Where conduit is shared, we sought information on the mechanism for establishing a just and reasonable rate.[329]

1.104 Section 224(e)(2) requires that two-thirds of the cost of the unusable space be apportioned equally among all attaching entities.[330] In the *Notice*, the Commission proposed a methodology to apportion the costs of unusable space among attaching entities.[331] The following formula was proposed as the methodology to determine costs of unusable space in a conduit:

$$\text{Conduit Unusable Space Factor} = \frac{2}{3} \times \frac{\text{Net Linear Cost of Unusable Conduit Space}}{\text{Number of Attachers}} \times \text{Carrying Charge Rate}$$

In the *Notice*, the Commission also sought comment on what portions of duct or conduit are "unusable" within the terms of the 1996 Act.[332] The Commission proposed that a presumptive ratio of usable ducts to maintenance ducts be adopted to establish the amount of unusable space.[333]

1.105 Section 224(e)(3) states that the cost of providing usable space shall be apportioned according to the percentage of usable space required for the entity using the conduit.[334] Usable space is based on the number of ducts[335] and the diameter of the ducts

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[326]The issues regarding conduit systems were initially raised by the Commission in the *Pole Attachment Fee Notice*, 12 FCC Rcd 7449 at paras. 38-46.

[327]*Notice*, 12 FCC Rcd at 11739, para. 36.

[328]*Id.*

[329]*Id.*

[330]47 U.S.C. § 224(e)(2).

[331]*Notice*, 12 FCC Rcd at 11740, para. 40.

[332]*Id.*

[333]*Id.*

[334]47 U.S.C. § 224(e)(3).

contained in a conduit.[336] In the *Pole Attachment Fee Notice*,[337] the Commission sought comment on a proposed conduit methodology for use in determining a pole attachment rate for conduit under Section 224(d)(3).[338] In the *Notice*, the Commission sought comment on a proposed half-duct methodology for use in a proposed formula to determine a conduit usable space factor.[339] The proposed usable space formula under Section 224(e)(3) for pole attachments in conduits is as follows:

$$\text{Conduit Usable Space Factor} = \frac{1}{2} \times \frac{1 \text{ Duct}}{\text{Average Number of Ducts, less Adjustments for maintenance ducts}} \times \text{Net Linear Cost of Usable Conduit Space} \times \text{Carrying Charge Rate}$$

In the *Notice*, the Commission sought comment on the half-duct presumption's applicability to determine usable space and to allocate costs of providing usable space to the telecommunications carrier.[340] The Commission also sought comment on how its proposed conduit methodology impacts determining an appropriate ratio of usable to unusable space within a duct or conduit.[341]

1.106 As with poles, defining what an attaching entity is and establishing how to calculate the number of attaching entities in conduit is critical. Consistent with the half-duct convention proposed in the *Pole Attachment Fee Notice*,[342] the Commission stated that each entity using one half-duct should be counted as a separate attaching entity.[343] The Commission sought comment on this method of counting attaching entities for the purpose of allocating the

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[335] NESC defines the term "duct" as a single enclosed raceway for conductors or cable. NESC at Section 32.

[336] *Notice*, 12 FCC Rcd at 11739, para. 38.

[337] *Pole Attachment Fee Notice*, 12 FCC Rcd 7449 at paras. 43-46.

[338] 47 U.S.C. § 224(d)(3).

[339] *Notice*, 12 FCC Rcd at 11739, para. 38.

[340] *Id.* at 11739-40, para. 39.

[341] *Id.* at 11740, para. 40.

[342] *Pole Attachment Fee Notice*, 12 FCC Rcd 7449 at para. 45.

