Pole Rulemaking
UT 970723

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:

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Paragraph No.

I. INTRODUCTION

1. In this Report and Order ("Order"), the Commission adopts rules implemen 703 of the Telecommunications Act of 1996 ("1996 Act") relating to pole attachments. requires the Commission to prescribe regulations to govern the charges for pole atta telecommunications carriers to provide telecommunications services. Section 703 als Commission's regulations ensure that a utility charges just, reasonable, and nondisc pole attachments. We adopt the rules set forth in Appendix A hereto based upon the comments filed in response to the Notice of Proposed Rulemaking in this docket (the of commenters, as well as the abbreviations used in this Order to refer to such part Appendix B hereto. The commenters generally represent the interests of one of the f categories: (1) utility pole owners; (2) cable operators; and (3) telecommunication

II. BACKGROUND

2. The purpose of Section 224 of the Communications Act is to ensure that t of communications networks and the development of competition are not impeded by pri and control of the scarce infrastructure and rights-of-way that many communications in order to reach customers. The rules we adopt in this Order further the pro-comp Section 224 and the 1996 Act by giving incumbents and new entrants in the telecommun fair and nondiscriminatory access to poles and other facilities, while safeguarding owners of those facilities.

3. As originally enacted, Section 224 was designed to ensure that utilities and rights-of-way did not create a bottleneck that would stifle the growth of cable sought to prohibit utilities from engaging in "unfair pole attachment practices . . effect of unjust or unreasonable pole attachment practices on the wider development service to the public." As mandated by Section 224, the Commission established a fo maximum rates that utilities could charge cable operators for the installation of at facilities where such rates are not regulated by a state. In subsequent proceedings amended and clarified its methodology for establishing rates and its complaint proce

4. The 1996 Act amended Section 224 in several important respects. While p protections of Section 224 had applied only to cable operators, the 1996 Act extende to telecommunications carriers as well. Further, the 1996 Act gave cable operators telecommunications carriers a mandatory right of access to utility poles, in additio scheme of rate regulation governing such attachments. In the Local Competition Orde number of rules implementing the new access provisions of Section 224.

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

6. Section 224 contains two separate provisions governing maximum rates for attachments, one of which covers attachments used to provide cable service and one o attachments for telecommunications services (including attachments used jointly for telecommunications). Section 224(b)(1), which was not amended by the 1996 Act, gran Commission authority to regulate the rates, terms, and conditions governing pole att service to ensure that they are just and reasonable. Section 224(d)(1) defines a ju as ranging from the statutory minimum (incremental costs) to the statutory maximum (costs). Incremental costs include pre-construction survey, engineering, make-ready incurred in preparing for cable attachments. Fully allocated costs refer to the po expenses and capital costs that a utility incurs in owning and maintaining poles tha of usable pole space that is occupied by an attacher.

7. Separately, Section 224(e)(1), the subject of this Order, governs rates used in the provision of telecommunications services, including single attachments u both cable and telecommunications service. Under this section, the Commission must than two years after the date of enactment of the 1996 Act, regulations "to govern c attachments used by telecommunication carriers to provide telecommunications service fail to resolve a dispute over such charges." Section 224(e)(1) states that such re that a utility charges just, reasonable, and nondiscriminatory rates for such pole a section also sets forth a transition schedule for implementation of the new rate for telecommunications carriers. Until the effective date of the new formula governing attachments, the existing pole attachment rate methodology of cable services is appl television systems and to telecommunications carriers.

8. In the Notice, the Commission sought comment on implementing a methodolo just, reasonable, and nondiscriminatory maximum pole attachment and conduit rates fo telecommunications carriers. Under the present formula, a portion of the total annu included in the pole attachment rate based on the portion of the usable space occupi entity. Under the 1996 Act's amendments, the portion of the total annual cost inclu attachment rate for cable systems and telecommunications carriers providing telecomm will be determined under a more delineated method. This method allocates the costs the total pole cost associated with the usable portion of the pole and the portion o associated with the unusable portion of the pole in a different manner. The Commiss comment on how to ensure that rates charged for use of rights-of-way are just, reaso nondiscriminatory.

9. The rules we adopt today implement the plain language of Section 224. provides that the regulations promulgated will apply "when the parties fail to resol

charges." Accordingly, and as discussed below, we encourage parties to negotiate th conditions of pole attachment agreements. Although the Commission's rules will serv to such negotiations, we intend the Commission's enforcement mechanisms to be utiliz faith negotiations fail. Based on the Commission's history of successful implementa of rules governing attachments used to provide cable service, we believe that the ne today will foster competition in the provision of communications services while guar compensation for the utilities that own the infrastructure upon which such competiti

III. PREFERENCE FOR NEGOTIATED AGREEMENTS AND COMPLAINT RESOLUTION PROCEDURES

A. Background

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

> . . . govern the charges for pole attachments used by telecommunication provide telecommunications services when the parties fail to resolve a d charges. Such regulations shall ensure that a utility charges just, rea nondiscriminatory rates for pole attachments.

The statute, legislative policy, administrative authority, and current industry prac private negotiation the preferred means by which pole attachment arrangements are ag a utility pole owner and an attaching entity. Pursuant to the Commission's authorit reasonable, and nondiscriminatory rates, terms and conditions for pole attachments, have recourse to the Commission when unable to resolve a dispute with a utility pole Commission's rules establish a specific complaint process. Under the current rule, complaint about rates, the Commission will compare the utility's proposed rate to a calculated using the statutory formula.

11. In proposing a methodology to implement Section 224(e), the Commission s Notice that the Commission's role is limited to circumstances when the parties fail and that negotiations between a utility and an attacher should continue to be the pr pole attachment issues are resolved. The Commission also indicated that Congress re importance of access in enhancing competition in telecommunications markets and that attachment negotiation do not have equal bargaining positions. To further Congressi competition in telecommunications, the Commission proposed to apply to telecommunica the Commission's existing complaint rules developed to resolve pole attachment rate cable operators and utilities.

12. Some telecommunications carriers and utility pole owners agree that nego a utility and an attaching entity will continue, under Section 224(e), to be the pri pole attachment issues are resolved. Several utility pole owners, however, suggest to the complaint process, such as adding a mandatory negotiation period and establis limitations and a minimum amount in controversy. American Electric, et al., also co meaningful negotiations can occur "only when the default pricing mechanism establish Commission is somewhere close to the price on which the parties would agree absent s Attaching entities respond that the American Electric, et al., proposals would elimi Commission, contrary to the content and spirit of the law.

13. The Association of Local Telecommunications Services ("ALTS") asserted i comments in response to the Pole Attachment Fee Notice that its members have experie obtain pole attachments from numerous utilities, and many negotiations were unsatisf to the intransigence by or blatant refusal of utilities to negotiate. USTA, a natio representing over 1,000 LECs, contends that while the most efficient manner to deter reasonable pole attachment rates is that of permitting pole owners and attachers to agreements, the proposal by American Electric, et al., contravenes the statute.

14. Electric utility pole owners oppose the continued use of the current neg and complaint procedures established for cable operators, claiming the current regul resulted in government-sponsored unilateral contract modification and subsidization by the electric utility ratepayer. American Electric, et al., contend that the Comm that the bargaining relationship between electric utilities and cable companies has when Congress provided the cable television industry with access to the distribution just and reasonable rates. In asserting that attaching entities no longer represent

rate regulation under Section 224, American Electric, et al., acknowledge that in 19 concerned with the cable companies' inferior bargaining position vis-a-vis utilities an industry in its infancy." USTA interprets Congressional intent as expecting the intervene and rely on the statutory formula only in instances where negotiating part a mutually acceptable agreement. USTA further states that the Commission has establ maintained a case-by-case dispute resolution process since 1978, rather than adoptin attachment rate prescription process in compliance with that Congressional mandate. telecommunications carriers assert that potential and existing attaching entities do attachment rate regulation because they are still not able to bargain from a level p owners. Cable operators and telecommunications carriers urge the Commission to exte negotiation and complaint resolution system to telecommunications carriers.

15. Some attaching entities suggest that the Commission impose on itself a in which to issue a decision on a pole attachment complaint. Other cable and teleco carriers request that the Commission impose upon utility pole owners the requirement agreements between private parties be on public record so that an attaching entity w (1) the expectations of the utility; and (2) the terms provided to other attaching e would be that the most favored provisions from various agreements would then be avai attaching entities. Pole owners assert that attaching entities have no legitimate e provisions be available to all attaching entities.

B. Discussion

16. Our rules for complaint resolution will only apply when the parties are at a negotiated agreement. We affirm our belief that the existing methodology for d presumptive maximum pole attachment rate, as modified in this Order, facilitates neg parties can predict an anticipated range for the pole attachment rate. We further c current complaint procedures are adequate to establish just and reasonable rates, te for pole attachments. No party has demonstrated that the Commission's time for reso a problem in the past. While we will not impose a deadline for Commission action, w endeavor to resolve complaints expeditiously. An uncomplicated complaint process an for rate determination are essential to promote the use of negotiations for pole att and conditions. We are committed to an environment where attaching entities have en where the interests of pole owners are recognized, and where both parties can negoti attachment rates, allowing the availability of telecommunications services to expand

17. We agree with attaching entities that time is critical in establishing t conditions for attaching. Prolonged negotiations can deter competition because they entrant to choose between unfavorable and inefficient terms on the one hand or delay a weaker position in the market on the other. For these reasons, we reject a propos we mandate a 180-day negotiation period prior to filing a complaint with the Commiss with cable and telecommunications carriers that such a requirement would not be cond competitive, deregulatory environment. Such an extended period of time could delay telecommunications carrier's ability to provide service and unnecessarily obstruct t

18. We disagree with utilities suggesting that, in addition to the existing owner should receive 30 days' notice by a cable operator or telecommunications carri to file a complaint. Such a notice requirement would be redundant under our rule an unnecessarily prolong the resolution of disputes. The current rule provides for a 4 the utility pole owner must respond to the request for access filed by a cable opera telecommunications carrier seeking to install an attachment. A complaint to the Com filed within 30 days of the denial of a request for access. The utility then has an respond to the complaint. When a cable operator or a telecommunications carrier bel to complain that a pole attachment rate, term, or condition is not just or reasonabl data and information is required under the current rule. A utility has 30 days in w an attaching entity's request for the data and information regarding the rate, term, for the complaint. Under the present rules, the utility has had communication with prior to the filing of the complaint, to such a degree as is necessary to understand outlined in the complaint. The utility has sufficient notice of the issues involved requirements unnecessary.

19. GTE suggests that we impose a one year statute of limitations on the fil and suggests an amount in controversy threshold of $5,000. We view these proposals restrictive as they could foreclose remedy of an unjust or unreasonable rate, term, attachments, especially for small enterprises. There is no provision in the statute

Establishing a threshold of any dollar amount could preclude relief to small entitie inconsistent with Section 257 and the pro-competitive goals of the 1996 Act.

20. Utility pole owners must provide access to attaching entities on a non-d basis. While we do not agree that all pole attachment agreements have to be identic provisions must not violate the statutory requirement that terms be just, reasonable nondiscriminatory. We believe that these statutory standards are enforceable under

21. We believe it is implicit in our current rule that all parties must nego for non-discriminatory access at just and reasonable pole attachment rates. In the Order, the Commission addressed the requirement of Section 251 that requires an ILE interconnection and other rights to new entrants, and observed that new entrants hav incumbent. Rather, these new competitors seek to reduce the incumbent s subscribers the incumbent s dominant position in the market. An ILEC is likely to have scant, i incentive to reach agreement. In the Local Competition Order, the Commission determ stood in a position vis-a-vis the competitive telecommunications provider seeking po agreements that was virtually indistinguishable from that of the ILEC with respect t seeking interconnection agreements under Sections 251 and 252 of the 1996 Act. We f demand for a clause waiving the licensee's right to federal, state, or local regulat se unreasonable and an act of bad faith in negotiation. In particular, a request th agreement include a clause waiving statutory rights to file a complaint with the Com unreasonable.

IV. CHARGES FOR ATTACHING

A. Poles

1. Formula Presumptions

22. In determining a just and reasonable rate, two elements of the pole are space and other than usable space. The costs relating to these elements are allocat pole. In the Second Report and Order, consistent with Section 224(d)(2), the Commis usable space as the space on the utility pole above the minimum grade level that is attachment of wires, cables, and related equipment. This determination was based up consideration of the National Electric Safety Code ("NESC"), and practical engineeri in constructing utility poles. The Commission found that "the most commonly used po feet high, with usable spaces of 11 to 16 feet, respectively." The Commission recog guideline that 18 feet of the pole space must be reserved for ground clearance and t space is for setting the depth of the pole. To avoid a pole by pole rate calculatio adopted rebuttable presumptions of an average pole height of 37.5 feet, an average a space of 13.5 feet, and an average amount of 24 feet of unusable space on a pole. T established a rebuttable presumption of one foot as the amount of space a cable tele occupies. These presumptions serve as the premise for calculating pole attachment r current formula.

