

ALJ/TRP/mrj

Mailed 10/28/98

Decision 98-10-058 October 22, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion Into Competition
for Local Exchange Service.

ORIGINAL
R.95-04-044

(Filed April 26, 1995)

Order Instituting Investigation on the
Commission's Own Motion Into Competition
for Local Exchange Service.

1.95-04-044

(Filed April 26, 1995)

TABLE OF CONTENTS

Title	Page
OPINION	2
I. Procedural Background.....	3
II. Statutory Authority For ROW Access Rulemaking	5
A. The Need For Rules and Tariffs.....	9
B. Discussion.....	12
III. General Definitions and Applicability of Rules	14
A. Utility Categories Covered Under ROW Rules	14
1. Parties' Positions.....	14
2. Discussion.....	15
B. Definition of Rights of Way.....	16
1. Parties' Positions.....	16
2. Discussion.....	17
C. Definition of Nondiscriminatory Access	18
1. Parties' Positions.....	18
2. Discussion.....	20
D. Renegotiation of Existing Agreements to Conform to Commission Rules ...	21
1. Parties' Positions.....	21
2. Discussion.....	22
E. Applicability of Rules to Cable Companies.....	22
1. Discussion.....	23
F. Applicability of Rules to Commercial Mobile Radio Service (CMRS).....	25
1. Parties' Positions.....	25
2. Discussion.....	26
G. Applicability of Rules to Municipalities and Governmental Agencies.....	28
1. Parties' Positions.....	28
2. Discussion.....	33
H. Reciprocity of Rights-of-Way Access Between Incumbents and CLCs	40
1. Parties' Positions.....	40
2. Discussion.....	42
IV. Pricing Issues.....	43
A. Parties' Positions	43
B. Discussion.....	48
V. Obligations to Respond to Requests Concerning Facility Availability and Requests for Access	57
A. Parties' Positions	57
B. Discussion.....	61

VI. Treatment of Confidential Information.....	65
A. Parties' Positions	65
B. Discussion.....	66
VII. Restrictions on Access to Utility Capacity.....	66
A. Safety and Reliability Issues.....	66
1. Parties' Positions.....	66
2. Discussion.....	72
B. Reservations of Capacity	76
VIII. Capacity Expansion, and Modification, and Reclamation	87
A. Parties' Positions	87
B. Discussion.....	89
IX. Obtaining Third-Party Access to Customer Premises.....	92
A. Parties' Positions	92
B. Discussion.....	97
X. Third Party Access to Jointly-Owned Facilities.....	102
A. Parties' Positions	102
B. Discussion.....	105
XI. Expedited Dispute Resolution	105
A. Parties' Positions	105
B. Discussion.....	109
Findings of Fact.....	112
Conclusions of Law	119
ORDER	132

OPINION

By this decision, we take a further significant step in our program to open the local exchange market within California to competition. We adopt rules herein governing the nondiscriminatory access to the poles, ducts, conduits, and rights-of-way (ROW) applicable to all competitive local carriers (CLCs) competing in the local exchange market within the service territories of the large and mid-sized incumbent local exchange carriers (ILECs): Pacific Bell (Pacific) and GTE California Incorporated (GTEC), Roseville Telephone Company (RTC) and Citizens Telecommunications Company of California (CTC). In order for broadly available facilities-based competition to succeed, CLCs need access to the poles, ducts, conduits, and ROW, owned not only by the ILECs, but those owned by other entities controlling essential ROW including electric utilities and by local governments. The rules adopted herein shall apply to the major investor-owned electric utilities¹ as well as to the above-referenced ILECs. The obligations of the ILECs and electric utilities to provide nondiscriminatory access to CLCs shall also extend to cable companies. Thus, our rules shall apply uniformly, without the need to distinguish whether a given attachment is used to provide cable television, as opposed to telecommunications services. We also address herein ROW access issues relating to municipal utilities and local governments. At this time, we shall not apply these rules to other categories of investor-owned public utilities such as gas, water, or steam utilities. We will consider expanding the scope of the rules at a later time to cover additional classes of utilities.

¹ The major electric utilities are Pacific Gas and Electric Company (PG&E); Southern California Edison Company (Edison); and San Diego Gas & Electric Company (SDG&E).

I. Procedural Background

We establish rules herein regarding ROW access as a crucial part of our continuing program to facilitate the emergence of robust competition for local exchange service within California. We solicited initial comments on proposed rules for access to ROW among telecommunications carriers in conjunction with the initiation of local exchange competition in the incumbent territories of Pacific and GTEC in Phase II of this proceeding. In Decision (D.) 96-02-072, in response to Phase II comments, we concluded that parties had raised a number of complex issues relating to ROW access which were important but which could not readily be resolved at that time. We directed carriers to negotiate any necessary ROW access requirements through contract on a case-by-case basis as an interim measure and stated our intention to further consider the need to define carriers' ROW access rights through a combination of workshops and written pleadings. In the event parties could not reach agreement, we directed them to file complaints for prompt resolution. By Rule 12 in Appendix B of D.96-02-072, we directed that "LECs and CLCs may mutually negotiate access to and charge for right-of-way, conduits, pole attachments, and building entrance facilities on a nondiscriminatory basis."

By ruling dated March 28, 1996, the need for further rules governing access to ROW was designated among the matters to be addressed in Phase III of this proceeding. The record on this issue was developed through written comments and technical workshops. No evidentiary hearings have been held. An initial workshop was held on April 8, 1996, addressing provisions for ROW access among telecommunications carriers. Workshop participants agreed that telecommunications ROW issues also impact municipal and investor-owned electric utilities, and that notice of subsequent proceedings on this issue should be provided to such utilities. A ruling subsequently was prepared on

May 30, 1996, setting forth the issues identified by the workshop participants, and was served on the major investor-owned and municipal electric utilities in California with an invitation to participate in a further workshop.

A second ROW workshop on June 17, 1996, which included representatives of municipal and investor-owned electric utilities, provided participants an opportunity to discuss and to further define the relevant ROW issues to be addressed through subsequent written comments. Based on the input from the workshops, a list of issues was prepared by the assigned Administrative Law Judge (ALJ) and submitted for comments by ruling dated September 10, 1996. Opening comments were received on October 22, 1996, with reply comments on November 13, 1996. Comments were filed by the large and mid-sized ILECs, a group of small ILECs,² by the major California electric utilities,³ by a group of CLCs known as the California Rights-of-Way Coalition (Coalition),⁴ by the California Cable Television Association (CCTA) and by AT&T Wireless Services, Inc. (AWS).

² The small LECs represent: Calaveras Telephone Company; California-Oregon Telephone Co.; Ducor Telephone Company; Foresthill Telephone Co.; Happy Valley Telephone Company; Hornitos Telephone Company; The Ponderosa Telephone Co.; Sierra Telephone Company, Inc.; and Winterhaven Telephone Company.

³ Pacific Gas and Electric Company (PG&E); Southern California Edison Company (Edison); and San Diego Gas & Electric Company (SDG&E).

⁴ The California Rights-of-Ways Coalition consists of: AT&T Communications of California Inc. (AT&T); MCI Telecommunications Corporation; ICG Telecom Group, Inc.; and MFS Intelenet of California, Inc. The view expressed in the Coalition's comments represent a consensus of the Coalition's members and may not represent all of the views of each member of the Coalition.

Although various municipal electric utility and certain local government entities were provided notice of the workshops held in this proceeding and were provided the opportunity to file comments, none chose to comment.