[343] *Notice*, 12 FCC Rcd at 11740, para. 41.

cost of the unusable space consistent with Section 224(e).[344] The Commission also sought comment on the use an attaching entity may make of its assigned space, including allowing others to use its dark fiber in the conduit.[345]

2. Discussion

a.Counting Attaching Entities for Purposes of Allocating Cost of Other than Usable Space

1.107 For the purpose of allocating the cost of unusable space, ICG Communications states that each party that actually installs one or more wires in a duct or duct bank should be counted as a single attaching entity, regardless of the number of cables installed or the amount of duct space occupied.[346] Section 224(e)(2) states that the costs of unusable space shall be allocated ". . . under an equal apportionment of such costs among all attaching entities."[347] We agree that each party that actually installs one or more wires in a duct or duct bank should be counted as a single attaching entity, regardless of the number of cables installed or the amount of duct space occupied. The statutory preference for clarity is preeminent and we perceive no generally applicable method that does not involve complexity and confusion other than counting each entity within the conduit system as a separate attaching entity.

b. Unusable Space in a Conduit System

1.108 Carolina Power, et al., assert that the only usable space is the duct itself, because the surrounding structure and supportive infrastructure of the duct is the unusable space.[348] To allocate the cost of the unusable space, they argue that two-thirds of the costs involved in constructing a conduit system should be apportioned among attaching entities.[349] These utility conduit owners reason that the structure surrounding a conduit system exists to make other parts of the system usable in the same way that unusable portions of a pole exist to make other parts of

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[344] *Id.*

[345] *Id.*

[346] *See* ICG Communications Comments at 55; *see also* Edison Electric/UTC Comments at 29. *But see* Ameritech Comments at 15.

[347] 47 U.S.C. § 224(e)(2).

[348] Carolina Power, et al., Comments at 16; *see also* American Electric, et al., Comments at 53.

[349] These costs typically include obtaining permits, excavating rock, shoring trench sides and treating subsurfaces. Carolina Power, et al., Reply at 6.

the pole usable.[350]

1.109 USTA argues that although unusable conduit space differs from unusable pole space in the way it is created, it is possible to allocate the costs of unusable space.[351] According to USTA, space in a conduit is unusable because it either is reserved for maintenance or has deteriorated.[352] The record demonstrates that in some conduit systems not all of the ducts are used; one duct may simply be unoccupied or another may be reserved for maintenance.[353] We conclude that if a maintenance duct is reserved for the benefit of all conduit occupants, such reservation renders that duct unusable and the costs of that space should be allocated to those who benefit from it. To the degree space in a conduit is reserved for a maintenance or emergency circumstances, but not generally used, it should be considered unusable space and its costs allocated appropriately as entities using the conduit benefit by the space.

1.110 Commenters representive of all industries suggest that no unusable space exists in a conduit system.[354] We disagree. There appear to be two aspects to the unusable space within conduit systems. First, there is that space involved in the construction of the system, without which there would be no usable space.[355] Second, there is that space within the system which may be unusable after the system is constructed. We agree with Carolina Power, et al., that the costs for the construction of the system, which allow the creation of the usable space, should be part of the unusable space allocated among attaching entities.[356] We also agree with USTA[357] to the extent that maintenance ducts reserved for the benefit and use of all attaching

[350]Carolina Power, et al., Comments at 16; *see also* American Electric, et al., Comments at 53.

[351]*See* USTA Comments at 4-5.

[352]USTA Comments at 4-5.

[353]*See, e.g.,* Bell Atlantic Comments at 8; GTE Comments at 14; Carolina Power, et al., Reply at 6; Edison Electric/UTC Reply at 28.

[354]Ameritech Comments at 14; AT&T Comments at 16 (even ducts reserved for maintenance and/or emergency purposes are used at times and therefore serve an ongoing purpose); Bell Atlantic Comments at 8; Comcast, et al., Comments at 22-23; Edison Electric/UTC Comments at 29. *But see* Carolina Power, et al., Comments at 16; ICG Communications Comments at 53-54; USTA Comments at 4-5.

[355]This space would include the level down to which one must go in order to lay the system, much like one must go up on a pole to reach the usable space there. The costs associated with creating this portion of space may generally include trenching, excavation, supporting structures, concrete, and backfilling.