23. A group of electric utilities filed a white paper ("White Paper") in ant Notice and the Pole Attachment Fee Notice in which they suggest that an increase in presumptive pole height is appropriate. The White Paper asserts that over time, and demand, the average pole height has increased to 40 feet. At the same time, the Whi that the usable space presumption should be reduced from 13.5 feet to 11 feet. The comment on these presumptions in the Pole Attachment Fee Notice and sought further c Notice to establish a full record for attachments made by telecommunications carrier Act.

24. We will address changing the existing presumptions in the Pole Attachmen rulemaking. Until resolution of that proceeding, we will apply our presumptions as and proceed with the implementation under the 1996 Act of a methodology used in the telecommunications services by telecommunications carriers and cable operators.

25. The Notice also sought comment on an issue raised by Duquesne Light in i reconsideration petition of the Commission's decision in the Local Competition Order Duquesne Light advocates that the number of physical attachments of an attaching ent reflective of the burden on the pole, and therefore of the costs relating to the att states that varying attachments place different burdens on the pole and proposes tha include factors addressing weight and wind loads. We will address whether any presu

reflect these factors in the Pole Attachment Fee Notice rulemaking.

2. Restrictions on Services Provided over Pole Attachments

26. In the Notice, we sought comment on whether the Commission's decision in Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Company ("Heritag extended. In Heritage, a cable operator provided traditional cable services as well services through its facilities. Those facilities consisted of coaxial cable lashed and fiber optic cable overlashed to the aerial support strands. The nontraditional the cable operator consisted of non-video broadband communications services, includi services. The pole owner attempted to charge the cable operator an additional, unre those poles with pole attachments supporting the facilities transmitting both video

27. In Heritage, which was decided prior to the 1996 Act, the Commission det the provision by a cable operator of both traditional cable services and nontraditio commingled basis over a single network within the cable operator's franchise area ju regulated pole attachment charge by the utility pole owner. The Commission affirmed view of cable as a provider of video and nonvideo broadband services and determined attachment authority includes nonvideo broadband services under Section 224. The Co that its jurisdiction under Section 224 was not limited by definitions emanating fro Communications Policy Act of 1984 ("Cable Act of 1984") because such definitions app purposes of Title VI. Further, it stated that, even when Section 224 is read in con Cable Act of 1984, the Cable Act of 1984 and its legislative history indicate that a both video and nonvideo broadband services is not excluded from the benefits of Sect

28. Whether Heritage continues to apply raises significant issues as cable o into new service areas, such as Internet services. Generally, commenters disagree a of Heritage since the passage of the 1996 Act amendments to Section 224. Some utili contend that Heritage has been overruled by the 1996 Act, but they do not agree as t overruling. Some of the utility pole owners argue that the new Sections 224(d)(3) a new regime requiring new rules, and therefore Heritage is no longer applicable. Som commenters also argue that, after the year 2001, a cable company is entitled to the under Section 224(d)(3) if the pole attachment is used solely to provide cable servi the use of a cable attachment to provide nonvideo services in addition to video woul attachment used solely for cable service and such attachment would be subject to the telecommunications services rate. Other utility pole owners argue that the provisio than cable and telecommunications services are outside the scope of Section 224 and subject to the Commission's jurisdiction. They contend that such services will be s place negotiations.

29. Cable operators generally contend that Heritage has not been overruled b They also contend that high speed Internet access is a cable service and an operator should not be assessed the Section 224(e) telecommunications services rate. Telecom carriers generally agree that Heritage has not been overruled, and therefore the pre continue to provide that a utility should not charge different pole attachment rates service provided by the cable operator, and further that a utility should be prohibi unreasonable restrictions on the use of pole attachments by permitted attachers. So telecommunications carriers, however, oppose any extension of Heritage, arguing that would provide preferential treatment for cable operators. At least one telecommunic argues that the distinctions established by Congress effectively overrule Heritage a providing additional services besides video service are to be treated as telecommuni Section 224.

30. We disagree with the utility pole owners who assert that the Heritage de "overruled" by the passage of the 1996 Act insofar as it held that a cable system is Commission-regulated rate for pole attachments that the cable system uses to provide and video. The definition of "pole attachment" does not turn on what type of servic used to provide. Rather, a "pole attachment" is defined to include any attachment b system." Thus, the rates, terms and conditions for all pole attachments by a cable are subject to the Pole Attachment Act. Under Section 224(b)(1), the Commission has that such rates, terms, and conditions are just and reasonable. We see nothing on 224 to support the contention that pole owners may charge any fee they wish for Inte cable services commingled on one transmission facility.

31. The history of Section 224 further supports our conclusion. The purpos

amendments to Section 224 made by the 1996 Act was similar to the purpose behind Sec it was first enacted in 1978, i.e., to remedy the inequitable position between pole seeking pole attachments. The nature of this relationship is not altered when the c to provide additional service. Thus, it would make little sense to conclude that a lose its rights under Section 224 by commingling Internet and traditional cable serv contentions that cable operators expanding their services to include Internet access to the benefits of Section 224 would penalize cable entities that choose to expand t that will contribute "to promot[ing] competition in every sector of the communicatio Congress intended in the 1996 Act.

32. Having decided that cable operators are entitled to the benefits of Sect providing commingled Internet and traditional cable services, we next turn to the ap applied. We conclude, pursuant to Section 224 (b)(1), that the just and reasonable cable and Internet service is the Section 224(d)(3) rate. In specifying this rate, cable operators to make Internet services available to their customers. We believe higher rate might deter an operator from providing non-traditional services. Such a serve the public interest. Rather, we believe that specifying the Section 224(d)(3 greater competition in the provision of Internet service and greater benefits to co

33. We emphasize that our decision to apply the Section 224(d)(3) rate is ba regulatory authority under Section 224(b)(1). Several commenters suggested that cab providing Internet service should be required to pay the Section 224(e) telecommunic disagree. The Universal Service Order concluded that Internet service is not the pr telecommunications service under the 1996 Act. Under this precedent, a cable televi providing Internet service over a commingled facility is not a telecommunications ca revised rate mandated by Section 224(e) by virtue of providing Internet service. We Congress has directed the Commission to undertake a review of the implementation of the 1996 Act relating to universal service, and to submit a report to Congress no la 1998. That report is to provide a detailed description of, among other things, the Commission's definition of "telecommunications" and "telecommunications service," an of those definitions to mixed or hybrid services, are consistent with the language o do not intend, in this proceeding, to foreclose any aspect of the Commission's ongoi those issues.

34. We need not decide at this time, however, the precise category into whic services fit. Such a decision is not necessary in order to determine the pole attac to cable television systems using pole attachments to provide traditional cable serv services. Regardless of whether such commingled services constitute "solely cable s Section 224(d)(3), we believe that the subsection (d) rate should apply. If the pro over a cable television system is a "cable service" under Section 224(d)(3), then th by that section would clearly apply. Even if the provision of Internet service over system is deemed to be neither "cable service" nor "telecommunications service" unde definitions, the Commission is still obligated under Section 224(b)(1) to ensure tha conditions [for pole attachments] are just and reasonable," and, as Section 224(a)(4 attachment includes "any attachments by a cable television system." And we would, i apply the subsection (d) rate as a "just and reasonable rate" for the pro-competitiv above. We again emphasize the pervasive purpose of the 1996 Act and the premise of Heritage decision, to encourage expanded services, and that a higher or unregulated purpose. We note that in the one case where Congress affirmatively wanted a higher particular service offered by a cable system, it provided for one in section 224(e). Section 224(d) rate apply to any pole attachment used 'solely to provide cable serv Congress intended to bar the Commission from determining that the Section 224(d) rat would be just and reasonable in situations where the Commission is not statutorily r higher Section 224(e) rate.

35. We also disagree with utility pole owners that submit that all cable ope "presumed to be telecommunications carriers" and therefore charged at the higher rat operator certifies to the Commission that it is not "offering" telecommunications se that a certification process would add a burden that manifests no benefit. We belie pole owner to be notified is met by requiring the cable operator to provide notice t it begins providing telecommunication services. The rule we adopt in this Order wil notification. We also reject the suggestions of utility pole owners that the Commis responsible for monitoring and enforcing a certification of cable operators regardin record does not demonstrate that cable operators will not meet their responsibilitie the Commission's complaint processes can be invoked.

3. Wireless Attachments

a. Background

36. In the Notice, the Commission stated that, although wireless carriers ha affixed their equipment to utility poles, the 1996 Act gives them the right to do so rates consistent with Commission rules. The Local Competition Order held that Secti describe the specific type of telecommunications equipment that an entity may attach an exhaustive list of equipment is not advisable or even possible.

37. Some utility pole owners argue for limiting the type of equipment that a to facilities and assert that wireless carriers should not have the benefit of Secti legislative history accompanying the 1978 Pole Attachment Act and the failure of Sec the word "wireless" in its language. According to the pole owners, Congress intende attachments only for wire communications, and would have explicitly expanded that sc Act if it wanted to do so. These interests cite the 1977 Senate Report stating, "Fe in pole attachment matters will occur only where space on a utility pole has been de actually being used for communications services by wire or cable." In contrast, wir assert that they are telecommunications carriers entitled to the protection of Secti cite Section 3(44), which defines "telecommunications carrier" as "any provider of t services," and Section 3(46), which defines "telecommunications service" as "the off telecommunications for a fee . . . regardless of the facilities used." Wireless pro do not have easy alternatives for placing their equipment because they have had diff to erect antennas. They argue that telecommunications competition arises in many fo Commission's regulations should not deter any particular method of delivering servic ask the Commission to decide that Section 224 "unambiguously affords all telecommuni a legal right of access to poles."

38. Telecommunications carriers and the utility pole owners acknowledge that an appropriate formula for wireless attachments is difficult. Some utility pole own beyond the scope of this rulemaking. Some telecommunications carriers and utility p that previous and proposed rate formulas do not lend themselves to the requirements attachments. On the other hand, wireless interests emphasize that pole attachment f the use of space, and should not depend primarily on what type of equipment occupies These parties contend that rates for wire and wireless attachments should be the sam discriminatory pricing does not occur.

b. Discussion

39. Wireless carriers are entitled to the benefits and protection of Section 224(e)(1) plainly states: "The Commission shall . . . prescribe regulations to gove attachments used by telecommunications carriers to provide telecommunications servic language encompasses wireless attachments.

40. Statutory definitions and amendments by the 1996 Act demonstrate Congres expand the pole attachment provisions beyond their 1978 origins. Section 224(a)(4) a pole attachment as "any attachment by a cable television system," but now states t is "any attachment by a cable television system or provider of telecommunications se in Section 224(d)(3), Congress applied the current pole attachment rules as interim telecommunications carrier . . . to provide any telecommunications service." In bot of the word "any" precludes a position that Congress intended to distinguish between attachments. Section 224(e)(1) contains three terms whose definitions support this 3(44) defines telecommunications carrier as "any provider of telecommunications serv 3(46) states that telecommunications services is the "offering of telecommunications the public . . . regardless of the facilities used," and Section 3(43) specifies tel transmission, between or among points specified by the user, or information of the u without change in the form or content of the information as sent and received." The Section 3(44) precludes limiting telecommunications carriers only to wireline provid companies meet the definitions in Sections 3(43) and 3(46). In fact, the Commission recognized that cellular telephone, mobile radio, and PCS are telecommunications ser

41. There are potential difficulties in applying the Commission's rules to w attachments, as opponents of attachment rights have argued. They note that previous formulas do not account for the unusual requirements of wireless attachments. These

such attachments are usually more than a traditional box-like device and cable wires They include an antenna or antenna clusters, a communications cabinet at the base of cables connecting antennas to the cabinet, concrete pads to support the cabinet, gro trenching, and wires for telephone and electric service. One commenter noted that t costs and operational considerations" for wireless attachments.

42. There is no clear indication that our rules cannot accommodate wireless poles when negotiations fail. When an attachment requires more than the presumptive space on the pole, or otherwise imposes unusual costs on a pole owner, the one-foot rebutted. In addition, when wireless devices do not need to use every pole in a uti parties can agree on some reasonable percentage of poles for developing a presumptiv attaching entities. If parties cannot modify or adjust the formula to deal with uni the parties are unable to reach agreement through good faith negotiations, the Commi the issues on a case-by-case basis.

4. Allocating the Cost of Other than Usable Space

a. Method of Allocation

43. To determine the rate that a telecommunications carrier must pay for pol Section 224(e)(2) provides that:

> A utility shall apportion the cost of providing space on a pole, duct, conduit way other than the usable space among entities so that such apportionment equa thirds of the costs of providing space other than the usable space that would to such entity under an equal apportionment of such costs among all attaching

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

Unusable Space Factor	=	2 X 3	Net Cost of Unusable Space Pole Height	X	a Bare Pole Attachers	X	Number of Rate	Carrying Charge

44. We adopt our proposed methodology to apportion the cost of unusable spac this formula most accurately determines the apportionment of cost of unusable space. Congress, it equally apportions two-thirds of the costs of unusable space among atta

b. Counting Attaching Entities

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

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

46. We will count as separate entities any telecommunications carrier, any c and any non-incumbent LEC. This approach is consistent with the language of the sta with Congress' intent to count all attaching entities when allocating the costs of u statute uses the term "entities" not "telecommunications carriers" when indicating h unusable space should be allocated. We interpret this use to indicate the inclusion well as telecommunications carriers when allocating the cost of unusable space.

