

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

In the Matter of) CS Docket No. 97-98
Amendment of Commission's)
Rules and Policies)
Governing Pole Attachments)
)
In the Matter of) CS Docket No. 97-151
Implementation of Section 703(e) of)
The Telecommunications Act of 1996)

CONSOLIDATED PARTIAL ORDER ON RECONSIDERATION

Adopted: May 22, 2001

Released: May 25, 2001

By the Commission:

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I. INTRODUCTION

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

2. In the *Telecom Order*, we implemented Section 703(e) of the 1996 Act⁸ by prescribing regulations,⁹ effective February 8, 2001,¹⁰ to ensure that a utility¹¹ complies with the Pole

¹ 47 U.S.C. §224.

² 47 C.F.R. §§1.1401-1.1418.

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

⁴ Pub. L. No. 104-104, 110 Stat. 61, 149-151.

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

⁶ 15 FCC Rcd 6453 (2000).

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

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

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

¹⁰ *See* 47 U.S.C. § 224(e)(4).

Attachment Act's requirements for just and reasonable rates, terms and conditions and nondiscriminatory access for pole attachments used to provide telecommunications services.¹² Among other things, the *Telecom Order* considered the 1996 Act, *Telecom Order* comments and *Telecom Order* reply comments filed in response to the *Telecom Order Notice*.¹³ Increases in prescribed rates for telecommunications services attachers pursuant to section 224(e) of the Pole Attachment Act are to be phased in over five years beginning February 8, 2001.¹⁴

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

4. In the *Fee Order*, we adopted rules based on the comments filed in response to the *Fee Order Notice*.¹⁷ We also considered the *Telecom Order* comments and reply comments when relevant to the issues addressed. Among other things, the *Fee Order* addressed the use of certain

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¹¹A "utility" is defined as any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduit or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State. 47 U.S.C. § 224(a)(1).

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

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

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

¹⁵ 208 F.3d 1263 (11 Cir. 2000).

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

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

presumptions in our rate calculation methodology, the carrying charge rate elements used in our formulas, the use of gross versus net data in our formulas used to determine a maximum just and reasonable rate for pole attachments, the regulatory accounts to be used in our formulas, and the formula used to determine a maximum rate for attachments to conduit.

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

6. In this *Reconsideration Order*, we

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

¹⁸See Appendix C.

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

²⁰See Appendix B.

²¹See *Telecom Order* at ¶¶ 10-21.

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

²³Cf. *Telecom Order* at ¶¶ 45-58.

formulas after February 8, 2001;²⁴

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

²⁴*Cf. Telecom Order* at ¶¶ 74-79.

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

²⁶*Cf. Telecom Order* at ¶¶ 83-91.

²⁷*Cf. Telecom Order* at ¶ 115.

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

²⁹*See Telecom Order* at ¶ 110. *Fee Order* at ¶ 91.

³⁰*See Telecom Order* at ¶¶ 117-121 and n. 390.

³¹*Fee Order* at ¶¶ 31, 33-34.

- (m) amend our rules to reflect our decisions in this *Reconsideration Order*.

II. BACKGROUND

7. In 1978, Congress enacted section 224 of the Communications Act³² granting the Commission authority to regulate the rates, terms, and conditions governing pole attachments, requiring that such rates, terms and conditions be just and reasonable.³³ The Commission is authorized to adopt procedures necessary to hear and to resolve complaints concerning such rates, terms, and conditions.³⁴ Congress sought to constrain the ability of utilities to extract monopoly profits from cable television system operators in need of pole, duct, conduit or right-of-way space for pole attachments.³⁵

8. Section 224(d)(1) of the Pole Attachment Act defines a just and reasonable rate as ranging from the statutory minimum based on the additional costs of providing pole attachments, to the statutory maximum based on fully allocated costs.³⁶ The additional, or incremental, costs are the costs that would not be incurred by the utility *but for* the pole attachments.³⁷ The maximum rate, identified as a percentage of fully allocated costs, refers to the portion of operating expenses and capital costs that a utility incurs in owning and maintaining pole attachment infrastructure that is equal to the portion of space on a pole,³⁸ or capacity of a duct, conduit, or right-of-way,³⁹ that is occupied by an attacher.⁴⁰ The Commission developed a methodology⁴¹ to

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

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

³⁴47 U.S.C. § 224(b)(1).

³⁵See S. Rep. No. 580, 95th Congress., 1st Sess. at 19-20 (1977) ("*1997 Senate Report*"), reprinted in 1978 U.S.C.C.A.N. 109; *FCC v. Florida Power Corp.*, 480 U.S. 245, 247-48 (1987) (Congress enacted this legislation as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service).

³⁶47 U.S.C. § 224(d)(1).

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

³⁸47 U.S.C. § 224(d)(1-2).

³⁹47 U.S.C. § 224(d)(1).

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

9. Subsequently, Congress enacted the 1996 Act "to accelerate rapidly private sector deployment of advanced telecommunication and information technologies and services."⁴³ The 1996 Act amended section 224 in several important respects. Section 703(6) of the 1996 Act added a new subsection 224(d)(3),⁴⁴ that expanded the scope of section 224 by applying the *Cable Formula* to rates for pole attachments made by telecommunications carriers⁴⁵ in addition to cable systems,⁴⁶ until a separate methodology becomes effective for telecommunications carriers in 2001.⁴⁷ Section 703(7) of the 1996 Act added new subsections 224(e)(1-4), which set forth a separate methodology to govern charges for pole attachments used to provide telecommunications services beginning February 8, 2001 ("*Telecom Formula*").⁴⁸ Further, the 1996 Act gave cable operators and telecommunications carriers a right of nondiscriminatory access to utility poles, ducts, conduit and rights-of-way.⁴⁹ In the *Local Competition Order*, we adopted a number of rules implementing the new access provisions of section 224.⁵⁰

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⁴⁰1977 Senate Report at 19-20.

⁴¹47 C.F.R. § 1.1404. See: *First Report and Order, Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Dkt. 78-144, 68 FCC 2d 1585 (1978) ("*First Report and Order*"); *Second Report and Order*, 72 FCC 2d 59 (1979) ("*Second Report and Order*"); *Third Report and Order*, 77 FCC 2d 187 (1980) ("*Third Report and Order*"), *aff'd*, *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (*per curiam*); see also, *Pole Attachment Order*, 2 FCC Rcd 4387 (1987).

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

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

⁴⁴47 U.S.C. § 224(d)(3).

⁴⁵47 U.S.C. § 153(44).

⁴⁶47 U.S.C. § 153(8); 47 U.S.C. § 602(5).

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

⁴⁸47 U.S.C. § 224(e)(1-4).

⁴⁹47 U.S.C. § 224(a),(f).

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

III. ORDER ON RECONSIDERATION

A. COMPLAINT PROCEDURES AND NEGOTIATED AGREEMENTS

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

11. Utilities must provide a cable television system⁵⁵ or telecommunications carrier⁵⁶ with nondiscriminatory access⁵⁷ to any pole, duct, conduit or right-of-way owned or controlled by it, at just and reasonable rates, terms and conditions.⁵⁸ In the *Telecom Order*, we concluded that the current complaint procedures are adequate to establish just and reasonable rates, terms, and conditions for pole attachments, and determined that the existing methodology for determining a presumptive maximum pole attachment rate for telecommunications carriers, as modified, facilitates negotiation because the parties can identify an anticipated range for the pole attachment rate.⁵⁹ We rejected proposals to require uniformity of terms in pole attachment agreements stating that "[w]hile we do not agree that all pole attachment agreements have to be identical, differing provisions must not violate the statutory requirement that terms be just, reasonable, and nondiscriminatory."⁶⁰

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

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

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

⁵⁴ 47 C.F.R. § 1.1404 (l) (1998).

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

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

⁵⁷ 47 U.S.C. § 224(f)(1).

⁵⁸ 47 U.S.C. §§ 224(b),(d),(e).

⁵⁹ See *Telecom Order* at ¶¶ 16-21.

⁶⁰ *Telecom Order* at ¶¶ 20-21.

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

13. Contrary to UTC/EEI's argument, the record as a whole does not demonstrate that the market for pole attachments is fully competitive or that the utilities now lack any incentive to discriminate against attaching entities. As the Court stated in *Gulf Power II*,⁶⁵ contrary to American Electric's assertions,⁶⁶ the original purpose of the Pole Attachment Act, to prevent utilities from charging monopoly rents to attach to their bottleneck facilities, did not change with the 1996 Act.⁶⁷ Nothing in the record demonstrates that the utilities' monopoly over poles has since changed. Upon consideration of the record, we affirm our decision not to impose additional regulation on either the negotiation process or the rules for resolution of complaints arising out of failed negotiations.⁶⁸ We reject assertions by utilities that our rules frustrate negotiations.⁶⁹ To the contrary, our experience has taught us, and the record gained through these proceedings demonstrates, that without our rules and the use of presumptions in a formula methodology, attaching entities would not be able to challenge any rate offered by a utility.⁷⁰ There would be no reasonable negotiation without a benchmark rate against which to compare the utility's proposed rate. We continue to reject arguments⁷¹ by utilities that attaching parties should be required to

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

⁶² UTC/EEI *Fee Order* petition at 5.

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

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

⁶⁵ 208 F.3d 1263 (11th Cir. 2000).

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

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

⁶⁸ See *Telecom Order* at ¶¶ 16-21.

⁶⁹ UTC/EEI *Telecom Order* petition at 2.

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

⁷¹ See *Telecom Order* at ¶¶ 12-21.

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

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

B. BASIC CONCEPTS USED IN THE FORMULA

1. Use of Actual Costs

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

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

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

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

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

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

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

⁷⁸*Telecom Order* at ¶ 124.

⁷⁹*Fee Order* at ¶ 10.

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

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

17. We affirm our decision that the *Cable Formula*, which includes regulatory accounts maintained using historical costs, encompasses the statutory directive to provide just and reasonable rates for pole attachments,⁸⁷ adding certainty and clarity to negotiations.⁸⁸ We have been presented with no persuasive evidence⁸⁹ that utility owners do not recover a just and

⁸⁰ *Fee Order* at ¶ 10.

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

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

⁸³ American Electric *Fee Order* petition at 2-7.

⁸⁴ UTC/EEI *Fee Order* petition at 7.

⁸⁵ See, e.g., Southern Co. *Fee Order* recon. reply at 3.

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

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

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

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

reasonable compensation⁹⁰ for pole attachments from use of the *Cable Formula*.⁹¹ The application of the well-established *Cable Formula*, with technical adjustments adopted from time to time, is consistent with establishing a just, reasonable, and nondiscriminatory maximum pole attachment rate as envisioned by Congress.⁹² The statute requires the Commission to develop a methodology to compensate the pole owner for its actual costs associated with the amount of space used by an attacher.⁹³ Congressional intent to rely on existing regulatory accounts and avoid a prolonged rate making process is realized in the Commission's regulations.⁹⁴

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

⁹⁰The U. S. Supreme Court held all that is required is that a "reasonable, certain and adequate provision for obtaining compensation" exist at the time of the taking, stating: "[i]f the government has provided an adequate process for obtaining compensation, and if the resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985), quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n.21 (1984).

⁹¹*Cf.* § 224(d)(1) and § 224(e)(1).

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

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

⁹⁴*1977 Senate Report* at 20.

⁹⁵ 187 F.3d 1324 (11th Cir. 1999).

⁹⁶ 208 F.3d 1263 (11th Cir. 2000).

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

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

⁹⁹ 488 U.S. 299 (1989).

landmark case of [*Hope Natural Gas*¹⁰⁰], this Court . . . held that the 'fair value rule' is not the only constitutionally acceptable method of fixing utility rates. In [*Hope Natural Gas*] we ruled that historical cost was a valid basis on which to calculate utility compensation."¹⁰¹

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

20. In the Universal Service Order¹⁰³ and Local Competition Order,¹⁰⁴ the Commission reasonably and in detail explained that, in connection with universal service requirements and interconnection agreements, ratemaking on the basis of forward-looking economic cost would best effectuate the new competitive objectives of the 1996 Act. These objectives were to stimulate direct competition in local telecommunications markets, to ensure the efficient use of existing telecommunications network facilities, and to encourage new entrants to make economically rational decisions about whether or how to enter a local telecommunications market.¹⁰⁵ The Commission found the use of a forward-looking cost methodology particularly important in this context because we determined that a firm compares forward-looking costs with existing market prices, in making decisions about entry, expansion, and price.¹⁰⁶

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

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

¹⁰¹ *Duquesne Light* at 310.

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

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

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

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

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

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

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

22. Since 1978, the Commission has applied an embedded cost methodology, which has been upheld by the United States Supreme Court.¹¹¹ The Commission's continued use of a historical cost methodology in the pole attachment context is consistent with Congressional expectations. Specifically, while the Commission's pole attachment formula has been in place since 1978, Congress did not directly or by implication instruct the Commission to deviate from the use of historical costs when it amended the Pole Attachment Act in 1996.¹¹² By comparison, the local competition provisions of the Telecommunications Act of 1996 contemplated some degree of departure by the Commission from its past practice of setting rates on the basis of rate based/rate-of-return regulation.¹¹³ Specifically, section 252(d)(1)(A)(i) requires that rates be based on the "cost" of providing the interconnection or network element "determined without reference to a rate-of-return or rate-based proceeding."¹¹⁴

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

¹⁰⁸ *Id.*

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

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

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

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

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

¹¹⁴ 47 U.S.C. § 252(d)(1)(A)(i).

¹¹⁵ We recognize that increasing convergence of services and electric utilities' entry into telecommunications may
(...continued)

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

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

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change this situation in the future.

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

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

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

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

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

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

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

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

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

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

¹²⁴ *Id.*

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

2. When Net Pole Investment is Zero or Negative

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

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

¹²⁶1977 Senate Report at 21.

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

¹²⁸*Id.* at 20.

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

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

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

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

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

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

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

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

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

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

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

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

continued use of net figures in the formulas unless the parties agree otherwise, with the following limited exception.

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

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

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

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

32. In the *Fee Order*, we affirmed the calculation of net cost of a bare pole as total investment in poles less accumulated depreciation¹³⁶ for poles and less accumulated deferred income taxes.¹³⁷ We also affirmed our adjustment to a utility's net pole investment of 15% for

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

¹³⁷ *Fee Order* at ¶¶ 34-35 (LECs), ¶¶ 41-42 (electric utilities); see also *Pole Attachment Order*, 2 FCC Rcd 4287, (...continued)

electric utilities and 5% for LECs to eliminate the investment in crossarms and other non-pole related items.¹³⁸ In the *Fee Order*, we attempted to adjust the formula for application in situations that involve negative net pole investment by eliminating the cause of the negative results. We concluded that the accumulated depreciation attributable to removal costs should be removed from the total accumulated depreciation when calculating net pole investment. We redefined net pole investment in those cases involving negative net pole investment as follows:

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

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

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

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at ¶¶ 10-19 & Appendix B.

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

¹³⁹ TxCTA *Fee Order* petition at 1; USTA *Fee Order* petition at 6-9.

¹⁴⁰ USTA *Fee Order* petition at 7.

¹⁴¹ *Id.*; see also Verizon *Fee Order* recon. comments at 3.

¹⁴² USTA *Fee Order* petition at 6-9.

under the current formula.¹⁴³ Verizon supports USTA's alternative method for estimating the amount of removal costs when calculating net pole investment.¹⁴⁴

34. NCTA asserts USTA's solution would not effectuate the Commission's intention to "unbundle accumulated depreciation so that the amounts already recovered through advance expensing of anticipated net salvage would be removed."¹⁴⁵ According to NCTA, the negative net salvage associated with additions to the depreciation reserve varies substantially over time and necessary records do not appear to be publicly available.¹⁴⁶

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

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

The FCC should allow LECs to identify the portion of accumulated depreciation that is 'attributable to poles' by subtracting the 'future net salvage' component from the pole depreciation rate. For example, if the depreciation rate for poles is 7 percent, and 3 percent represents future net salvage, the portion 'attributable to poles' would be 4 percent. The LEC would then calculate net pole investment by subtracting 4/7ths of the balance in the Accumulated Depreciation Account 3100 (Poles) from Gross Pole Investment in Account 2411.¹⁵⁰

¹⁴³ TxCTA *Fee Order* petition at 1.

¹⁴⁴ Verizon *Fee Order* recon. comments at 3.

¹⁴⁵ NCTA *Fee Order* recon. reply at 2-3.

¹⁴⁶ *Id.*

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

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

¹⁴⁹ USTA *Fee Order* petition at 6-9.

¹⁵⁰ *Id.*

37. This approach raises concern because it suggests that only the current relative relationship between gross pole investment and future net salvage value should be considered as a basis for the proration necessary to calculate the required data. This overlooks the dramatic change in the relative relationship between gross pole investment and future net salvage value over the period for which depreciation adjustments are needed; because future net salvage value now comprises a far greater percentage of gross pole investment than in the past, an adjustment on this basis would be overstated. The same would be true of any corresponding adjustment to deferred income taxes. Therefore, on this basis, we disagree with USTA's claim that this approach provides a reasonable estimate of the amount of removal costs that should be removed from the formula.¹⁵¹

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

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

40. With the exception of the maintenance component, the expense accounts upon which the pole attachment rates rely are not kept by type of plant. Because utilities cannot directly measure the amount of administrative expenses or taxes that are incurred because of poles, we must allocate administrative expenses and taxes to poles on some rational basis. In the Pole Attachment Order, we determined that allocation of expenses based on net pole investment was

¹⁵¹ See USTA *Fee Order* petition at 6-9.

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

reasonable. We continue to agree with the Pole Attachment Order that the appropriate figures to use in the normal situation are the net figures. However, in the unusual situations where net pole investment is zero or negative, we find application of the formula using gross figures, with the noted net adjustment to the return element, to be appropriate.

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

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

(A). Gross Plant (Poles) ¹⁵³	(G). Administrative Expenses (Total)
(B). Net Plant (Poles)	(H). Taxes (Total)
(C). Depreciation Rate (Poles)	(I). Gross Plant (Total)
(D). Maintenance Expense (Poles)	(J). Net Plant (Total)
(E). Quantity of Poles	(K). Usable Space Factor (.074)
(F). Authorized Rate of Return	(L). Bare Pole Factor (.85 or .95)

Maintenance Element = Maintenance Expense (Poles) ÷ Gross Plant (Poles)
= (D) ÷ (A)

Depreciation Element = Depreciation Rate (Poles)
= (C)

Return Element = Rate of Return x Net Plant (Poles) ÷ Gross Plant (Poles)
= [(F) x (B)] ÷ (A)

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

Administrative Element	= Administrative Expenses (Total) ÷ Gross Plant (Total) = (G) ÷ (I)
Tax Element	= Taxes (Total) ÷ Gross Plant (Total) = (H) ÷ (I)
Total Carrying Charge	= Sum of Maint., Depr., Ret. (-), Admin. and Tax Elements
Max Rate	= Space Factor x Bare Pole Factor x Gross Plant (Poles) x Total Carrying Charges ÷ Quantity of Poles = [(K) x (L) x (A) x Total Carrying Charges] ÷ (E)

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

3. Case by Case Applications

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

44. In the *Telecom Order*, we stated that the record was not sufficient to enable us to adopt detailed standards that would govern all of these situations.¹⁵⁶ We believe our basic rate methodology is adaptable to attachments that fit these categories.¹⁵⁷ A complaint involving a dispute about these attachments would be treated as any other pole attachment complaint.¹⁵⁸ In the *Telecom Order*¹⁵⁹ and the *Local Competition Order*,¹⁶⁰ we recognized guiding principles based on the Pole Attachment Act to be used in determining rates for pole attachments, including attachments to rights-of-way, wireless attachments and transmission facilities attachments.