[356]Carolina Power, et al., Reply at 6-10.

entities should be considered unusable.[358]

1.111 With regard to space in a conduit that is deteriorated, the record is less clear. If a duct has deteriorated beyond usability, USTA believes it should be counted in the unusable space category and therefore included in allocation of costs for unusable space to attachers.[359] We disagree. We are reluctant to require that the costs of space that can not be used by, and provide no benefit to, an existing attaching entity should be allocated beyond the utility conduit owner. In contrast, unusable space on a pole is largely attributed to safety and engineering concerns, adherence to which benefits the pole owner and attaching entities. Space in a conduit that has deteriorated serves no benefit to the existing rate-paying attaching entities. Deteriorated duct creates space that has been rendered unused by the utility. If such space could, with reasonable effort and expense, be made available, the space is usable and not unusable.

c. Half-Duct Presumption for Determining Usable Conduit Space

1.112 Certain telecommunications carriers support the proposed half-duct methodology for determining a conduit rate for usable space.[360] Bell Atlantic and GTE agree with the simplicity and efficiency of our proposed formula, while SBC supports its applicability to telecommunications carriers as well as cable operators because it is based on "actual figures and presumptions that attempt to approximate actual figures."[361] GTE estimates that the average conduit consists of four ducts. GTE further indicates that consideration of the variations in duct diameter ". . . would unduly complicate the formula with even more non-public data, resulting in

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[357]USTA Comments at 4-5.

[358]As we explained in the *Pole Attachment Fee Notice* at para 45:

> [i]f a utility reserves one duct for maintenance, and if the attacher has the right to utilize that reserved space in the event of a cable break or benefits in any way from the reservation of that space, that reserved duct would be considered unusable space. In that event, it is necessary to include an 'adjustment for reserved ducts' element in the formula to reduce the average number of ducts in the denominator of the occupied space component of the formula. The adjustment for reserved ducts element would be the number of reserved ducts that all attachers have the right to use in the event of a cable break or that they otherwise receive benefit from in any other way. If the attacher has no right to use that space or receives no benefit from that duct, we propose that the denominator should not be reduced.

[359]*See* USTA Comments at 4-5.

[360]Bell Atlantic Comments at 8; GTE Comments at 14; KMC Telecom Comments at 8; SBC Comments at 30.

[361]SBC Comments at 31 (emphasis in original).

additional pole attachment disputes."[362] SBC states that the half-duct methodology will adjust easily to telecommunications carriers that may use copper facilities that occupy an entire duct.[363]

1.113 Other telecommunications carriers and some cable operators oppose the use of the half-duct methodology asserting that it creates too large a presumption of usable space, resulting in rates that could result in an unreasonably high pole attachment rate.[364] Sprint, on the other hand, opposes the methodology, indicating that due to the likelihood of damaging existing cables, it does not allow another cable through a duct where there are no inner-ducts.[365] Sprint states that once an attacher uses an empty duct, 100% of the space has been effectively used.[366]

1.114 Electric utilities oppose the half-duct methodology, stating that electric and communications cable cannot share the same duct due to practical and safety concerns as evidenced by the NESC.[367] Generally, the electric utilities state that safety considerations compel differences between electric utility and other conduit systems.[368] American Electric, et al., indicate that underground conduit is often used by the electric utilities solely to hold conductors that carry high voltage electric current.[369] Further, they state that the difference between electric utility conduit systems and other conduit systems makes it impossible to develop a uniform conduit formula that is equally applicable to electric and telephone utility

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[362]GTE Comments at 14.

[363]SBC Comments at 30-31.

[364]AT&T Comments at 22, Reply at 18-19 & 25; ICG Communications Comments at 55, Reply at 21,24-25; NCTA Comments at 25; NCTA CS Docket 97-98 Comments at 39; TCI CS Docket 97-98 Comments at 16; Time Warner Cable CS Docket 97-98 Comments at 28.

[365]The term "inner-duct" generally refers to small diameter pipe or tubing placed inside conventional duct to allow the installation of multiple wires or cables.

[366]Sprint Comments in CS Docket 97-98 at 11.

[367]*See* American Electric, et al., Comments at 54; Duquesne Light Comments at 49-52; Ohio Edison Comments at 47-49; Union Electric Comments at 41-46 (citing NESC Rule 341(A)(6) which states: Supply, control and communication cables shall not be installed in the same duct unless the cables are maintained or operated by the same utility).