47. Some commenters argue that cable operators providing only cable service counted because it would result in requiring the incumbent LEC that owns a pole, but of the incumbent LEC, to subsidize "pure" cable attachments. Similarly, other comm cable operators that solely provide cable service should not be included in the coun attachments are not subject to rate regulation under Section 224(e)(2). We find the unpersuasive. The statutory language compels a different conclusion. The statute s

unusable space shall be allocated under an equal apportionment "among all attaching the cable operator rate is different, Congress made no indication that it intended t entity when apportioning the costs of unusable space. On the contrary, the legislat Act states that all attaching entities should be counted. Congress explicitly provi formula when determining pole attachment rates for cable operators providing cable s no such provision for the exclusion of those operators in the allocation of costs fo Moreover, Section 224(e)(2) does not restrict the use of the term "entities" to thos under Section 224(e).

(2) Pole Owners Providing Telecommunications Services and Incumbent LECs

48. In the Notice, the Commission tentatively concluded that, where a pole-o providing telecommunications services, the utility would also be counted as an attac purposes of allocating the costs of unusable space under Section 224(e). The Commis tentatively concluded that an ILEC with attachments on a pole should be counted for apportionment of the costs of unusable space. The Commission sought comment on how definitions impact its tentative conclusion. The Commission noted that the definitio telecommunications carrier under Section 224 excludes ILECs, and a pole attachment i attachment by a cable television system or a provider of telecommunications service.

49. American Electric, et al., oppose counting an ILEC with attachments on t the definition of a telecommunications carrier excludes ILECs and the definition of specifically includes only attachments made by telecommunications carriers or cable Inclusion of ILECs in the apportionment of costs of unusable space, they conclude, w extend the scope of Section 224 and contradict Congressional intent. We disagree. Section 224(a)(5) of ILECs from the term telecommunications carrier is directed to t amended Section 224, to provide an important means of access. ILECs generally posse Congress apparently determined that they do not need the benefits of Section 224. T precept of the 1996 Act was to enhance competition, and the amendments to Section 22 the amendments to the 1996 Act, are directed to new entrants. In contrast, Section delineates a new means to allocate costs, does not refer to "telecommunications carr "attaching entities." Moreover, the term pole attachment is defined in terms of att "provider of telecommunications service" not as an attachment by a "telecommunicatio Conference Report confirms that Congress concluded that the unusable space "is of eq entities attaching to the pole" and intended that the associated costs be apportione such attachments." We thus think the statute draws a clear distinction between thos invoke Section 224 and those entities that count for purposes of allocating the cost

50. We affirm our tentative conclusion that any pole owner providing telecom services, including an ILEC, should be counted as an attaching entity for the purpos costs of unusable space under Section 224(e)(2). This includes pole owners that use physical plant capacity to provide these services and is consistent with our recogni attachments are defined in terms of attachments by a "provider of telecommunication 224(e)(2) states that the costs of unusable space shall be allocated on the basis of There is no indication from the statutory language or legislative history that any p should not be counted.

51. We also believe this conclusion is supported by Section 224(g) which req utility providing telecommunications services impute to its costs of providing servi to the rate for which it would be liable under Section 224. This section reflects C that as a provider of telecommunications services, a pole owner uses and benefits fr in the same way as the other attaching entities. Section 224(g) also directs the ut relating to these services to the appropriate affiliate, making clear that another e and should be counted as an attaching entity. We will count any pole owner providin telecommunications services, including an ILEC, as an attaching entity for the purpo of unusable space.

(3) Government Attachments

52. The Notice proposed that government entities with attachments, like othe on the utility pole, be counted as entities on the pole for purposes of allocating t space. A utility may be required under its franchise or statutory authorization to attachments for public use, such as traffic signals, festoon lighting, and specific

the responsible government agency does not directly pay for the attachment. The Com that, since the government agency is using space on the pole, its attachments be cou allocating the cost of unusable space. This cost would be borne by the pole owner, responsibility under its franchise or statutory authorization.

53. Some cable operators and telecommunications carriers agree with our prop as a separate attaching entity government agencies that have attachments to the pole owners and other telecommunications carriers disagree, stating that the utilities wo a cost that should be shared by all users of the pole because all parties benefit fr pole as allowed by the government. Since the agencies do not pay fees to the pole o commenters continue, the utility must unfairly absorb the government agency's share unusable space, in addition to the one-third share of the cost for which the pole ow liable. Still other utility pole owners disagree, asserting that government attachm attachments, do not provide telecommunications or cable services and are not include of "pole attachment." In defending its recommendation not to count government attac Communications adds that government attachments are normally installed in the pole's so as to avoid interference with other parties' use of the pole space.

54. To the extent that government agencies provide cable or telecommunicatio affirm our proposal that they be included in the count of attaching entities for pur cost of unusable space. We will not include government agencies in the count as a s only provide certain attachments for public use, such as traffic signals, festoon li pedestrian lighting. We conclude that, where a government agency's attachment is us or telecommunications service, the government attachment can accurately be described attachment" within the meaning of Section 224(a)(4) of the 1996 Act. Like a private it benefits equally from the unusable space on the pole and the costs for this benef on the government entity or the pole owner. Since the government attacher and the p relationship that benefits both parties, we are not persuaded that the pole owner is cost of the government's telecommunications attachments to the extent the pole owner provides. We will not include a government agency with an attachment that does not telecommunications service as an entity in the count when apportioning the costs of because such an attachment is not a "pole attachment" within the meaning of Section

(4) Space Occupied on Pole

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

56. Based on the record, we reject this alternate proposal. U S West, in op alternate method, argues that if Congress had intended to allocate the costs of unus space occupied, it would not have distinguished between usable and unusable space. the alternative method because, it argues, not all attaching entities benefit to the unusable space and those using more space should be allocated more of the costs of u Similarly, SBC argues that we should consider the amount of space occupied when allo of unusable space because an attaching entity that occupies two spaces on the pole s twice as much costs as an attaching entity that only occupies one space.

57. In suggesting the alternative approach that entities using more than one as a separate entity for each foot or increment thereof, we sought to ensure that e costs of the unusable space through a means reflecting their relative use. The reco whether use of more than one foot by an entity will be a pervasive or occasional cir with those parties that state that allocating space in such a manner will add a leve necessarily produce a fairer allocation of the cost of unusable space. We are also alternative proposal is inconsistent with the plain meaning of Section 224(e) which of unusable space "under an equal apportionment of such costs among all attaching en

58. As another alternative method to apportioning cost equally, MCI argues t apportionment of two-thirds of the costs of unusable space should be based on the nu rather than the number of attaching entities. Allocating costs by the number of ent would not allocate any unusable space to overlashings and will result in an incentiv

overlashing by existing attachers. We also will not adopt MCI's proposal to count a of attaching entities. The record does not demonstrate that overlashing leads to di of the costs of the pole.

c. Overlashing

(1) Background

59. Overlashing, whereby a service provider physically ties its wiring to ot secured to the pole, is routinely used to accommodate additional strands of fiber or existing pole attachments. The Commission sought information in the Notice on how e and overlashing entity should be treated for purposes of allocating the costs of unu space. We observed that each possible "host attachment" may be overlashed with wiri other types of services or owned by other types of providers. The Commission also r commenters discuss whether and to what extent overlashing facilitates the provision cable service by cable operators.

60. In addressing overlashing in the cable operator context, the Commission notice in January 1995 (the "Overlashing Public Notice") cautioning owners of utilit restricting cable operators from overlashing their own pole attachments with fiber o Commission noted the serious anti-competitive effects of preventing cable operators to their systems by overlashing. The Commission believed improper constraints were cable systems that sought to overlash fiber optic lines to their existing coaxial ca out their facilities. While recognizing concerns regarding engineering specificatio access and notification in cases of emergencies or modification, the Commission affi to ensure that the growth and development of cable system facilities are not hindere denial of overlashing by a utility pole owner. Overlashing capability continues to competitive market because it maximizes the usable capacity on a pole.

(2) Discussion

(a) Overlashing One's Own Pole Attachment

61. The 1996 Act ushered in an era of transition from regulation to competit telecommunications markets. The 1996 Act is grounded in the belief that competition greatest benefits to consumers and the greatest diversity of telecommunications serv These broad aims include those expressed in Section 1 of the Communications Act, to . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, communication service," and those expressed in the 1996 Act, to establish a "pro-com regulatory national policy framework designed to accelerate private sector deploymen telecommunications and information technologies and services to all Americans by ope telecommunications markets to competition." To implement this framework, the 1996 A numerous amendments to the Communications Act, including the expansion of Section 22 to pole attachments for telecommunications carriers and expanded access to utility p of providing cable and telecommunications services. As the Commission has made clea whether actions enhance competition requires examining those actions in light of the to the laws governing the provision of telecommunications services made by the 1996

62. We believe overlashing is important to implementing the 1996 Act as it f expedites installing infrastructure essential to providing cable and telecommunicati American communities. Overlashing promotes competition by accommodating additional telecommunications providers and minimizes installing and financing infrastructure f that overlashing is an important element in promoting the policies of Sections 224 a diversity of services over existing facilities, fostering the availability of teleco communities, and increasing opportunities for competition in the marketplace.

63. Utility pole owners oppose overlashing as an expansion of their obligati pole attachments and, further, as an unsupervised burden on the poles. Cable operat telecommunications carriers assert that overlashing is a routine construction practi decades without interference from the pole owners until the utilities began entering businesses. Some telecommunications carriers urge the Commission to bar utility pol prohibiting overlashing.

64. We have been presented with no persuasive reason to change the Commissio that encourages overlashing, and we agree with representatives of the cable and tele

industries that, to the extent that it does not significantly increase the burden on one's own pole attachment should be permitted without additional charge. To the ext overlashing does create an additional burden on the pole, any concerns should be sat with generally accepted engineering practices. We note that we have deferred decisi the effect any increased burden may have on the rate the utility pole owner may char As stated above, we believe that the Pole Attachment Fee Notice rulemaking is a more for resolution of this issue. As also stated above, we affirm our current presumpti being. We also do not believe that overlashing is an expansion of a pole owners' ob has been in practice for many years. We believe utility pole owners' concerns are a 224's assurance that pole owners receive a just and reasonable rate and that pole at denied for reasons of safety, reliability, and generally applicable engineering purp

(b) Third Party Overlashing

65. Telecommunications carriers seeking expeditious means to gain access to begun contracting with existing attaching entities to overlash to existing attachmen the Commission inquired whether a third party should be permitted to overlash an exi or telecommunications carrier's attachment without the agreement of the pole owner.

66. As stated above, NCTA reports that it is current practice for cable oper to overlash their existing attachments without specific prior notification to the po provisions for major modification contained in their pole attachment agreements. At assert that pole owners can exert a veto to market entry if allowed to restrict over attachment facilities. Utility pole owners object to overlashing by third parties u is compensated for what they view as an additional infringement on their property, if third party overlashing is permitted without additional compensation, pole owners of the nature and engineering requirements of the overlasher.

67. Utility pole owners assert that overlashed attachments must occupy the s space as the initial attachment, be considered a separate attachment, and that the o required to pay the same rate as though it were an initial attaching entity. Cable telecommunications carrier interests voice varying opinions on if and how a third pa be counted as an attaching entity, indicating that cross interests are at stake in f access to the pole, minimizing disruption to existing attachments, and reducing pole the existing attachers.

68. The record does not indicate that third party overlashing adds any more than overlashing one's own pole attachment. We do not believe that third party over pole owners in either receiving fair compensation or in being able to ensure the int Facilitating access to the pole is a tangible demonstration of enhancing competitive communications. Allowing third party overlashing will also reduce construction disr expense associated therewith) which would otherwise likely take place by third parti and separate attachments. Accordingly, we will allow third party overlashing subjec reliability, and engineering constraints that apply to overlashing one's own pole at that third party overlashing will increase the burden on the pole can be addressed b generally accepted engineering practices.

69. We believe that when a host attaching entity allows an overlashing attac installed to its own pole attachment by a third party for the purposes of that third providing cable or telecommunications services to the public, that third party overl be classified as a separate attaching entity for purposes of allocating costs of unu because Congress indicated that the unusable space was of equal benefit to all attac In order to implement the allocation of unusable space, the third party overlasher w to have some understanding or agreement with the pole owner, and an agreement with t entity. Commenters assert that overlashing under these circumstances should be clas attachment. We agree.