An initial draft decision of the assigned Administrative Law Judge was mailed to parties of record on March 30, 1998 for comment. Although evidentiary hearings were not held in this matter requiring that a proposed decision be served on parties for comment, the assigned Commissioner determined that an opportunity for comments was appropriate. Opening comments were filed on May 7 and reply comments were filed on May 18, 1998. In addition to the parties previously filing comments, certain new parties filed comments. A revised version of the draft decision was served on parties of record on July 7, 1998, soliciting additional comments from parties. The revised draft decision was also served on The League of California Cities and various other local governments throughout California, providing them with the opportunity to comment on the Commission's jurisdiction with respect to telecommunications carriers' access to the ROW of local governments. Opening comments on the revised draft decision were filed on July 24, 1998, with replies filed on July 31, 1998. We have reviewed parties' comments and taken them into account, as appropriate, in finalizing this order.

II. Statutory Authority For ROW Access Rulemaking

The current rights and obligations of public utilities with respect to ROW access are addressed in various federal, state, and local statutes. The rules we adopt expand, elaborate, or clarify previously existing access rights and obligations with a view toward promoting a more competitive market for telecommunications services. The rules we adopt shall apply to the major ILECs as well as to the major investor-owned electric utilities under our jurisdiction.

We establish rules for ROW access in this decision pursuant to our jurisdictional authority, as discussed below.

Legal disputes relating to accessing the ROW and support structures of public utilities became significant nationally in the late 1970s as the newly-emerging cable television industry sought to gain access to the utility poles and underground conduit owned by incumbent public utilities. In 1978, Congress enacted the Pole Attachments Act (47 U.S.C. § 224) which gave the Federal Communications Commission (FCC) jurisdiction to regulate the rates, terms, and conditions of attachments by cable television operators to the poles, conduit or ROW owned or controlled by utilities in the absence of parallel state regulation. More recently, with the accelerated implementation of competition for telecommunications services, Congress has further addressed and modified federal law pertaining to ROW access rights and obligations. In the Telecommunications Act of 1996 (the "Act") Congress expanded the scope of § 224 to include pole attachments by telecommunications carriers. It also gave the FCC the authority to regulate nondiscriminatory access to poles, ducts, conduits and ROW.⁵ As amended by the Act, § 224 provides that "a utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."⁶ Section 251(b)(4) of the Act further provides that "all local exchange carriers have the duty to afford access to the poles, ducts, conduits, and rights-of-way of such carriers to competing providers of telecommunications services on rates, terms, and conditions that are consistent with § 224." Similarly,

⁵ 47 U.S.C. §§ 224(a)(4) and (f).

⁶ 47 U.S.C. § 224 (f)(1).

§ 271(c)(2)(B), checklist item (iii), requires "[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by a Bell operating company at just and reasonable rates in accordance with the requirements of § 224 "prior to that Bell operating company being able to provide certain in-region inter-Local Access and Transport Area services.

The FCC adopted rules governing access to ROW in its Interconnection Order, FCC 96-325, adopted August 1, 1996, in conformance with the Act. As set forth in § 224(c)(1), however, the FCC does not have "jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) for pole attachments in any case where such matters are regulated by a State." This Commission, therefore, has jurisdiction to exercise reverse preemption, setting our own rules governing access to ROW, and we are not obligated to conform to the FCC rules. The discretion of state and local authorities to regulate in the area of pole attachments is circumscribed by § 253 which invalidates all state or local legal requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." This restriction does not prohibit a state from imposing "on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." In addition, § 253 specifically recognizes the authority of state and local governments to manage public ROW and to require fair and reasonable compensation for the use of such ROW.

In order to establish our jurisdiction, the Commission must satisfy the conditions of §§ 224(c)(2) and (3), which provide:

- "(2) Each State which regulates the rates, terms, and conditions for pole attachment shall certify to the Commission that - -

- (A) it regulates such rates, terms, and conditions; and
 - (B) in so regulating such rates terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachment, as well as the interests of the consumers of the utility service.
- (3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments - -
- (A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and
 - (B) With respect to any individual matter, unless the State takes final action on a complaint regarding such matter - -
 - i. within 180 days after the complaint is filed with the State or
 - ii. within the application period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint."

The Commission must prescribe rules governing access to public utility ROW consistent with state statutory law as set forth in Public Utilities (PU) Code § 767 which provides in pertinent part:

"Whenever the commission, after a hearing had upon its own motion or upon complaint of public utility affected, finds that public convenience and necessity require the use by one public utility of all or any part of the conduits, subways, tracks, wires, poles, pipes, or other equipment, on, over, or under any street or highway, and belonging to another public utility, and that such will not result in irreparable injury to the owner or other users of such property or equipment or in any substantial detriment to the service, and that such public utilities have failed to agree upon such use or the terms or conditions or compensation therefore, the commission may by order direct that such use be permitted, and prescribe a reasonable compensation and reasonable terms and conditions for the joint use. . ."

By virtue of the rules we issue pursuant to the instant decision, we hereby certify to the FCC that we regulate the rate, terms, and conditions of access to poles, ducts, conduits, and ROW in conformance with §§ 224(c)(2) and (3).

A. The Need For Rules and Tariffs

As a threshold issue, we must address the extent to which the Commission should prescribe detailed rules or require tariffs governing the pricing and other terms and conditions for access to the ROW and support structures of the incumbent utilities.

The Coalition and CCTA propose a detailed set of rules for adoption by the Commission governing various terms and conditions for ROW access. The Coalition and CCTA argue that detailed rules and minimum performance standards are needed to prevent the ILECs and electric utilities from extracting unreasonable terms of access and excessive rents from CLCs through the negotiation process, impeding the growth of local exchange competition. By contrast, the ILECs and electric utilities oppose the adoption of structured rules and favor negotiations of access agreements with recourse to a dispute resolution process in case of impasse.

The Coalition also argues that incumbents should be required to file tariffs covering the pricing and terms for ROW access, in order to mitigate CLCs' lack of equal bargaining power with the incumbent utilities. The Coalition argues that tariffs avoid the danger of CLCs being forced to accept an anticompetitive contract to gain access to an ILEC's facilities.

The Coalition argues that the incumbent utilities, through their control of essential facilities, have little or no real incentive to reach agreement through negotiations, especially where permitting attachments would simply subject them to greater competition and potential loss of market share. In the absence of fixed rules or performance requirements, and in the absence of a

prescribed formula governing the calculation of pole attachment rates, the Coalition argues, negotiations alone will not be productive, but will frustrate the introduction of competition, especially for facilities-based CLCs. The Coalition notes that either through existing affiliates, such as Pacific Bell Communications or GTE Card Services, Inc., and through affiliates that will likely soon be formed by electric utilities, the incumbents will offer competitive telecommunications services of their own. The incumbents' ROW and support structures will be valuable assets for themselves and their affiliates in competing against CLCs.

The Coalition and CCTA propose that the Commission therefore require incumbent electric and telephone utilities to file pole attachment "compliance tariffs" (in compliance with specific provisions in the Commission's decision). The compliance tariffs envisioned by the Coalition and CCTA would, (1) incorporate by reference the rules governing access to incumbent utilities' ROW and support structures adopted by the Commission; (2) contain the per pole attachment rates and per linear foot conduit usage rates presently charged to cable television companies under the contracts which they have entered into pursuant to § 767.5; and (3) set forth the specific charges a utility would collect for copies of any necessary maps, diagrams, and drawings. The Coalition agrees that while some items may be impossible to reduce to tariff form simply because of their infinite variety, negotiation for access to support structures and ROW should always be an option open to an CLC, as long as contracting is not mandatory.

The Coalition is not opposed to CLCs entering into negotiated agreements with incumbent utilities which reflect compensation arrangements different from those contained in the incumbent utility's tariffs. The Coalition believes, however, that negotiations for alternative compensation arrangements are more likely to be successful if, but only if, all parties know, through the

adoption of rules requiring incumbent utilities to file "minimum" tariffs, what the standard charge is.