[368]American Electric, et al., Comments at 55; Dayton Power Comments at 3; Edison Electric/UTC Reply at 26.

[369]American Electric, et al., Comments at 55-57.

conduit systems.[370] NCTA replies that utilities have not demonstrated that sharing of conduits between telecommunications carriers and electric utilities poses significant safety risks.[371] Some electric utilities claim that they do not have the information necessary to apply the formula and that the methodology is inappropriate for the pricing of access to electric utility conduit.[372] Specifically, the electric utilities claim that they cannot "readily determine the number of feet of conduit or the number of ducts deployed or available in their system."[373]

1.115 We adopt our proposed rebuttable presumption that a cable or telecommunications attacher occupies a half-duct of space in order to determine a reasonable conduit attachment rate. We note that the NESC rule relied on by the electric utilities does not prohibit the sharing of space between electric and communications. Rather, the rule conditions the sharing of such space on the maintenance and operation being performed by the utility.[374] We continue to believe that the half-duct methodology is the "simplest and most reasonable approximation of the actual space occupied by an attacher."[375] This method, patterned after the one used by the Massachusetts Department of Public Utilities ("MDPU"),[376] allows for determining the cost per foot of one duct and then dividing by two instead of actually measuring the duct space occupied. The MDPU finds, and we agree, that this method is reasonable because an attacher's use of a duct does not preclude the use of the other half of the duct so the attacher should not have to pay for the entire duct. In situations where the formula is inappropriate because it has been demonstrated that there are more than two users in the conduit or that one particular attachment occupies the entire duct, so as to preclude another from using the duct, our half-duct presumption can be rebutted. If a new entity is installing an attachment in a previously unoccupied duct, we believe that such entity should be encouraged to place inner-duct prior to placing its wires in the duct.

d. Conduit Pole Attachment Formula

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[370] American Electric, et al., Comments at 55.

[371] NCTA Reply at 23.

[372] American Electric, et al., Comments at 52-53; Edison Electric/UTC Comments at 28.

[373] American Electric, et al., Comments in CS Docket 97-98 at 83.

[374] NESC Rule 341(A)(6) states that: "Supply, control, and communication cables shall not be installed in the same duct unless the cables are maintained or operated by the same utility."

[375] *Pole Attachment Fee Notice*, 12 FCC Rcd 7449 at para. 46.

[376] *See Greater Media, Inc. v. New England Telephone and Telegraph*, Massachusetts D.P.U. 91-218 (1992).

1.116 We believe that a formula encompassing statutory directives of how utilities should be compensated for the use of conduit adds certainty and clarity to negotiations as well as assists the Commission when it addresses complaints. We conclude that the addition of the conduit unusable and conduit usable space factors, developed to implement Section 224(e)(2)[377] and Section 224(e)(3),[378] is consistent with a just, reasonable, and nondiscriminatory pole attachment rate for telecommunications carriers in conduit.[379] We adopt the following formula to be used to determine the maximum just and reasonable pole attachment rate for telecommunications carriers in a conduit system, effective February 8, 2001, encompasses the elements enumerated in the law:

Maximum Conduit Rate Per Net Linear Foot	=	Conduit Unusable Space Factor	+	Conduit Usable Space Factor

D. Rights-of-Way

1. Background

1.117 The amended Section 224(a)(4) of the Communication Act defines "pole attachment" to include ". . . right-of-way owned or controlled by a utility." The Commission has previously determined that the access and reasonable rate provisions of Section 224 apply where a cable operator or telecommunications carrier seeks to install facilities in a right-of-way but does not intend to make a physical attachment to any pole, duct or conduit.[380] For example, a

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[377]For allocating the cost of unusable space in a conduit for telecommunications carriers, see discussion at para. 104 above for the following basic formula:

$$\text{Conduit Unusable Space Factor} = \frac{2}{3} \times \frac{\text{Net Linear Cost of Unusable Conduit Space}}{\text{Number of Attachers}} \times \text{Carrying Charge Rate}$$

[378]For allocating the cost of usable space in a conduit for telecommunications carriers, see discussion at para. 105 above for the following basic formula:

$$\text{Conduit Usable Space Factor} = \frac{1}{2} \times \frac{1 \text{ Duct}}{\text{Average Number of Ducts, less Adjustments for maintenance ducts}} \times \text{Net Linear Cost of Usable Conduit Space} \times \text{Carrying Charge Rate}$$

[379]47 U.S.C. § 224(e)(1).