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

70. Recent technological advances have made it possible for excess capacity optic cable, known as "dark fiber," to be leased from an attaching entity by a third consists of the bare capacity and does not involve any of the electronics necessary signals over that capacity. It thus differs from dim or lit fiber by which the carr of the electronics necessary to power the fiber. The Commission requested comment o party using dark fiber should be counted as a separate pole attaching entity for pur

the number of attaching entities on a pole among whom to apportion the costs of unus

71. SBC asserts that the Commission should not address the issue of dark fi is the subject of a remand from the U. S. Court of Appeals for the D.C. Circuit. In LECs challenged a series of Commission orders finding that the LECs were offering da common carrier basis and prescribing tariffed rates for the service. The petitioner Commission exceeded its jurisdiction because they had offered dark fiber only on an thereby placing this service beyond the Commission's authority over common carrier o II of the Communications Act.

72. We believe that our jurisdiction to consider the leasing and use of dark it is used to provide telecommunications services is consistent with the court's hol Bell. The court concluded that the Communications Act delegates broad authority to regulate constantly evolving communications facilities that have transcended in comp beyond the specific technologies known to its drafters in 1934. Section 224 gives t mandate and the jurisdiction to regulate pole attachment rates for facilities over w or telecommunications services are provided, and therefore our consideration of dark is appropriate for this proceeding.

73. There is general consensus among cable operators and telecommunications the leasing and use of dark fiber by third parties places no additional spatial or p the utility pole. Cable operators, telecommunications carriers, and utility pole ow the use of dark fiber is a pro-competitive, environmentally sound and economical use facilities. We agree and conclude that the leasing of dark fiber by a third party i pole attachment separate from the host attachment. Such use will not require payme separate from the payment by the host attaching entity. We also agree with cable op telecommunications carriers, and utility pole owners that, if an attachment previous providing solely cable services would, as a result of the leasing of dark fiber, als telecommunications services, the rate for the attachment would be determined under S consistent with our discussion regarding restrictions on services provided over pole

d. Presumptive Average Number of Attaching Entities

74. The Commission presently uses rebuttable presumptions in the context of reasonable pole attachment rates. These presumptions help to reduce reporting requi keeping, and are more efficient so there is less administrative burden on all partie presumptions provides a level of predictability and efficiency in calculating the ap is preserved because the presumptions may be overcome through contrary evidence. We predictability, efficiency and fairness in determining the costs of unusable space o the Commission stated that a pole-by-pole inventory of the number of entities on eac costly. The Commission proposed that each utility develop, through the information presumptive average number of attachers on one of its poles. The Commission also pr telecommunications carriers be provided the methodology and information underlying a presumption. The Notice sought comment on this proposal and on whether any paramete established in developing the presumptive average. The Notice also sought comment o should develop averages for areas that share similar characteristics relating to pol whether different presumptions should exist for urban, suburban, and rural areas. T comment on the criteria to develop and evaluate any presumption.

75. The Commission asked whether, as an alternative to pole-by-pole inventor owners, the Commission should determine the average number of attachments. The Comm as to whether it should initiate a survey to develop a rebuttable presumption regard attachments. The Commission also sought comment on the difficulties of administerin additional data required, and parameters of accuracy and reliability required for fa

76. Generally, commenters agree with the idea that a presumptive average num attachers should be developed, but disagree on how this should be accomplished. The support developing their own average as the most efficient method. Several attachin the Commission's development of the presumptive average and encourage the establishm rebuttable presumption of at least three attachers. Comcast, et al., in particular, presumptive average of six attaching entities as supported by the Commission's Fiber End of Year 1996 ("Fiber Deployment Update"). U S West indicates that having the Co develop the presumptive average will serve efficiency, minimize complaints, and plac rebuttal on the pole owner.

77. We believe that the most efficient and expeditious manner to calculate a

number of attaching entities is for each utility to develop its own presumptive aver attaching entities. Utilities not only possess this information but have familiarit structure it properly. Based on the record, we think the alternative of the Commiss survey is too cumbersome and would not necessarily enhance accuracy. We do not beli Deployment Update is an appropriate resource from which to develop the presumptive a Fiber Deployment Update presents data about fiber optic facilities and capacity buil interexchange carriers, Bell operating companies, and other LECs and competitive acc These data are inadequate for the purposes of creating a presumptive average number because it does not include data pertaining to cable operators. Our decision provid establish a presumptive number of attaching entities is also premised on the informa reflecting where the service is being provided, instead of a broad national average. be a range of presumptive averages depending on rural, urban, or urbanized areas. T are appropriately representative, each utility shall determine a presumptive average and urbanized service areas as defined by the United States Census Bureau.

78. We will require each utility to develop, through the information it poss presumptive average number of attaching entities on its poles based on location (urb and based upon our discussion herein regarding the counting of attaching entities fo of unusable space. A utility shall, upon request, provide all attaching entities an access the methodology and information by which a utility's presumption was determin a good faith effort by a utility in establishing its presumption and updating it whe necessitated. For example, when a new attaching entity has a substantial impact on attaching entities, the utility's presumptive average should be modified. This meth with present practice, as we understand most pole attachment agreements "provide for surveys, generally once every three to seven years, to determine which entities have facilities to whose poles."

79. Challenges to the presumptive average number of attaching entities by th telecommunications carrier or cable operator may be made in the same manner as chall are undertaken. The challenging party will initially be required to identify and ca attachments on the poles and submit to the utility what it believes to be an appropr the number of poles is large, and complete inspection impractical, a statistically s submitted. The pole owner will be afforded an opportunity to justify the presumptio presumption is successfully challenged, the resulting figure will be deemed to be th entities.

5. Allocating the Cost of Usable Space

a. Background

80. Section 224(e)(3) provides that a utility shall apportion the cost of pr among all entities according to the percentage of usable space required for each ent Commission has defined usable space as the space on the utility pole above the minim that is usable for the attachment of wires, cable, and related equipment. In the S Order, the Commission considered comment regarding the amount of usable space for va poles in different service areas. The Commission subsequently adopted a rebuttable pole contains 13.5 feet of usable space. The usable space presumption has been cont proceedings before the Commission. In 1986, the Commission revisited the usable spa upheld the presumption. In 1997, the Commission sought comment on the presumptive a usable space in the Pole Attachment Fee Notice. In the Notice, we sought comment on presumption to establish a full record for attachments made by telecommunications ca 1996 Act. The Commission also proposed to modify the current methodology to reflect associated with usable space to arrive at a factor for apportioning the costs of usa telecommunications carriers under Section 224(e)(3). For allocating the costs of u telecommunications carriers, the following basic formula was proposed:

Usable Space = Space Occupied by Attachment / Total Usable Space × Total Usable Space / Pole Height × Net Cost of Bare Pole × Carr Factor

81. In the Notice, the Commission sought comment on the amount of usable spa by telecommunications carriers and on whether the presumptive one foot used for cabl should be applicable to telecommunications carriers generally. Currently, each atta presumed to use a specific amount of space, and costs are allocated on the proportio overall costs of the usable space. The 1977 Senate Report evidenced Congress' inten

providers be responsible for 12 inches of usable space on a pole, including actual s clearance space. In 1979, the Commission established the rebuttable presumption tha attachment occupies one foot. The Commission subsequently refined its methodology f the amount of usable space and made the one foot presumption permanent. The Commis this result to be consistent with the legislative history of Section 224, as express Report.

82. Determining the presumptive amount of usable space attributable to each impacts the allocation of costs. Section 224(d)(1), which predates the 1996 Act, sp maximum just and reasonable pole rate shall be determined by multiplying the percent usable space that is occupied by the pole attachment by the sum of the operating exp capital costs attributable to the entire pole. Each factor is individually determin has been assigned a presumptive average value for purposes of resolving complaints i manner. The current pole attachment rate methodology consists of a usable space fac of dividing the space occupied on the pole, or the presumptive one foot assigned to by 13.5 feet or the total amount of usable space.

b. Discussion

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

83. The law provides a method for the allocation of costs associated with th We believe that the information we received in this proceeding regarding calculation more appropriately addressed in the Pole Attachment Fee Notice proceeding and we wil decision on the total amount of usable space issue until the resolution of that proc time, the presumption that a pole contains 13.5 feet of usable space will remain app our proposed methodology to apportion the cost of the usable space. We believe this accurately determines the apportionment of the cost of usable space. As mandated by incorporates the principle of apportioning the cost of such space according to the p required for each entity.

84. The Commission's one foot presumption has been in place since 1979. The initially assigned the one foot presumption to cable television operators based on c expressed in the legislative history of Section 224, that cable television was to be of space, the electric utilities' use of safety space, and an analysis of replacemen impose on cable television companies. The Commission concluded in the Usable Space several years of experience in regulating pole attachments had not indicated that ca more space than the one foot of usable space as originally contemplated by Congress. Act's amendments to Section 224 nor the record in this proceeding suggest that a dif should be applicable to telecommunications carriers. Circumstances that are unique warrant a departure from the formula may be used to rebut the presumption. We affir assigning a presumptive one foot of usable space and find that the presumptive one f attachments should be applied to attachments by telecommunications carriers generall the one foot presumption remains reasonable and continues to provide an expeditious method for determining reasonable rates.

85. Some utility pole owners and telecommunications carriers suggest changes presumption and express other concerns. Some electric utilities have sought to alte amount of usable space allocated when fiber optic cable is involved. For example, D Ohio Edison contend that, in their service areas, tightly pulled fiber optics will b the mid span of the pole as a cable television attachment above it that is hung with sag. They argue that this is in violation of the NESC code which requires parallel separated by appropriate distances between the spans of the poles as well as on the Duquesne Light and Ohio Edison further maintain that, because the tensioned fiber op easily sagged except by cutting and rerunning the cable, the fiber optic cable must on the pole. They recommend that the Commission adopt a rebuttable presumption that cable requires, and should be charged for, two feet of usable space to account for t companies' practice of pulling fiber optic cables tightly.

86. The impact of deploying fiber optic cable is dependent upon how the fibe The rebuttable nature of the one foot presumption offers an opportunity for the pres information in situations outside of the norm. The record does not contain sufficie a decision on the impact of the practice of pulling fiber optics cable tightly, and presume that fiber optics require two feet of usable space.

87. We disagree with ICG Communications' position that the Commission's one presumption is outdated and should be abandoned. ICG Communications maintains that communications attachments should only be allocated six inches of usable space. ICG notes that the NESC does not distinguish between cable used for cable operators and telecommunications carriers. Based on accepted engineering and governmentally-requi it advocates six inches of usable space for simple communications attachments below ICG Communications notes that where communications lines have been installed in elec especially fiber optic cables, more than one foot of usable space is required and an of usable space should be made.

88. Bell Atlantic contends that there is no factual support for ICG Communic Bell Atlantic points to Bellcore's Manual of Construction procedures as demonstratin the pole between communications cables supported on different strands of suspension inches. SBC maintains that ICG Communications' proposals are based on improper assu especially regarding overlashing. SBC maintains that the one foot presumption is st We agree that ICG Communications has not adequately supported its suggested allocat of space for most communications attachments or 16 inches for fiber optic cables.

89. Adelphia, et al., express concern regarding the validity of assigning th one-foot of pole space to cable systems and/or other telecommunications providers wi the horizontal uses of the pole by the pole owner. Adelphia, et al., also suggest t of the pole on which the attachment is located is of significance. RCN observes tha presumption should not apply where extension arms or boxing is used by the attaching its facilities. RCN suggests that where extension
arms are used, the communications cable is located not on the pole itself, but farth arm. RCN states that this will lead to a situation where an entity's physical attac little as six inches of usable space. RCN claims that this configuration will still clearance required between communications attachments, if the cable is positioned a the extension.

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

91. We agree with those commenters who have found the presumptive one foot a We further affirm our decision to continue using the current methodology, modified t associated with usable space. Commenters have not persuaded us that the rationale o assigning the one foot of space to cable television operators should not be equally telecommunications carriers generally. We continue to see the need and basis for th presumption due to the impracticality of developing sufficient information applicabl Where use of the one foot presumption would not encourage just and reasonable rates, rebut the presumption.

(2) Overlashing and Dark Fiber

92. Consistent with our above discussion regarding overlashing, we find that presumption shall continue to apply where an attaching entity has overlashed its own We also determine that facilities overlashed by third parties onto existing pole att to share the presumptive one foot of usable space of the host attachment. To the ex overlashing creates an additional burden on the pole, any concerns should be satisfi generally accepted engineering practices. We again note that we have deferred decis Attachment Fee Notice proceeding on the issue of the effect any increased burden may the utility pole owner may charge the host attacher. As stated above, we believe th a more appropriate forum for resolution of this issue. As also stated above, we aff presumptions for the time being.

93. Some commenters have suggested that the third party overlasher should be for some portion of the costs associated with overlashing and be responsible for pay costs to the pole owner. Carolina Power, et al., argue that because the third party under Section 224(f) to make a separate attachment of its own, overlashing should be negotiation. They maintain that the Commission should recognize that each overlashe

separate attachment for which the overlasher may be charged a just and reasonable ra Telecom asserts that the allocation of usable space should be one-half to the origin remaining one-half to the third party overlasher. ICG Communications advocates the and one-half inches of usable space to each party when one party overlashes another' recommends sharing the presumptive one foot of space assigned to cable operators' an telecommunications carriers' pole attachments with overlashers. MCI argues that bec expands usable space, there should be a presumptive number of two overlashings per o as an estimate of the number of overlashings. MCI asks the Commission to further pr will be four attachments: one for a cable operator; one for the ILEC; one for an in LEC; and one for a LEC affiliated with the incumbent electric company. It alleges t four non-electric attachments, and two overlashings per original attachment, the sam can presumptively accommodate 12 attachments. Ohio Edison and Union Electric argue no rational basis for adopting such an approach under Section 224(e)(3) because the is entitled to charge the attaching entity for one foot of usable space regardless o attachment is overlashed.