The ILECs and electric utilities oppose the adoption of detailed rules and tariff filing requirements, but believe that the Commission should leave it to the carriers to freely negotiate ROW access through individual contracts. The incumbents argue that the Commission should intervene only where individual carriers cannot agree on specific terms of access. The incumbents argue that detailed rules will unduly constrain the flexibility of parties to creatively negotiate terms and conditions which best fit the individual circumstances of a given carrier. Pacific objects to the Coalition's proposed rules as being overly inclusive, inflexible, and one-sided in favor of the CLCs. Pacific believes that no single set of rules can take into account all of the issues involved in the context of a single installation. In the event that the Commission chooses to adopt detailed rules, Pacific and PG&E have proposed specific modifications to the rules proposed by the Coalition and CCTA. Edison argues that utilities have the best understanding of their system requirements and operating characteristics, and that utility decisions about necessary restrictions to access should be given deference as long as the utility applies its rules in a nondiscriminatory manner to all carriers.

Pacific argues that the Act permits negotiated agreements, which implies that individual rates will differ among CLCs. Pacific disagrees that the term "nondiscriminatory rates" requires exactly uniform rates for all CLCs, including those that also act as cable television providers.

Rather than the tariffing of rates, GTEC advocates the use of negotiated agreements based upon an appropriate costing methodology. With tariffed rates, terms, and conditions, GTEC argues, there is little incentive for parties to negotiate anything different, and the tariffed rate(s) in effect becomes

the ceiling. GTEC argues that if the Commission decides that tariffing is appropriate, then an expiration date of no longer than one year be set on the applicability of the tariff. GTEC believes that market forces could then determine what the rates, terms, and conditions for such access should be in the future.

B. Discussion

Given the complexities of utility facilities and the diversity of ROW access needs, it is not feasible to craft a set of rules or tariffs which addresses every conceivable situation which may arise. Individual carriers must negotiate the terms of ROW access based on the particular circumstances of each situation. On the other hand, the adoption of certain general guiding principles and minimum performance standards concerning ROW access is appropriate to promote a more level competitive playing field in which individual negotiations may take place. In order to guide parties in negotiations, we shall therefore adopt a general set of rules governing ROW access which strike a balance in providing some degree of detailed performance standards while leaving discretion to parties to tailor specific terms to the demands of individual situations.

It is unrealistic to expect that all ROW access agreements will be uniform with respect to prices, terms, or conditions. Differences are acceptable as long as they are justified by the particular circumstances of each situation, and do not merely reflect anticompetitive discrimination among similarly situated carriers. Because telecommunications carriers' ROW requirements and constraints are too diverse to lend themselves to a uniform set of tariff rates and rules for every situation, we shall not require the filing of tariffs covering the terms of ROW access. A similar approach to that adopted for interconnection arrangements in D.95-12-056 is appropriate here. In D.95-12-056, in setting interim rules governing interconnection arrangements for local exchange service,

we considered whether interconnection arrangements should be instituted by the filing of tariffs or by contract. Historically, the use of utility tariffs has been relied upon as a way to assure that the rates and terms of service offered by the utility are available on a nondiscriminatory basis. We concluded in D.95-12-056, however, that given the inflexibility and inefficiencies of tariffs, interconnection should be arranged by contract rather than tariff. We concluded that the use of contractual negotiations was more appropriate for the newly emerging world of multiple co-carriers.

We recognize, however, that while the local exchange markets have been opened to competition for some time now, the incumbent utilities still hold a significant advantage in the control of essential ROW corridors and support structures in comparison with CLCs which have only recently entered the local exchange market. We are concerned that the advantages of incumbent status of ILECs and electric utilities may have the potential incentive for discriminatory treatment in negotiating terms of access. In D. 95-12-056, we addressed parties' concerns over imbalance in negotiating power by prescribing a set of "preferred outcomes" which were intended to lead to the most efficient and economic interconnection solutions should the Commission be required to become involved. In approving interconnection agreements, the Commission would consider how well a contract achieved the "preferred outcomes." The "preferred outcomes" were not mandatory requirements, however, and the Commission would still approve an interconnection contract with different terms from those prescribed by the "preferred outcomes" if the proposed terms were mutually agreeable to the parties, were not unduly discriminatory or anticompetitive, and did not violate other Commission rules.

Likewise, we conclude that a similar use of "preferred outcomes" is called for in connection with access-to-ROW arrangements. We shall, therefore,

adopt a set of rules as prescribed in Appendix A governing ROW arrangements, and shall administer the rules in the form of "preferred outcomes." Parties may negotiate their own terms and conditions different from those set forth in our rules, tailored to the particular circumstances of a given situation. Yet, the presence of the "preferred outcomes" embodied in our rules will provide a disciplined point of reference as recourse for negotiations to proceed in a competitively neutral manner. The use of these rules as "preferred outcomes" will help guard against unbalanced negotiating power and unfairly discriminatory treatment, yet provide the necessary flexibility to facilitate mutually agreeable arrangements.

In resolving disputes over ROW access, we shall consider how closely each party has conformed with our adopted "preferred outcomes" and whether proposed terms are unfairly discriminatory or anticompetitive. The burden of proof shall be on the party advocating a departure from our adopted standards in prevailing in a disputed agreement. Within the parameters of our prescribed "preferred outcomes" as default criteria, parties shall have the flexibility to negotiate their agreements governing access, tailored to the particular circumstances of each situation.

III. General Definitions and Applicability of Rules

A. Utility Categories Covered Under ROW Rules

1. Parties' Positions

Parties express differing views concerning what categories of utilities should be subject to Commission ROW access rules. In the draft decision previously circulated to parties for comment, the rules were defined broadly to apply to gas, water, and steam utilities, in addition to electric and telecommunications utilities. Comments were filed by certain gas, water, and smaller electric utilities, raising concerns that these rules should not be extended

to include them since there had been no previous consideration on the implications of extending the rules to additional categories of utilities. SDG&E argues that the Commission should consider extending the rules to apply to railroad facilities, noting that PU Code § 767 calls for access to subways and tracks in addition to poles and wires.

2. Discussion

For purposes of the rules we adopt in this decision, we shall limit the public utilities covered to the large and mid-sized ILECs, to the CLCs, and to the major electric utilities, PG&E, Edison, and SDG&E. In D. 97-09-115 in which we adopted initial local competition rules for the service territories of the mid-sized ILECs, RTC and CTC, we concluded that the basic rules we had previously adopted for the major ILECs should also be applied to the mid-sized ILECs. We find no reason here to deviate from our previously adopted policy, and conclude that the ROW access rules we adopt herein should generally apply to the mid-sized ILECs. We acknowledge, however, that the mid-sized ILECs lack the resources of their larger counterparts to respond as quickly to inquiries regarding access. We shall therefore leave it to the parties to negotiate individual response times in the case of the mid-sized ILECs. In all other respects, we shall apply the same rules to them as to the larger ILECs.

In the workshops conducted for the instant proceeding and in written comments that were produced relating to ROW access, we did not address the implications of extending the rules adopted herein to other utility industries such as gas, water, or steam. We also did not consider the implications of extending the rules to smaller electric utilities or to other utility industries. We recognize the usefulness of, and will later explore, expanding the coverage of our rules to include other utility industries. We shall provide all potentially affected

entities with due notice and opportunity to be heard concerning any further proceedings of this nature.

B. Definition of Rights of Way

1. Parties' Positions

The Coalition argues that the term "rights of way" should be understood as analytically distinct from, and larger than, the physical support structures to which wires may be attached for wire communication but should also include the underlying ROW that the utility controls.

The Coalition and CCTA propose that the term "right-of-way" should be defined broadly to encompass:

"all the real property, physical facilities and legal rights for use of such property and facilities which provide for access on, over, along, under, through or across public and private property for placement and use of poles, pole attachments, anchors, ducts, innerducts, conduits, guy and support wires, remote terminals, vaults, telephone closets, telephone risers, and other support structures to reach customers for communications purposes." (Proposed Rule II.K.)