[380]*Local Competition Order*, 11 FCC Rcd at 16058-107, paras. 1119-1240; 47 U.S.C. § 224(a)(4); *see also* AT&T Comments at 18.

utility must provide a requesting cable operator or telecommunications carrier with "non-discriminatory access" to any right-of-way owned or controlled by the utility.[381] An electric utility may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits and rights-of-way, on a non-discriminatory basis, where there is "insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[382]

1.118 The Commission's proceedings and cases generally have addressed issues involving physical attachments to poles, ducts, or conduits. The *Notice* sought information about the frequency at which rights-of-way rate disputes might arise and the range of circumstances that would be involved.[383] We also asked whether we should adopt a methodology and/or formula to determine a just and reasonable rate, or whether rights-of-way complaints should be addressed on a case-by-case basis.[384] If a methodology were recommended, the Commission requested comment on the elements, including any presumptions, that could be used to calculate the costs relating to usable and unusable space in a right-of-way.

1.119 Generally, cable and telecommunications carriers urge the Commission to establish a set of guiding principles against which rights-of-way pole attachment complaints would be reviewed to minimize the number of disputes to be resolved through the complaint process.[385] Attaching entity interests assert that, without some form of established methodology or formula, the parties to a pole attachment agreement would be without instruction and the attaching entity would be at the mercy of the right-of-way owner.[386]

2. Discussion

1.120 The record indicates there have been few instances of attachment to a right-of-way that did not include attachment to a pole, duct or conduit.[387] Comments of cable operators,

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[381] 47 U.S.C. § 224(f)(1).

[382] 47 U.S.C. § 224(f)(2). These considerations were addressed as access issues in the *Local Competition Order*: 11 FCC Rcd at 16058-107, paras. 1119-1240.

[383] *Notice*, 12 FCC Rcd at 11740, para. 42.

[384] *Id.* at 11740, para. 43.

[385] *See* AT&T Comments at 17-18, Reply at 20; Bell Atlantic Reply at 27; MCI Reply at 24-25; NCTA Comments at 27-28; *But see* Winstar Comments at 11-12.

[386] *See* MCI Reply at 24-25; Winstar Reply at 6-7.

[387] *See, e.g.*, American Electric, et al. Comments at 65; Ameritech Comments at 15-16; Carolina Power, et al., Comments at 16; GTE Comments at 14-15; USTA Comments at 14-15; U S West Comments at 10.

telecommunications carriers and utility pole owners confirm that there are too many different types of rights-of-way, with different kinds of restrictions placed on the various kinds of rights-of-way, to develop a methodology that would assist a utility and potential attacher in their efforts to arrive at just and reasonable compensation for the attachment.[388] Such restrictions may also vary by state and local laws of real property, eminent domain, utility, easements, and from underlying property owner to property owner.[389]

1.121 This *Order*, like the statute and the *Local Competition Order*, sets forth guiding principles to be used in determining what constitutes just, reasonable and nondiscriminatory rates for pole attachments in rights-of-way. The information submitted in this proceeding is not sufficient to enable us to adopt detailed standards that would govern all right-of-way situations. We thus believe it prudent for the Commission to gain experience through case-by-case adjudication to determine whether additional "guiding principles" or presumptions are necessary or appropriate.[390] Therefore, we will address complaints about just, reasonable, and nondiscriminatory pole attachments to a utility's right-of-way on a case-by-case basis.

V. COST ELEMENTS OF THE FORMULA FOR POLES AND CONDUIT

1.122 Section 224 ensures a utility pole owner just and reasonable compensation for pole attachments made by telecommunications carriers.[391] When Congress in 1978 directed the Commission to regulate rates for pole attachments used for the provision of cable service, Congress established a zone of reasonableness for such rates, bounded on the lower end by incremental costs[392] and on the upper end by fully allocated costs.[393] In the pole attachment

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[388] *See, e.g.,* American Electric, et al., Comments at 60; Ameritech Comments at 15; Carolina Power, et al., Comments at 16-17.