¹⁵⁴Teligent *Telecom Order* petition at 7-9.

¹⁵⁵MCI *Telecom Order* petition at 24-25.

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

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

¹⁵⁸47 C.F.R. § 1.1401-1.1418.

¹⁵⁹*See generally*, the *Telecom Order*.

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

Guiding principles include the congressionally mandated methodology,¹⁶¹ preference for publicly available records when available,¹⁶² and an acceptable range of just and reasonable rates.¹⁶³ We stated that we believed it prudent to gain experience through case-by-case adjudication of disputes to determine whether additional "guiding principles" or presumptions were necessary or appropriate for non-traditional situations.¹⁶⁴ We concluded that complaints will be considered on a case by case basis.¹⁶⁵

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

C. THE SPACE FACTOR

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

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

In order to facilitate the negotiation of just and reasonable rates and the resolution of pole attachment complaints, we make use of rebuttable presumptions in the *Cable Formula*.¹⁶⁹ In the

¹⁶¹47 U.S.C. §224(d),(e).

¹⁶²1977 *Senate Report* at 19-21.

¹⁶³*Pole Attachment Order*, 2 FCC Rcd 4387 (1978).

¹⁶⁴*Telecom Order* at ¶ 121 n.390

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

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

¹⁶⁷47 C.F.R. §§ 1.1401-1.1418.

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

¹⁶⁹To avoid a pole by pole rate calculation, the Commission adopted rebuttable presumptions such as an average (...continued)

Fee Order, we reviewed the continued applicability of various factors and elements within the *Cable Formula*, including certain presumptions used to determine the total usable space or capacity occupied by a pole attachment.¹⁷⁰

47. We first discuss the rebuttable presumption of the amount of space occupied by the attachment as a percentage of the total usable space on the pole. The *1977 Senate Report* indicated a Congressional intent that cable system pole attachments be responsible for no more than 12 inches of the usable space on a pole, including actual space occupied plus clearance space.¹⁷¹ The Commission established a rebuttable presumption of one foot as the amount of space a cable television attachment occupies when calculating a maximum rate under an interim formula.¹⁷² We subsequently refined our methodology for determining the amount of usable space and retained the one foot presumption in the *Cable Formula*.¹⁷³ The same presumption also applies to telecommunications service providers.

48. The presumptions used in the *Cable Formula* have been repeatedly affirmed since the enactment of the Pole Attachment Act.¹⁷⁴ We define total usable space as the space on the utility pole above the minimum grade level that is usable for the attachment of wires, cables, and related equipment.¹⁷⁵ In the *Fee Order*, we affirmed the use of various presumptions that lead to 13.5 feet as the presumptive average usable space on a pole. The *Cable Formula* uses a 37.5 foot presumptive pole height, an 18 foot average minimum ground clearance, allocation of the 40-inch safety space to usable space, and the inclusion of poles of 30 feet or less when calculating the costs of a bare pole.¹⁷⁶ No persuasive evidence or arguments have been presented which challenge our long-standing presumptions resulting in 13.5 feet as the presumptive usable space.

(...continued from previous page)

pole height of 37.5 feet, and an average of 13.5 feet of usable space on a pole. See *Second Report and Order*, 72 FCC 2d at 69-72; see also, *Telecom Order*, 13 FCC Rcd 6777 (1998).

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

¹⁷¹*1997 Senate Report* at 20.

¹⁷²*Second Report and Order*, 72 FCC 2d at 69-70.

¹⁷³*Second Report and Order*, 72 FCC 2d at 69-70; see also *Petition to Adopt Rules Concerning Usable Space on Utility Poles*, FCC 84-325 (rel. July 25, 1984) ("*Usable Space Order*") at ¶ 10. This one-foot presumption is affirmed in the *Fee Order* at ¶¶ 18-19.

¹⁷⁴*First Report and Order*, 72 FCC 2d 59; *Second Report and Order*, 77 FCC 2d 187, 191-193; *Cable Information Services, Inc. v. Appalachian Power Co.*, 81 FCC 2d 383 (1980); *Television Cable Service, Inc. v. Monongahela Power Co.*, 88 FCC 2d 56 (D.C. Cir. 1981).

¹⁷⁵See 72 FCC 2d at 69; 47 C.F.R. § 1.1402(c).

¹⁷⁶*Fee Order* at ¶ 22 (safety space), ¶ 24 (minimum ground clearance), and ¶ 26 (30-foot poles); see *Fee Order Notice* at ¶¶ 18-20.

Application of these presumptions results in 7.4% as the percentage of usable space occupied by a pole attachment.¹⁷⁷

49. In the *Telecom Order*, we found that the one foot presumption of space occupied should continue to apply where an attaching entity has overlashed¹⁷⁸ its own pole attachments.¹⁷⁹ We also determined that facilities overlashed by third parties onto existing pole attachments are presumed to share the presumptive one foot of usable space of the host attachment.¹⁸⁰ We declined to adopt procedures to allocate the cost of usable space between a third party overlasher and the host attaching entity, in part, because the benefit of third party overlashing as an expeditious means for entry into the market would be undermined by such procedures.¹⁸¹ In their filings, the parties raise the following specific issues relating to the rebuttable presumptions concerning the percentage of space occupied.

1. Average Pole Height

50. Some *Fee Order* petitioners continue to urge that we exclude 30-foot poles from the average pole height calculation as well as the bare pole calculation.¹⁸² The record in this proceeding confirms the prevalent use of 30-foot poles and reflects that exclusion of such poles from the *Cable Formula* calculations could distort the resulting rate by excluding a significant portion of local exchange carrier ("LEC") utility plant investment from the rate calculation.¹⁸³ We affirm our position that a distorted inventory of poles would be reflected if utilities were allowed to "opt out" or exclude their poles of 30 feet or less when calculating their pole attachment rates.¹⁸⁴

2. Safety Space

¹⁷⁷The ratio of space occupied (presumptive 1 foot) over usable space (presumptive 13.5 feet) results in a factor of 0.074 for use in calculations of the *Cable Formula*.

¹⁷⁸Overlashing occurs when an attacher physically ties additional cables to cables already attached to a pole.

¹⁷⁹*Telecom Order* at ¶ 92.

¹⁸⁰*Telecom Order* at ¶ 92. We noted that we deferred decision to the *Fee Order* Notice proceeding on the issue of the effect any increased burden, such as wind and weight loading, may have on the rate the utility pole owner may charge the host attacher. In the *Fee Order*, we declared that weight and wind loading may be a consideration in the make-ready plans and expenses, for safety, reliability and engineering purposes, but not a consideration in calculating the recurring rate. *Fee Order* at ¶¶ 29-30.

¹⁸¹See *Telecom Order* at ¶ 94.

¹⁸²See, e.g., Southern Co. *Fee Order* petition at 14. But see, WorldCom *Fee Order* recon. opposition at 9.

¹⁸³See, e.g., GTE *Fee Order* reply at 13; NCTA *Fee Order* comments at 12-16, *Fee Order* reply at 21-22; Ohio Edison *Fee Order* comments at 26; SBC *Fee Order* comments at 38-39; TCI *Fee Order* comments at 13; Time Warner *Fee Order* comments at 11-13, 18-19; U S West *Fee Order* comments at 4.

¹⁸⁴*Fee Order* at ¶ 26.

51. UTC/EEI continues to urge that we consider as unusable the 40-inch safety space that exists to minimize the likelihood of physical contact between employees working on cable television or telephone lines and the potentially lethal voltage carried by the electric lines, as well as to prevent electrical contact between such cables.¹⁸⁵ No new arguments or evidence was presented in the filings and based on our previous reasoning,¹⁸⁶ that the space is usable and used by the electric utility, we reject arguments to reduce the presumptive usable space of 13.5 feet by 40 inches.

¹⁸⁵UTC/EEI *Fee Order* petition at 9-10. *See, Second Report and Order*, 72 FCC 2d 59, 69-70 (*citing* National Electrical Safety Code® at Appendix C, at 163, Table 235-5 (1977 ed.) at n. 25.

¹⁸⁶ *Fee Order* at ¶ 21-22.

3. Minimum Ground Clearance

52. Some *Fee Order* petitioners continue to urge that we depart from our well-established presumption of an average minimum ground clearance of 18 feet.¹⁸⁷ Ground clearance requirements in the National Electric Safety Code ("NESC"),¹⁸⁸ include an average amount of sag for cable lines. WorldCom disagrees with petitioners' claims that the average line sag should decrease the amount of usable space on a pole.¹⁸⁹ No new evidence or arguments were provided that would persuade us to abandon our long-standing reliance on the presumptive average minimum ground clearance based on NESC standards.¹⁹⁰

4. Telecom Formula Space Factor

a. Counting Attaching Entities

53. Under the *Cable Formula*, the costs of unusable space are allocated based on the portion of usable space an attachment occupies, the space factor. Our formula is stated as follows:

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

54. Using the presumptions in the *Cable Formula*, this results in a space factor of 1/13.5 or .074, multiplied by the net cost of a bare pole and the carrying charge rate:

$$\text{Maximum Rate} = .074 \times \text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate}$$

55. In the *Telecom Order*,¹⁹¹ we adopted a formula for the purpose of allocating costs of unusable space. Under the *Telecom Formula*, pursuant to the specific requirements of the Pole Attachment Act, the costs of unusable space are separated from the costs of usable space and are allocated based on the number of attaching entities. The costs of usable space are still calculated

¹⁸⁷ See, e.g., American Electric *Fee Order* petition at 11-12; UTC/EEI *Fee Order* petition at 9-10.

¹⁸⁸The National Electrical Safety Code® ("NESC"), published by the Institute of Electrical and Electronics Engineers, Inc. ("IEEE") adopts certain standards that cover basic provisions for safeguarding persons from hazards arising from the installation, operation, or maintenance of (1) conductors and equipment in electric supply stations, and (2) overhead and underground electric supply and communication lines. *NESC*, 1997 Edition (published August 1, 1996) Abstract and § 1, p. 1. The *NESC* is a voluntary standard; however, some editions and some parts have been adopted, with or without changes, by some state and local jurisdictional authorities. *NESC*, p. vi.

¹⁸⁹ WorldCom *Fee Order* recon. opposition at 7-8.

¹⁹⁰ *Fee Order* at ¶ 24.

¹⁹¹ See *Telecom Order* at ¶ 43-44.

based on the portion of usable space occupied. In the *Telecom Order*,¹⁹² we adopted separate formulas for determining the unusable space factor maximum rate and the usable space factor maximum rate which, when added together, calculate a maximum rate under section 224(e) of the Pole Attachment Act.¹⁹³ We now simplify the two formulas into one combined formula as follows:¹⁹⁴

$$\left| \begin{array}{l} \text{Maximum} \\ \text{Rate} \end{array} \right. = \left[\frac{\left(\frac{\text{Space Occupied}}{\text{Pole Height}} \right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right] \times \text{Net Cost of a Bare Pole} \times \left. \begin{array}{l} \text{Carrying} \\ \text{Charge} \\ \text{Rate} \end{array} \right|$$

56. Using our presumptions in the *Telecom Formula*, this calculation can be stated as:

$$\left| \begin{array}{l} \text{Maximum} \\ \text{Rate} \end{array} \right. = \left[\frac{(1) + \left(\frac{16}{\text{No. of Attaching Entities}} \right)}{37.5} \right] \times \text{Net Cost of a Bare Pole} \times \left. \begin{array}{l} \text{Carrying} \\ \text{Charge} \\ \text{Rate} \end{array} \right|$$

which results in a combined (usable and unusable) space factor of between .24 for 2 attachers and .098 for 6 attachers for telecommunications attachers, as opposed to .074 for cable attachers. The difference between the two rate calculations is then phased in over five years, pursuant to the provisions of the Pole Attachment Act.

57. In the *Telecom Order*, we recognized that the number of attaching entities is a significant factor in determining the maximum rate. We concluded that certain entities should be counted as attaching entities pursuant to the Pole Attachment Act.¹⁹⁵ We now reconsider and clarify our methodology for counting the number of attaching entities used in the *Telecom Formula*. In the *Telecom Order*, we stated that for the purposes of allocating costs of unusable space, parties to a pole attachment agreement should count as separate entities, in addition to telecommunications carriers and cable operators, any incumbent or competitive LEC,¹⁹⁶ all

¹⁹²*Telecom Order* at ¶¶ 50-51.

¹⁹³*Telecom Order* at ¶ 43 (Unusable Space Factor) & ¶¶ 80-82 (Usable Space Factor); see also *Telecom Order* ¶ 102.

¹⁹⁴ Because we are now using a combined formula for calculating the *Telecom Formula* rate, we will no longer refer to the separate rate calculations for usable and unusable space as space factors. Instead, the term space factor refers to the percentage of space occupied in either formula that is multiplied by the net cost of a bare pole and the carrying charges to determine the maximum rate.

¹⁹⁵*Telecom Order* at ¶¶ 43-54.

¹⁹⁶See *Telecom Order* at ¶ 46.

governmental agencies that provide cable or telecommunications service¹⁹⁷ and any electric or other utility providing telecommunications services, with a physical attachment to the pole.¹⁹⁸ We also included third party overlashers as separate entities.¹⁹⁹

58. UTC/EEI's *Telecom Order* petition argues that we should consider only attaching telecommunications carriers as entities in the *Telecom Formula*.²⁰⁰ In contrast, ICG asks us to clarify that not only electric utilities but all commercial users of a pole, duct, conduit or right-of-way are attaching entities for purposes of the apportionment of unusable space in the *Telecom Formula*.²⁰¹ We clarify our position that all utilities should be counted as attaching entities.²⁰² In addition, we further reconsider and clarify that any entity with a physical attachment to the pole should be counted as an attaching entity. Thus, in the case of government attachments, we find that any physical attachment by a government entity qualifies the government attacher as an attaching entity. The statute does not provide an exclusion for non-telecommunications attachments. We will continue to exclude a government's temporary or seasonal attachments from this category. Because of the temporary nature of these attachments, the burden of identifying and counting such attachments outweighs any increase in accuracy that might ensue from including them. We also reconsider our inclusion of third party overlashers as separate entities and conclude that they are not to be counted as separate attaching entities. This is consistent with our conclusion that an overlashing entity does not occupy additional space on a pole. An overlashed cable is still only attached to the pole by the original single attachment.

59. The term "attaching entities" includes, without limitation, and consistent with the Pole Attachment Act, any telecommunications carrier, incumbent or other local exchange carrier, cable operator, government agency, and any electric or other utility, whether or not the utility provides a telecommunications service to the public, as well as any other entity with a physical attachment to the pole.²⁰³ This is consistent with the language of the statute and with Congress' intent to count all attaching entities when allocating the costs of unusable space.²⁰⁴ We believe that if Congress intended that only telecommunications carriers' with attachments on a pole, or in a

¹⁹⁷*Telecom Order* at ¶ 54.

¹⁹⁸The statute uses the term "entities" not "telecommunications carriers" when indicating how the costs of unusable space should be allocated. 47 U.S.C. § 224(e)(2).

¹⁹⁹*Telecom Order* at ¶ 69.

²⁰⁰UTC/EEI *Telecom Order* petition at 16-21. Cf. ICG *Telecom Order* petition at 7-8.

²⁰¹ICG *Telecom Order* petition at 8.

²⁰²See *Telecom Order* at ¶¶ 46-47, 50-51, and 54.

²⁰³See, e.g., ICG *Telecom Order* petition at 7-8; NCTA *Telecom Order* petition at 5-8; see also, AT&T *Telecom Order* comments at 2-4; Ameritech *Telecom Order* comments at 2-3; MCI *Telecom Order* comments at 4-5; Joint Cable Parties *Telecom Order* reply at 3-5; Sprint *Telecom Order* comments at 2.

²⁰⁴See *Conf. Rpt.* at 220 (the Commission shall . . . recognize that the entire pole, duct, conduit, or right-of-way other than the usable space is of equal benefit to all entities attaching to the pole and therefore apportion the cost of the space other than the usable space equally among all such attachments).

conduit, duct or right-of-way, should be counted as attaching entities for the purpose of apportioning costs of unusable space pursuant to section 224(e)(2), Congress would have used the specific term "telecommunications carrier" or "provider of telecommunications services" instead of the more general and more inclusive term "entity" and "entities."²⁰⁵

60. We find arguments that the pole owner must absorb unfairly the costs of government attachments to be unpersuasive. As we stated in the *Telecom Order*, because the government attacher and the pole owner have a relationship that benefits both parties, we are not persuaded that the pole owner is unfairly absorbing the cost of government attachments to the extent the pole owner's franchise so provides. Moreover, many attachers pay a separate fee to governments for the ability to attach to poles in public right of ways in addition to the pole rental fee. We also find unpersuasive arguments that the non-telecommunications utility pole owner should not be included as an attaching entity. We find no reasonable distinction to be drawn when comparing telecommunications utility pole owners and non-telecommunications utility pole owners that would warrant different treatment in counting attaching entities. We do not believe that Congress intended for a single attacher, protected by the Pole Attachment Act, that uses one foot of space on a pole, to pay a higher (double) portion of the unusable space cost than the pole owner that controls, and uses a good portion of, the rest of the usable space. Therefore, we include the utility pole owner in the count, resulting in a minimum of two attaching entities being counted.²⁰⁶

61. Upon reconsideration, we find that third party overlashers should not be counted as separate entities because they are not occupying separately segregated pole space. This conclusion is consistent with our finding that overlashing does not constitute a separate attachment and our conclusion that all entities with a physical attachment should be counted. Our review of the Pole Attachment Act leads us to reconsider our previous decision and conclude that the term "attaching entity" as it is used in the Pole Attachment Act is not limited to entities with attachments that meet the definition of pole attachment as it is used in the Pole Attachment Act. Rather, we conclude that any entity with a physical attachment to the pole should be counted. Our rule for counting attaching entities will allow parties to pole attachment agreements to calculate an average number of attaching entities for use in the *Telecom Formula*.

b. Average Number of Attaching Entities

62. In the *Telecom Order*, we determined that the most efficient and expeditious manner to identify an average number of attaching entities, was for each utility to develop its own average number of attaching entities.²⁰⁷ We concluded that the alternative, the Commission undertaking a

²⁰⁵ 47 U.S.C. § 224(e)(2).