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

95. Regarding the leasing of dark fiber, to the extent that dark fiber is us telecommunications service within an existing attachment generally, the majority of believe that such activity constitutes a separate attachment under Section 224. As Section IV.A.4.c., we agree. The one foot presumption is therefore only applicable attacher.

B. Application of Pole Attachment Formula to Telecommunications Carriers

1. Background

96. To implement the 1978 Pole Attachment Act, the Commission developed a me and implementing formula to determine a presumptive maximum pole attachment rate. T Commission regulates pole attachment rates by applying this formula ("Cable Formula" between cable operators and utilities. The Cable Formula is based on Section 224(d a rate is just and reasonable if it:

> . . . assures a utility the recovery of not less than the additional cos attachments, nor more than an amount determined by multiplying the perce total usable space, or the percentage of the total duct or conduit capac occupied by the pole attachment by the sum of the operating expenses and costs of the utility attributable to the entire pole, duct, conduit, or

Currently, application of the Cable Formula results in a rate that is in the range b and fully allocated costs of providing pole attachment space.

97. Section 703(6) of the 1996 Act amended Section 224 by adding a new subse This amendment expanded the scope of Section 224 by applying the Cable Formula to te carriers in addition to cable systems until a separate methodology is established fo carriers. We invited further comment on this issue in the Notice.

98. Congress directed the Commission to issue a new pole attachment formula 224(e) relating to telecommunications carriers within two years of the effective dat become effective five years after enactment. In the 1996 Act, Section 224(e)(1) pro

> The Commission shall . . . prescribe regulations in accordance with this subse govern charges for pole attachments used by telecommunication carriers to prov telecommunications services, when the parties fail to resolve a dispute over s Such regulations shall ensure that a utility charges just, reasonable, and non rates for pole attachments.

99. In the Notice, the Commission proposed to modify the Cable Formula to ac the two statutory components added by the 1996 Act and to develop a maximum pole att for telecommunications carriers. These components dictate separate calculations for apportionment of unusable space and the allocation of a percentage of usable space.

100. In paragraphs 41 and 78 above, the Commission affirms its proposals to u formulas implementing Section 224(e)(2) and Section 224(e)(3) respectively. The for 224(e)(2) establishes the unusable space factors for telecommunications carriers, pr apportionment of two-thirds of the costs of providing unusable space on the utility formula for Section 224(e)(3) establishes the usable space factors for cable operato telecommunications carriers providing telecommunications services, premised on the p usable space required for the attachment on the utility facility.

101. AT&T observes that there was almost unanimous support from cable op telecommunications carriers for the Commission's proposed telecommunications carrier rate formula. Several utility pole owners support the Commission's use of its propo formula, but advocate the use of gross book instead of net book costs. American Ele advocate that when applied the formula should use forward-looking/replacement costs. entities urge the Commission to reject the pole owners' call for replacement costs d pole attachment rates.

2. Discussion

102. We agree with cable operators and telecommunications carriers that a clear formula for the Commission's rate determination is an essential element when for pole attachment rates, terms and conditions. We think that a formula encompassi directives of how pole owners should be compensated adds certainty and clarity to ne as assists the Commission when it addresses complaints. We conclude that the additi and usable space factors, developed to implement Sections 224(e)(2) and (e)(3), is c reasonable, and nondiscriminatory pole attachment rate for telecommunications carrie following formula, to be used to determine the maximum just and reasonable pole atta telecommunications carriers, including cable operators providing telecommunications February 8, 2001, encompassing the elements enumerated in the law:

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

C. Application of Pole Attachment Formula to Conduits

1. Background

103. Conduit systems are structures that provide physical protection for new cables to be added inexpensively along a route, over a long period of time, with up the streets each time a new cable is placed. Conduit systems are usually multipl standardized duct diameters. The duct diameter is the principal factor for determin

number of cables that can be placed in a duct. Conduit is included in the definiti attachments, therefore, the maximum rate for a pole attachment in a conduit for tele carriers must be established through separate allocations relating to unusable space In the Notice, the Commission sought comment on the differences between conduit owne by cable operators and telecommunications carriers and conduit owned and/or used by utilities to determine if there are inherent differences in the safety aspects or li two which should affect the rate for these facilities as discussed below. The Commi comment on the distribution of usable and unusable space within the conduit or duct determination for this space is made. Where conduit is shared, we sought informatio mechanism for establishing a just and reasonable rate.

104. Section 224(e)(2) requires that two-thirds of the cost of the unusa equally among all attaching entities. In the Notice, the Commission proposed a meth apportion the costs of unusable space among attaching entities. The following formu as the methodology to determine costs of unusable space in a conduit:

Conduit Unus able
Space Factor

=

2
3

X

Net Linear Cost of
Unusable Conduit Space
Number of Attachers

X

Carrying
Charge Rate

In the Notice, the Commission also sought comment on what portions of duct or condui within the terms of the 1996 Act. The Commission proposed that a presumptive ratio to maintenance ducts be adopted to establish the amount of unusable space.

105. Section 224(e)(3) states that the cost of providing usable space sh according to the percentage of usable space required for the entity using the condui based on the number of ducts and the diameter of the ducts contained in a conduit. Attachment Fee Notice, the Commission sought comment on a proposed conduit methodolo in determining a pole attachment rate for conduit under Section 224(d)(3). In the N Commission sought comment on a proposed half-duct methodology for use in a proposed determine a conduit usable space factor. The proposed usable space formula under Se for pole attachments in conduits is as follows:

Condui t
Usable

Space
Factor

=
1

2

X
1 Duct
Average Number of
Ducts, less Adjustments
for maintenance ducts

X
Net Linear Cost of
Usable Conduit
Space

X
Carrying
Charge
Rate

In the Notice, the Commission sought comment on the half-duct presumption's applicab usable space and to allocate costs of providing usable space to the telecommunicatio Commission also sought comment on how its proposed conduit methodology impacts deter appropriate ratio of usable to unusable space within a duct or conduit.

106. As with poles, defining what an attaching entity is and establishin number of attaching entities in conduit is critical. Consistent with the half-duct the Pole Attachment Fee Notice, the Commission stated that each entity using one hal counted as a separate attaching entity. The Commission sought comment on this metho attaching entities for the purpose of allocating the cost of the unusable space cons 224(e). The Commission also sought comment on the use an attaching entity may make space, including allowing others to use its dark fiber in the conduit.

2. Discussion

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

107. For the purpose of allocating the cost of unusable space, ICG Commu each party that actually installs one or more wires in a duct or duct bank should be attaching entity, regardless of the number of cables installed or the amount of duct Section 224(e)(2) states that the costs of unusable space shall be allocated ". . . apportionment of such costs among all attaching entities." We agree that each party installs one or more wires in a duct or duct bank should be counted as a single atta of the number of cables installed or the amount of duct space occupied. The statuto clarity is preeminent and we perceive no generally applicable method that does not i and confusion other than counting each entity within the conduit system as a separat

b. Unusable Space in a Conduit System

108. Carolina Power, et al., assert that the only usable space is the du surrounding structure and supportive infrastructure of the duct is the unusable spac cost of the unusable space, they argue that two-thirds of the costs involved in cons system should be apportioned among attaching entities. These utility conduit owners structure surrounding a conduit system exists to make other parts of the system usab that unusable portions of a pole exist to make other parts of the pole usable.

109. USTA argues that although unusable conduit space differs from unusa the way it is created, it is possible to allocate the costs of unusable space. Acco in a conduit is unusable because it either is reserved for maintenance or has deteri demonstrates that in some conduit systems not all of the ducts are used; one duct ma unoccupied or another may be reserved for maintenance. We conclude that if a maint reserved for the benefit of all conduit occupants, such reservation renders that duc of that space should be allocated to those who benefit from it. To the degree space reserved for a maintenance or emergency circumstances, but not generally used, it sh

unusable space and its costs allocated appropriately as entities using the conduit b

110. Commenters representive of all industries suggest that no unusable conduit system. We disagree. There appear to be two aspects to the unusable space systems. First, there is that space involved in the construction of the system, wit be no usable space. Second, there is that space within the system which may be unus system is constructed. We agree with Carolina Power, et al., that the costs for the system, which allow the creation of the usable space, should be part of the unusable among attaching entities. We also agree with USTA to the extent that maintenance du for the benefit and use of all attaching entities should be considered unusable.

111. With regard to space in a conduit that is deteriorated, the record has deteriorated beyond usability, USTA believes it should be counted in the unusabl therefore included in allocation of costs for unusable space to attachers. We disag to require that the costs of space that can not be used by, and provide no benefit t entity should be allocated beyond the utility conduit owner. In contrast, unusable largely attributed to safety and engineering concerns, adherence to which benefits t attaching entities. Space in a conduit that has deteriorated serves no benefit to t attaching entities. Deteriorated duct creates space that has been rendered unused b space could, with reasonable effort and expense, be made available, the space is usa

c. Half-Duct Presumption for Determining Usable Conduit Space

112. Certain telecommunications carriers support the proposed half-duct determining a conduit rate for usable space. Bell Atlantic and GTE agree with the s efficiency of our proposed formula, while SBC supports its applicability to telecomm as well as cable operators because it is based on "actual figures and presumptions t approximate actual figures." GTE estimates that the average conduit consists of fou further indicates that consideration of the variations in duct diameter ". . . would formula with even more non-public data, resulting in additional pole attachment disp that the half-duct methodology will adjust easily to telecommunications carriers tha facilities that occupy an entire duct.

113. Other telecommunications carriers and some cable operators oppose t duct methodology asserting that it creates too large a presumption of usable space, could result in an unreasonably high pole attachment rate. Sprint, on the other han methodology, indicating that due to the likelihood of damaging existing cables, it d cable through a duct where there are no inner-ducts. Sprint states that once an att duct, 100% of the space has been effectively used.

114. Electric utilities oppose the half-duct methodology, stating that e communications cable cannot share the same duct due to practical and safety concerns the NESC. Generally, the electric utilities state that safety considerations compel electric utility and other conduit systems. American Electric, et al., indicate tha is often used by the electric utilities solely to hold conductors that carry high vo Further, they state that the difference between electric utility conduit systems and makes it impossible to develop a uniform conduit formula that is equally applicable telephone utility conduit systems. NCTA replies that utilities have not demonstrate conduits between telecommunications carriers and electric utilities poses significan electric utilities claim that they do not have the information necessary to apply th methodology is inappropriate for the pricing of access to electric utility conduit. electric utilities claim that they cannot "readily determine the number of feet of c of ducts deployed or available in their system."

115. We adopt our proposed rebuttable presumption that a cable or teleco occupies a half-duct of space in order to determine a reasonable conduit attachment the NESC rule relied on by the electric utilities does not prohibit the sharing of s and communications. Rather, the rule conditions the sharing of such space on the ma operation being performed by the utility. We continue to believe that the half-duct "simplest and most reasonable approximation of the actual space occupied by an attac method, patterned after the one used by the Massachusetts Department of Public Utili allows for determining the cost per foot of one duct and then dividing by two instea measuring the duct space occupied. The MDPU finds, and we agree, that this method i because an attacher's use of a duct does not preclude the use of the other half of t should not have to pay for the entire duct. In situations where the formula is inap

has been demonstrated that there are more than two users in the conduit or that one occupies the entire duct, so as to preclude another from using the duct, our half-du be rebutted. If a new entity is installing an attachment in a previously unoccupied such entity should be encouraged to place inner-duct prior to placing its wires in t

d. Conduit Pole Attachment Formula

116. We believe that a formula encompassing statutory directives of how compensated for the use of conduit adds certainty and clarity to negotiations as wel Commission when it addresses complaints. We conclude that the addition of the condu conduit usable space factors, developed to implement Section 224(e)(2) and Section 2 consistent with a just, reasonable, and nondiscriminatory pole attachment rate for t carriers in conduit. We adopt the following formula to be used to determine the max reasonable pole attachment rate for telecommunications carriers in a conduit system, 8, 2001, encompasses the elements enumerated in the law:

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

D. Rights-of-Way

1. Background

117. The amended Section 224(a)(4) of the Communication Act defines "pol include ". . . right-of-way owned or controlled by a utility." The Commission has p that the access and reasonable rate provisions of Section 224 apply where a cable op telecommunications carrier seeks to install facilities in a right-of-way but does no physical attachment to any pole, duct or conduit. For example, a utility must provi cable operator or telecommunications carrier with "non-discriminatory access" to any or controlled by the utility. An electric utility may deny a cable television syste telecommunications carrier access to its poles, ducts, conduits and rights-of-way, o basis, where there is "insufficient capacity and for reasons of safety, reliability engineering purposes."