[389] *See, e.g.,* American Electric, et al., Comments at 60; Carolina Power, et al., Comments at 16-17.

[390] Other rights-of-way issues were raised in the comments but are outside the scope of this rulemaking are the subject of petitions of reconsideration, or involve litigation relating to the access provisions of Section 224. *See Gulf Power Co. et al. v. United States*, C.A. No. 3:96 CV 381 (N.D. Fla.) Until such time as the Commission resolves the petitions for reconsideration, or a court issues a decision addressing Section 224's access provisions, the Commission's decisions continue to provide appropriate guidance to both utility pole owners and attaching entities for the purpose of negotiating pole attachments.

[391] 47 U.S.C §§ 224(b), (d)(1), (e)(1).

[392] *1977 Senate Report* at 19; *see also Second Report and Order*, 72 FCC 2d at 4.

[393] *See* 47 U.S.C. § 224(d)(1); *see also 1977 Senate Report* at 19.

context, incremental costs are those costs that the utility would not have incurred "but for" the pole attachments in question.[394] 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.[395] The Commission has noted that, in arriving at an appropriate rate between these two boundaries, it is important to ensure that the attaching entity is not charged twice for the same costs, once as up-front "make-ready" costs and again for the same costs if they are placed in the corresponding pole line capital account that is used to determine the recurring attachment rate.

1.123 In regulating pole attachment rates, the Commission implemented a cost methodology premised on historical or embedded costs.[396] These are costs that a firm has incurred in the past for providing a good or service and are recorded for accounting purposes as past operating expenses and depreciation. Many parties in this proceeding, as well as in the *Pole Attachment Fee Notice* proceeding,[397] advocate extension of historical costs, while a number of parties advocate that the Commission adopt a forward-looking economic cost-pricing ("FLEC") methodology for pole attachments.[398] Forward-looking cost methodologies seek to consider the costs that an entity would incur if it were to construct facilities now to provide the good or service at issue.

1.124 We did not raise the issue of forward looking costs in the *Notice* in this proceeding. While we do not prejudge the arguments raised by the commenters, we decline to address at this time proposals to shift to a forward looking cost methodology. Accordingly, we will continue the use of historical costs in our pole attachment rate methodology, specifically as it is applied to telecommunications carriers and cable operators providing telecommunications services.

VI. IMPLEMENTATION AND EFFECTIVE DATE OF RULES

1.125 Section 224(e)(4) states that:

> [t]he regulations under paragraph (1) shall become effective 5 years after the date of enactment of the Telecommunications Act of 1996. Any increase in the rates for pole

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[394] *1977 Senate Report* at 19; *see also* 72 FCC 2d at 62.

[395] *1977 Senate Report* at 19-20.

[396] 72 FCC 2d at 66, para. 15

[397] NCTA CS Docket No. 97-98 Comments at 3, Reply at 12-19; USTA CS Docket No. 97-98 Reply at 5-6; U S West Comments at 2.

[398] *See* American Electric, et al., Comments at 11-18, CS Docket No. 97-98 Comments at 14-95; Edison Electric/UTC Comments at 8, Reply at 6-7.

> attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.[399]

Because the 1996 Act was enacted on February 8, 1996, Section 224(e)(4) requires the Commission to implement the telecommunications carrier rate methodology beginning February 8, 2001.