²⁰⁶ An attaching entity with its own separate attachment, that is an affiliate, subsidiary or associate of another attaching entity with its own separate attachment, is counted as a separate attaching entity unless it is a wholly-owned subsidiary of the other attaching entity.

²⁰⁷ *Telecom Order* at ¶¶ 77-79.

survey, would be too cumbersome and would not necessarily enhance accuracy.²⁰⁸ Our decision that the utility would establish an average number of attaching entities was premised on the belief that utilities not only possess information with which to develop an average number of attaching entities, but also have both the expertise to structure the development of an average and the information reflecting where services are being provided. In an effort to have the averages reflect the different characteristics of geographic areas' varying incidents of attachments, we required utilities to establish averages based on rural, urban, or urbanized service areas as defined by the Bureau of Census, United States Department of Commerce ("Bureau of Census").²⁰⁹ The Bureau of Census, identifies all territory, population and housing as rural (population under 2,500 and *not* in an urbanized area), urban (population over 2,500), or urbanized (a central city plus the closely-settled urban fringe that together have a minimum population of 50,000).²¹⁰ We adopted these categories because we believed they would equitably reflect the different levels of attachment usage based on characteristics of the locations.²¹¹

63. In the *Telecom Order*, we established the right of attaching entities to challenge the average number of attaching entities set by the utilities, in the same manner as challenges presently are made to other presumptions used in the *Cable Formula*.²¹² For example, the challenging party will identify and calculate the number of attaching entities on the poles and submit to the utility what it believes to be an appropriate average. Where the number of poles is too large, and/or complete inspection impractical, we found that a statistically sound survey could be substituted.²¹³ The utility will be afforded an opportunity to justify its averages and where the utility's average is successfully challenged, the resulting figure will be deemed to be the number of attaching entities.²¹⁴

²⁰⁸ *Id.* at ¶ 77.

²⁰⁹ *Id.*

²¹⁰ *A Guide to State and Local Census Geography*, U.S. Census Bureau, (issued June, 1993), U.S. Department of Commerce, Economics and Statistics Administration, at 4-5. We note that an urbanized area may contain one or more urban areas. See also, *SBC Telecom Order* petition at 10-16, *SBC Telecom Order Ex Parte Presentations* dated September 24, 1998 and December 16, 1998.

²¹¹ We also stated that a utility shall, upon request, provide all attaching entities and all entities seeking access the methodology and information by which a utility's presumption was determined. We expect a good faith effort by a utility in establishing its presumption and updating it when a change is necessitated. For example, when a new attaching entity has a substantial impact on the number of attaching entities, the utility's presumptive average should be modified. This method should be consistent with present practice, as we understand most pole attachment agreements "provide for periodic field surveys, generally once every three to seven years, to determine which entities have attached what facilities to whose poles." *Telecom Order* at ¶ 78 (citing *ICG Telecom Order Comments* at 37).

²¹² See, e.g., *Pole Attachment Order*, 2 FCC Rcd 4387 (1987).

²¹³ *Telecom Order* at ¶ 79. See, e.g., *Capital Cities Cable, Inc. v. Mountain States Telephone & Telegraph Co.*, 56 RR 2d 393 at ¶ 22 (1984) (establishing methodology for developing a statistically sound survey).

²¹⁴ *Telecom Order* at ¶ 79.

i. Geographic Areas

64. *Telecom Order* petitioners urge that we reconsider the geographic areas used by utilities to determine an average number of attachers for use in calculations of the formulas for pole attachment rates.²¹⁵ Upon presentation of additional information and consideration of the record in this proceeding, we modify the geographic areas on which a utility will base its average numbers of attaching entities.²¹⁶ Confusion has been demonstrated on the part of utilities attempting to implement the *Telecom Order*, because the term "urban" comprises all territory, population and housing units in places of 2,500 or more people.²¹⁷ An urbanized area may be contained within an urban area, and vice-versa, and it has been demonstrated that utilities do not have the ability to determine what portion of their service areas fall within a rural, urban or urbanized area without unreasonable costs and effort.²¹⁸ Further confusion has been demonstrated about the three categories of areas for which averages should be prepared because individual utilities may have distinct service areas, specific to a state, their company or industry, that complicate the development of averages as outlined in the *Telecom Order*. These distinct service areas may not correspond to the Bureau of Census categories.²¹⁹ Some utilities assert it will not be feasible to determine averages in any cost-efficient manner,²²⁰ so we will provide default averages for urbanized and non-urbanized areas, for use in the absence of utility developed averages.

65. The purpose of having averages based on geographic areas was to have pole attachment rates reflect an appropriate average number of pole attachments in a particular geographic area as of February 2001, when utilities begin calculating rates for telecommunications carriers.²²¹ It was expected that densely populated areas would have more attachments, in

²¹⁵SBC *Telecom Order* petition at 10-16; USTA *Telecom Order* petition at 10-11; UTC/EEI *Telecom Order* petition at 22-23.

²¹⁶See, e.g., UTC/EEI *Telecom Order* petition at 22, *Telecom Order* comments at 18-19, *Telecom Order* reply at 11-12; see also, SBC *Telecom Order* petition at 10-16. In its *ex parte* presentations, SBC suggested in the alternative to statewide presumptions, utilities could develop presumptions by service area or by rural and urban, of which the urban would include urban and urbanized. SBC *Telecom Order Ex Parte Presentations* dated September 24, 1998 and December 16, 1998.

²¹⁷See, e.g., UTC/EEI *Telecom Order* petition at 22; SBC *Telecom Order* petition at 14-15, SBC *Telecom Order Ex Parte Presentations* dated September 24, 1998 and December 16, 1998; USTA *Telecom Order* petition at 10-11; see also, e.g., NCTA *Telecom Order* comments at 11-12;

²¹⁸See UTC/EEI *Telecom Order* comments at 18-19; SBC *Telecom Order Ex Parte Presentations* dated September 24, 1998 and December 16, 1998; see also USTA *Telecom Order Written Ex Parte*, dated November 5, 1998.

²¹⁹See, e.g., SBC *Telecom Order Ex Parte Presentations* dated September 24, 1998 and December 16, 1998 (company's service areas rarely correspond to geographic designations of Bureau of Census).

²²⁰See, e.g., SBC *Telecom Order Ex Parte Presentations* dated September 24, 1998 and December 16, 1998; USTA *Telecom Order Written Ex Parte*, dated November 5, 1998.

²²¹*Telecom Order* at ¶¶ 43-44 (Unusable Space Factor includes the use of an average number of attaching entities).

response to various communities' diversity of communications and other services.²²² For instance, utility poles in a densely built out urbanized area would be expected to have multiple attachments of governmental entities that may not exist in a rural area without street or pedestrian directional lighting, and multiple service providers. It has been suggested by SBC²²³ and USTA²²⁴ that the development of an average number of attaching entities by distinct service area within a state, designated as urbanized or non-urbanized, reflecting the demographics of the particular service area, would be an efficient, cost-effective exercise resulting in averages for areas that share similar characteristics relating to pole attachments.²²⁵ A population of 50,000 or greater (urbanized area) is a reasonable density in which to expect greater penetration of service providers and attachments. The record shows that using urbanized and non-urbanized areas allows a reasonably effective classification of poles based upon the actual characteristics of pole inventory of different utilities.²²⁶

66. We will require utility pole owners to calculate an average number of attaching entities by service area.²²⁷ Where a utility territory or service area in which an attaching entity seeks to install pole attachments can be identified as either urbanized or non-urbanized, the default averages, or the actual averages if developed by the utility, for that area should be used. However, where a utility territory or service area in which an attaching entity seeks to install pole attachments cannot be identified as either urbanized or non-urbanized because it crosses into both an urbanized and non-urbanized area, and the utility is unable to identify a separate service area as non-urbanized, the default averages, or the actual averages if developed by the utility, for an urbanized area should be used. If any part of a specific service area, as identified by the utility, is urbanized, then all that service area would be considered urbanized for pole attachment purposes. This will facilitate an equitable calculation of pole attachment rates for telecommunications carriers. Utilities that have multiple service areas in a state would classify each service area, as either urbanized or non-urbanized depending on whether any part of the service area is within an area designated by the Bureau of Census as urbanized.²²⁸ Utilities advise this would be equitable

²²²See, e.g., NCTA *Telecom Order* comments at 20-22; Comcast *Telecom Order* comments at 8-10.

²²³SBC *Telecom Order* petition at 10-15, SBC *Telecom Order Ex Parte Presentations* dated September 24, 1998 and December 16, 1998.

²²⁴USTA *Telecom Order Written Ex Parte Presentation* dated November 5, 1998.

²²⁵See *Telecom Order Notice* at ¶ 26; *Telecom Order* at ¶¶ 77-78.

²²⁶See, e.g., NCTA *Telecom Order* comments at 20-22; SBC *Telecom Order* petition at 10-15, SBC *Telecom Order Ex Parte Presentations* dated September 24, 1998 and December 16, 1998; USTA *Telecom Order Written Ex Parte Presentation* dated November 5, 1998; see also UTC/EEI *Telecom Order* reply at 9-10.

²²⁷The service area must be representative of the area for which pole attachment rates are being set.

²²⁸See, e.g., SBC *Telecom Order Ex Parte Presentations* dated September 24, 1998 and December 16, 1998; USTA *Telecom Order Written Ex Parte Presentation* dated November 5, 1998. Cf. NCTA *Telecom Order* comments at 20-22.

because in a service area in which any part is considered urbanized, the development potential for the entire area to become urbanized is great.²²⁹

67. We emphasize our preference that each utility use the data it has available in its corporate and regulatory records, and not go to extraordinary lengths to be precise when reasonable estimates will generally provide an equitable process.²³⁰ The utility shall make available its data, information and methodology upon which the averages were developed, unless the default averages are used.²³¹ We clarify that when a distinct area defined by the Bureau of Census as urban falls within an urbanized area, a separate average number of attaching entities for that urban area is not required. The record demonstrates that in some states, and for some utilities, there may be no significant difference in the number of attaching entities for rural areas and for urban areas that are outside urbanized areas.²³² Therefore, we provide utilities the option of using our presumptive averages presented below, or developing averages for two areas: (1) urbanized (50,000 or higher population), and (2) non-urbanized (less than 50,000 population).²³³

68. When a utility exercises good faith in determining average numbers of attaching entities upon which to base the costs of providing unusable space, the burden of proof will be on an attaching entity to demonstrate the costs are being unjustly apportioned.²³⁴ In demonstrating its good faith, the utility must make its methodology and data publicly available to the attaching entity, upon request for information sufficient for an attaching entity to project its costs of attaching to that utility's infrastructure.²³⁵ The costs of conducting an exercise to determine average numbers of attaching entities shall not be directly passed on to the attaching entities as make-ready costs.²³⁶ Expenses relating to the exercise necessary to develop these averages will be shared ultimately by all attachers and the utility when, as a reasonable business expense incurred as part of doing business, the expense is reported to the utility's appropriate regulatory accounts and factored into the carrying charge rate of the *Cable Formula*. We do not believe that

²²⁹See, e.g., *SBC Telecom Order Ex Parte Presentations* dated September 24, 1998 and December 16, 1998.

²³⁰*1977 Senate Report* at 19-21.

²³¹*Telecom Order* at ¶¶ 78-79.

²³²See, e.g., *SBC Telecom Order Ex Parte Presentations* dated September 24, 1998 and December 16, 1998; *USTA Telecom Order Written Ex Parte Presentation* dated November 5, 1998. Cf. *NCTA Telecom Order* comments at 20-22.

²³³*Accord*, e.g., *Comcast Telecom Order* comments at 7-11; *NCTA Telecom Order* comments at 20-21.

²³⁴See, e.g., *Joint Cable Parties Telecom Order* reply at 9; *NCTA Telecom Order* comments at 11-12, *Telecom Order* reply at 6.

²³⁵*Telecom Order* at ¶¶ 78-79.

²³⁶See, e.g., *Joint Cable Parties Telecom Order* reply at 9; *NCTA Telecom Order* comments at 11-12, *Telecom Order* reply at 6. *But see*, e.g., *MCI Telecom Order* comments at 6-7; *UTC/EEI Telecom Order* petition at 22, *Telecom Order* comments at 18-19, *Telecom Order* reply at 11-12.

such expenses would be within the methodology prescribed by Congress for individual payment by each attaching entity for a pole attachment.²³⁷

²³⁷ See 47 U.S.C. § 224(b), (d-e).

ii. Presumptive Averages

69. In order to expedite the process of developing average numbers of attaching entities, and allow utilities to avert the expense of developing location specific averages,²³⁸ we provide two rebuttable presumptive averages for use in our *Telecom Formula*.²³⁹ This gives both small and large utilities the option of not conducting a potentially costly and burdensome exercise necessary to develop averages based on their company specific records. The adoption of presumptive averages should reduce cost and effort by all parties. In the *Telecom Order*,²⁴⁰ we declined to set default presumptions, even though various commenters suggested the development of a rebuttable presumption of at least three attachers was appropriate.²⁴¹ Comcast encouraged a presumptive average of six attaching entities based on our Common Carrier Bureau's Fiber Deployment Update - End of Year 1996 ("*Fiber Deployment Update*").²⁴² U S West indicated that having the Commission develop the presumptive average would serve efficiency, minimize complaints, and place the burden of rebuttal on the pole owner.²⁴³

70. In the *Telecom Order*, we did not establish presumptions, but said we believed the most efficient and expeditious manner to calculate a presumptive number of attaching entities would be for each utility to develop its own presumptive average number of attaching entities.²⁴⁴ We now reconsider that decision and set rebuttable presumptive average numbers of attaching entities for our two categories, urbanized and non-urbanized. We are now persuaded that utilities and attaching entities would benefit from our providing presumptive averages for their use. Our establishment of presumptive averages will expedite the process and allow utilities to avert the expense of developing location specific averages.²⁴⁵ As with all our presumptions, either party may rebut this presumption with a statistically valid survey or actual data.²⁴⁶

71. Based on the expanded record, we establish presumptive average numbers of attaching entities in a non-urbanized (less than 50,000 population) area to be three (3) attaching entities, based on information presented in the record and the expectation that on a pole or in a conduit,

²³⁸ See USTA *Telecom Order* petition at 6-7; see also, MCI *Telecom Order* comments at 6-7.

²³⁹ See ¶ 41 of this *Reconsideration Order*, above.

²⁴⁰ *Telecom Order* at ¶¶ 76-78.

²⁴¹ AT&T *Telecom Order* comments at 14; Comcast, *et al.*, *Telecom Order* comments at 8-10.

²⁴² Jonathan Kraushaar, Fiber Deployment Update - End of Year 1996 released by the Common Carrier Bureau of the Federal Communications Commission on August 29, 1997 ("*Fiber Deployment Update*"); see also Comcast, *et al.*, *Telecom Order* comments at 8-10.

²⁴³ U S West *Telecom Order* comments at 9 n.25.

²⁴⁴ *Telecom Order* at ¶ 77.

²⁴⁵ See, e.g., USTA *Telecom Order* petition at 6-7; MCI *Telecom Order* comments at 6-7.

²⁴⁶ See *Pole Attachment Order*, 2 FCC Rcd 4387 (1987) at ¶ 19 & see also n. 27.

for instance, there would be electric, telephone and cable attachers.²⁴⁷ It is estimated that cable systems now provide access to cable television services to over 97% of all households with a television.²⁴⁸ Electric power and telephone service is even more universal. The record supports a presumptive average of three attaching entities in non-urbanized areas.

72. In an urbanized area that is more densely populated (50,000 or higher population), more developed commercially than a non-urbanized area, and in which we expect both residential and business commercial competition to flourish, we set a presumptive average number of attaching entities at five (5) to reflect the inclusion of, but not limited to, the following possible attaching entities: electric, telephone, cable, competitive telecommunications service providers and governmental agencies.²⁴⁹ **Advanced telecommunications capability is being deployed throughout the country.**²⁵⁰ **As noted above, competitive services are increasing.**²⁵¹ The record supports a presumptive average number of five attachers in urbanized areas.

D. OVERLASHING

1. Space Occupied by Third Party Overlapping

73. Cable companies have, through overlapping, been able for decades to replace deteriorated cables or expand the capacity of existing communications facilities, by tying communication conductors to existing, supportive strands of cable on poles.²⁵² The 1996 Act was designed to accelerate rapid deployment of telecommunications and other services, and to increase competition among providers of these services.²⁵³ Overlapping existing cable reduces construction disruption and associated expense.²⁵⁴ Accordingly, in the *Telecom Order*, we

²⁴⁷See, e.g., Comcast *Telecom Order* comments at 8-10; NCTA *Telecom Order* comments at 20; see also, SBC *Telecom Order Ex Parte Presentations* dated September 24, 1998 and December 16, 1998.

²⁴⁸American Electric *Fee Order* comments at 8 (citing *Annual Assessment of Status of Competition in the Market for Delivery of Video Programming*, CS Dkt. 96-133 (rel'd Jan. 2, 1997) at ¶ 14.

²⁴⁹See, e.g., AT&T *Telecom Order* comments at 13; NCTA *Telecom Order* comments at ; Comcast *Telecom Order* comments at 7-11; Joint Cable Parties *Telecom Order* recon. comments in opposition at 3. See also, Seventh Annual Report on Competition in Video Markets, CS Docket No. 00-132), (rel'd January 8, 2001);

²⁵⁰See *Deployment of Advanced Telecommunications Capability: Second Report*, CC Docket No. 98-146, FCC 00-290 (rel'd August 2000) ("2000 Advanced Services Report").

²⁵¹Jonathan Kraushaar, Fiber Deployment Update - End of Year 1996 released by the Common Carrier Bureau of the Federal Communications Commission on August 29, 1997 ("*Fiber Deployment Update*"); see also Comcast, et al., comments at 8-10.

²⁵²*Telecom Order* at ¶ 59-62. See also, Comcast, et al., *Telecom Order* reply at 8 (cable operators have routinely overlapped for 30 years); NCTA *Telecom Order* comments at 5 (overlapping has been a critical component of cable industry's construction strategy for decades).

²⁵³See *Conf. Rpt.* at 124, Joint Explanatory Statement of the Committee of Conference.