GTEC objects to this proposed Coalition definition as being overly broad, arguing that the term "right-of-way" has long held particular legal significance, as a right to pass or cross over the real property of another, but that it does not encompass the right to use the personal property of another, such as telephone closets, vaults owned by a telecommunications carrier. Pacific and GTEC argue that the Commission's rules regulating access to ROW should not be interpreted to include all possible pathways to the customer, as sought by the Coalition and CCTA. GTEC believes this Commission should delineate the scope of access by competing carriers to "poles, ducts, conduits, and right-of-ways," as

defined in § 251 (b)(4) permitting carriers to "piggyback" along utilities distribution networks.

Edison proposes that transmission support structures or rights-of-way be excluded from the scope of these rules because of the heightened safety and system reliability concerns raised by such access. Since electric utilities' distribution systems are concentrated in urban areas where telecommunication providers most desire access, Edison argues there should be little need to provide mandatory access to transmission facilities.

If the Commission contemplates including transmission support structures and rights-of-ways with these rules, Edison urges the Commission to seek the input of the Independent System Operator (ISO) which now operates and controls utility transmission facilities throughout California. Edison argues that the electric utilities' ability to comply with certain mandatory time limits in the rules (e.g. completion of requests for information, requests for access, and make ready work) may have to be substantially lengthened to account for the complexities of dealing with the transmission system. For example, installing fiber optic on transmission towers may require ISO coordination and approval (the timing of which the electric utility cannot control) and even planned outages along certain segments of the transmission system. Moreover, Edison claims that the utilities' ability to reserve or take back space for capacity additions may also have to be expanded to ensure the smooth, uninterrupted operation of the transmission system.

2. Discussion

We conclude that the Coalition's proposed definition of ROW is overly broad, and decline to adopt it. As stated in the FCC Order, the intent of Congress in § 224(f) was to permit cable television operators and telecommunications providers to "piggyback" along distribution networks

owned or controlled by utilities as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.⁷ We shall delineate the scope of access to refer to the poles, ducts, conduits, and ROW as defined by § 251(b)(4). An overly broad interpretation of ROW would be unduly burdensome on the owners of facilities and is unnecessary to provide for the reasonable access needs of third parties.

In view of the potential problems in terms of logistics, system reliability and safety associated with mandatory access to electric transmission facilities, we shall include only electric utilities' distribution poles, support structures, and rights-of-way within the scope of these rules at this time.

C. Definition of Nondiscriminatory Access

1. Parties' Positions

The Coalition defines "nondiscriminatory access" as access that is uniformly equal in fact, for all rates, terms, and conditions, to the access provided to cable television companies, and equal to the access that ILECs provide to themselves. The Coalition believes that the Act, PU Code § 767, and cable television companies' existing rights to attach to utility support structures in California at just and reasonable rates pursuant to PU Code § 767.5 create a solid foundation for telecommunications carrier to gain access to utility ROW.

Pacific objects to the Coalition's proposed definition of nondiscriminatory access as being "uniformly equal in fact" with respect to the access which the ILEC provides itself, and to every other telecommunications carrier or cable television provider. Pacific argues that such a definition would effectively eliminate any type of creatively negotiated agreements between

⁷ First Report and Order, para. 1185

individual parties and would require an owner to treat itself as a third party. Pacific argues that the Act only requires a utility to provide "access" to its facilities, but not to divest itself of all the benefits (and burdens) of ownership. This provision would also require disbandment of the joint pole associations, in Pacific's opinion.

In order to achieve the Commission's goal of opening the local telecommunications market to active competition, CCTA argues that the Commission's resolution of ROW issues must incorporate the broadest possible definitions to ensure competitive access to all real property pathways to the customer, including poles, conduits, ROW, easements, and licenses. CCTA seeks, however, to exclude cable television inside wire and drops from the facilities subject to ROW access. CCTA makes this assertion on the grounds that cable television inside-wiring is a federal matter under the purview of the FCC, and has different characteristics than does telephony inside-wiring. Unlike telephone service, CCTA argues that the cable network is not an essential service, and cable and telephone technologies have different power requirements, signal leakage concerns, and tolerances of interference.

GTEC argues that the Coalition's proposed rules and definitions would turn the ILECs into construction managers and financiers for the CLCs, making every possible piece of equipment and support structure that the ILEC owns subject to access by CLCs at the below-cost rate set for cable television providers.

PG&E states that the Commission must distinguish between the underlying ROW and the support structures which may be located in an easement that grants ROW. (PG&E Comments, p. 7.)

The Coalition objects to PG&E's proposed definition of a utility pole which would apply only to wood utility distribution poles with

electric supply cables of no greater than 50 kV. The Coalition argues that there is no basis to prohibit telecommunications facilities from being attached to electric support structures with supply cables greater than 50 kV.

2. Discussion

We shall consider nondiscriminatory access to mean that similarly situated carriers must be provided the opportunity to gain access to the ROW and support structures of the incumbent utilities under impartially applied terms and conditions on a first-come, first-served basis. Nondiscriminatory access does not mean that the incumbent utility is divested of all of the benefits or relieved of the obligations of ownership. The utility must maintain the ability to manage its assets. No party may attach to the ROW or support structures of another utility without the express written authorization from the utility.

Nondiscriminatory access does mean, however, that the incumbent utility cannot deny access simply to impede the development of a competitive market and to retain its competitive advantage over new entrants. The incumbent utility may only restrict access to a particular facility or may place conditions on access for specified reasons relating to safety or engineering reliability. We discuss these conditions below in Section VII. We also discuss below in Section VII the restrictions on third parties' access to space which the incumbent utility seeks to reserve for its own future growth needs. In situations where there is no available space for an additional attachment, the incumbent utility is obliged to negotiate with the carrier seeking access to attempt to find some alternative solution such as rearrangement or modification of the existing space to accommodate the latter carrier's needs. In the event that the Commission must resolve disputes over access rights, the burden shall be on the incumbent to justify any claims asserted in defense of its refusal to permit access.

D. Renegotiation of Existing Agreements to Conform to Commission Rules

1. Parties' Positions

The Coalition proposes that existing contracts between utilities and CLCs be subject to renegotiation, with Commission review pursuant to General Order (GO) 96-A, if the results of such negotiations yielded anticompetitive terms and conditions based on the rules adopted by this decision.

GTEC believes that any rules which the Commission may adopt relative to ROW and access be applicable to all users of those facilities, regardless of whether a party has an existing agreement entered into during the era of noncompetitive telecommunications providers. Existing agreements for pole attachments and access are subject to the Commission's continuing jurisdiction, and typically include clauses that make them subject to renegotiation or modification in view of an applicable Commission ruling.

Edison and SDG&E disagree with any attempt to *require* renegotiation or to unilaterally change the terms of existing access agreements with electric utilities that were negotiated between the parties to these agreements. Edison questions how an existing contract would be found "anticompetitive" under the Coalition's proposal. Edison argues that GO 96-A does not provide a basis for non-consensual modification of existing access agreements, but only relates to contracts "for the furnishing of any public utility service." Edison contends that the access to electric utility facilities provided by existing access contracts is *not* public utility service and therefore is not governed by GO 96-A. Edison argues that the Commission has a long history of respecting freely-negotiated contracts, even when one of the parties to an agreement later expresses dissatisfaction with some of the terms.

2. Discussion

We shall not require parties to renegotiate preexisting contracts to conform with the rules adopted in this decision in the cases where the contract does not prescribe that it is subject to renegotiation to conform to any subsequent Commission rules. Parties mutually negotiated such contracts based upon information available to each side at the time. We respect the mutual obligations and rights of parties to enter into, and to bind each other to, such contracts.

In cases where contracts contain provisions requiring renegotiation in the event that subsequently adopted Commission rules come into conflict with the preexisting contract, however, parties to such contracts may seek renegotiation consistent with their prior agreement. If parties to such renegotiation efforts are unable to agree on revised contract terms, they may seek a remedy through the dispute resolution procedures we adopt elsewhere in this order.