1.126 The Commission proposed that the amount of any rate increase should be phased in at the beginning of the five years, with one-fifth of the total rate increase added each year. The *Notice* sought comment on our proposed five-year phase-in of the telecommunications carrier rate. It also sought comment on any other proposals that would equitably phase in the telecommunications carrier rate within the five years allotted by Section 224(e)(4).[400]

1.127 Commenters request that the Commission clarify its phase-in requirement by specifying when the first phase-in increase is to begin or when the first annual increment should go into effect. USTA notes an ambiguity regarding the Commission's proposal that the increment be added to the rate in each of the subsequent five years.[401] USTA's concern is that the Commission's proposal gives the impression that the phase in would not occur until after the first full year Section 224(e)(4) applies, or February 8, 2002. MCI requests that the Commission clarify that the five-year phase-in pertains to any rate increase resulting from the absorption of unusable costs by telecommunications carriers. It asks that the Commission affirm that Congress intended only rate increases to be phased in and not rate changes or reductions.[402] New York State Investor Owned Electric Utilities offer a plan to implement the phase-in whereby the billing rate would be calculated by applying 1/5, 2/5, 3/5, and 4/5 of the difference between the current Section 224(d)(3) rate and the new Section 224(e) rate calculated each year and adding that amount to the incremental Section 224(d)(3) rate.[403]

1.128 SBC further recommends that the Commission provide explicit procedures for this phase-in in order to avoid disputes over interpretation of Section 224(e)(4)'s requirement.[404] It recommends that the amount of the increase be calculated based on the data available in the previous year, the year 2000, and that the amount of the increase not be recalculated during the five year phase-in. SBC requests that a full share be added in 2001, even though the carrier rate

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[399] 47 U.S.C. § 224(e)(4).

[400] *Notice*, 12 FCC Rcd at 11741, para. 44.

[401] USTA Comments at 15.

[402] MCI Comments at 23.

[403] New York State Investor Owned Electric Utilities Comments at 27.

[404] SBC Comments at 35-36.

is not effective until February 8, 2001, and that after the fifth year, for the year 2006, rates be calculated in accordance with the carrier formula, including any changes in data through the end of the five year period.

1.129 We conclude that the statutory language is explicit in requiring that any increase in the rates for pole attachments shall be phased-in in equal annual increments over five years beginning on the effective date of such regulations.[405] We clarify that the language "beginning on the effective date of such regulations" refers to February 8, 2001, or five years after the enactment of the 1996 Act. We find New York State Investor Owned Electric Utilities' plan to implement the phase-in consistent with the Commission's requirement that the increases be phased-in in equal increments over five years, with the goal to have the entire amount of the increase implemented within five years of February 8, 2001.[406]

1.130 We affirm that the five-year phase-in is to apply to rate increases only and that the amount of the increase or the difference between the Section 224(d) rate and the 224(e) rate shall be applied annually until the full amount of the increase is absorbed within five years of February 8, 2001.[407] Rate reductions are not subject to the phase-in and are to be implemented immediately.

VII. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

1.131 As required by the Regulatory Flexibility Act ("RFA"),[408] an Initial Regulatory

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[405] *See* Carolina Power, et al., Comments at 17; GTE Comments at 15; and Edison Electric/UTC Comments at 31.

[406] For example, if a telecommunications provider pays a Section 224(d)(3) rate on February 7, 2001 of $5.00 per pole and application of the new formula pursuant to Section 224(e) produces a rate of $7.00 per pole, the difference or increase of $2.00 per pole would be applied in five annual increments of $0.40 (or 20%) until the full amount of the increase is reached in the year 2005. The rate per pole for each year should be as follows:

Beginning February 8, 2001	$5.40
Beginning February 8, 2002	$5.80
Beginning February 8, 2003	$6.20
Beginning February 8, 2004	$6.60
Beginning February 8, 2005	$7.00

[407] *See Conf. Rpt.* at 99.

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

Flexibility Analysis ("IRFA") was incorporated in the *Notice*.[409] The Commission sought written public comment on the proposals in the *Notice* including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[410]

1. Need for, and Objectives of, the *Order*

1.132 Section 703 of the 1996 Act requires the Commission to prescribe regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services. The objectives of the rules adopted herein are, consistent with the 1996 Act, to promote competition and the expansion of telecommunications services and to reduce barriers to entry into the telecommunications market by ensuring that charges for pole attachments are just, reasonable and nondiscriminatory.