²⁵⁴The Commission has recognized overlapping as a legitimate and desirable practice, especially because utility (...continued)

declared our continued approval of, and support for, third party overlashing, subject to the same safety, reliability, and engineering constraints that apply to overlashing one's own pole attachment.²⁵⁵

74. We determined that facilities overlashed by third parties are presumed to share the presumptive one foot of usable space occupied by the host attachment.²⁵⁶ We did not dictate how the utility, host attaching and third party attaching entities would relate to each other for compensation purposes.²⁵⁷ We did not require the host attaching entity or the third party overlasher to obtain the consent of the utility beyond the consent already acquired for the host attachment although the utility is entitled to notice of the overlashing. We stated that third party overlashing did not disadvantage the utility's ability to ensure the integrity of its poles.²⁵⁸

75. Some *Telecom Order* petitioners continue to urge that we impose additional regulation on third party overlashing.²⁵⁹ We decline to impose additional regulation and clarify several aspects of our position regarding third party overlashing.²⁶⁰ Allowing third party overlashing reduces construction disruption and associated expenses which would otherwise be incurred by third parties installing new poles and separate attachments.²⁶¹ We clarify that third party overlashing is subject to the same safety, reliability, and engineering constraints that apply to overlashing the host pole attachment.²⁶² We affirm our policy²⁶³ that neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment.²⁶⁴

(...continued from previous page)

poles are often regarded as essential facilities. *See Overlashing Public Notice* (1995); *see also, TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, 21429 (1997), *aff'd*, FCC 98-216 (Sept. 4, 1998).

²⁵⁵*Telecom Order* at ¶ 68; *see also* discussion at ¶¶ 59-64 of the *Telecom Order*.

²⁵⁶*Telecom Order* at ¶ 92.

²⁵⁷*Telecom Order* at ¶ 69.

²⁵⁸*Telecom Order* at ¶ 68.

²⁵⁹*See, e.g.*, MCI *Telecom Order* petition at 8-13; SBC *Telecom Order* petition at 7-8; USTA *Telecom Order* petition at 11-12; U S West *Telecom Order* petition at 2.

²⁶⁰*Telecom Order* at ¶ 68, referencing the Preamble to 1996 Act.

²⁶¹*See, e.g.*, BellSouth *Telecom Order* comments at 1-2; NCTA *Telecom Order* comments at 5-10.

²⁶²*Telecom Order* at ¶ 68.

²⁶³*See Local Competition Order*, 11 FCC Rcd 15499 (1996) at ¶¶ 1161-64; *Telecom Order* at ¶ 68.

²⁶⁴*See, e.g.*, U S West *Telecom Order* petition at 3-4; *see also*, Ameritech *Telecom Order* comments at 4-5; Bell Atlantic *Telecom Order* comments at 8; BellSouth *Telecom Order* comments at 1-2. *Cf. Local Competition Order*, 11 FCC Rcd 15499 at ¶¶ 1161-64; *Telecom Order* at ¶68.

2. What the Third Party Overlasher Pays

76. Some petitioners urge us to specify, or at least clarify, what the third party telecommunications carrier overlasher pays to the host attacher or the utility pole owner.²⁶⁵ We decline to attempt to regulate this relationship.²⁶⁶ However, if the third party overlasher is a telecommunications carrier, then the pole attachment will be considered to be used to provide telecommunications services for purposes of calculating the pole attachment rate. The maximum rate for that overlashed pole attachment would then be calculated using the *Telecom Formula* after February 8, 2001.²⁶⁷ In some instances, the host attaching entity will pay the utility for a telecommunications carrier pole attachment.²⁶⁸ We have stated that the third party overlasher is not separately liable to the utility for the usable space which the overlasher shares with the host attachment because there would be no additional usable space occupied. We expect and encourage the overlasher and host attaching entities to negotiate a just and reasonable rate of compensation between them for the overlasher, which will represent some sharing of the usable and unusable space costs.²⁶⁹ Until our intervention is necessary to facilitate pole attachments for these parties, we will rely on all parties to act in good faith to develop their own just and reasonable compensation.

3. Wind and Weight Load Factors

77. *Fee Order* petitioners continue to urge that we allow some factor for increased weight and wind load in cases of overlasher.²⁷⁰ We have reviewed Sections 24 through 26 of the NESC²⁷¹ that address loading and structural requirements in detail.²⁷² Based on our analysis and the record, we continue to believe that an attachment's "burden on the pole" relates to an assessment of need for make-ready changes to the pole structure, including pole change-out, to meet the strength requirements of the NESC. For example, if the addition of overlashed wires to an existing attachment causes an excessive weight to be added to the pole requiring additional support or causes the cable sag to increase to a point below safety standards, then the attacher must pay the make-ready charges to increase the height or strength of the pole. Make-ready costs

²⁶⁵MCI *Telecom Order* petition at 13; SBC *Telecom Order* petition at 7-8; USTA *Telecom Order* petition at 11-12; U S West *Telecom Order* petition at 3.

²⁶⁶See, e.g., U S West *Telecom Order* petition at 3-4. *But see*, MCI *Telecom Order* petition at 9; USTA *Telecom Order* petition at 11; *cf.* NCTA *Telecom Order* comments at 14.

²⁶⁷See *Telecom Order* at ¶ 69 (third party overlasher by a telecommunications carrier); ¶ 73 & ¶ 94 (discussion of dark fiber), ¶ 73.

²⁶⁸47 U.S.C. § 224(e).

²⁶⁹*Telecom Order* at ¶ 94. *Cf.* 47 U.S.C. § 224(d)(1) and 47 U.S.C. § 224(e)(3).

²⁷⁰American Electric, *Fee Order* petition at 9-11; UTC/EEI *Fee Order* petition at 9-10. *But see* WorldCom *Fee Order* recon. comments at 7.

²⁷¹National Electric Safety Code.

²⁷²NESC at 142-168, Sections 24-26.

are non-recurring costs for which the utility is directly compensated and as such are excluded from expenses used in the rate calculation.²⁷³ The statutory language prescribes that we allocate costs based on space occupied, not load capacity.²⁷⁴

78. *Fee Order* petitioners present no new or persuasive evidence that the "burden on the pole" due to weight and wind load is an additional factor for consideration in the determination of the amount of space occupied through which some rate increase would be calculated. We affirm our position that the costs of the physical attachments of an attaching entity are normally paid to the pole owner as a condition of attachment, addressing such factors as weight, wind load and safety space.²⁷⁵ Overlashing does not increase the amount of space actually occupied by the attachment.

4. Shared One-Foot Usable Space

79. In the *Telecom Order*, we found that the one foot presumption should continue to apply where an attaching entity has overlashed its own pole attachments.²⁷⁶ We also determined that facilities overlashed by third parties onto existing pole attachments are presumed to share the presumptive one foot of usable space of the host attachment.²⁷⁷

80. *Telecom Order* petitioners urge us to clarify that the presumption of one foot of usable space occupied by a pole attachment is rebuttable.²⁷⁸ The one foot presumption is rebuttable by any party.²⁷⁹ We decline to abandon or redefine our presumption for usable space occupied by a pole attachment, even in instances of overlashing.²⁸⁰ We have previously considered and rejected ICG's argument that the one foot presumption is outdated.²⁸¹ The record on reconsideration affirms that the sharing and use of the one foot presumption, for usable space occupied by a pole

²⁷³See *Second Report and Order*, 72 FCC 2d 59, at ¶ 27.

²⁷⁴47 U.S.C. § 224(d); see also, e.g., *USTA Fee Order* recon. reply at 13-14.

²⁷⁵See, e.g., *Fee Order* at ¶ 30; see also *NCTA Fee Order* comments at 15-16.

²⁷⁶*Telecom Order* at ¶ 92.

²⁷⁷*Telecom Order* at ¶ 92. We noted that we deferred decision to the *Fee Order Notice* proceeding on the issue of the effect any increased burden, such as wind and weight loading, may have on the rate the utility pole owner may charge the host attacher. In the *Fee Order*, we declared that weight and wind loading may be a consideration in the make-ready plans and expenses, for safety, reliability and engineering purposes, but not a consideration in calculating the recurring rate. *Fee Order* at ¶¶ 29-30.

²⁷⁸ICG *Telecom Order* petition at 11-14; MCI *Telecom Order* petition at 8-9.

²⁷⁹See *Telecom Order* at ¶ 84.

²⁸⁰See, e.g., ICG *Telecom Order* petition at 11-14, ICG *Ex Parte Presentation*, December 9, 1998; see also, MCI *Telecom Order* petition at 8-9.

²⁸¹See *Telecom Order* at ¶ 87, referencing ICG *Telecom Order* comments at 39; see also discussion, *Telecom Order* at ¶ 85-91.

attachment, does not lead to a distortion of the allocation of the costs of the pole in determining a just and reasonable compensation for the utility.²⁸²

5. Cable Operator Not a Utility Obligated to Provide for Overlapping

81. MCI urges us to classify cable operators and telecommunications carriers with pole attachments as utilities and therefore require them to act as a utility for a third party overlapping.²⁸³ The Pole Attachment Act does not define utility to include attachers.²⁸⁴ Section 224(f) of the Pole Attachment Act obligates a utility to provide a cable television system or any telecommunications carrier with nondiscriminatory access for purposes of a pole attachment.²⁸⁵ Neither a cable system attacher nor a telecommunications attacher has an obligation to act as a host and share its pole attachment with a third party overlasher.²⁸⁶

6. Notice to Utility Pole Owner

82. U S West urges us to clarify that the utility pole owner shall receive explicit notice of a third party overlasher.²⁸⁷ U S West asserts that notice to the pole owner of a third party overlasher is necessary for the pole owner to determine whether the overlapping will endanger the integrity of a pole line or create a hazardous condition, as well as to calculate *Telecom Formula* rates after February 8, 2001 if the overlasher is a telecommunications service provider.²⁸⁸ We agree that the utility pole owner has a right to know the character of, and the parties responsible for, attachments on its poles, including third party overlashers. The pole owner is entitled to charge a *Telecom Formula* rate when a pole attachment previously used to provide only cable services is used to provide telecommunications services, as a result of a third party

²⁸²See, e.g., Bell South *Telecom Order* comments at 2; UTC/EEI *Telecom Order* comments at 11; NCTA *Telecom Order* comments at 14-17; SBC *Telecom Order* comments at 9.

²⁸³MCI *Telecom Order* petition at 10 (cable [attachers] may deny a third party from overlapping, but if they do so, they may not subsequently offer telecommunications services because once they offer telecommunications services they may not reserve space); see also, e.g., SBC *Telecom Order* comments at 19-20 But see, NCTA *Telecom Order* comments at 15-16, *Telecom Order* reply at 7-8.

²⁸⁴See 47 U.S.C. § 224(a)(1) (" 'utility' means any person who is a local exchange carrier or an electric, gas, water, steam or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communication"). See, e.g., MCI *Telecom Order* petition at 8-13; see also, SBC *Telecom Order* comments at 19-20; TUEC *Telecom Order* comments at 5. But see, e.g., Joint Cable Parties *Telecom Order* reply at 9-10; NCTA *Telecom Order* comments at 15-16, *Telecom Order* reply at 7-8.

²⁸⁵47 U.S.C. § 224(f)(1).

²⁸⁶See, e.g., Joint Cable Parties *Telecom Order* comments at 9-10; NCTA *Telecom Order* comments at 14-17. However, a telecommunications carrier may have certain obligations under 47 U.S.C. § 251.

²⁸⁷U S West *Telecom Order* petition at 3-4.

²⁸⁸U S West *Telecom Order* petition at 4; see also, e.g., AT&T *Telecom Order* comments at 4-5; Bell Atlantic *Telecom Order* comments at 7; GTE *Telecom Order* reply at 4.

telecommunications carrier overlashing.²⁸⁹ When the cable operator's pole attachment provides transmission of telecommunications services, whether for itself or via third party overlashing, it will notify the pole owner.²⁹⁰ We clarify that it would be reasonable for a pole attachment agreement to require notice of third party overlashing.

83. In the *Telecom Order*, we concluded that the third party overlashing entity should be classified as a separate attaching entity for purposes of counting entities using the Telecom Formula.²⁹¹ We now reconsider that decision, and based on our review of the statute, the record herein and our decision that an overlasher shares space with the host attachment, we believe that the third party overlasher should not be counted as a separate attaching entity.²⁹²

84. *Telecom Order* petitioners request that we require cable operators to certify that they are *not* providing telecommunications service.²⁹³ We decline to adopt such a regulatory reporting requirement as it would impose unnecessary administrative burdens on cable operators, utilities, and the Commission.²⁹⁴ We affirm the requirement that a cable operator notify the utility when the cable operator begins providing telecommunications services itself or via third party overlashing.²⁹⁵ Cable attachers stress that this notification should not provide utilities with an opportunity to acquire sensitive proprietary and business development, planning, or scheduling information that could result in a competitive disadvantage to the attaching entity.²⁹⁶ We agree. The record fails to demonstrate any legitimate purpose for a utility to require commercially-sensitive data or information to be provided as a part of this notification of a change of service status by a cable operator.²⁹⁷

²⁸⁹ 47 U.S.C. § 224(e)(1).

²⁹⁰ See, e.g., *Telecom Order* at ¶ 35.

²⁹¹ *Telecom Order* at ¶ 68; see 47 U.S.C. § 224(e)(2).

²⁹² See ¶¶ 54-57 and ¶¶ 69-74 of this *Reconsideration Order*.

²⁹³ See, e.g., UTC/EEI *Telecom Order* petition at 11-12; see also, Bell Atlantic *Telecom Order* comments at 5.

²⁹⁴ See, e.g., *Closed Captioning Order*, 13 FCC Rcd 19973 (1998) at ¶ 41.

²⁹⁵ *Telecom Order* at ¶ 35.

²⁹⁶ See, e.g., Adelpia and Lenfest *Telecom Order* comments at 11-12; NCTA *Telecom Order* comments at 3-9. Joint Cable Parties urge the Commission to reject utility efforts to secure competitively sensitive data from cable operators that Joint Cable Parties believe would result from certification. Joint Cable Parties advise that the New York Public Service Commission similarly rejected a proposal to adopt this utility proposal in a 1997 pole attachment rulemaking order, *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, New York Pub. Serv. Comm'n. Case No. 95-C-0341, 1997 N.Y. PUC LEXIS 364 (issued and effective June 17, 1997), *recon. denied*, 1997 N.Y. PUC LEXIS 639 (October 7, 1997). See Joint Cable Parties *Telecom Order* comments at 19 (referencing prior Commission actions denying utility access to such information in *Telecom Order* at ¶ 35; *Marcus Cable Associates, L.P. v. Texas Utilities Electric Co.*, 12 FCC Rcd 10362, 8 Comm. Reg. (P&F) 1293 (July 21, 1997).

²⁹⁷ See, e.g., Joint Cable Parties *Telecom Order* comments at 19. Cf. Letter from Meredith J. Jones, Chief, Cable Services Bureau to Danny E. Adams, Esq., Kelley Drye & Warren LLP, DA No. 97-131 (January 17, 1997) (...continued)

85. Finally, utilities contend²⁹⁸ that they are entitled to bill for and/or receive interest on any difference in rates between the *Cable Formula* rates and the *Telecom Formula* rates, if a cable operator fails to notify the utility that the cable operator is offering telecommunications services over its pole attachment. Pole attachment agreements after February 8, 2001 could be expected to include a reasonable mechanism for notification by a cable operator of its change of status to a telecommunications carrier. Pole attachment agreements could also be expected to include a reasonable remedy for a cable operator's failure to so notify. Because we have not explored the issue of a penalty for failure to notify and have no record on the question, we will not make a determination on that issue at this time.

7. Dark Fiber

86. *Telecom Order* petitioners continue to urge that we impose additional regulation on the leasing of "dark fiber" when a pole attachment that has been used to provide only cable services would, as a result of activation of dark fiber, be used to also provide telecommunications services.²⁹⁹ We affirm our holding in the *Telecom Order* that if an attachment previously used for providing solely cable services would, as a result of the leasing of dark fiber, also be used for providing telecommunications services, the rate for the attachment would be determined using the *Telecom Formula*.³⁰⁰ However, attaching entities may lease their dark fiber to third parties without such leases being considered separate attachments and without making an additional payment beyond the host's existing attachment rate.³⁰¹ The cable system operator may lease excess fiber capacity within its existing attachment to any party for a negotiated rate without the knowledge or consent of the pole owner because the physical attachment will not be altered. The dark fibers contained within the attaching host have already been taken into account in determining the rent for the attachment. The character and content of the services provided do not affect the amount of space occupied by the attachment. The type of services provided over the attachment only affect the pole attachment rate if the services are telecommunications services. If the third party leasing the fiber is, or becomes, a telecommunications carrier,³⁰² then the utility is entitled to compensation for the pole attachment based on the *Telecom Formula* and must be notified.

(...continued from previous page)

regarding unreasonable terms and conditions in pole attachment agreements.

²⁹⁸See, e.g., Bell Atlantic *Telecom Order* petition at 6-7, *Telecom Order* reply at 6-7; USTA *Telecom Order* petition at 7-8.

²⁹⁹SBC *Telecom Order* petition at 7-8.

³⁰⁰*Telecom Order* at ¶ 73.

³⁰¹See, e.g., U S West *Telecom Order* petition at 2-3; *Telecom Order* at ¶¶ 72-73, 95; *In the Matter of the Public Utility Commission of Texas*, 13 FCC Rcd 3460, 3541 n.409 (1997); see also, e.g., NCTA *Telecom Order* petition at 7-8; Joint Cable Parties *Telecom Order* reply at 1-3.

³⁰²*Telecom Order* at ¶ 73. A telecommunications carrier is, by definition, "...any provider of telecommunications services." 47 U.S.C. § 153(44).

E. CONDUIT ISSUES

87. Conduits are structures that provide physical protection for cables and allow new cables to be added inexpensively along a pathway or route. A conduit consists of one or more ducts, which are the enclosures that carry the cables.³⁰³ Often, when a cable operator's or telecommunications carrier's cables are placed in a duct, three or more inner duct are inserted into the duct allowing "one duct to be treated more like conduit."³⁰⁴ A collection of conduits, together with their supporting infrastructure, constitutes a conduit system.³⁰⁵ A conduit system may vary widely among geographic areas,³⁰⁶ and between LEC and electric utilities.

88. In the *Fee Order*, we reviewed the *Fee Order Notice* filings as well as the *Telecom Order* petition filings³⁰⁷ and concluded that other than collapsed ducts which are not counted in determining total capacity, there is no unusable capacity in a conduit.³⁰⁸ This was a departure from our conclusion in the *Telecom Order* and we now affirm our conclusion in the *Fee Order*. The total capacity of a duct or conduit is the entire volume of available capacity in the conduit system. All costs associated with the construction of the conduit system are considered in determining the cost of this total capacity. Essentially, the lack of any unusable capacity in a conduit makes the practical application of the Pole Attachment Act formulas the same for both cable attachers and telecommunications attachers both before and after February 8, 2001.

89. In the *Fee Order*, we adopted a conduit methodology and clarified what should be considered the total capacity of a conduit for purposes of determining a per unit rate for use of a utility's conduit.³⁰⁹ Cable operators and telecommunications carriers alike will calculate a maximum just and reasonable rate for a pole attachment in a conduit by apportioning the cost of providing capacity among all entities according to the percentage of capacity used by each

³⁰³NESC § 2.

³⁰⁴See *Fee Order* at ¶ 77; see also, e.g., AT&T *Telecom Order* comments at 22; ICG *Telecom Order* comments at 55; UTC/EEI *Fee Order* comments at 22, n. 7.

³⁰⁵See NESC § 2; see also American Electric *Fee Order* comments at 84.