On a prospective basis, our adopted rules shall serve as "preferred outcomes" to guide parties in negotiating new ROW agreements subsequent to the effective date of this order.

E. Applicability of Rules to Cable Companies

In its comments on the revised draft decision filed July 24, 1998, CCTA noted that the draft rules make reference only to "telecommunications carriers." Yet, CCTA believes that the draft rules were intended to incorporate the Commission's jurisdiction over both cable and telecommunications providers, in accordance with Section 224 of the Act. CCTA argues that Section 224 of the Act provides for State preemption of both cable and telecommunications services *vis a vis* rights of way, but require a State to issue effective rules and regulations implementing the State's authority. To remove

any ambiguity as to the intent or scope of the rules, CCTA proposes that the decision be amended to explicitly state that the rules shall apply to cable corporations, as well as to CLCs. Otherwise, CCTA is concerned that cable corporations will be faced with separately litigating each and every rule before the Commission to ensure their applicability to cable video, internet, and data services.

The incumbent utilities object to including cable corporations within the scope of the adopted rules. GTEC argues that the stated purpose of the proceeding is to adopt rules to open to competition the local exchange market—not the well-established cable market. GTEC argues that because the proceeding has not pertained to providers of solely cable service, the Commission cannot simply apply these rules to that very different industry without any evidence or analysis. GTEC proposes that if the CCTA wants the Commission to consider adopting ROW rules designed to address issues relating to the cable television market, CCTA should ask the Commission to open a proceeding to do so. GTEC objects to any “last-minute clarification” to a proceeding intended to address rules for local exchange competition.

1. Discussion

The question of the applicability of our rules to cable corporations shall be addressed in three components: first, the rights of cable corporations to come under the protections offered by the rules; second, the obligations of cable corporations to offer nondiscriminatory access to telecommunications carriers under the rules; and third, the reach of our jurisdiction into the dealings between municipalities that grant franchises to providers of cable TV services and those providers' plans to extend facilities to provide cable TV. We conclude that it is appropriate to require the ILECs and electric utilities to extend the same rates and terms of access offered to CLCs

under the rules to cover cable corporations, as well. While we agree with GTEC that the focus of this proceeding is on promoting competition in the local exchange telecommunications market, we must simultaneously consider the interrelationship between the local exchange and cable industries in seeking to promote a competitive infrastructure. As we explain below in our discussion of pole attachment rates, various cable corporations have in recent years become certificated as CLCs, and now offer telecommunications services over the same connections previously used only for cable services. For the same reasons that we have determined to apply uniform pole attachment rates for both cable and telecommunications services, we conclude that the rules governing other terms and conditions of access should likewise apply uniformly. By applying our rules uniformly both to cable corporations and telecommunications carriers, we will avoid potential disputes over whether our adopted rules apply to a particular service offered over an attachment used to provide multiple services. By applying our rules in this manner, we seek to minimize potential litigation which may threaten to impede the growth of the local exchange competitive infrastructure. In the succeeding sections of this decision addressing the applicability of our rules, references to CLCs shall therefore be understood to include cable companies, unless explicitly stated otherwise.

We shall not at this time, however, require cable companies to offer reciprocal terms and conditions of access to telecommunications carriers, as we have done for CLCs. Cable companies are not public utilities as defined in Section 216 (a) of the PU Code, but are separately defined in Section 215.5 of the PU Code. This Commission's jurisdiction is limited to the regulation of public utilities. Since cable companies are not public utilities, they are not subject to this Commission's jurisdiction with respect to the rates or terms of service which they offer. Therefore, we shall not impose upon cable companies the obligations to

provide access to telecommunications carriers. Similarly, we shall not require CLCs to provide access to cable companies. We shall thus limit the obligations to provide access to cable companies to the ILECs and electric utilities until we obtain additional evidence in this proceeding.

Further, we will not at this time intervene in the relationship between municipalities that grant cable franchises and those same franchisees inasmuch as those franchisees are not telecommunications carriers certified by this Commission. If a cable franchisee is looking to expand its facilities for the provision of cable TV only, then the procedural avenues described below to address disputes between carriers and cities will not be available. We will seek further comment on whether we have jurisdiction in this area and how this jurisdiction, if it exists, should be exercised.

F. Applicability of Rules to Commercial Mobile Radio Service (CMRS)

1. Parties' Positions

AWS argues that under the nondiscrimination principles of the Act, incumbent utilities must provide all telecommunications carriers, including commercial mobile radio service (CMRS) providers, the same type of access they would afford themselves, regardless of the technology the telecommunications carrier employs. AWS states that CMRS providers will be using poles and other utility facilities in ways perhaps not contemplated by traditional land-line providers, and that any rules adopted by the Commission must be able to accommodate innovative pole uses required by new technologies.

Among other things, in implementing its own new technology plans, AWS will seek to: (1) place micro-cell devices on top of existing poles; (2) replace some existing poles with taller poles in order to improve signal reception; and (3) use poles similar to those of a traditional land-line

telecommunications carrier, transporting and carrying the call through telephone lines attached to existing poles, to AWS's switch.

Traditionally, CLCs have not sought access to the tops of poles, nor have they sought pole "change outs," or replacements, purely to improve signal reception. AWS argues that any rules adopted by the Commission should accommodate CMRS providers' need for taller poles and access to the top of poles.

Teligent is a CLC which utilizes radio spectrum and point-to-multipoint microwave technology to provide local service. Teligent is thus a "fixed-wireless CLC" in contrast to CMRS providers which provide ubiquitous mobile wireless service and which are not certificated by this Commission to provide local exchange service. Teligent argues that while fixed wireless CLCs rely heavily upon the innovative use of radio spectrum for their infrastructure, they also use conventional wireline facilities. Unlike CMRS providers, fixed wireless CLCs such as Teligent do not seek to place any attachments on top of utility poles, nor to place large towers in the public ROW.

The ILECs and electric utilities oppose the inclusion of CMRS providers within the scope of rules adopted in this proceeding. Pacific argues that the proposed rules have been developed with traditional facilities in mind, and that there is not a sufficient record to apply the rules to incorporate the unique safety, reliability, and space allocation issues for wireless attachments. PG&E also highlights safety concerns regarding CMRS providers' attempts to access taller poles or the tops of utility poles.

2. Discussion

We agree that under the Section 224(f)(1) provisions of the Act, CMRS providers should not be subjected to unfair discrimination. Yet, the primary focus of this proceeding has been on wireline local exchange service, not

CMRS. The technological and market dynamics of the CMRS industry are distinct from those of the local exchange market. The rationale underlying the pole attachment rates and access requirements we adopt with respect to local exchange service may not necessarily apply in the case of CMRS service. The regulation of CMRS providers has been addressed in a separate docket (I.93-12-007) based upon specific characteristics peculiar to the CMRS industry. Likewise, CMRS carriers have different space requirements than do CLCs with respect to ROW access. For example, CMRS providers request access to the tops of existing utility poles to install communications devices. The work involved in pole-top access raises special safety concerns. While we do not minimize the importance of ROW access rights for CMRS carriers, we believe that a further record needs to be developed regarding safety, reliability and special access needs before we determine the applicability of our adopted ROW access rules to the CMRS industry. Accordingly, we shall defer consideration of the applicability of our rules to CMRS carriers to a later phase of the proceeding.

In contrast to CMRS providers are "fixed wireless" CLCs such as Teligent. Unlike CMRS systems, fixed wireless providers, such as Teligent, are certificated to provide local service as a CLC. Teligent and other fixed wireless providers use a different technology from CMRS carriers by providing customers with point-to-multipoint transmission service at fixed locations, rather than ubiquitous mobile service. As a result, fixed wireless providers require fewer antennas to be deployed in order to provide the necessary service coverage than do CMRS providers.