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

1.133 No comments submitted in response to the *Notice* were specifically identified by the commenters as being in response to the IRFA contained in the *Notice*. Small Cable Business Association ("SCBA") filed comments in response to the IRFA contained in the *Pole Attachment Fee Notice*, and, to the extent they are relevant to the issues in this proceeding, we incorporate them herein by reference. SCBA claims in its IRFA comments that, because of the statutory exclusion of cooperatives from the definition of utility, Section 224 does not minimize market entry barriers for small cable operators.[411] According to SCBA, the IRFA in the *Pole Attachment Fee Notice* fails to consider this issue.[412]

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

1.134 The RFA generally defines a "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[413] In

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Enforcement Fairness Act of 1996 ("SBREFA").

[409] *Notice of Proposed Rulemaking*, CS Docket No. 97-151, 12 FCC Rcd 11725, 11741-51, paras. 45-74 (1997).

[410] *See* 5 U.S.C. § 604.

[411] SCBA IRFA Comments in CS Docket No. 97-98 at 2.

[412] *Id.*

[413] 5 U.S.C. § 601(6).

addition, the term "small business" has the same meaning as the term small business concern under the Small Business Act.[414] A "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[415] For many of the entities described below, the SBA has defined small business categories through Standard Industrial Classification ("SIC") codes.

a. Utilities

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

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

1.136 *Electric Services (SIC 4911).* The SBA has developed a definition for small electric utility firms.[416] The Census Bureau reports that a total of 1379 electric utilities were in operation for at least one year at the end of 1992. According to SBA, a small electric utility is an entity whose gross revenues did not exceed five million dollars in 1992.[417] The Census Bureau reports that 447 of the 1379 firms listed had total revenues below five million dollars.[418]

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[414]5 U.S.C. § 601(3) (incorporating by reference the definitions of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions' of such term which are appropriate to the activities of the agency and publishes such definitions in the Federal Register."

[415]Small Business Act, 15 U.S.C. § 632.

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

[417]13 C.F.R. § 121.201.

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

1.137 *Electric and Other Services Combined (SIC 4931).* The SBA has classified this entity as a utility whose business is less than 95% electric in combination with some other type of service.[419] The Census Bureau reports that a total of 135 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small electric and other services combined utility is a firm whose gross revenues did not exceed five million dollars in 1992.[420] The Census Bureau reported that 45 of the 135 firms listed had total revenues below five million dollars.[421]

1.138 *Combination Utilities, Not Elsewhere Classified (SIC 4939).* The SBA defines this utility as providing a combination of electric, gas, and other services which are not otherwise classified.[422] The Census Bureau reports that a total of 79 such utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small combination utility is a firm whose gross revenues did not exceed five million dollars in 1992.[423] The Census Bureau reported that 63 of the 79 firms listed had total revenues below five million dollars.[424]

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

1.139 *Natural Gas Transmission (SIC 4922).* The SBA's definition of a natural gas transmitter is an entity that is engaged in the transmission and storage of natural gas.[425] The Census Bureau reports that a total of 144 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small natural gas transmitter is an entity whose gross revenues did not exceed five million dollars in 1992.[426] The Census Bureau reported that 70 of the 144 firms listed had total revenues below five million dollars.[427]

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[419] *See supra* note 416.

[420] 13 C.F.R. § 121.201.

[421] *See supra* note 418.

[422] *See supra* note 416.

[423] 13 C.F.R. § 121.201.

[424] *See supra* note 418.

[425] *See supra* note 416.

[426] 13 C.F.R. § 121.201.

[427] *See supra* note 418.

1.140 *Natural Gas Transmission and Distribution (SIC 4923).* The SBA has classified this entity as a utility that transmits and distributes natural gas for sale.[428] The Census Bureau reports that a total of 126 such entities were in operation for at least one year at the end of 1992. The SBA's definition of a small natural gas transmitter and distributer is a firm whose gross revenues did not exceed five million dollars.[429] The Census Bureau reported that 43 of the 126 firms listed had total revenues below five million dollars.[430]

1.141 *Natural Gas Distribution (SIC 4924).* The SBA defines a natural gas distributor as an entity that distributes natural gas for sale.

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[428] *See supra* note 416.

[429] 13 C.F.R. § 121.201.

[430] *See supra* note 418.