³⁰⁶See, e.g., Carolina Power *Fee Order* comments at 62, 65-75; Duquesne Light *Fee Order* comments at 7; NCTA *Fee Order* comments at 40; Ohio Edison *Fee Order* comments at 43; Time Warner *Fee Order* comments at 27.

³⁰⁷See, e.g., MCI *Telecom Order* petition at 14-23; MCI *Telecom Order* comments at 2-4 (conduit formula is unworkable); NCTA *Telecom Order* petition at 2-5 (assignment of costs raises intractable and unnecessary complications into the conduit-rate formula. . . no publicly available data on which one can disaggregate total conduit investment . . . Commission should question whether its initial approach . . . is the best interpretation of the [1996] Act); see also, SBC *Telecom Order* petition at 16-17 (clarify method for determining total capacity); US West *Telecom Order* petition at 4-5 (clarify what makes up total capacity). *But see, e.g.,* USTA *Telecom Order* petition at 8-9 (use proposal in original proceeding of Bell Atlantic (Bell Atlantic *Telecom Order* comments at 8) that unusable space is all spare or excess capacity not actually being used by the conduit owner or any attaching entity)

³⁰⁸*Fee Order* at ¶ 90 and see *Fee Order* at n. 290.

³⁰⁹*Fee Order* at ¶¶ 82-114.

entity.³¹⁰ Calculation of the maximum rate may be simplified by using the presumptions in the formula.³¹¹ The carrying charge rate is calculated for pole attachments in conduit, in the same manner as the carrying charge rate in our pole attachment formula.³¹² The conduit formula adopted in the *Fee Order* and affirmed here is the following:³¹³

$$\begin{array}{rcccl} \text{Maximum Rate} & & \text{Percentage of} & & \text{Carrying} \\ \text{Per Linear ft./m.} & = & \text{Conduit Capacity} & \times & \text{Charge} \\ & & \text{Occupied} & & \text{Rate} \\ & & & \times & \\ & & & \text{Net Linear Cost} & \\ & & & \text{of Conduit} & \end{array}$$

1. Space Factor in Conduit

90. In the *Fee Order*, we concluded that all costs attributable to utilities' underground conduit systems are costs of providing capacity. The regulatory accounts to which LEC and electric utilities report their gross conduit investment include the costs of installed conduit, original permit, excavation, sewer connections and other costs.³¹⁴ For instance, in ARMIS Account 2441 LECs report the “. . . original cost of conduit. . . which is reusable in place. . . includ[ing] the costs of opening trenches and of any repaving necessary in the construction of conduit plant.”³¹⁵ For electric utilities, FERC Account 366 reports the capital costs for “installed underground conduit and tunnels used for housing distribution cables or wires.”³¹⁶ All costs associated with the construction of the conduit system are considered in determining the cost of this total capacity.

a. Total Duct or Conduit Capacity

91. In the *Fee Order*,³¹⁷ we clarified that a utility may designate capacity in a duct for maintenance or emergency use, but that a duct so designated is usable in the event it is needed, and therefore is part of the conduit capacity. Where duct capacity is set aside for future municipal use (in the nature of consideration as a condition for a license, franchise, or permit), the utility is compensated for those costs as part of its net conduit investment and/or in the carrying charge

³¹⁰See 47 U.S.C. § 224(e)(3).

³¹¹*Fee Order* at ¶¶ 82-88.

³¹²See *Fee Order* at ¶¶ 82-114 & Appendix C.

³¹³For detailed formula methodologies and regulatory accounts to be used for calculating a maximum rate allowable, see Appendix C of *Fee Order*.

³¹⁴See, e.g., FCC Part 32 Account 2441 (47 C.F.R. Part 32, § 32.2441); FERC Account 366 (18 C.F.R. Part 101, Account 366); see also, discussion at ¶ 70, above.

³¹⁵47 C.F.R. § 32.2441(a)(1999).

³¹⁶18 C.F.R. Part 101, Description of Accounts.

³¹⁷*Fee Order* at ¶ 89.

rate.³¹⁸ Collapsed or otherwise damaged ducts are no longer available for pole attachments, and should not be included in the calculation of total capacity of a conduit or duct in the *Cable Formula*.³¹⁹

92. USTA continues to urge that we declare that costs of ducts reserved for maintenance and municipal uses should be treated as “unusable space,” thus reducing the total capacity used in the denominator of the rate methodology formula.³²⁰ USTA argues because this duct space is available for the benefit of all users it cannot be used exclusively by the conduit owner or by any party from whom the owner can recover attachment charges.³²¹ Verizon supports USTA’s *Fee Order* petition that we should reconsider our treatment that ducts reserved for maintenance activities, or that are set-aside for municipal use should not be excluded from usable capacity.³²² Verizon asserts that these ducts are not available for pole attachments and conduit owners are “short-changed” when these set-asides are not excluded from usable capacity (i.e. not treated as unusable space).³²³

93. We will not allow capacity designated for maintenance, future business plans, or municipal set-asides to be subtracted from the total duct or conduit capacity for rate determination purposes. The record supports our analysis that capacity in a duct or conduit that is usable for any of these purposes is part of the “total duct or conduit capacity.”³²⁴ For example, a utility may set-aside capacity for maintenance or emergencies so that unoccupied capacity is available into which a temporary cable may be placed and spliced into a damaged cable.³²⁵ Capacity so designated is usable in the event it is needed, and available for use by the utility at any time for any purpose, and is therefore part of the total available conduit capacity. Such reservation of capacity is not necessarily identified by a specific duct or location, can be created, used, withdrawn or discarded at the sole discretion of the utility, and must be considered part of the total capacity of the conduit. Municipal set-asides are also capacity that may be made

³¹⁸ *Fee Order* at ¶ 89.

³¹⁹ SBC *Fee Order* comments at 72–73.

³²⁰ USTA *Fee Order* petition at 5-6.

³²¹ USTA *Fee Order* petition at 5.

³²² Verizon *Fee Order* recon. comments at 2-3.

³²³ Verizon *Fee Order* recon. comments at 2-3.

³²⁴ 47 U.S.C. § 224(d)(1). See, e.g., NCTA *Telecom Order* petition at 4-5; see also, Joint Cable Parties *Telecom Order* comments at 6-9.

³²⁵ See, e.g., MCI *Telecom Order* comments at 3-4; see also: AT&T *Fee Order Telecom Order* comments at 23; Carolina Power *Fee Order Telecom Order* comments at 63; Duquesne Light *Fee Order Telecom Order* comments at 7–8; Ohio Edison *Fee Order Telecom Order* comments at 35; SBC *Fee Order Telecom Order* comments at 30–31; see also, *Local Competition Access Reconsideration Order*, FCC99-266 (1999) at ¶ 69.

available for the use of the local government as a condition in a franchise, license, right-of-way or other agreement.³²⁶

94. Capacity may be reserved, or kept unused to be available to an electric utility for expansion of its core business services, but that capacity is still part of the total capacity of the duct or conduit system and must be made available for pole attachments until such time as it is needed by the electric utility under a bona fide business plan.³²⁷ Under the policy articulated in the *Local Competition Order*, an electric utility is allowed to reserve capacity for future business purposes under a bona fide business plan, but must allow that capacity to be used for attachments until an actual business need arises.³²⁸ For whatever reason capacity may be reserved or designated for special uses, by or on behalf of the utility, and regardless of who may benefit directly or indirectly from those uses, the capacity is available for use and therefore remains part of the total capacity of the conduit for rate determination purposes.³²⁹

b. Occupied Capacity, the Half-Duct Presumption

95. Presumptions are used in the *Cable* and *Telecom Formulas* to expedite the calculations of a just and reasonable rate so that complicated surveys, accounting and calculations may be avoided.³³⁰ In the *Fee Order* and *Telecom Order*, in order to identify a rebuttable presumption of the percentage of capacity occupied by an attachment in a conduit, we adopted a rebuttable presumption that a cable or telecommunications attacher occupies one half of a duct.³³¹

We stated that we believed that the one half duct methodology is a simple and reasonable presumptive approximation of the conduit capacity used by a cable operator or telecommunications carrier.³³² This method, patterned after the one used by the Massachusetts Department of Public Utilities ("MDPU"),³³³ and relied on in *Multimedia Cablevision*,³³⁴ allows for determining the cost, per foot or meter, of one duct and then dividing by two, instead of

³²⁶See, e.g., *SBC Fee Order Telecom Order* comments at 32 (imposed as condition of granting right-of-way).

³²⁷See *Local Competition Order* at ¶¶ 1168-69; see also, *ConEd Fee Order* comments at 9-11; *Duquesne Light Fee Order* comments at 8; *Ohio Edison Fee Order* comments at 35.

³²⁸*Local Competition Order*, 11 FCC Rcd 15499, 16077-79 (1996) at ¶¶ 1165-1170; see also *Local Competition Access Reconsideration Order*, 14 FCC Rcd 18049 (1999) at ¶¶ 65-70.

³²⁹*Fee Order* at ¶ 92.

³³⁰*Second Report and Order*, 72 FCC 2d 59 (1979); see also, *NCTA Fee Order Reply* at 46-47.

³³¹*Telecom Order* at ¶ 115 (NESC rule relied on by the electric utilities does not prohibit the coexistence of electric and communications facilities in a conduit, . . . the rule conditions the coexistence on the maintenance and operation being performed by the utility, citing NESC Rule 341(A)(6) that supply, control, and communication cables shall not be installed in the same duct unless the cables are maintained or operated by the same utility). *Id.* n.374.

³³²*Telecom Order* at ¶ 115.

³³³See *Greater Media, Inc. v. New England Telephone and Telegraph*, Massachusetts D.P.U. 91-218 (1992).

³³⁴11 FCC Rcd 11202 (1996).

actually measuring the actual capacity occupied. In situations where the formula, or the presumption, is inappropriate, for instance because it has been demonstrated that there are more than two users in the duct, or that one particular attachment precludes sharing the duct with another attachment, the one half duct presumption can be rebutted. If a new entity is installing an attachment in a previously unoccupied duct, we stated such an entity should be encouraged to place inner duct prior to placing its wires in the duct.³³⁵

96. *Telecom Order* petitioners continue to argue that our half-duct presumption of capacity occupied by an attachment in a conduit system is not an accurate reflection of capacity occupied. *Fee Order* petitioners continue to assert that an electric supply cable cannot share a duct with a communications cable, and therefore, from the electric utility point of view, the communications cable occupies the entire duct.³³⁶ Attachers argue that the presumption is too large;³³⁷ utilities argue that the presumption is too small.³³⁸ Joint Cable Parties and SBC support retention of the half-duct presumption.³³⁹ American Electric argues that electric conduit cannot be and is not shared and therefore the one half duct presumption leads to under recovery for the electric utility.³⁴⁰ WorldCom supports our conclusion that electric supply cables, not communications cables, effectively exclude other cables from occupying the same duct and therefore the one half duct presumption for a communications cable is appropriate. WorldCom challenges petitioners' claims that we misinterpreted NESC guidelines permitting a communications and electric cable to share a duct when both are controlled by the same party.³⁴¹

97. Petitioners have presented no new evidence to persuade us that utilities are not justly compensated for use of their conduit by the one half duct presumption. We affirm our rebuttable presumption that a cable or telecommunications attacher occupies a maximum capacity of one half of a duct, when determining a reasonable conduit attachment rate.³⁴² We have previously

³³⁵*Telecom Order* at ¶ 115. In the alternative, the utility can install inner duct as part of its make-ready, charging the attaching entity the percentage of the make-ready costs for the inner ducting that corresponds to the percentage of inner duct the attachment occupies in relation to the number of inner ducts installed (*i.e.*, utility installs 6 inner ducts in a previously open duct, the pole attachment will occupy only one of those inner ducts, the attaching entity pays one sixth of the costs of the inner duct installation as part of its make-ready expenses).

³³⁶*See, e.g.*, American Electric *Fee Order* comments at 85–87; ConEd *Fee Order* comments at 5–6; Duquesne Light *Fee Order* comments at 8; Edison Electric/UTC *Fee Order* comments at 20–21.

³³⁷*See, e.g.*, MCI *Telecom Order* petition at 14-23; NCTA *Telecom Order* petition at 2-5; USTA *Telecom Order* petition at 8-9; U S West *Telecom Order* petition at 4-5.

³³⁸*See, e.g.*, UTC/EEI *Telecom Order* comments at 13.

³³⁹Joint Cable Parties *Telecom Order* reply at 7-8; SBC *Telecom Order* comments at 9-12.

³⁴⁰*See, e.g.*, American Electric *Fee Order* petition at 11-12; Southern Co. *Fee Order* petition at ii.

³⁴¹WorldCom *Fee Order* recon. opposition at 9-10.

³⁴²*Telecom Order* at ¶ 115; *see also Fee Order* at ¶¶ 88, 93, Appendices C-3 & C-4. *But see, e.g.*, SBC *Telecom Order* comments at 9-10.

considered and rejected petitioners' arguments for a smaller presumption³⁴³ and electric utilities' arguments that a pole attachment occupies a whole duct.³⁴⁴ The presumption that a communications cable in a conduit system occupies one half of a duct³⁴⁵ is based on clear evidence that all types of cable – including electric supply cables when controlled by the same party as the communications cable – may share a duct.³⁴⁶ We affirm our position that, because the NESC rule relied on by the electric utilities does not prohibit the sharing of a duct by electric and communications cables when controlled by the same party or two communications cables, it is reasonable to expect there to be more than one attacher in a duct.³⁴⁷

98. The one half duct presumption is rebuttable and the presence of inner duct is adequate rebuttal.³⁴⁸ Where inner duct is installed, either by the attacher or in a previous installation, the maximum rate will be reduced in proportion to the fraction of the duct occupied. That fraction will be one divided by the actual number of inner ducts in the duct. We continue to believe that the use of the one half duct rebuttable presumption is a simple, expedient and reasonable approximation of the actual capacity occupied by a cable operator or telecommunications carrier attaching in a conduit system.³⁴⁹ When the actual percentage of capacity occupied is known, it can and should be used instead of the one half duct presumption.³⁵⁰

2. Net Linear Cost of Conduit

99. As stated in the *Fee Order*, in the conduit context, we use the net linear cost of the conduit, as compared to the net cost of a bare pole, as one factor within the formula for determining a maximum permissible rate for attachment within conduit. As the net cost of a bare pole reflects the total system investment for the above ground pole attachment infrastructure, to arrive at a system investment for use in the conduit formula we identify the net linear cost of the conduit system. To accomplish this, the utility must first establish the Net Conduit Investment.

³⁴³ See, e.g., *MCI Telecom Order* petition at 20-23 (one-third-duct presumption); *NCTA Telecom Order* comments at 25, *Fee Order* comments at 42-43 (adopt a one-quarter duct presumption). *But see*, *Joint Cable Parties Telecom Order* reply at 7-8; *SBC Telecom Order* comments at 9-10.

³⁴⁴ *Telecom Order* at ¶¶ 114-15; See, e.g., *American Electric Telecom Order* comments at 54.

³⁴⁵ See *Fee Order* at ¶ 94, discussion at ¶¶ 92-94.

³⁴⁶ See *Fee Order* at ¶ 94; see also *Verizon Fee Order* recon. comments at 2-3 (it is the electric supply cables, not communications cables, that effectively exclude other party's cables from occupying the same duct.); *WorldCom Fee Order* recon. comments at 10.

³⁴⁷ See, e.g., *NESC Rule* 341(A)(6).

³⁴⁸ See, *Fee Order* at ¶¶ 92-95 (conduit formula presumptions are adjusted for the presence of inner duct).

³⁴⁹ *Fee Order* at ¶ 94-95.

³⁵⁰ *Fee Order* at ¶ 95, see also Appendices C-3 & C-4.

100. Our goal has always been to adopt a formula which allows the parties to calculate the maximum rate using public data when available, in a fair and expeditious manner.³⁵¹ We also have a policy against requiring additional accounting procedures so long as the information is available from the utilities upon reasonable request.³⁵²

a. Net Conduit Investment (LEC-Owned Conduit)

101. Net Conduit Investment for LEC-owned conduit is calculated as follows:

$$\begin{array}{l} \text{Net Conduit} \\ \text{Investment} \end{array} = \begin{array}{l} \text{Gross Conduit Investment} \\ \text{(ARMIS Account 2441)} \end{array} - \begin{array}{l} \text{Accumulated Depreciation} \\ \text{(Conduit)} \end{array} - \begin{array}{l} \text{Accumulated Deferred Taxes} \\ \text{(Conduit)} \end{array}$$

102. Gross Conduit Investment for the LEC consists of Part 32 Account 2441.³⁵³ For LECs, Accumulated Depreciation (Conduit) represents the share of ARMIS Account 3100 that corresponds to Account 2441.³⁵⁴ Accumulated Depreciation related to conduit is publicly available at the LECs ARMIS Report 43-02.³⁵⁵ In the *Fee Notice*³⁵⁶ we proposed the following formula for the calculation of accumulated deferred income taxes for conduit:³⁵⁷

$$\begin{array}{l} \text{Accumulated Deferred} \\ \text{Income Taxes} \\ \text{(Conduit)} \end{array} = \frac{\text{Gross Conduit Investment}}{\text{Total Gross Plant Investment}} \times \text{Total Accumulated Deferred Income Taxes}$$

103. LEC conduit owners objected to this formula on the basis that the actual amount of accumulated deferred taxes for conduit is available directly from the LEC's books.³⁵⁸ BellSouth maintains that because it is required to keep separate and accurate records of accumulated deferred income taxes for poles and conduit, our formula will improperly introduce non-conduit related deferred taxes into rate calculations.³⁵⁹ NCTA argued that LECs should not

³⁵¹ *Pole Attachment Order*, 2 FCC Rcd 4387 (1987) at ¶ 37.

³⁵² *Second Report and Order*, 72 FCC 2d 59 at ¶ 32.

³⁵³ 47 U.S.C. § 32.2441.

³⁵⁴ *Part 32 Guidance Letter*, 5 FCC Rcd 3898 (1990). See ARMIS Report 43-02, row 0470.

³⁵⁵ *Part 32 Guidance Letter*, 5 FCC Rcd 3898 (1990). See ARMIS Report 43-02, row 0470.

³⁵⁶ 12 FCC Rcd 7449 (1997) at Appendix C.

³⁵⁷ See Appendices F-1 and F-2 for LEC and electric utility conduit formulas.

³⁵⁸ See, e.g., Bell South *Fee Order* comments at 8; GTE *Fee Order* comments at 14; SBC *Fee Order* comments at 20.