For the sake of consistency in the treatment among CLCs, we shall apply the adopted rules to include those CLCs which utilize fixed wireless technology. Nonetheless, we remain concerned that the radio spectrum and microwave technologies used by fixed wireless carriers entail different safety and

health issues than do the technologies of conventional wireline CLCs. Therefore, with respect to negotiations for access involving fixed wireless CLCs, we shall permit the incumbent utility the discretion to prescribe restrictions it deems necessary to safeguard public or employee health and safety.

G. Applicability of Rules to Municipalities and Governmental Agencies

1. Parties' Positions

The Coalition argues that the Commission's rules for mandating access to utility ROW and support structures should apply equally to municipally owned utilities and investor owned utilities in order to promote a competitive market. The Coalition argues that local governmental agencies and municipally owned utilities must be required to make their ROW and support structures accessible to CLCs on a nondiscriminatory basis if all California residents are to benefit from a competitive telecommunications market.

PU Code § 767.5(a)(1) excludes "publicly owned public utilities" from the definition of "public utility," such that the Commission does not have jurisdiction to set the pole attachment rates paid by cable television corporations to municipal utilities. In contrast, PU Code § 767 does not specify any such exclusion for "publicly owned public utilities." The Coalition infers therefore that the Commission has jurisdiction under § 767 to order "publicly owned" (i.e., municipal) public utilities to provide access to their ROW to telecommunications carriers, and to regulate the rates paid for such attachments, where public convenience and necessity so require.

The Coalition states that CLCs have encountered particular difficulty in attempting to gain access to ROW controlled by the California Department of Transportation (CalTrans), a state governmental agency which controls many of the most important ROW corridors (including major highways

and "bottleneck" facilities like the San Francisco-Oakland Bay Bridge). The Coalition claims that CalTrans seems to have little or no awareness of the public utility status, rights, and needs of CLCs, or of the adverse impacts of delays in responding to CLC requests for information and access which can cause CLCs to lose potential customers. Streets and Highways Code § 671.5 requires CalTrans to either approve or deny an application for an encroachment permit within 60 days of receiving a completed application. Yet, the Coalition claims that CalTrans frequently fails to meet this time limit.

The Coalition asks the Commission to coordinate with the Governor's Office to urge CalTrans to respond, whenever possible, both sooner and more favorably within no more than 60 days to CLC requests for access to ROW, and to urge CalTrans to adopt a basic "working rule" or presumption that CLC requests for access to its ROW will be granted unless there is, in fact, inadequate space or unless public safety concerns require the request for access to be denied.

CCTA argues that the Commission is required by the California Constitution to exercise its jurisdiction consistent with federal law as provided in the Communications Act of 1934, as amended by the 1996 Act. (Cal. Const., art. III, § 1.) CCTA contends that § 253 of the Act requires a municipal government to manage the use of its public ROW by telecommunications providers on a competitively neutral and nondiscriminatory basis.

CCTA asks the Commission to render conclusions of law in this proceeding concerning limitations on fees that municipal or other governmental entities may charge for the access to their ROW and facilities by CLCs. CCTA asks the Commission to prohibit governments from attempting to circumvent the limitations on fees which a state or local governmental agency

may charge under Article XIII A of the California Constitution. Enacted through Proposition 13, this provision restricts the ability of state and local governmental agencies to enact taxes without a two-thirds vote of the state legislature. CCTA asks the Commission not to permit local governments to attempt to "masquerade" a tax by labeling it a "fee." The Coalition argues that state law limits governmental fees to cost for access to the government's own ROW. If the fee charged exceeds actual cost, CCTA argues, the fee is considered to be a tax as a matter of law, and is subject to the cost limits of Article XIII A.

Regulatory fees cover the cost attributable to the government activity regulating the payor. Charges "levied for unrelated revenue purposes" or which exceed the cost of the regulatory activity are not fees but revenue-raising devices and hence taxes, according to CCTA (Beaumont 165 Cal. App. 3d at 234; United Business Comm. 91 Cal. App. 3d at 165).

Also excluded from special taxes are "user fees" which are charged for a service provided by the government to the fee payor. Typical examples include "developers' fees" charged as a condition of issuance of a building permit to cover costs of providing government benefits to the developed property.⁷ (Garrick Development Co. v. Hayward Unified School District (1992) 3 Cal. App. 4th 320 ("Garrick") [school facilities fee]; Bixel 216 Cal. App. 3d at 1216 [fire hydrant fee]; Beaumont 165 Cal. App. 3d at 231 [water system facility "hook-up" fee].)

CCTA argues that for exemption from Proposition 13, a user or development fee, like a regulatory fee,

⁷ (Bixel, supra, 216 Cal. App. 3d at 1218, emphasis added.)

"must not exceed the reasonable cost of providing the service for which the fee is charged, and the basis for determining the amount of fee allocated to the developer must bear a fair and reasonable relationship to the developer's benefit from the fee."

Pacific argues that while investor-owned utilities must provide access to any telecommunications carrier or cable television operator under § 224(f), municipal electric utilities are not included within the definition of "utilities" and therefore have no federal statutory duty to provide access at reasonable rates, terms, and conditions. Likewise, Pacific does not believe that municipal electric utilities are subject to the state statute governing attachments by cable television operators (PU Code § 767.5), or the statute requiring access to the facilities of one public utility by another public utility (PU Code § 767). Under the current legal and regulatory framework, therefore, Pacific claims that municipal electric utilities are free to deny access, or to impose onerous terms and conditions.

GTEC believes that both municipal and investor-owned electric utilities have the immediate potential to be formidable competitors in the telecommunications market. In addition, municipal utilities may enjoy other benefits not available to non-governmental providers such as the ability to raise capital tax-free in the public sector and the potential in some instances to regulate advantages for themselves over private utility competitors. Thus, GTEC argues that the rules that are established for the LEC/CLC relationship should be consistently applied to municipal and investor-owned electric utilities as well.

Comments were filed jointly by the League of California Cities, the Cities of Los Angeles, Sacramento, San Carlos, San Jose, Santa Monica,

the City and County of San Francisco, and the San Mateo County Telecommunications Authority ("the Cities").⁶

The Cities argue that the Commission does not have jurisdiction over the management of public ROW owned or controlled by local governmental bodies. As owners of fee title to many of their streets and highways, the Cities argue that they have an interest in any development that increases the costs of maintaining their property or the intensity of its use by investor-owned utilities. The Cities claim that attempts of this Commission to assert ROW jurisdiction over them would interfere with their power to adopt and enforce regulations that balance the legitimate interests of utilities, consumers, property owners, and the traveling public.

The Cities deny that any PU Code Section can be cited to show that the Commission has any jurisdiction over local governments with respect to access to public ROW. The Cities argue, for example, that while certain limited authority is granted to telephone corporations under Section 7901 to construct facilities along public ROW subject to regulation by the cities, this authority does not confer any jurisdiction on the Commission. Likewise the Cities note that the siting authority granted to the Commission in Section 762 is in reference to public utilities, not local governmental bodies.

The Cities argue that the California Constitution expressly excludes from Commission jurisdiction, and expressly reserves to charter cities jurisdiction over municipal affairs relating to public utilities. Article XII,

⁶ The above-referenced parties (collectively, "the Cities") concurrently filed a motion seeking to intervene as parties to the proceeding. The Cities seek to become parties to address their concerns regarding issues raised in the revised draft decision as to jurisdiction over local governmental ROW access matters. There is no opposition to the motion, and it shall be granted.

Section 8 states that a city "may not regulate matters over which the Legislature grants regulatory power to the Commission." However, this section "does not affect power over public utilities relating to the making and enforcement of police, sanitary and other regulations concerning municipal affairs pursuant to a city charter existing on October 10, 1911...." (Cal. Const. Art. XII, Sec. 8.) The Cities argue that power to regulate the manner of the use of city streets, such as access to public ROW, has traditionally fallen within the scope of cities' power over municipal affairs. (See, e.g., City of Walnut Creek v. Silveira (1957) 47 Cal.2d 804, 812; City of San Jose v. Lynch (1935) 4 Cal.2d 760, 764; Byrne v. Drain (1900) 127 Cal. 663, 667.)