118. The Commission's proceedings and cases generally have addressed iss physical attachments to poles, ducts, or conduits. The Notice sought information ab which rights-of-way rate disputes might arise and the range of circumstances that wo We also asked whether we should adopt a methodology and/or formula to determine a ju rate, or whether rights-of-way complaints should be addressed on a case-by-case basi methodology were recommended, the Commission requested comment on the elements, incl presumptions, that could be used to calculate the costs relating to usable and unusa way.

119. Generally, cable and telecommunications carriers urge the Commissio of guiding principles against which rights-of-way pole attachment complaints would b minimize the number of disputes to be resolved through the complaint process. Attac interests assert that, without some form of established methodology or formula, the attachment agreement would be without instruction and the attaching entity would be right-of-way owner.

2. Discussion

120. The record indicates there have been few instances of attachment to did not include attachment to a pole, duct or conduit. Comments of cable operators, telecommunications carriers and utility pole owners confirm that there are too many rights-of-way, with different kinds of restrictions placed on the various kinds of r a methodology that would assist a utility and potential attacher in their efforts to reasonable compensation for the attachment. Such restrictions may also vary by sta of real property, eminent domain, utility, easements, and from underlying property o owner.

121. This Order, like the statute and the Local Competition Order, sets to be used in determining what constitutes just, reasonable and nondiscriminatory ra attachments in rights-of-way. The information submitted in this proceeding is not s to adopt detailed standards that would govern all right-of-way situations. We thus the Commission to gain experience through case-by-case adjudication to determine whe

"guiding principles" or presumptions are necessary or appropriate. Therefore, we wi complaints about just, reasonable, and nondiscriminatory pole attachments to a utili a case-by-case basis.

V. COST ELEMENTS OF THE FORMULA FOR POLES AND CONDUIT

122. Section 224 ensures a utility pole owner just and reasonable compen attachments made by telecommunications carriers. When Congress in 1978 directed th to regulate rates for pole attachments used for the provision of cable service, Cong of reasonableness for such rates, bounded on the lower end by incremental costs and by fully allocated costs. In the pole attachment context, incremental costs are tho would not have incurred "but for" the pole attachments in question. Fully allocated portion of operating expenses and capital costs that a utility incurs in owning and are associated with the space occupied by pole attachments. The Commission has note arriving at an appropriate rate between these two boundaries, it is important to ens entity is not charged twice for the same costs, once as up-front "make-ready" costs costs if they are placed in the corresponding pole line capital account that is used recurring attachment rate.

123. In regulating pole attachment rates, the Commission implemented a c premised on historical or embedded costs. These are costs that a firm has incurred providing a good or service and are recorded for accounting purposes as past operati depreciation. Many parties in this proceeding, as well as in the Pole Attachment Fe proceeding, advocate extension of historical costs, while a number of parties advoca Commission adopt a forward-looking economic cost-pricing ("FLEC") methodology for po attachments. Forward-looking cost methodologies seek to consider the costs that an if it were to construct facilities now to provide the good or service at issue.

124. We did not raise the issue of forward looking costs in the Notice i While we do not prejudge the arguments raised by the commenters, we decline to addre proposals to shift to a forward looking cost methodology. Accordingly, we will cont historical costs in our pole attachment rate methodology, specifically as it is appl telecommunications carriers and cable operators providing telecommunications service

VI. IMPLEMENTATION AND EFFECTIVE DATE OF RULES

125. Section 224(e)(4) states that:

> [t]he regulations under paragraph (1) shall become effective 5 years after t enactment of the Telecommunications Act of 1996. Any increase in the rates attachments that result from the adoption of the regulations required by thi phased in equal annual increments over a period of 5 years beginning on the such regulations.

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

126. The Commission proposed that the amount of any rate increase should the beginning of the five years, with one-fifth of the total rate increase added eac sought comment on our proposed five-year phase-in of the telecommunications carrier comment on any other proposals that would equitably phase in the telecommunications the five years allotted by Section 224(e)(4).

127. Commenters request that the Commission clarify its phase-in requir when the first phase-in increase is to begin or when the first annual increment shou USTA notes an ambiguity regarding the Commission s proposal that the increment be ad in each of the subsequent five years. USTA's concern is that the Commission's propo impression that the phase in would not occur until after the first full year Section February 8, 2002. MCI requests that the Commission clarify that the five-year phase rate increase resulting from the absorption of unusable costs by telecommunications the Commission affirm that Congress intended only rate increases to be phased in and or reductions. New York State Investor Owned Electric Utilities offer a plan to imp whereby the billing rate would be calculated by applying 1/5, 2/5, 3/5, and 4/5 of t the current Section 224(d)(3) rate and the new Section 224(e) rate calculated each y amount to the incremental Section 224(d)(3) rate.

128. SBC further recommends that the Commission provide explicit proced in in order to avoid disputes over interpretation of Section 224(e)(4) s requirement the amount of the increase be calculated based on the data available in the previous and that the amount of the increase not be recalculated during the five year phase-i a full share be added in 2001, even though the carrier rate is not effective until F that after the fifth year, for the year 2006, rates be calculated in accordance with including any changes in data through the end of the five year period.

129. We conclude that the statutory language is explicit in requiring th rates for pole attachments shall be phased-in in equal annual increments over five y effective date of such regulations. We clarify that the language beginning on the regulations refers to February 8, 2001, or five years after the enactment of the 19 York State Investor Owned Electric Utilities' plan to implement the phase-in consis Commission s requirement that the increases be phased-in in equal increments over fi goal to have the entire amount of the increase implemented within five years of Febr

130. We affirm that the five-year phase-in is to apply to rate increases of the increase or the difference between the Section 224(d) rate and the 224(e) rat annually until the full amount of the increase is absorbed within five years of Febr reductions are not subject to the phase-in and are to be implemented immediately.

VII. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

131. As required by the Regulatory Flexibility Act ("RFA"), an Initial R Analysis ("IRFA") was incorporated in the Notice. The Commission sought written pub on the proposals in the Notice including comment on the IRFA. The comments received below. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the

1. Need for, and Objectives of, the Order

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

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

133. No comments submitted in response to the Notice were specifically i commenters as being in response to the IRFA contained in the Notice. Small Cable Bu ("SCBA") filed comments in response to the IRFA contained in the Pole Attachment Fee the extent they are relevant to the issues in this proceeding, we incorporate them h SCBA claims in its IRFA comments that, because of the statutory exclusion of coopera definition of utility, Section 224 does not minimize market entry barriers for small According to SCBA, the IRFA in the Pole Attachment Fee Notice fails to consider this

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

134. The RFA generally defines a "small entity" as having the same meani "small business," "small organization," and "small governmental jurisdiction." In a "small business" has the same meaning as the term small business concern under the S Act. A "small business concern" is one that: (1) is independently owned and operat dominant in its field of operation; and (3) satisfies any additional criteria establ Business Administration ("SBA"). For many of the entities described below, the SBA business categories through Standard Industrial Classification ("SIC") codes.

a. Utilities

135. Many of the decisions and rules adopted herein may have a significa substantial number of utility companies. Section 224 defines a "utility" as "any pe exchange carrier or an electric, gas, water, steam, or other public utility, and who

poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire com term does not include any railroad, any person who is cooperatively organized, or an the Federal Government or any State." The SBA has provided the Commission with a li which may be effected by this rulemaking. Based upon the SBA's list, the Commission all of the following types of utility firms may be affected by the Commission's impl 224.

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

136. Electric Services (SIC 4911). The SBA has developed a definition f firms. The Census Bureau reports that a total of 1379 electric utilities were in op one year at the end of 1992. According to SBA, a small electric utility is an entit did not exceed five million dollars in 1992. The Census Bureau reports that 447 of listed had total revenues below five million dollars.

137. Electric and Other Services Combined (SIC 4931). The SBA has class a utility whose business is less than 95% electric in combination with some other ty Census Bureau reports that a total of 135 such firms were in operation for at least of 1992. The SBA's definition of a small electric and other services combined utili gross revenues did not exceed five million dollars in 1992. The Census Bureau repor 135 firms listed had total revenues below five million dollars.

138. Combination Utilities, Not Elsewhere Classified (SIC 4939). The SB as providing a combination of electric, gas, and other services which are not otherw Census Bureau reports that a total of 79 such utilities were in operation for at lea of 1992. According to SBA's definition, a small combination utility is a firm whose not exceed five million dollars in 1992. The Census Bureau reported that 63 of the total revenues below five million dollars.

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

139. Natural Gas Transmission (SIC 4922). The SBA's definition of a nat is an entity that is engaged in the transmission and storage of natural gas. The Ce that a total of 144 such firms were in operation for at least one year at the end of SBA's definition, a small natural gas transmitter is an entity whose gross revenues million dollars in 1992. The Census Bureau reported that 70 of the 144 firms listed below five million dollars.

140. Natural Gas Transmission and Distribution (SIC 4923). The SBA has as a utility that transmits and distributes natural gas for sale. The Census Bureau of 126 such entities were in operation for at least one year at the end of 1992. Th a small natural gas transmitter and distributer is a firm whose gross revenues did n dollars. The Census Bureau reported that 43 of the 126 firms listed had total reven million dollars.

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

142. Mixed, Manufactured, or Liquefied Petroleum Gas Production and/or D 4925). The SBA has classified this entity as a utility that engages in the manufact of the sale of gas. These mixtures may include natural gas. The Census Bureau repo of 43 such firms were in operation for at least one year at the end of 1992. The SB small mixed, manufactured or liquefied petroleum gas producer or distributor is a fi revenues did not exceed five million dollars in 1992. The Census Bureau reported th firms listed had total revenues below five million dollars.

143. Gas and Other Services Combined (SIC 4932). The SBA has classified gas company whose business is less than 95% gas, in combination with other services. Bureau reports that a total of 43 such firms were in operation for at least one year According to the SBA, a small gas and other services combined utility is a firm whos did not exceed five million dollars in 1992. The Census Bureau reported that 24 of

had total revenues below five million dollars.

(3) Water Supply (SIC 4941)

144. The SBA defines a water utility as a firm who distributes and sells commercial and industrial use. The Census Bureau reports that a total of 3,169 wate in operation for at least one year at the end of 1992. According to SBA's definitio is a firm whose gross revenues did not exceed five million dollars in 1992. The Cen reported that 3065 of the 3169 firms listed had total revenues below five million do

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

145. Sewerage Systems (SIC 4952). The SBA defines a sewage firm as a ut is the collection and disposal of waste using sewage systems. The Census Bureau rep of 410 such firms were in operation for at least one year at the end of 1992. Accor definition, a small sewerage system is a firm whose gross revenues did not exceed fi The Census Bureau reported that 369 of the 410 firms listed had total revenues below dollars.

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

147. Sanitary Services, Not Elsewhere Classified (SIC 4959). The SBA de engaged in sanitary services. The Census Bureau reports that a total of 1214 such f operation for at least one year at the end of 1992. According to SBA's definition, firms gross revenues did not exceed five million dollars. The Census Bureau reporte 1214 firms listed had total revenues below five million dollars.

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

148. The SBA defines a steam and air conditioning supply utility as a fi and/or sells steam and heated or cooled air. The Census Bureau reports that a total were in operation for at least one year at the end of 1992. According to SBA's defi air conditioning supply utility is a firm whose gross revenues did not exceed nine m Census Bureau reported that 30 of the 55 firms listed had total revenues below nine

(6) Irrigation Systems (SIC 4971)

149. The SBA defines irrigation systems as firms who operate water suppl purpose of irrigation. The Census Bureau reports that a total of 297 firms were in one year at the end of 1992. According to SBA's definition, a small irrigation serv gross revenues did not exceed five million dollars. The Census Bureau reported that firms listed had total revenues below five million dollars.

b. Telephone Companies (SIC 4813)

150. Many of the decisions and rules adopted herein may have a significa substantial number of small telephone companies. The SBA has defined a small busine 4813 (Telephone Communications, except Radiotelephone) to be a small entity when it 1500 employees. The Census Bureau reports that, at the end of 1992, there were 3497 in providing telephone services, as defined therein, for at least one year. This nu variety of different categories of carriers, including local exchange carriers ("LEC carriers ("IXCs"), competitive access providers ("CAPs"), cellular carriers, mobile operator service providers, pay telephone operators, personal communications service covered SMR providers and resellers. Some of those 3497 telephone service firms may small entities or small incumbent LECs because they are not "independently owned and therefore conclude that fewer than 3497 telephone service firms are small entity tel or small incumbent LECs that may be affected by this Order. Below, we estimate the of small entity telephone service firms or small incumbent LEC's that may be affecte adopted herein in this service category.