³⁵⁹ Bell South *Fee Order* comments at 8.

use accumulated deferred income tax figures taken from the LEC's books because the information is not publicly available.³⁶⁰

104. In the *Fee Order*, we concluded that if the LEC conduit owner is required to keep this data precisely as required for the formula, we will allow them to use it in the rate calculation, as long as it was reported to and available through our public ARMIS.³⁶¹ There is confusion among utilities and attaching entities whether this data is available. Pursuant to our Biennial Regulatory Review, Review of Accounting and Cost Allocation Requirements, FCC 99-106 and Biennial Regulatory Review, Review of ARMIS Reporting Requirements, FCC 99-107³⁶² we require the LEC conduit owner to keep this data as required for the formula because we require LECs to use it in the rate calculation.³⁶³ This data will be available at ARMIS Report 43-02 and we will use this data in our formulas. Until ARMIS reports for LECs include this required data after 2001, we will continue to use the proration method to calculate the conduit portion of accumulated deferred taxes for use in the formula to calculate the net linear cost of conduit.

b. Net Conduit Investment (Electric Utility-Owned Conduit)

105. Net Conduit Investment for electric utility-owned conduit is calculated as follows:

$$\begin{array}{l}
 \text{Net Conduit} \\
 \text{Investment}
 \end{array}
 = \begin{array}{l}
 \text{Gross Conduit Investment} \\
 \text{(FERC Account 366)}
 \end{array}
 - \begin{array}{l}
 \text{Accumulated Depreciation} \\
 \text{(Conduit)}
 \end{array}
 - \begin{array}{l}
 \text{Accumulated Deferred Taxes} \\
 \text{(Conduit)}
 \end{array}$$

106. For electric utilities, Gross Conduit Investment is reflected in FERC Part 101 Account 366.³⁶⁴ Accumulated Depreciation (Conduit) represents the share of FERC Account 108 (Accumulated provision for depreciation of electric utility plant (Major only) - a composite account that is

³⁶⁰NCTA *Fee Order* reply at 33-34.

³⁶¹*Fee Order* at ¶ 101 & n.324.

³⁶² Biennial Regulatory Review, Review of Accounting and Cost Allocation Requirements, FCC 99-106 at ¶ 15 (*rel.* June 30, 1999) and Biennial Regulatory Review, Review of ARMIS Reporting Requirements, FCC 99-107 at ¶ 13 (*rel.* June 30, 1999) ("we are requiring [LECs] to continue to maintain subsidiary records to provide the information needed for the pole attachment formula. . . . The Commission is currently considering issues regarding the pole attachment formulas. *See Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Notice of Proposed Rulemaking, 12 FCC Rcd 7449 (1997). When a report and order is released, we will specify the subsidiary record categories carriers must maintain in order to provide data for the pole attachment formulas").

³⁶³*See* Biennial Regulatory Review, Review of ARMIS Reporting Requirements, FCC 99-107 at ¶ 13 (*rel.* June 30, 1999).

³⁶⁴*See* 18 C.F.R. Part 101 (stating the accounts associated with the conduit attachment formula for electric utilities); *see also* 47 C.F.R. Part 32 (stating accounts associated with the conduit formula for LECs).

required to be maintained on a subsidiary basis) that corresponds to Account 366.³⁶⁵ Accumulated Deferred Income Taxes for electric utilities represents the share of FERC Accounts 190, 281, 282, and 283 that correspond to Account 366.³⁶⁶

107. UTC/EEI argues that our conduit formula methodology should reflect differences between urban and suburban conduit.³⁶⁷ UTC/EEI objects to the use of system-wide data because UTC/EEI believes system-wide data fails to account for significant differences between the cost of deploying conduit in urban and suburban areas.³⁶⁸ However, in comments to the *Fee Notice*, UTC/EEI admitted that costs related to both urban and non urban facilities are recorded in the same utility accounts, such as FERC account 366 (Gross Conduit Investment).³⁶⁹ In fact, UTC/EEI further asserts that in the absence of their preferred "market-based" approach to establishing rates, more regulatory certainty and greater market stability results from the application of a uniform methodology, avoiding different regional or urban/rural formulas.³⁷⁰ Upon review, we found no new information presented that would persuade us to abandon the use of system-wide data in the conduit context, as it is used in the pole context. No viable alternate suggestion has been offered and we continue to find that the use of system-wide data is the most efficient and reasonable methodology.

F. FERC AND ARMIS ACCOUNTS USED IN THE FORMULAS

108. Both telecommunications and electric utilities continue to argue, as they have since the implementation of the pole attachment formula, that the various permutations of the formulas for poles and conduit, for LECs and electric utilities, do not include enough FERC or ARMIS regulatory accounts to fully compensate the utilities for their costs.³⁷¹ Before discussing the issues raised by the parties concerning the accounts used in the formulas, we first correct a typographical error appearing in the *Fee Order*.

1. Electric Utility Accumulated Deferred Income Taxes Poles (Correction)

109. In the *Fee Order*, we stated the following formula to determine the net cost of a bare pole for electric utilities:

³⁶⁵ 18 C.F.R. Part 101.

³⁶⁶ *Id.*

³⁶⁷ UTC/EEI *Fee Order* petition at 17-19.

³⁶⁸ UTC/EEI *Fee Order* petition at 17, referencing *Fee Order* at ¶ 85 (citing *Fee Order* comments of Carolina Power at 65, ConEd *Fee Order* comments at 3, UTC/EEI *Fee Order* comments at 18-19, Dayton P&L *Fee Order* comments at 3, Public Service Co. of NM *Fee Order* comments at 5).

³⁶⁹ See, e.g., UTC/EEI *Fee Order* comments at 24.

³⁷⁰ UTC/EEI *Fee Order* comments at 16.

³⁷¹ UTC/EEI *Fee Order* petition at 12; Southern Co. *Fee Order* petition at 12; USTA *Fee Order* petition at 2, supported by Verizon *Fee Order* recon. comments at 2.

$$\text{Net Cost of a Bare Pole (Electric)} = 0.85 \times \frac{\text{Account 364} - \text{Accumulated Depreciation (Poles)} - \text{Accumulated Deferred Income Taxes (Poles)}}{\text{Number of Poles}}$$

We stated that the Accumulated Deferred Income Taxes represents the share of composite FERC Account 190 (Accumulated deferred income taxes) that corresponds to Account 364.³⁷² In error, we neglected to include FERC Accounts 281, 282, and 283 along with Account 190. We now correct this typographical error so that Accumulated Deferred Income Taxes represents the share of composite FERC Accounts 190, 281, 282 and 283 that corresponds to Account 364.

2. Carrying Charge Accounts (LECs)

110. The carrying charge rate reflects those costs incurred by the utility in owning and maintaining pole attachment infrastructure regardless of the presence of attachments.³⁷³ The elements of the carrying charge rate are: administrative, maintenance, depreciation, taxes and cost of capital (rate of return). To calculate the carrying charge rate, we developed formulas that relate each element to a utility owner's net investment.³⁷⁴ The carrying charge rate factor of the *Cable Formula* is calculated as follows:³⁷⁵

$$\text{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

111. In May 1986, the Commission adopted a new uniform system of accounts for all FCC regulated telephone companies.³⁷⁶ The Commission's Annual Report Form M was revised on April 27, 1989³⁷⁷ to reflect the new accounting system in Part 32 that replaced the accounting system in Part 31, effective January 1, 1988.³⁷⁸ The *Pole Attachment Order* provided formulas for determining a maximum just and reasonable pole attachment rate with regulatory accounts identified.³⁷⁹ The formula for LECs used Part 31 accounts until after adoption of the *New USOA-Part 32 Adoption*, when the Common Carrier Bureau³⁸⁰ responded to a request for clarification of

³⁷² *Fee Order* at ¶ 42.

³⁷³ *Fee Order* at ¶ 44.

³⁷⁴ *Pole Attachment Order*, 2 FCC Rcd at 4387, 4402-03, Attachment B (1987).

³⁷⁵ *Fee Order* at ¶ 44.

³⁷⁶ *New USOA - Part 32 Adoption*, 51 Fed. Reg. 24745 (1986) and 51 Fed. Reg. 43493 (1986); *recon. in part*, 2 FCC Rcd 1086 (1987).

³⁷⁷ Common Carrier Bureau, DA 89-503 (*rel.*, May 22, 1989).

³⁷⁸ *Part 32 Guidance Letter*, 5 FCC Rcd 3898 (1990).

³⁷⁹ 2 FCC Rcd 4387, 4402-03 (1987).

³⁸⁰ Prior to 1996, the Common Carrier Bureau exercised authority for pole attachment regulation. In 1996, we amended our rules regarding the functions of the Cable Services Bureau to provide the delegated authority for pole attachment regulation to the Cable Services Bureau. *See Order In The Matter Of Amendment of Part 0 of The* (...continued)

what Part 32 accounts would be used in place of the Part 31 accounts specified in the *Pole Attachment Order*. That guidance was given with the understanding that an exact tracking of expenses from Part 31 accounts to Part 32 accounts was not possible.³⁸¹ In the *Fee Order*,³⁸² we clarified the Part 32 accounts to be used in the *Cable Formula* for LECs utilities.³⁸³

112. In the *Fee Order*, we adopted the following formula to determine the administrative element of the carrying charge rate of the *Cable Formula* for LEC pole owners:³⁸⁴

$$\text{Administrative Element} = \frac{\text{Administrative and General (Accounts 6710 + 6720)}}{\text{Gross Plant Investment (Account 2001)} - \text{Accumulated Depreciation (Account 3100)} - \text{Accumulated Deferred Taxes, Plant (Accounts 4100 \& 4340)}}$$

USTA and Verizon ask us to reconsider our decision to exclude certain accounts as administrative expenses.³⁸⁵ USTA asserts we should reconsider our decision to exclude expenses in ARMIS Accounts 6110 (network support expenses) which includes costs of repairing and maintaining the motor vehicle fleet; 6120 (general support expenses) which includes costs of land and buildings, office equipment and computers; 6534 (plant operations and administrative expenses) which includes costs related to the general administration of plant operations; and 6535 (engineering expenses) that support all plant operations.³⁸⁶ USTA argues that we should include all accounts that USTA claims indirectly support the administration of poles.³⁸⁷ USTA argues that our conclusions in the *Fee Order* contradicted the Pole Attachment Order and the court's advice in *Alabama Power v. FCC*.³⁸⁸

113. NCTA counters that a one to one mapping of accounts from Part 31 to part 32 is not feasible and the accounts included in the formula overstate the administrative expenses attributable to poles because administrative expenses such as research and development for highly complex technological and business planning projects would far exceed the administrative

(...continued from previous page)

Commission's Rules To Make Changes In The Functions of the Cable Services Bureau, 11 FCC Rcd. 19697 (Dec. 5, 1996).

³⁸¹ *Part 32 Guidance Letter*, 5 FCC Rcd 3898 (1990).

³⁸² *Fee Order in passim* and at Appendix C.

³⁸³ LECs maintain their Part 32 accounts and file their annual operating costs with the Commission's Automated Reporting and Management Information System ("ARMIS"). See *Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules)*, CC Docket No. 86-182, 2 FCC Rcd 5770 (1987), *modified on recon.*, 3 FCC Rcd 6375 (1988) (*released* Oct. 14, 1988) ("*ARMIS Order*").

³⁸⁴ *Fee Order* at ¶ 52.

³⁸⁵ USTA *Fee Order* petition at 2-4; Verizon *Fee Order* comments at 2.

³⁸⁶ USTA *Fee Order* petition at 2-4.

³⁸⁷ *Id.*

³⁸⁸ *Alabama Power v. FCC*, 773 F.2d 362 (D.C. Cir. 1985).

oversight for poles.³⁸⁹ NCTA points out that the conversion to Part 32 actually increased the administrative expenses because Account 6720 includes costs that were formerly excluded under Part 31 accounting. NCTA notes that Account 6720 is a composite account including expenses for accounting and finance,³⁹⁰ external relations,³⁹¹ human resources,³⁹² information management,³⁹³ legal,³⁹⁴ procurement,³⁹⁵ research and development,³⁹⁶ and a general account labeled "general and administrative."³⁹⁷ NCTA continues that Account 6535 (engineering expenses) is particularly inappropriate because the attacher pays any engineering expenses related to the attachment upfront in makeready charges. Referring to Account 6110 (network support expenses), NCTA argues that vehicle expenses associated with attachments are already included in makeready charges.

114. The *Fee Order* did not attempt to establish different accounts to be used in the administrative element of the carrying charges. The *Fee Order* merely reconciled the accounts formerly listed in Part 31 to their counterpart accounts in Part 32. This resulted in the identification of Accounts 6710 and 6720 to be included in the administrative element of the carrying charges. We agree with NCTA that these accounts provide a broad spectrum of administrative expenses. Contrary to USTA's argument, we did not exclude general plant administrative expense accounts from the calculation. USTA's citation to *Alabama Power Co. v. FCC*³⁹⁸ is not apropos. We are using plant-wide accounts representing administrative expenses, not pole-only administrative accounts.³⁹⁹ The court's reasoning in *Alabama Power Co. v. FCC* would apply if we used an administrative account that isolated pole administrative expenses and then divided that by the net plant investment. The accounts listed by USTA do not fall into the category of plant-wide administrative expenses that are attributable in any way to poles, and were not previously included in the calculation under Part 31. Maintenance expenses are already isolated into a pole-related account and are not to be included in the administrative element.

³⁸⁹ NCTA *Fee Order* reply comments, Declaration of Patricia D. Kravtin at 7.

³⁹⁰ See 47 C.F.R. § 32.6721.

³⁹¹ See 47 C.F.R. § 32.6722.

³⁹² See 47 C.F.R. § 32.6723.

³⁹³ See 47 C.F.R. § 32.6724.

³⁹⁴ See 47 C.F.R. § 32.6725.

³⁹⁵ See 47 C.F.R. § 32.6726.

³⁹⁶ See 47 C.F.R. § 32.6727.

³⁹⁷ See 47 C.F.R. § 32.6728.

³⁹⁸ 773 F.2d 362 (D.C.Cir. 1985).

³⁹⁹ The court in *Alabama Power Co. v. FCC* found it appropriate to divide total administrative expenses by total plant investment to arrive at a percentage of investment representing administrative expenses. *Alabama Power Co. v. FCC*, 773 F.2d at 369-370.

Capital accounts which are not pole investment also should not be included in the administrative element.

115. We reviewed and considered the record before us regarding the accounts to be used for the administrative element expenses for LECs. We do not believe Congress intended us to discover and aggregate all *de minimis* expenses which might have some intangible nexus to pole attachments. On the contrary, we believe Congress gave us a clear mandate *not* to engage in full-scale ratemaking exercises every time we had a pole attachment complaint before us.⁴⁰⁰ We have chosen not to disaggregate the major accounts selected for inclusion in our calculations in order to eliminate expenses not directly attributable to administrative costs with a nexus to pole attachments, such as corporate strategic planning.⁴⁰¹ On reconsideration, we decline to draw in more expenses to the administrative element because we already apply a comprehensive set of expenses in conformance with the statutory directive to allocate a percentage of operating expenses attributable to pole attachments.

3. Carrying Charge Accounts (Electric)

116. In the *Fee Order*, we rejected our tentative conclusion to include a portion of FERC Account 590 in the maintenance element of the carrying charge rate. We concluded that any indefinite and uncertain attempt to identify a possibly minute percentage of pole related expenses that may be included in Account 590, is outweighed by the complexity of arriving at an appropriate and equitable percentage of the account.⁴⁰² We also concluded that pole related maintenance expenses would be posted to Account 593, which is included in our calculation.⁴⁰³ Account 590 (maintenance supervision and engineering (Major only)) includes the cost of labor and expenses incurred in the general supervision and direction of maintenance of the distribution system. However, direct field supervision of specific jobs are charged to the appropriate maintenance account. Operating expense instruction 1 (supervision and engineering (Major utilities)) states that the supervision and engineering includible in the operating expense accounts shall consist of the pay and expenses of superintendents, engineers, clerks, other employees and consultants engaged in supervising and directing the operation and maintenance of each utility function.⁴⁰⁴

117. Account 593 (maintenance of overhead lines (Major only)) includes all the cost of labor, materials used and expenses incurred in the maintenance of overhead distribution line

⁴⁰⁰ See, e.g., 1977 Senate Report at 19-21.

⁴⁰¹ For example, Account 6712 includes "costs incurred in developing and evaluating long-term courses of action for the future operations of the company. This includes performing corporate organization and integrated long-range planning, including management studies, options and contingency plans, and economic strategic analysis. See 47 C.F.R. § 32.6712.

⁴⁰² *Fee Order* at ¶¶ 57-61.

⁴⁰³ *Id.*

⁴⁰⁴ See 18 C.F.R. Part 101.

facilities, the book cost of which is includible in Account 364 (poles, towers and fixtures), Account 365 (overhead conductors and devices), and Account 369 (services). In our calculation we include the net investment for all three accounts to determine the portion of Account 593 attributable to Account 364. UTC/EEI and Southern Co. continue to argue that Account 590, or a portion thereof, should be included in the carrying charge because the expenses relating to the maintenance of a distribution system may include poles.⁴⁰⁵ We disagreed in the *Fee Order*, and we have been provided no additional evidence to rebut the description of Account 590 or that "direct field supervision of specific jobs shall be charged to the appropriate maintenance account," in this case Account 593.⁴⁰⁶ *Fee Order* petitioners do not persuade us that there is any significant expense related to poles included in Account 590.

118. This same reasoning applies to Account 594 in the conduit context. Account 594 (maintenance of underground lines (Major only)) includes the cost of labor, materials used and expenses incurred in the maintenance of underground distribution line facilities, the book cost of which is includible in Account 366 (underground conduit), Account 367 (underground conductors and devices), and Account 369 (Services). All expenses associated with Account 366, the account used to determine conduit investment, are reported in Account 594 and no additional accounts should be included as maintenance expenses.

119. Petitioners also include a list of FERC accounts that they would like included as maintenance expenses in the pole and conduit calculations. These include Accounts 580 (operation and supervision), 583 (overhead line expenses (Major only)), 584 (underground line expenses (Major only)), 584 (operation of underground lines), 588 (miscellaneous distribution operation expenses), 590 (maintenance supervision and engineering-Major only), and 598 (maintenance of miscellaneous distribution plant).⁴⁰⁷ Accounts 580, 583, 584, and 588 are operational accounts to which electric utilities report expenses relating to the utility's core regulated business services, and not pole or conduit expenses.⁴⁰⁸ Account 598 is the miscellaneous account related generally to maintenance of equipment on customer premises and is not associated with pole or conduit expenses.⁴⁰⁹ We will not include any portion of Accounts 580, 583, 584, 588 or 598 in the calculation of the maintenance element of the carrying charge rate for pole or conduit because the costs or expenses reported to these accounts do not reflect a sufficient nexus to the operating expenses and actual capital costs of the utility attributable to

⁴⁰⁵ See, e.g., Southern Co. *Fee Order* petition at 11-13; UTC/EEI *Fee Order* petition at 16-17. But see NCTA *Fee Order* recon. reply at 2.

⁴⁰⁶ See, e.g., NCTA *Fee Order* comments at 37; Time Warner *Fee Order* comments at 26. Account 593 also includes some non-pole related expenses, such as expenses for the cleaning of insulators and bushings, various functions in support of crossarms, the capital costs of which are factored out of the net cost of a bare pole as discussed elsewhere in this *Order*; see also 18 C.F.R. Part 101, Account 590, 593 description of accounts.