The Cities further argue that the Legislature has specified that a city may not surrender to the Commission.

"[I]ts powers of control to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets, and the speed of common carriers operating within the limits of the municipal corporation." (PU Code § 2902 (emphasis added); see also PU Code § 2906.)

Thus, the Cities argue that they exclusively retain regulatory power over access to public ROW.

2. Discussion

We shall address separately the ROW access issues related to municipal utilities and to other local governmental bodies. We conclude that it is beyond the authority of this Commission to regulate municipally-owned utilities with respect to nondiscriminatory access to their poles, ducts, conduits, and ROW. In County of Inyo v. Pub. Util. Comm'n, 26 Cal.3d 154, 166 (1980), the

California Supreme Court stated that under established doctrine, "[i]n the absence of legislation otherwise providing, the Commission's jurisdiction to regulate public utilities extends only to the regulation of privately-owned utilities." (citation omitted) "The commission has no jurisdiction over municipally-owned utilities unless expressly provided by statute." *Id.* Among other things, the court construed § 216, defining a "public utility" and § 241, defining a "water corporation" as not encompassing a municipally-owned utility.

In light of County of Inyo, § 767 of the PU Code -- which provides that, subject to certain conditions, the commission may require that a public utility provide access to its conduits, poles, and other facilities that are on, over, or under any street or highway, to another public utility -- pertains only to a privately-owned utility.

In § 767.5(a)(1), a "public utility" is specifically defined to "include [] any person, firm, or corporation, except a publicly owned public utility, which owns or controls, or in combination jointly owns or controls, support structures or rights-of-way used or useful, in whole or in part, for wire communications." The purpose of § 767.5 was to codify existing practice and to require investor-owned utilities to make available, as a public utility service to cable television corporations, the excess capacity or surplus space on their facilities for pole attachment. The Commission, in turn, was authorized to regulate the terms and conditions of such public utility service. The Legislature was careful not to broaden the scope of the Commission's then existing jurisdiction over public utilities, and so explicitly exempted publicly-owned public utilities from the scope of § 767.5.

In 1994, the Legislature enacted § 767.7 recognizing that the requirement that public utilities make available the excess capacity and surplus space on their facilities should apply not just to cable television corporations but

to all telecommunications corporations. In explaining the purpose and intent of § 767.7, the Legislature distinguishes in § 767.7 (a)(2), between privately and publicly-owned utilities in discussing the practices of each, and recognizes that some utilities that have dedicated space on their support structures are "not under the jurisdiction of the commission."

In § 767.7 (a)(3), the Legislature continues to distinguish between "public utility" and "publicly owned utility" support structures, and to note that the use of the latter facilities by those seeking to install fiber optic cable is with the "voluntary permission of the publicly owned utility." Similarly, in § 767.7 (a)(4), the Legislature distinguishes "electric public utilities" and "publicly owned utilities" and finds that both types of utilities may access the fiber optic cables installed by telecommunications corporations to better serve their electric customers.

In § 767.7(b), the Legislature states its intent that "public utilities and publicly owned utilities be fairly and adequately compensated for the use of their rights of way and easements for the installation of fiber optic cable" and that electric utilities and publicly owned utilities have access to fiber optic cables for their own use. While some parties may read §§ 767.5 and 767.7 as an intent by the Legislature to narrow the commission's jurisdiction as if it previously extended to both publicly-owned and privately-owned utilities, in fact the opposite is true. In these sections, the Legislature has simply clarified that the Commission's previously-recognized jurisdiction with respect to only privately-owned facilities continues to apply.

Hence, the Commission lacks authority over a publicly-owned public utility's provision of access to its support structures or ROW to a telecommunications carrier. The publicly-owned public utility, however, must set just and reasonable terms for such access. A party that believes that the terms

are not just and reasonable may pursue whatever remedies are available under laws directly governing publicly-owned public utilities. No remedy, however, appears to be available under federal law, which expressly exempts publicly-owned public utilities from the FCC's jurisdiction.⁹

The Coalition argues that we can exert jurisdiction over publicly-owned municipal utilities by regulating the joint pole associations to which some municipal utilities belong. We believe that the relationships between joint pole association members and their access agreements for pole attachments warrant further scrutiny within the framework of our jurisdiction over the various members of such associations. We shall direct the ALJ to solicit further comments concerning the implications of joint pole associations attachment agreements as they relate to nondiscriminatory access.

The obligations of a city, county or other political subdivision's to provide access to ROW under its control is addressed under Part 3 of the PU Code. The Legislature has expressly recognized the duties and responsibilities of a "municipal corporation", and the ability of a municipal corporation to retain or surrender control of some of its powers to the Commission. Municipal corporations are expressly authorized not to surrender the power to supervise and regulate the relationship between such public utilities and the general public "in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets

⁹ Section 703(6) of the Act amended § 224 of the Communications Act of 1934 to require, among other things, that the poles, ducts, conduits and ROW owned or controlled by utilities are made available on reasonable terms and conditions to all telecommunications carriers. Section 224(a)(1), however, limits the definition of utility to investor-owned public utilities.

by any public utility, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets...." (Section 2902.)

In § 7901.1(a), the Legislature has further stated its intent, however, for local governmental bodies not to abuse their discretion or to arbitrarily or unfairly deny requests for access, but that "municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." Under § 7901.1(b), the "control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner." Under § 7901.1(c), "[n]othing in this section shall add to or subtract from any existing authority with respect to the imposition of fees by municipalities." Article XI, § 9 of the California Constitution expressly recognizes the authority of a city to prescribe regulations governing persons or corporations that provide public utility service.

While local governments thus may regulate the time, location, and manner of installation of telephone facilities in public streets, they may not arbitrarily deny requests for access by public utilities in public roads or highways that are located within the rights of way. The PU Code recognizes the rights of telecommunications carriers to obtain reasonable access to public lands and ROW to engage in necessary construction. PU Code § 7901 states:

"Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

In addressing the Commission's role in relation to that of local governments with respect to ROW access, we believe it is appropriate to consider

the general approach adopted in General Order ("GO") 159-A, (D.96-05-035), revising rules relating to the construction of cellular radiotelephone facilities in California. Recognizing local government's interest in cell siting locations and land use policies as well as the Commission's interest in promoting development of wireless technologies and its duty to protect ratepayers, the Commission ceded regulatory jurisdiction in circumstances where the local agency has a specific interest, yet recognized this Commission's obligation to protect the overriding state interests. GO 159-A, acknowledges that primary authority regarding cell siting issues belongs to local authorities. Local authorities continue to issue permits, oversee the California Environmental Quality Act ("CEQA") compliance, and adopt and implement noticing and public comment requirements, if any. In like manner, local agencies have an interest in managing local ROW and requiring compensation for the use of public ROW. The Commission, on the other hand, has an interest in removing barriers to open and competitive markets and in ensuring that there is recourse for actions which may violate state and federal laws regarding nondiscriminatory access and fair and reasonable compensation. Moreover, PU Code § 762 also authorizes this Commission to order the erection and to fix the site of facilities of a public utility where found necessary "to promote the security or convenience of its employees or the public...to secure adequate service or facilities...."

The statewide interest in promoting competition and the removal of barriers to entry and nondiscrimination are equally important with respect to both investor-owned utilities and municipally-owned ROW access rights. This is particularly true to the extent that many municipalities are themselves offering, or intending to offer, communications and cable television services, and thus, are or will become competitors to other providers of those services. Accordingly, the Commission shall intervene in disputes over

municipal ROW access only when a party seeking ROW access contends that local action impedes statewide goals, or when local agencies contend that a carrier's actions are frustrating local interests. In this manner, the Commission reserves jurisdiction in those matters which are inconsistent with the overall statewide procompetitive objectives, and ensure that individual local government decisions do not adversely impact such statewide interests.