TRS Worksheet places cellular licensees and Personal Communications Service ("PCS") group. According to the most recent data, there are 804 carriers reporting that the as either PCS or cellular carriers. Although it seems certain that some of these ca independently owned and operated, or have more than 1500 employees, we are unable at estimate with greater precision the number of cellular service carriers that would q concerns under SBA's definition. Consequently, we estimate that there are fewer tha cellular service carriers that may be affected by the decisions and rules adopted in

(6) Mobile Service Carriers

156. Neither the Commission nor SBA has developed a definition of small applicable to mobile service carriers, such as paging companies. The closest applic SBA rules is for telephone communications companies other than radiotelephone (wirel (SIC 4813). The most reliable source of information regarding the number of mobile nationwide of which we are aware appears to be the data that we collect annually in TRS Worksheet. According to our most recent data, 172 companies reported that they the provision of mobile services. Although it seems certain that some of these carr independently owned and operated, or have more than 1500 employees, we are unable at estimate with greater precision the number of mobile service carriers that would qua definition. Consequently, we estimate that there are fewer than 172 small entity mo that may be affected by the decisions and rules adopted in this Order.

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

157. The broadband PCS spectrum is divided into six frequency blocks des F, and the Commission has held auctions for each block. The Commission has defined for Blocks C and F as an entity that has average gross revenues of less than $40 mil previous calendar years. For Block F, an additional classification for "very small and is defined as an entity that, together with their affiliates, has average gross $15 million for the preceding three calendar years. These regulations defining "sma context of broadband PCS auctions has been approved by the SBA. No small businesse SBA-approved definition bid successfully for licenses in Blocks A and B. There were that qualified as small entities in the Block C auction. A total of 93 small and ve bidders won approximately 40% of the 1479 licenses for Blocks D, E, and F. However, blocks C through F have not been awarded fully, therefore there are few, if any, sma currently providing PCS services. Based on this information, we conclude that the n PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidd and F blocks, for a total of 183 small PCS providers as defined by the SBA and the C auction rules. We note that the TRS Worksheet data track PCS licensees in the repor "Cellular or Personal Communications Service Carrier." As noted supra in the parag cellular carriers, according to the most recent data, there are 804 carriers reporti themselves in this category.

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

158. Pursuant to 47 C.F.R. □□ 90.814(b)(1) and 90.912(b)(1), the Commiss small entity in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a f average annual gross revenues of less than $15 million in the three previous calenda definition of a small entity in the context of 800 MHz and 900 MHz SMR has been appr SBA. The rules adopted in this Order may apply to SMR providers in the 800 MHz and bands that either hold geographic area licenses or have obtained extended implementa We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service to extended implementation authorizations, nor how many of these providers have annu than $15 million. We assume, for purposes of this FRFA, that all of the extended im authorizations may be held by small entities which may be affected by the decisions in this Order. We note that the TRS Worksheet data track SMR licensees in the repor "Paging and Other Mobile Carriers." According to the most recent data, there are 17 SMR carriers, reporting that they place themselves in this category.

159. The Commission recently held auctions for geographic area licenses band. There were 60 winning bidders that qualified as small entities in the 900 MHz this information, we conclude that the number of 900 MHz geographic area SMR license the rules adopted in this Order includes these 60 small entities. The Commission al auctions for the 525 licenses for the upper 200 channels in the 800 MHz SMR band. T

(1) Wireline Carriers and Service Providers

151. The SBA has developed a definition of small entities for telephon companies other than radiotelephone (wireless) companies. The Census Bureau reports 2321 such telephone companies in operation for at least one year at the end of 1992. SBA's definition, a small business telephone company other than a radiotelephone com employing no more than 1500 persons. Of the 2321 non-radiotelephone companies liste Bureau, 2295 were reported to have fewer than 1000 employees. Thus, at least 2295 n companies that might qualify as small entities or small incumbent LECs, or small ent employment statistics. Although some of these carriers are likely not independently we are unable at this time to estimate with greater precision the number of wireline providers that would qualify as small business concerns under SBA's definition. Con estimate that there are fewer than 2295 small entity telephone communications compan radiotelephone companies that may be affected by the decisions or rules adopted in t

(2) Local Exchange Carriers

152. Neither the Commission nor SBA has developed a definition of small exchange services. The closest applicable definition under SBA rules is for telepho companies other than radiotelephone (wireless) companies (SIC 4813). The most relia information regarding the number of LECs nationwide appears to be the data that the publishes annually in its Telecommunications Industry Revenue report, regarding the Relay Service ("TRS"). According to "TRS Worksheet" data released in November 1997, companies reporting that they categorize themselves as LECs. Although some of these likely not independently owned and operated, or have more than 1500 employees, we ar time to estimate with greater precision the number of LECs that would qualify as sma under SBA's definition. Consequently, we estimate that there are fewer than 1371 sm that may be affected by the rules adopted herein.

(3) Interexchange Carriers

153. Neither the Commission nor SBA has developed a definition of small applicable to providers of interexchange services. The closest applicable definitio for telephone communications companies other than radiotelephone (wireless) companie The most reliable source of information regarding the number of IXCs nationwide of w appears to be the data that we collect annually in connection with TRS. According t data, 143 companies reported that they were engaged in the provision of interexchang Although some of these carriers are likely not independently owned and operated, or 1500 employees, we are unable at this time to estimate with greater precision the nu would qualify as small business concerns under SBA's definition. Consequently, we e are fewer than 143 small entity IXCs that may be affected by the decisions and rules Order.

(4) Competitive Access Providers

154. Neither the Commission nor SBA has developed a definition of small applicable to providers of competitive access services. The closest applicable defi is for telephone communications companies other than radiotelephone (wireless) compa The most reliable source of information regarding the number of CAPs nationwide of w appears to be the data that we collect annually in connection with the TRS Worksheet most recent data, 109 companies reported that they were engaged in the provision of services. Although some of these carriers are likely not independently owned and op more than 1500 employees, we are unable at this time to estimate with greater precis CAPs that would qualify as small business concerns under SBA's definition. Conseque that there are fewer than 109 small entity CAPs that may be affected by the decision herein.

(5) Cellular Service Carriers

155. Neither the Commission nor SBA has developed a definition of small applicable to providers of cellular services. The closest applicable definition und telephone communications companies other than radiotelephone (wireless) companies (S most reliable source of information regarding the number of cellular service carrier we are aware appears to be the data that we collect annually in connection with the

winning bidders that qualified as small entities in that auction. Based on this inf that the number of geographic area SMR licensees that may be affected by the rules a also includes these 10 small entities. However, the Commission has not yet determin licenses will be awarded for the lower 230 channels in the 800 MHz geographic area S There is no basis, moreover, on which to estimate how many small entities will win t Given that nearly all radiotelephone companies have fewer than 1000 employees and th estimate of the number of prospective 800 MHz licensees for the lower 230 channels c assume, for purposes of this FRFA, that all of the licenses may be awarded to small affected by the decisions and rules adopted in this Order.

(9) Resellers

160. Neither the Commission nor SBA has developed a definition of small applicable to resellers. The closest applicable definition under SBA rules is for a communications companies (SIC 4812 and 4813). The most reliable source of informati number of resellers nationwide of which we are aware appears to be the data that we connection with the TRS Worksheet. According to our most recent data, 339 companies were engaged in the resale of telephone services. Although it seems certain that so are not independently owned and operated, or have more than 1500 employees, we are u to estimate with greater precision the number of resellers that would qualify as sma under SBA's definition. Consequently, we estimate that there are fewer than 339 sma that may be affected by the decisions and rules adopted in this Order.

c. Wireless (Radiotelephone) Carriers (SIC 4812)

161. Although wireless carriers have not historically affixed their equi pursuant to the terms of the 1996 Act, such entities are entitled to do so with rate Commission's rules discussed herein. SBA has developed a definition of small entiti (wireless) companies. The Census Bureau reports that there were 1176 such companies at least one year at the end of 1992. According to SBA's definition, a small busine company is one employing no more than 1500 persons. The Census Bureau also reported of those radiotelephone companies had fewer than 1000 employees. Thus, even if all 12 companies had more than 1500 employees, there would still be 1164 radiotelephone might qualify as small entities if they are independently owned and operated. Altho carriers are likely not independently owned and operated, we are unable at this time greater precision the number of radiotelephone carriers and service providers that w business concerns under SBA's definition. Consequently, we estimate that there are small entity radiotelephone companies that may be affected by the rules adopted here

d. Cable System Operators (SIC 4841)

162. The SBA has developed a definition of small entities for cable and services, which includes all such companies generating less than $11 million in reve definition includes cable systems operators, closed circuit television services, dir services, multipoint distribution systems, satellite master antenna systems and subs services. According to the Census Bureau, there were 1423 such cable and other pay generating less than $11 million in revenue.

163. The Commission has developed its own definition of a small cable sy the purposes of rate regulation. Under the Commission's rules, a "small cable compa fewer than 400,000 subscribers nationwide. Based on our most recent information, we there were 1439 cable systems that qualified as small cable system operators at the then, some of those companies may have grown to serve over 400,000 subscribers, and been involved in transactions that caused them to be combined with other cable syste we estimate that there are fewer than 1439 small entity cable system operators that the decisions and rules adopted in this Order.

164. The Communications Act also contains a definition of a small cable which is "a cable operator that, directly or through an affiliate, serves in the agg percent of all subscribers in the United States and is not affiliated with any entit annual revenues in the aggregate exceed $250,000,000." The Commission has determine are 61,700,000 subscribers in the United States. Therefore, we found that an operat 617,000 subscribers shall be deemed a small operator, if its annual revenues, when c total annual revenues of all of its affiliates, do not exceed $250 million in the ag available data, we find that the number of cable systems serving 617,000 subscribers

Although it seems certain that some of these cable system operators are affiliated w gross annual revenues exceed $250,000,000, we are unable at this time to estimate wi the number of cable system operators that would qualify as small cable systems under the Communications Act.

e. Municipalities

165. The term "small governmental jurisdiction" is defined as "governmen with a population of less than 50,000." There are 85,006 governmental entities in t This number includes such entities as states, counties, cities, utility districts an that Section 224 specifically excludes any utility which is cooperatively organized, by the Federal Government or any State. For this reason, we believe that Section 22 if any affect upon small municipalities. Further, there are 18 states and the Distr regulate pole attachments pursuant to Section 224(c)(1). Of the 85,006 governmental counties, cities and towns. The remainder are primarily utility districts, school d the 38,978 counties, cities and towns, 37,566 or 96%, have populations of fewer than

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

166. The rules adopted in this Order will require a change in certain re requirements. A utility pole owner will now have to maintain specific records relat attachers for purposes of determining and updating its presumptive average number of computing the unusable space calculation for the telecommunications carrier rate for pole owner may also require the services of an accountant to determine the new telec In addition, our rules adopted herein will require cable operators to notify the pol the cable operator begins providing telecommunications services. We sought comment whether small entities may be required to hire additional staff and expend additiona comply with the proposals set forth in the Notice. In addition, we sought comment a will be a disproportionate burden placed on small entities in complying with the pro Order.

167. We did not receive any comments asserting that small entities will additional staff and expend additional time and money to determine the appropriate r telecommunications carriers under our new rules. SCBA was the only commenter to cla be a disproportionate burden placed on small entities. SCBA claims that small cable particularly hurt by the statutory exemption of cooperatives from the definition of cable systems often operate in rural areas and therefore necessarily attach their p and electric cooperatives. We note that SBCA does not appear to be claiming that ou disproportionately burden small cable systems, but that where our rules do not apply operators will be disproportionately harmed. Because the exemption for cooperatives Congress clearly in Section 224(a)(1), the Commission is unable to address SBCA's co regard. We conclude that our rules will not disproportionately burden small entitie

E. Steps Taken to Minimize Significant Economic Impact on Small Entiti Significant Alternatives Considered

168. The 1996 Act requires the Commission to adopt a telecommunications methodology within two years of the enactment of the 1996 Act. We sought comment in on various alternative ways of implementing the statutory requirements and any other of these proposals on small business entities. We sought comment on the implementat methodology to ensure just, reasonable and nondiscriminatory pole attachment and con telecommunications carriers. We also sought comment on how to develop a rights-of-w methodology for telecommunications carriers.

169. In accordance with the RFA, the Commission has endeavored to minimi impact on small entities. With regard to our pole attachments complaint process, we that we establish an amount in controversy as a minimum threshold for filing a compl other things, it might preclude small entities from obtaining relief from unjust, un discriminatory pole attachment rates. We also rejected as too burdensome the sugges operators be required to certify annually as to whether they are providing telecommu To minimize the burden on utility pole owners, including those that qualify as small promote certainty and efficiency in determining the pole attachment rate for telecom we have maintained our formula presumptions, including our one-foot presumption of u We also determined that, as an alternative to requiring utility pole owners to condu

pole-by-pole inventories for the number of attachers on each pole, we would require develop, through information it possesses, a presumptive average number of attachers (i.e., urban, rural and urbanized).