⁴⁰⁷ See Edison Electric/UTC *Fee Order* comments at 26; Carolina Power *Fee Order* comments at 68-75; Ohio Edison *Fee Order* comments at 42-45.

⁴⁰⁸ 18 C.F.R. Part 101, Description of Accounts.

⁴⁰⁹ 18 C.F.R. Part 101, Description of Accounts.

the pole or conduit attachment.⁴¹⁰ The pertinent maintenance expenses are reported in Accounts 593 (poles) and 594 (conduit) and we include those in the calculation.

4. Investment Accounts (Electric)

120. In addition to its arguments for including additional accounts in the carrying charge component of the pole and conduit attachment formulas, Southern Co. argues that additional capital accounts should be included in the investment calculation for poles and conduit, including FERC Accounts 360 (land and land rights); 365 (overhead conductors and devices); 368 (line transformers) and Accounts 389-399 (General Plant).⁴¹¹ UTC/EEI joins in arguing for inclusion of Accounts 360, 365, 367 (underground conductors and devices), 369 (services), and 397 (communications equipment). We calculate net pole or conduit investment for two purposes in the formula. First, we calculate net investment to identify the portion of net investment that is allocable to the physical attachment. We then apply the rate of return against that portion so that the utility is fully compensated for the capital investment that is being used by the attacher. The only account pertinent to that calculation is the pole or conduit investment account.

121. We measure the capital investment that is used by determining the percentage of physical space occupied by the attachment. For electric utility poles, we use Account 364 (poles, towers and fixtures).⁴¹² Account 364 includes the cost of installed poles, towers, and appurtenant fixtures used for supporting overhead distribution conductors and service wires. Specific items include: 1. Anchors, head arm, and other guys, including guy guards, guy clamps, strain insulators, pole plates, etc.; Brackets; Crossarms and braces; Excavation and backfill, including disposal of excess excavated material; Extension arms; Foundations; Guards; Insulator pins and suspension bolts; Paving; Permits for construction; Pole steps and ladders; Poles, wood, steel, concrete, or other material; Racks complete with insulators; Railings; Reinforcing and stubbing; Settings; Shaving, painting, gaining, roofing, stenciling, and tagging; Towers; Transformer racks and platforms. Even with the 15% reduction for non-pole appurtenances such as crossarms, this is still a very generous account, including the cost of towers, transformer racks and platforms.

122. The attacher is paying to attach a cable to the pole. The Pole Attachment Act requires the attacher to pay a portion of the capital costs attributable to the pole. Those costs are fully captured in Account 364. The accounts suggested by petitioners include capital expenditures which support the utility's core business function and are not related to the pole costs. For instance, petitioners would like to include tree trimming from Account 365 (overhead conductors and devices) in the pole investment calculation. However, tree trimming in that account is related to the overhead conductors which relate to the core business function of the

⁴¹⁰ 47 U.S.C. § 224(d)(1).

⁴¹¹ The inclusion of Accounts 389-399 in Southern Co.'s petition may have been an error. Southern Co. provides absolutely no information or arguments in support of including general plant investment accounts as pole investment.

⁴¹² 18 CFR § 101.364.

utility. Any excavation relating to the installation of the pole itself, including disposal of excess material, is already included in Account 364.⁴¹³ If tree trimming is required as part of make-ready activity to provide for installation of an attaching entity's pole attachment, the attacher pays or reimburses that amount as part of make-ready charges.

123. Petitioners also ask to include Account 360 (land and land rights). This account includes the cost of land and land rights used in connection with distribution operations. It does not include the cost of permits to erect poles, towers, etc. which are included in Account 364. Electric Plant Instruction 7 states that "[t]he accounts for land and land rights shall include the cost of land owned in fee by the utility and rights, interests, and privileges held by the utility in land owned by others, such as leaseholds, easements, water and water power rights, diversion rights, submersion rights, rights-of-way, and other like interests in land. *Do not include in the accounts for land and land rights and rights-of-way costs incurred in connection with first clearing and grading of land and rights-of-way and the damage costs associated with the construction and installation of plant. Such costs shall be included in the appropriate plant accounts directly benefited.*" (emphasis added). Petitioners propose that they should earn a return on the entire amount of Account 360 which includes the entire cost of all its land and land rights acquisitions which support its distribution system.⁴¹⁴ Even if some costs associated with the land or right of way on which the poles are placed are included in this account rather than Account 364, the utility is enjoying the full use of those rights and the attacher's physical occupation of a portion of space on a pole does not restrict the utility's use of the land for its distribution network. The ratio of space occupied used to determine the capital pole investment allocable to the attachment bears no relationship to the portion of land on which the pole sits in relation to the entire inventory of square footage included in Account 360. In addition, an attacher usually pays a separate franchise, permit or license fee to the local government or franchising authority for the right to operate in the public right of ways. To the extent that an attacher wished to place a separate structure (pole, box, etc.) on utility property, we would examine any rate issue on a case by case basis.

124. Petitioners also suggest that a portion of Account 368 (line transformers) benefits other pole users because the lightning arresters attached to the transformers to protect the transformers may also benefit other pole attachments. Once again, Southern Co. proposes using an undisclosed formula for calculating what portion of these costs should be attributed to the pole investment.⁴¹⁵ We do not believe that the Pole Attachment Act envisions a drawn out ratemaking process to determine whether a lightning arrester, whose only function is to protect a piece of equipment which supports the utility's core business function of power distribution, indirectly benefits other attachers on the pole. Neither do we propose a complex ratemaking process to remove every possible cost included in Account 364 that does not benefit the pole attacher.

⁴¹³ Pole maintenance expenses are not included in the investment calculation. Our formula includes pole maintenance expenses in the carrying charges.

⁴¹⁴ See, e.g., Southern Co. *Fee Order* comments at 46.

⁴¹⁵ See, e.g., Southern Co. *Fee Order* comments at 48.

125. Another account proposed by UTC/EEI is Account 367 (underground conductors and devices) which UTC/EEI proposes to add to conduit investment. This account includes the cost installed of underground conductors and devices used for distribution purposes. Items included are: Armored conductors, buried, including insulators, insulating materials, splices, potheads, trenching, etc.; Armored conductors, submarine, including insulators, insulating materials, splices in terminal chamber, potheads, etc.; Cables in standpipe, including pothead and connection from terminal chamber or manhole to insulators on pole; Circuit breakers; Fireproofing, in connection with any items listed herein; Hollow-core oil-filled cable, including straight or stop joints, pressure tanks, auxiliary air tanks, feeding tanks, terminals, potheads and connections, etc.; Lead and fabric covered conductors, including insulators, compound-filled; oil-filled or vacuum splices, potheads, etc.; Lightning arresters; Municipal inspection; Permits; Protection of street openings; Racking of cables; Switches; and Other line devices. All of these items are related to the utility's distribution of power.⁴¹⁶

126. Account 366 (underground conduit), which we include in the investment calculation, includes the cost installed of underground conduit and tunnels used for housing distribution cables or wires. Items included are: 1. Conduit, concrete, brick and tile, including iron pipe, fiber pipe, Murray duct, and standpipe on pole or tower; Excavation, including shoring, bracing, bridging, backfill, and disposal of excess excavated material; Foundations and settings specially constructed for and not expected to outlast the apparatus for which constructed; Lighting systems; Manholes, concrete or brick, including iron or steel frames and covers, hatchways, gratings, ladders, cable racks and hangers, etc., permanently attached to manholes; Municipal inspection; Pavement disturbed, including cutting and replacing pavement, pavement base, and sidewalks; Permits; Protection of street openings; Removal and relocation of subsurface obstructions; Sewer connections, including drains, traps, tide valves, check valves, etc.; Sumps, including pumps; and Ventilating equipment.⁴¹⁷ All items associated with the construction of the conduit are included in this account.

127. Finally, UTC/EEI would like to include the costs of providing electric service to its customers homes and the costs of its own communications facilities in the pole investment calculation. They seek to include Account 369 (services) which covers "*the cost installed of overhead and underground conductors leading from a point where wires leave the last pole of the overhead system or the distribution box or manhole, or the top of the pole of the distribution line, to the point of connection with the customer's outlet or wiring.*"⁴¹⁸ Conduit used for this purpose is also included in this account. Account 397 includes the cost installed of telephone, telegraph, and wireless equipment for general use in connection with utility operations. Neither of these accounts can be considered as pole investment.

⁴¹⁶ 18 C.F.R. § 101.367.

⁴¹⁷ 18 C.F.R. § 101.366.

⁴¹⁸ 18 CFR § 101.369 (emphasis added).

128. Based on our extensive review of the record and the description of the accounts, we affirm that only FERC accounts to be included in the investment calculation are Accounts 364 for pole investment and Account 366 for conduit investment. Petitioners failed to provide any new information and their reiteration of the same arguments fail to persuade us to include additional accounts in our calculation of the pole or conduit investment. As we have stated above, any unusual requests involving access to land or rights of way other than for a pole attachment or conduit attachment will be considered on a case by case basis. Our inclusion of unrelated expenses in certain accounts and our exclusion of possible minor expenses in other accounts provides a balanced overall allocation of costs while avoiding a prolonged and contentious ratemaking process.

IV. FINAL REGULATORY FLEXIBILITY CERTIFICATION

129. As required by the Regulatory Flexibility Act ("RFA"),⁴¹⁹ an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in both the *Fee Order Notice* and *Telecom Order Notice*⁴²⁰ and a Final Regulatory Flexibility Analysis ("FRFA") was incorporated in both the *Fee Order*⁴²¹ and *Telecom Order*.⁴²² The Commission sought written public comment on the proposals in the *Fee Order Notice* and *Telecom Order Notice*, including comment on the IRFAs. No comments were received in response to the IRFA in either the *Fee Order Notice* or *Telecom Order Notice*, nor did we receive any petitions for reconsideration of the *Fee Order* FRFA or *Telecom Order* FRFA. The RFA requires that an RFA analysis be prepared for notice and comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."⁴²³

130. The RFA generally defines a "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁴²⁴ In addition, the term "small business" has the same meaning as the term small business concern under the Small Business Act.⁴²⁵ A "small business concern" is one that: (1) is independently owned

⁴¹⁹See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

⁴²⁰*Notice of Proposed Rulemaking*, CS Docket No. 97-151, 12 FCC Rcd 11725, 11741-51, ¶¶ 45-74 (1997).

⁴²¹*Fee Order*, 15 FCC Rcd 6453 (2000).

⁴²²*Telecom Order*, 13 FCC Rcd 6777 (1998).

⁴²³5 U.S.C. § 605(b).

⁴²⁴5 U.S.C. § 601(6).

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

(...continued)

and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").⁴²⁶ As we described in the FRFA analyses in the *Fee Order* and *Telecom Order*, we estimate that there are small business entities that might be affected by those orders.

131. In this *Reconsideration Order*, we affirm most of our prior conclusions in the *Fee Order* and *Telecom Order*. We have, among other things, amended certain requirements of Sections 1.1401-1.1418 of our rules.⁴²⁷ These amendments serve to simplify our formulas for calculating pole attachment rates. Specifically, we provide a simplified equation of our formula for telecommunications attachers;⁴²⁸ we simplify the geographic categories for determining average numbers of attaching entities;⁴²⁹ and we allow parties to a pole attachment proceeding to substitute presumptive numbers of attaching entities in the formula in order to avoid the expense of establishing numbers based on a survey or compilation of actual data.⁴³⁰ We also provide a simpler methodology for calculating rates when the net pole investment is negative or zero.⁴³¹ These changes do not impose additional compliance burdens on small entities nor do they alter the number or type of small entities possibly affected by the rules published in the *Fee Order* and *Telecom Order*. The changes may, in fact, reduce the burden on small entities. Therefore, we certify, pursuant to Section 605(b) of the RFA, that the rules adopted herein will not have a significant economic impact on a substantial number of small entities.

132. *Report to Congress*: The Commission will send a copy of this *Reconsideration Order*, including this final certification, in a report to Congress pursuant to the Congressional Review Act, 5 U.S.C. § 801(a)(1)(A). A copy of this *Reconsideration Order* (or summary thereof) and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register pursuant to 5 U.S.C. § 605.

V. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

133. The requirements adopted in this *Reconsideration Order* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and found to impose no new or modified information collection requirements on the public.

VI. ORDERING CLAUSES

(...continued from previous page)
and publishes such definitions in the Federal Register."

⁴²⁶Small Business Act, 15 U.S.C. § 632.

⁴²⁷47 C.F.R. § 1.1401-1.1418.

⁴²⁸*Reconsideration Order* at ¶ 51.

⁴²⁹*Id.* at ¶ 63.

⁴³⁰*Id.* at ¶¶ 67-68.

⁴³¹*Id.* at ¶ 22, *et seq.*

134. Accordingly, IT IS ORDERED, pursuant to section 405 of the Communications Act of 1934, *as amended*, 47 U.S.C. §§ 405 and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the petitions for reconsideration and/or clarification are DENIED IN PART and GRANTED IN PART to the extent indicated above.

135. IT IS FURTHER ORDERED that, pursuant to Sections 1, 4(i), 224 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 224 and 303(r), this Reconsideration Order is hereby ADOPTED and the Commission's rules are HEREBY AMENDED as set forth in Appendix A.

136. IT IS FURTHER ORDERED that the Commission's rules, as amended in Appendix A hereto, will become effective 30 days after the date of publication of this *Reconsideration Order* (or summary thereof) in the Federal Register.

137. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Reconsideration Order*, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

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(i), 154(j), 155, 225, 303(r), 309 and 325(e).

2. Amend § 1.1402 to revise paragraph (m) to read as follows:

§ 1.1402 Definitions.

* * * * *

(m) The term *attaching entity* includes cable system operators, telecommunications carriers, incumbent and other local exchange carriers, utilities, governmental entities and other entities with a physical attachment to the pole, duct, conduit or right of way. It does not include governmental entities with only seasonal attachments to the pole.

* * * * *

3. Amend § 1.1409 to remove paragraph (e)(4) and revise paragraphs (e)(1), (e)(2), (e)(3) and the first sentence of paragraph (f) to read as follows:

§ 1.1409 Commission consideration of the complaint.

* * * * *

(e) * * *

(1) The following formula shall apply to attachments to poles by cable operators providing cable services. This formula shall also apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\text{Maximum Rate} = \text{SpaceFactor} \times \frac{\text{Net Cost of a Bare Pole}}{\text{Carrying Charge Rate}}$$

$$\text{Where Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}}$$

(2) Subject to paragraph (f) the following formula shall apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or

cable operator providing telecommunications services beginning February 8, 2001:

$$\text{Maximum Rate} = \text{SpaceFactor} \times \text{NetCostofaBarePole} \times \left[\begin{array}{c} \text{Carrying} \\ \text{Charge} \\ \text{Rate} \end{array} \right]$$

$$\text{WhereSpaceFactor} = \left[\frac{\left(\frac{\text{Space Occupied}}{\text{Pole Height}} \right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right]$$

(3) The following formula shall apply to attachments to conduit by cable operators and telecommunications carriers:

$$\text{Maximum Rate per Linear ft./m.} = \left[\frac{1}{\text{Number of Ducts}} \times \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \right] \times \left[\frac{\text{No. of Ducts} \times \text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \right] \times \text{Carrying Charge Rate}$$

(Percentage of Conduit Capacity) (Net Linear Cost of a Conduit)

simplified as:

$$\text{Maximum Rate Per Linear ft./m.} = \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \times \text{Carrying Charge Rate}$$

If no inner-duct is installed the fraction, "1 Duct divided by the No. of Inner-Ducts" is presumed to be 1/2.

(f) Paragraph (e)(2) of this section shall become effective February 8, 2001 (i.e., five years after the effective date of the Telecommunications Act of 1996). * * *

* * * * *

4. Amend §1.1417 to revise paragraphs (a), (b), (c), and the first sentence of paragraph (d) to read as follows:

§ 1.1417 Allocation of Unusable Space Costs.

(a) With respect to the formula referenced in Section 1.1409(e)(2), a utility shall apportion the cost of providing unusable space on a pole so that such apportionment equals two-thirds of the costs of providing unusable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(b) All attaching entities attached to the pole shall be counted for purposes of apportioning the costs of unusable space.

(c) Utilities may use the following rebuttable presumptive averages when calculating the

number of attaching entities with respect to the formula referenced in Section 1.1409(e)(2). For non-urbanized service areas (under 50,000 population), a presumptive average number of attaching entities of three (3). For urbanized service areas (50,000 or higher population), a presumptive average number of attaching entities of five (5). If any part of the utility's service area within the state has a designation of urbanized (50,000 or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities.

(d) A utility may establish its own presumptive average number of attaching entities for its urbanized and non-urbanized service areas as follows: * * *

* * * * *

5. Amend §1.1418 to read as follows:

§ 1.1418 Use of presumptions in calculating the space factor.

With respect to the formulas referenced in Sections 1.1409(e)(1) and (e)(2), the space occupied by an attachment is presumed to be one (1) foot. The amount of usable space is presumed to be 13.5 feet. The amount of unusable space is presumed to be 24 feet. The pole height is presumed to be 37.5 feet. These presumptions may be rebutted by either party.

APPENDIX B
List of Parties Filing in *Fee Order* Reconsideration Proceeding

Petitions for Reconsideration and/or Clarification of the Fee Order were filed by:

American Electric Power Corporation, Commonwealth Edison Company and Duke Energy Corporation (filed errata to correct the name of American Electric Power Corporation to American Electric Power Services Corporation) (American Electric)

Southern Company Services, Inc., on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company (Southern Co.)

Texas Cable & Telecommunications Association (TxCTA)

United States Telecom Association (USTA)

United Telecom Council and the Edison Electric Institute (UTC/EEI)

Comments in Support of and/or Opposition to Fee Order Petitions were filed by:

Verizon, local telephone companies of Bell Atlantic Corporation (d/b/a Verizon Communications), including telephone companies formerly affiliated with GTE Corporation, specifically: Bell Atlantic- Delaware, Inc., Bell Atlantic- Maryland, Inc., Bell Atlantic- New Jersey, Inc., Bell Atlantic- Pennsylvania, Inc., Bell Atlantic- Virginia, Inc., Bell Atlantic- Washington, D.C., Inc., Bell Atlantic- West Virginia, Inc., Contel of Minnesota, Inc., Contel of the South, Inc., GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Midwest Incorporated, GTE Southwest Incorporated, The Micronesian Telecommunications Corporation, New England Telephone and Telegraph Company, New York Telephone Company, Verizon Florida Inc., Verizon Hawaii Inc., Verizon North Inc., Verizon Northwest Inc., Verizon South Inc., Verizon West Coast (Verizon).

WorldCom, Inc. (WorldCom)

Replies to Comments in Support of and/or Opposition to Fee Order Petitions were filed by:

American Electric Power Corporation, Commonwealth Edison Company and Duke Energy Corporation (American Electric)

National Cable Television Association (NCTA)

Southern Company Services, Inc., on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company (Southern Co.)

The United States Telecom Association (USTA) filed a *Fee Order* Reconsideration Reply after the deadline for timely filing. No new arguments or issues were raised in that *Fee Order* Reconsideration Reply and we have considered the comments contained therein in the interest of having a full record reflected in the *Reconsideration Order*.

APPENDIX C
List of Parties Filing in *Telecom Order* Reconsideration Proceeding

Petitions for Reconsideration and/or Clarification of the Telecom Order were filed by:

Bell Atlantic (Bell Atlantic)
ICG Communications (ICG)
MCI Telecommunications Corporation (MCI)
National Cable Television Association, Cable Telecommunications Association,
Texas Cable & Telecommunications Association, Cable Television Association of Georgia,
South Carolina Cable Television Association, Cable Television Association of Maryland,
Delaware and the District of Columbia, Mississippi Cable Telecommunications Association,
Mid-America Cable Telecommunications Association, Kansas Cable Telecommunications
Association, Jones Intercable, Inc., Charter Communications, Greater Media, Inc., Prime
Cable, Rifkin & Associates, TCA Cable TV, Inc., and The Helicon Corporation (NCTA)
SBC Communications Inc. (SBC)
Teligent
United States Telephone Association (USTA)
United Telecom Council and the Edison Electric Institute (“UTC/EEI”)
U S West, Inc. (U S West)

Comments in Support of or in Opposition to Telecom Order Petitions were filed by:

Adelphia and Lenfest Communications (Adelphia and Lenfest)
Ameritech
AT&T Corp. (AT&T)
Bell Atlantic (Bell Atlantic)
BellSouth Corporation (BellSouth)
Edison Electric Institute and UTC, the Telecommunications Association (UTC/EEI)
GTE Service Corporation (GTE)
Joint Cable Parties: Texas Cable & Telecommunications Association; Cable Telecommunications
Association of Maryland, Delaware & District of Columbia; Mid-American Cable
Telecommunications Association, Jones Intercable, Inc.; Helicon, Inc.; and Rifkin &
Associates (Joint Cable Parties)
MCI Telecommunications Corporation (MCI)
National Cable Television Association, Cable Telecommunications Association,
Texas Cable & Telecommunications Association, Cable Television Association of Georgia,
South Carolina Cable Television Association, Cable Television Association of Maryland,
Delaware and the District of Columbia, Mississippi Cable Telecommunications Association,
Mid-America Cable Telecommunications Association, Kansas Cable Telecommunications
Association, Jones Intercable, Inc., Charter Communications, Greater Media, Inc., Prime
Cable, Rifkin & Associates, TCA Cable TV, Inc., and The Helicon Corporation (NCTA)
SBC Communications Inc. (SBC)
Sprint Local Telephone Companies (Sprint)

Texas Electric Utilities Company (TUEC)
Time Warner Cable (Time Warner)
WinStar Communications (WinStar)

Reply Comments to Comments in Support of or Opposition to Telecom Order Petitions were filed by:

Association for Local Telecommunications Services (ALTS)
Bell Atlantic (Bell Atlantic)
Edison Electric Institute and UTC, the Telecommunications Association (UTC/EEI)
GTE Service Corporation (GTE)
Joint Cable Parties: Texas Cable & Telecommunications Association; Cable Telecommunications Association of Maryland, Delaware & District of Columbia; Mid-American Cable Telecommunications Association, Jones Intercable, Inc.; Helicon, Inc.; and Rifkin & Associates (Joint Cable Parties)
MCI Telecommunications Corporation (MCI)
National Cable Television Association, Cable Telecommunications Association, Texas Cable & Telecommunications Association, Cable Television Association of Georgia, South Carolina Cable Television Association, Cable Television Association of Maryland, Delaware and the District of Columbia, Mississippi Cable Telecommunications Association, Mid-America Cable Telecommunications Association, Kansas Cable Telecommunications Association, Jones Intercable, Inc., Charter Communications, Greater Media, Inc., Prime Cable, Rifkin & Associates, TCA Cable TV, Inc., and The Helicon Corporation (NCTA)
Teligent
WinStar Communications (WinStar)

Note: If no abbreviation appears in parentheses following the full name of the party, the full name is used in this *Reconsideration Order*.

Appendix D-1

Section 224(d) *Cable Formula* for Determining Maximum Rate For Use of LEC Utility Poles Using FCC ARMIS Accounts

$$\text{Maximum Rate per Pole} = \frac{\text{Space Occupied}}{\text{Usable Space}} \times \frac{\text{Net Pole Investment}}{\text{Total Number of Poles}} \times 0.95 \times \text{Carrying Charge Rate}$$

Where:

Space Occupied = 1 foot (presumed, but rebuttable)

Usable Space = 13.5 feet (presumed, but rebuttable)

And:

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

$$\text{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

$$\text{Administrative Element} = \frac{\text{Total General and Administrative (Accounts 6710 \& 6720)}}{\frac{\text{Gross Plant Investment}}{\text{(Account 2001)}} - \frac{\text{Accumulated Depreciation}}{\text{(Account 3100)}} - \frac{\text{Accumulated Deferred Taxes (Plant) (Accounts 4100 + 4340)}}{\text{(Account 4100 + 4340)}}$$

$$\text{Maintenance Element} = \frac{\text{Account 6411} - \text{Rental Expense (Poles)}}{\text{Net Pole Investment}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Pole Investment (Account 2411)}}{\text{Net Pole Investment}} \times \text{Depreciation Rate for Gross Pole Investment}$$

$$\text{Taxes Element} = \frac{\text{Operating Taxes (Account 7200)}}{\frac{\text{Gross Plant Investment}}{\text{(Account 2001)}} - \frac{\text{Accumulated Depreciation}}{\text{(Account 3100)}} - \frac{\text{Accumulated Deferred Taxes (Plant) (Accounts 4100 + 4340)}}{\text{(Account 4100 + 4340)}}$$

$$\text{Return Element} = \text{Applicable Rate of Return (default } \approx 11.25\%)$$

Appendix D-2

Section 224(d) Cable Formula for Determining Maximum Rate for Use of Electric Utility Poles Using FERC Form 1 Accounts

$$\text{Maximum Rate per Pole} = \frac{\text{Space Occupied}}{\text{Usable Space}} \times \frac{\text{Net Pole Investment}}{\text{Total Number of Poles}} \times 0.85 \times \text{Carrying Charge Rate}$$

Where:

Space Occupied = 1 foot (presumed, but rebuttable)

Usable Space = 13.5 feet (presumed, but rebuttable)

And:

$$\text{Net Pole Investment} = \text{Gross Pole Investment (Account 364)} - \text{Accumulated Depreciation (Account 108)(Poles)} - \text{Accumulated Deferred Income Taxes (Account 190, 281 - 283)(Poles)}$$

$$\text{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

$$\text{Administrative Element} = \frac{\text{Total General and Administrative}}{\text{Gross Plant Investment (Electric)} - \text{Accumulated Depreciation (Account 108 - Electric)} - \text{Accumulated Deferred Taxes (Electric Plant) (Accounts 190, 281 - 283)}}$$

$$\text{Maintenance Element} = \frac{\text{Account 593}}{\text{Pole Investment in Accounts 364, 365, \& 369} - \text{Depreciation (Poles) Related to Accounts 364, 365, \& 369} - \text{Accumulated Deferred Income Taxes related to Accounts 364, 365, \& 369}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Pole Investment (Account 364)}}{\text{Net Pole Investment}} \times \text{Depreciation Rate for Gross Pole Investment}$$

$$\text{Taxes Element} = \frac{\text{Accounts 408.1 + 409.1 + 410.1 + 411.4 - 411.1}}{\text{Gross Plant Investment (Total Plant)} - \text{Accumulated Depreciation (Account 108)} - \text{Accumulated Deferred Taxes (Plant) (Account 190, 281 - 283)}}$$

$$\text{Return Element} = \text{Applicable Rate of Return (default } \cong 11.25\%)$$

Appendix E-1

Section 224(e) *Telecom Formula* for Determining Maximum Rate For Use of LEC Utility Poles Using FCC ARMIS Accounts

$$\text{Maximum Rate} = \left[\frac{\left(\text{Space Occupied} \right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right] \times \frac{\text{Net Pole Investment}}{\text{Number of Poles}} \times \left[\text{Carrying Charge Rate} \right]$$

Where:

Space Occupied = 1 foot (presumed, but rebuttable)

Unusable Space = 24 feet (presumed, but rebuttable)

Number of Attaching Entities = 3 (non - urbanized) and 5 (urbanized) (presumed, but rebuttable)

Pole Height = 37.5 feet (average, presumed, but rebuttable)

And:

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

$$\text{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

$$\text{Administrative Element} = \frac{\text{Total General and Administrative (Accounts 6710 \& 6720)}}{\frac{\text{Gross Plant Investment}}{\text{(Account 2001)}} - \frac{\text{Accumulated Depreciation}}{\text{(Account 3100)}} - \frac{\text{Accumulated Deferred Taxes (Plant)}}{\text{(Accounts 4100 + 4340)}}$$

$$\text{Maintenance Element} = \frac{\text{Account 6411} - \text{Rental Expense (Poles)}}{\text{Net Pole Investment}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Pole Investment (Account 2411)}}{\text{Net Pole Investment}} \times \text{Depreciation Rate for Gross Pole Investment}$$

$$\text{Taxes Element} = \frac{\text{Operating Taxes (Account 7200)}}{\frac{\text{Gross Plant Investment}}{\text{(Account 2001)}} - \frac{\text{Accumulated Depreciation}}{\text{(Account 3100)}} - \frac{\text{Accumulated Deferred Taxes (Plant)}}{\text{(Accounts 4100 + 4340)}}$$

$$\text{Return Element} = \text{Applicable Rate of Return (default } \cong 11.25\%)$$

Appendix E-2
Section 224(e) Telecom Formula for Determining Maximum Rate For Use of Electric Utility Poles
Using FERC Form 1 Accounts

$$\text{Maximum Rate} = \left[\frac{\left(\text{Space Occupied} \right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right] \times \frac{\text{Net Pole Investment}}{\text{Number of Poles}} \times \left[\text{Carrying Charge Rate} \right]$$

Where:

Space Occupied = 1 foot (presumed, but rebuttable)

Unusable Space = 24 feet (presumed, but rebuttable)

Number of Attaching Entities = 3 (non - urbanized) and 5 (urbanized) (presumed, but rebuttable)

Pole Height = 37.5 feet (average, presumed, but rebuttable)

$$\text{Net Pole Investment} = \text{Gross Pole Investment (Account 364)} - \text{Accumulated Depreciation (Account 108) (Poles)} - \text{Accumulated Deferred Income Taxes (Account 190, 281-283) (Poles)}$$

Carrying Charge Rate = Administrative + Maintenance + Depreciation + Taxes + Return

$$\text{Administrative Element} = \frac{\text{Total General and Administrative}}{\text{Gross Plant Investment (Electric)} - \text{Accumulated Depreciation (Account 108)} - \text{Accumulated Deferred Taxes (Plant) (Accounts 190, 281 - 283)}}$$

$$\text{Maintenance Element} = \frac{\text{Account 593}}{\text{Pole Investment in Accounts 364, 365, \& 369} - \text{Depreciation (Poles) Related to Accounts 364, 365, \& 369} - \text{Accumulated Deferred Income Taxes related to Accounts 364, 365, \& 369}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Pole Investment (Account 364)}}{\text{Net Pole Investment}} \times \text{Depreciation Rate for Gross Pole Investment}$$

$$\text{Taxes Element} = \frac{\text{Accounts 408.1 + 409.1 + 410.1 + 411.4 - 411.1}}{\text{Gross Plant Investment (Total Plant)} - \text{Accumulated Depreciation (Account 108)} - \text{Accumulated Deferred Taxes (Plant) (Account 190, 281 - 283)}}$$

Return Element = Applicable Rate of Return (default = 11.25%)

Appendix F-1
Formula for Determining Maximum Rate for Use of LEC Utility Conduit
Using FCC ARMIS Accounts

$$\text{Maximum Rate per Linear ft./m.} = \left[\frac{1}{\text{No. of Ducts}} \times \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \right] \times \left[\frac{\text{No. of Ducts}}{\text{System}} \times \frac{\text{Net Conduit Investment}}{\text{Duct Length (ft./m.)}} \right] \times \text{Carrying Charge Rate}$$

(Percentage of Conduit Capacity) (Net Linear Cost of a Conduit)

simplified as:

$$\text{Maximum Rate per Linear ft./m.} = \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \times \text{Carrying Charge Rate}$$

Where:

$$\text{Net Conduit Investment} = \text{Gross Conduit Investment} - \frac{\text{Accumulated Depreciation}}{\text{(Conduit)}} - \frac{\text{Accumulated Deferred Income Taxes}}{\text{(Conduit)}}$$

and

$$\text{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

The Carrying Charge Rate reflects the costs incurred by the utility in owning and maintaining conduit and other pole attachment infrastructure regardless of the presence of pole attachments. To help calculate the Carrying Charge Rate, we developed formulas that relate each of these components to the utility's conduit investment. The Carrying Charge Rate used in the conduit formula is the same as used in the pole formula.

$$\text{Maximum Rate} = \frac{\text{Percentage of Conduit Capacity Occupied}}{\text{Occupied}} \times \frac{\text{Net Linear Cost of Conduit}}{\text{of Conduit}} \times \frac{\text{Carrying Charge Rate}}{\text{Charge Rate}}$$

Where:

$$\frac{\text{Percentage of Conduit Capacity Occupied}}{\text{Occupied}} = \frac{1}{\text{Number of Inner Ducts } (\geq 2)} \times \frac{1}{\text{Number of Ducts in Conduit}}$$

$$\frac{\text{Net Linear Cost of Conduit}}{\text{of Conduit}} = \frac{\text{Number of Ducts in Conduit}}{\text{in Conduit}} \times \frac{\text{Net Conduit Investment}}{\text{Total Conduit System Duct Length (ft. or m.)}} \text{ OR } = \frac{\text{Net Conduit Investment}}{\text{Total Length of Conduit in System}}$$

$$\text{Net Conduit Investment} = \frac{\text{Gross Conduit Investment (Account 2441)} - \text{Accumulated Depreciation (Account 3100)(Conduit)} - \text{Accumulated Deferred Income Taxes (Account 4100 + 4340)(Conduit)}}{1}$$

Carrying Charge Rate = Administrative + Maintenance + Depreciation + Taxes + Return

$$\text{Administrative Element} = \frac{\text{Total General and Administrative Expenses (Accounts 6710 \& 6720)}}{\text{Gross Plant Investment (Account 2001)} - \text{Accumulated Depreciation (Account 3100)} - \text{Accumulated Deferred Taxes (Plant) (Accounts 4100 + 4340)}}$$

$$\text{Maintenance Element} = \frac{\text{Conduit Maintenance Expense (Account 6441)}}{\text{Net Conduit Investment}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Conduit Investment (Account 2441)}}{\text{Net Conduit Investment}} \times \text{Depreciation Rate for Conduit}$$

$$\text{Taxes Element} = \frac{\text{Operating Taxes (Account 7200)}}{\text{Gross Plant Investment (Account 2001)} - \text{Accumulated Depreciation (Account 3100)} - \text{Accumulated Deferred Taxes (Plant) (Accounts 4100 + 4340)}}$$

Return Element = Applicable Rate of Return (default = 11.25%)

Appendix F-2
Formula for Determining Maximum Rate for Use of Electric Utility Conduit
Using FERC Form 1 Accounts

$$\text{Maximum Rate per Linear ft./m.} = \left[\frac{1}{\text{No. of Ducts}} \times \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \right] \times \left[\frac{\text{No. of Ducts}}{\text{System Duct Length (ft./m.)}} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \right] \times \text{Carrying Charge Rate}$$

(Percentage of Conduit Capacity) (Net Linear Cost of a Conduit)

Simplified as:

$$\text{Maximum Rate per Linear ft./m.} = \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \times \text{Carrying Charge Rate}$$

Where:

$$\text{Net Conduit Investment} = \text{Gross Conduit Investment} - \frac{\text{Accumulated Depreciation}}{\text{(Conduit)}} - \frac{\text{Accumulated Deferred Income Taxes}}{\text{(Conduit)}}$$

And

$$\text{Carrying Charges} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

The Carrying Charge Rate reflects the costs incurred by the utility in owning and maintaining conduit and other pole attachment infrastructure regardless of the presence of pole attachments. To help calculate the Carrying Charge Rate, we developed formulas that relate each of these components to the utility's conduit investment. The Carrying Charge Rate used in the conduit formula is the same as used in the pole formula.

$$\text{Maximum Rate} = \frac{\text{Percentage of Conduit Capacity Occupied}}{\text{Occupied}} \times \frac{\text{Net Linear Cost of Conduit}}{\text{of Conduit}} \times \text{Carrying Charge Rate}$$

Where:

$$\frac{\text{Percentage of Conduit Capacity Occupied}}{\text{Occupied}} = \frac{1}{\text{Number of Inner Ducts } (\geq 2)} \times \frac{1}{\text{Number of Ducts in Conduit}}$$

$$\text{Net Linear Cost of Conduit} = \frac{\text{Number of Ducts in Conduit}}{\text{Total Conduit System Duct Length (ft. or m.)}} \times \frac{\text{Net Conduit Investment}}{\text{Total Length of Conduit in System}} \text{ OR } = \frac{\text{Net Conduit Investment}}{\text{Total Length of Conduit in System}}$$

$$\text{Net Conduit Investment} = \frac{\text{Gross Conduit Investment (Account 366)} - \text{Accumulated Depreciation (Conduit)} - \text{Accumulated Deferred Income Taxes (conduit)}}$$

Carrying Charge Rate = Administrative + Maintenance + Depreciation + Taxes + Return

$$\text{Administrative Element} = \frac{\text{Total General and Administrative Expenses}}{\frac{\text{Gross Plant Investment (Electric)} - \text{Accumulated Depreciation (Electric Plant)} - \text{Accumulated Deferred Taxes (Electric Plant)}}$$

$$\text{Maintenance Element} = \frac{\text{Account 594}}{\frac{\text{Conduit Investment in Accounts 366, 367, \& 369} - \text{Depreciation (Conduit) in Accounts 366, 367, \& 369} - \text{Accumulated Deferred Income Taxes related to Accounts 366, 367, \& 369}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Conduit Investment (Account 366)}}{\text{Net Conduit Investment}} \times \text{Depreciation Rate for Conduit}$$

$$\text{Taxes Element} = \frac{\text{Accounts 408.1 + 409.1 + 410.1 + 411.4 - 411.1}}{\frac{\text{Gross Plant Investment (Total Plant)} - \text{Accumulated Depreciation (Plant)} - \text{Accumulated Deferred Taxes (Plant)}}$$

Return Element = Applicable Rate of Return (default = 11.25%)