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

VIII. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

171. The requirements adopted in this Order have been analyzed with resp Reduction Act of 1995 (the "1995 Act") and found to impose modified information coll requirements on the public. The Commission, as part of its continuing effort to red burdens, invites the general public to take this opportunity to comment on the infor requirements contained in this Order, as required by the 1995 Act. Public comments from date of publication of this Order in the Federal Register. Comments should add the proposed collection of information is necessary for the proper performance of th Commission, including whether the information shall have practical utility; (2) the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity collected; and (4) ways to minimize the burden of the collection of information on t including the use of automated collection techniques or other forms of information t

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

IX. ORDERING CLAUSES

173. IT IS ORDERED that, pursuant to Sections 1, 4(i) and 224 of the Com of 1934, as amended, 47 U.S.C. 151, 154(i) and 224, the Commission's rules are he as set forth in Appendix A.

174. IT IS FURTHER ORDERED that Section 1.1402 of the Commission's rules in Appendix A hereto, will become effective 30 days after the date of publication of Order in the Federal Register, and that Sections 1.1403, 1.1404, 1.1409, 1.1417 and Commission's rules, as amended in Appendix A hereto, will become effective 140 days publication of this Report and Order in the Federal Register, unless the Commission before that date stating that the Office of Management and Budget ("OMB") has not ap information collection requirements contained in the rules.

175. IT IS FURTHER ORDERED that the Commission's Office of Public Affair Operations Division, SHALL SEND a copy of this Report and Order, including the Final Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Admini

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

Revised Rules

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

PART 1 -- PRACTICE AND PROCEDURE

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

AUTHORITY: 47 U.S.C. 151, 154, 303, and 309(j) unless otherwise noted.

2. Section 1.1402 is amended by revising paragraph (c) and by adding n (j), (k), (l) and (m) to read as follows:

Sec. 1.1402 Definitions.

* * * * *

(c) With respect to poles, the term usable space means the space on a utilit minimum grade level which can be used for the attachment of wires, cables, and assoc With respect to conduit, the term usable space means space within a conduit system w or which could, with reasonable effort and expense, be made available, for the purpo wires, cable and associated equipment for telecommunications services.

* * * * *

(i) The term conduit means a pipe placed in the ground in which cables and/ installed.

(j) The term conduit system means structures that provide physical protecti wires that allow new cables to be added along a route.

(k) The term duct means a single enclosed raceway for conductors, cable and

(l) With respect to poles, the term unusable space means the space on a uti usable space, including the amount required to set the depth of the pole. With resp term unusable space means space involved in the construction of a conduit system, wi would be no usable space, and maintenance ducts reserved for the benefit of all cond

(m) The term attaching entity includes cable operators, telecommunications local exchange carriers, utilities and governmental entities providing cable or tele

3. Section 1.1403 is amended by retitling the section and by adding ne read as follows:

Sec. 1.1403 Duty to provide access; modifications; notice of removal, increase petition for temporary stay; and cable operator notice.

* * * * *

(e) Cable operators must notify pole owners upon offering telecommunication

4. Section 1.1404 is amended to add a new subsection (g)(12) and new p and (j) to read as follows, and to redesignate old paragraphs (g)(12), (h), (i), (j) (l), (m) and (n), respectively:

Sec. 1.1404 Complaint.

* * * * *

(g) * * * * *

(12) The average amount of unusable space per pole for those poles used for (a 24 foot presumption may be used in lieu of actual measurement, but the presumptio and

* * * * *

(h) With respect to attachments within a duct or conduit system, where it i a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable a

term or condition requires review of the associated rate, the complaint shall provid in support of said claim. The data and information shall include, where applicable, information as specified in paragraph (g) of this section.

(i) With respect to rights-of-way, where it is claimed that either a rate i or a term or condition is unjust or unreasonable and examination of such term or con review of the associated rate, the complaint shall provide data and information in s The data and information shall include, where applicable, equivalent information as (g) of this section.

(j) If any of the information and data required in paragraphs (g), (h) and provided to the cable television operator or telecommunications carrier by the utili request, the cable television operator or telecommunications carrier shall include a the steps taken to obtain the information from the utility, including the dates of a complaint filed by a cable television operator or telecommunications carrier shall b utility has failed to provide the information required under paragraphs (g), (h) or applicable, after such reasonable request. A utility must supply a cable television telecommunications carrier the information required in paragraph (g), (h) or (i) of applicable, along with the supporting pages from its FERC Form 1, FCC Form M, or oth regulatory body, within 30 days of the request by the cable television operator or t carrier. The cable television operator or telecommunications carrier, in turn, shal with its complaint. If the utility did not supply these pages to the cable televisi telecommunications carrier in response to the information request, the utility shall in its response to the complaint.

5. Section 1.1409 is amended by revising paragraph (e) and adding a ne read as follows:

Sec. 1.1409 Commission consideration of the complaint.

* * * * *

(e) When parties fail to resolve a dispute regarding charges for pole attac Commission's complaint procedures under Section 1.1404 are invoked, the Commission w following formulas for determining a maximum just and reasonable rate:

(1) The following formula shall apply to attachments by cable operators pro This formula shall also apply to attachments by any telecommunications carrier (to t is not a party to a pole attachment agreement) or cable operator providing telecommu until February 8, 2001:

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

(2) Subject to subsection (f) the following formula shall apply to pole att any telecommunications carrier (to the extent such carrier is not a party to a pole or cable operator providing telecommunications services beginning on February 8, 200

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

For purposes of this formula, the unusable space factor, as defined under Section 1. usable space factor, as defined under Section 1.1418(b), shall apply per pole.

(3) Subject to subsection (f) the following formula shall apply to pole att conduit system beginning on February 8, 2001:

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

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

(f) Subsections (e)(2) and (e)(3) of this section shall become effective Fe five years after the effective date of the Telecommunications Act of 1996). Any inc

pole attachments that result from the adoption of such regulations shall be phased i years beginning on the effective date of such regulations in equal annual increments in is to apply to rate increases only. Rate reductions are to be implemented immedi determination of any rate increase shall be based on data currently available at the of the rate increase.

6. Section 1.1417 is added to read as follows:

Sec. 1.1417 Allocation of Unusable Space Costs.

(a) A utility shall apportion the cost of providing unusable space on a pol right-of-way so that such apportionment equals two-thirds of the costs of providing would be allocated to such entity under an equal apportionment of such costs among a

(b) With respect to poles, the following formula shall be used to establish unusable space costs on a pole for telecommunications carriers and cable operators p telecommunications services:

Pole Unusable Space Factor = 2/3 X Unusable Space Pole Height X Net Cost of Bare Pole Number of Attachers X Carrying Charge R

All attaching entities shall be counted as separate attaching entities for purposes of unusable space.

(c) With respect to conduit, the following formula shall be used to establi unusable space costs for telecommunications carriers and cable operators providing t services within a conduit:

Conduit Unusable Space Factor = 2/3 X Net Linear Cost of Unusable Conduit Space X Carrying Charge Rate / Number of Attachers

All attaching entities with lines occupying any portion of a conduit system shall be attaching entities for purposes of apportioning the costs of unusable space.

(d) Each utility shall establish a presumptive average number of attachers f urban, and urbanized service areas (as defined by the Bureau of Census of the Depart

(1) Each utility shall, upon request, provide all attaching entities and all access the methodology and information upon which the utilities presumptive average is based.

(2) Each utility is required to exercise good faith in establishing and upda presumptive average number of attachers.

(3) The presumptive average number of attachers may be challenged by an atta entity by submitting information demonstrating why the utility's presumptive average attaching entity should also submit what it believes should be the presumptive avera methodology used. Where a complete inspection is impractical, a statistically sound submitted.

(4) Upon successful challenge of the existing presumptive average number of the resulting data determined shall be used by the utility as the presumptive number the rate formula.

7. Section 1.1418 is added to read as follows:

Sec. 1.1418 Allocation of Usable Space Costs.

(a) A utility shall apportion the amount of usable space among all entities percentage of usable space required by each entity.

(b) With respect to poles, the following formula shall be used to establish space costs on a pole for telecommunications carriers and cable operators providing services:

Pole Usable Space Factor = Space Occupied by Attachment / Total Usable Space X Net Cost of Pole Height / Bare Pole Total Usable Space X C

The presumptive 13.5 feet of usable space may be used in lieu of the actual measurem amount of usable space. The presumptive 37.5 feet of pole height may be used in lie measurement of each pole. The presumptive one foot of space occupied by attachment both cable operators and telecommunications carriers.

(c) With respect to conduit, the following formula shall be used to establis usable space costs within a conduit system:

Conduit Usable Space Factor = 1/2 X 1 Duct / Average Number of Ducts less Adjustments for maintenance ducts X Linear Usable Conduit Space

With respect to conduit, an attacher is presumed to occupy one half-duct of usable s

APPENDIX B

List of Commenters

Note: If no abbreviation appears in parentheses following the full name of the part used in this Order.

Comments in CS Docket No. 97-151

Adelphia Communications Corp., Arizona Cable Telecommunications Association, Pennsylvania Cable & Telecommunications Association and Suburban Cable TV Co. (Adelphia, et al.)
American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation and Florida Power and Light Company (American Electric, et
Ameritech
AT&T Corp. (AT&T)
Bell Atlantic
Cable Television & Telecommunications Association of New York, Inc. (New York Cable Television Assn.)
Carolina Power & Light Company, Delmarva Power & Light Company, Atlantic City Electr Company, Entergy Services, Florida Power Corporation, Pacific Gas and Electri Potomac Electric Power Company, Public Service Company of Colorado, Southern Georgia Power, Alabama Power, Gulf Power, Mississippi Power, Savannah Electri Electric Company and Virginia Power, including North Carolina Power (Carolina
City of Colorado Springs on behalf of Colorado Springs Utilities (Colorado Springs U
Comcast Corporation, Charter Communications, Marcus Cable Operating Co., L.P., Rifki Associates, Greater Media, Inc., Texas Cable & Telecommunications Association Telecommunications Association of Maryland, Delaware and District of Columbia America Cable TV Association (Comcast, et al.)
Consolidated Edison Company of New York, Inc., Central Hudson Gas & Electric Corporation, Long Island Lighting Company, New York State Electric & Gas Corp Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Ro and Electric Corporation (New York State Investor Owned Electric Utilities)
Dayton Power and Light Company (Dayton Power)
Duquesne Light Company (Duquesne Light)
Edison Electric Institute and UTC, the Telecommunications Association (Edison Electric/UTC)
GTE Service Corporation (GTE)
ICG Communications, Inc. (ICG Communications)
KMC Telecom Inc. (KMC Telecom)
MCI Telecommunications Corporation (MCI)
National Cable Television Association (NCTA)
Ohio Edison Company (Ohio Edison)
Omnipoint Communications Inc. (Omnipoint)
RCN Telecom Services, Inc. (RCN)
SBC Communications Inc. (SBC)

Sprint Local Telephone Companies (Sprint)
Summit Communications, Inc. (Summit)
Teligent, L.L.C. (Teligent)
Texas Utilities Electric Company (Texas Utilities)
Union Electric Company (Union Electric)
United States Telephone Association (USTA)
U S West, Inc. (U S West)
Winstar Communications, Inc. (Winstar)

Reply Comments in CS Docket No. 97-151

Adelphia Communications Corp., Arizona Cable Telecommunications Association, Pennsylvania Cable & Telecommunications Association and Suburban Cable TV Co. (Adelphia, et al.)
American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation and Florida Power and Light Company (American Electric, et
Ameritech
AT&T Corp. (AT&T)
Bell Atlantic
BellSouth Corporation (BellSouth)
Carolina Power & Light Company, Delmarva Power & Light Company, Atlantic City Electr Company, Entergy Services, Florida Power Corporation, Pacific Gas and Electri Potomac Electric Power Company, Public Service Company of Colorado, Southern Georgia Power, Alabama Power, Gulf Power, Mississippi Power, Savannah Electri Electric Company and Virginia Power, including North Carolina Power (Carolina
Champlain Valley Telecom Inc., Waitsfield-Fayston Telephone Co., Inc., and Waitsfiel Television, a Division of Waitsfield-Fayston Telephone Co., Inc. (Champlain V et al.)
Comcast Cable Communications, Inc., Charter Communications, Marcus Cable Operating C L.P., Rifkin & Associates, Greater Media, Inc., Texas Cable & Telecommunicati Cable Telecommunications Association of Maryland, Delaware and District of Co Mid-America Cable TV Association (Comcast, et al.)
Edison Electric Institute and UTC, the Telecommunications Association (Edison Electric/UTC)
GTE Service Corporation (GTE)
ICG Communications, Inc. (ICG Communications)
KMC Telecom Inc. (KMC Telecom)
MCI Telecommunications Corporation (MCI)
National Cable Television Association (NCTA)
Ohio Edison Company and Union Electric Company (Ohio Edison/Union Electric)
Omnipoint Communications Inc. (Omnipoint)
SBC Communications Inc. (SBC)
Small Cable Business Association (SCBA)
Sprint Local Telephone Companies (Sprint)
Teligent, L.L.C. (Teligent)
Texas Utilities Electric Company (Texas Utilities)
United States Telephone Association (USTA)
U S West, Inc. (U S West)
Winstar Communications, Inc. (Winstar)