The Commission's authority shall be exercised in the following manner. In the event that a telecommunications carrier is unable to satisfactorily resolve a dispute with a local governmental body over the terms and conditions of access to a public ROW, we shall direct the carrier to file an application with this Commission seeking a certificate of public convenience and necessity for specific siting authority to gain access to the public ROW pursuant to Chapter 5 of the PU Code, "Certificates of Public Convenience and Necessity." We shall require that, prior to making such filing, the telecommunications carrier first make a good-faith effort to obtain all necessary local permits and to negotiate mutually acceptable terms of access with the local governmental body. In order to be processed, the application must provide a demonstration showing that this requirement has been met. We intend to limit our inquiry in such applications only to a consideration of whether the actions of the local governmental body impedes a statewide interest in the development of a competitive market. We shall require a showing as to what specific terms or conditions of access the CLC claims constitutes such an impediment, and what alternative the CLC proposes to remedy the matter.

We shall rule upon the requested authority sought in the application following an opportunity for interested parties, including the local governmental body, to respond or protest. In ruling upon such an application, any orders issued will be directed toward the telecommunications carrier

pursuant to our jurisdiction over public utilities. We recognize that the Commission lacks the jurisdiction to directly order a local governmental body to grant access. In the event that we grant the siting authority sought in the application, it will be the responsibility of the telecommunications carrier to notify the local governmental body of the Commission's order. In the event that we grant such an application, and the local governmental body still refuses to grant access in accordance with the Commission order, the telecommunications carrier's recourse shall be to file a lawsuit in the appropriate court of civil jurisdiction seeking resolution of the dispute over access. The telecommunications carrier may use the Commission's order authorizing access in support of its case in civil court. We conclude that this procedure appropriately reconciles the respective roles of the Commission in relation to the cities in terms of resolving disputes with telecommunications carriers over access to public ROW.

We, here also acknowledge parties' concerns over ROW access difficulties with state agencies such as CalTrans. We shall seek to promote greater awareness by CalTrans of the importance of CLCs' accessibility to essential state-controlled ROW in the interests of California's legislative mandate to promote the development of a competitive telecommunications market and shall inform CalTrans that CLCs are telephone corporations with all the rights of the incumbent LECs. To that end, we shall serve a copy of this order on CalTrans.

H. Reciprocity of Rights-of-Way Access Between Incumbents and CLCs

1. Parties' Positions

As amended by the Act, 47 U.S.C. § 224(f)(1), requires a utility to grant telecommunications carriers and cable operators nondiscriminatory

access to all poles, ducts, conduits, and ROW owned or controlled by the utility. A utility's rights under § 224(f)(1), however, do not extend to ILECs. ILECs are excluded from the definition of "telecommunications carriers" under 47 U.S.C. § 224(a)(5) which "operates to preclude the incumbent LEC from obtaining access to the facilities of other LECs." FCC Interconnection Order 1, ¶ 1157. The Coalition argues that therefore, under the Act, ILECs do not have a reciprocal right of access to the ROW and support structures of the CLCs, and that the Commission should adopt the same policy in interpreting California PU Code § 767. The Coalition claims that an ILEC's requests for reciprocal access rights could be the product of anticompetitive motives, made solely to disrupt the operations of a new market entrant that may not have the same range of alternative facilities as an incumbent utility has. Until the date when CLCs have extensive ROW and support structures of their own, the Coalition argues that the Commission should not require a reciprocal access policy.

Pacific contends that this exclusion could lead to irrational and unfair results, and that the Commission should continue to require reciprocal access in California. Under both federal and state law, investor-owned electric utilities are required to provide access to their facilities. Section 224, however, excludes the ILEC from the definition of "telecommunications carrier," and therefore permits an electric utility to unilaterally deny access to the ILEC, or charge unreasonable rates. Pacific views this policy as illogical and inequitable, and asks the Commission to continue to require all utilities to provide access under reasonable terms and conditions.

Pacific argues that reciprocal access among all utilities has long been required in California under PU Code § 767. Section 767 provides that, if public convenience and necessity requires the use of the conduits and other

facilities of one public utility by another public utility, the Commission may order it and establish reasonable compensation.

GTEC disagrees with the Coalition's interpretation of Section 224(a)(5) of the Act. While Section 224(a)(5) excludes ILECs from the definition of a telecommunications carrier for purposes of this Section, GTEC argues, this simply means that the nondiscrimination provision does not apply to ILECs. GTEC does not interpret it to mean that ILECs can completely be denied access to CLC facilities and ROW, for this would be at odds with the requirements of Section 251(b)(4).

GTEC notes that Section 251(b)(4) states that all LECs, not merely incumbent LECs, have the duty to afford access to the poles, ducts, conduits, and ROW of such carriers to competing providers of telecommunications service on rates, terms, and conditions that are consistent with Section 224.

2. Discussion

As a practical matter, we expect that CLCs will need access to the support structures and ROW of incumbent utilities on a much greater scale than incumbents will need access to CLC facilities. Nonetheless, the general provisions of PU Code § 767 relating to reciprocal access of utility support structures and ROW apply to all public utilities, independently of any reciprocal requirements under the Act. Consistent with the requirements of PU Code § 767, a CLC or an electric utility may not arbitrarily deny an ILEC's request for access to its facilities or engage in discrimination among carriers. We believe that the rules for access which we adopt herein should be applied evenhandedly among the ILECs and CLCs, and shall make our ROW access rules reciprocal. Nonetheless, we expect any requests for access by an incumbent utility to be

made in good faith, and to take into account the limited resources of new CLCs to accommodate requests for access to their own facilities.

IV. Pricing Issues

A. Parties' Positions

Parties disagree concerning the manner in which prices for third-party attachments to facilities of utilities should be determined. Pricing includes (1) the one-time charge for any necessary rearrangement of facilities performed by the utility to accommodate the additional attachment of the requesting telecommunications carrier and (2) an annual recurring fee for the cost of providing the ongoing attachment to poles, supporting anchors, or other support structures of the utility. In addition, utilities' charges may also include out-of-pocket costs associated with any work done by the utility to respond to third-party requests concerning the availability of space for an attachment. Parties generally agree on the pricing for the one-time costs of rearrangements based on actual out-pocket expenses incurred. Parties' pricing disputes focus principally on the proper basis for the pricing of the recurring charge for attachment to poles and other support structures of the utility.

The Coalition argues that attachments to poles, anchors, and other support structures for telecommunications services should be priced on the basis of historic or embedded costs of the utility less accumulated depreciation, under the same formula as is required for cable services under PU Code § 767.5(c)(2) in order to ensure nondiscriminatory treatment among all telecommunications carriers.

PU Code § 767 (which generally covers all public utilities) prescribes no specific formula for fixing the annual recurring fee for pole attachments for telecommunications services such as is found in PU Code § 767.5(c)(2) (which covers only cable corporations). Section 767 generally authorizes the

Commission only to "prescribe a reasonable compensation and reasonable terms and conditions for the joint use" of facilities in the event parties fail to negotiate an agreement. The Coalition believes, however, that there is no legislative prohibition on the Commission's adopting the cable television formula (when it acts pursuant to § 767) for fixing the rate for pole attachments generally by all telecommunications carriers. Moreover, the Coalition argues that such an approach is mandated by nondiscrimination principles. Since the Commission cannot, by statute, vary from the pricing formula set forth in PU Code § 767.5(c)(2)¹⁹ when it sets pole attachment rates applicable to cable television systems, the Coalition argues that all telecommunications carriers, including those that are not cable operators, must be given the same nondiscriminatory rate treatment. The Coalition claims that access to utility support structures and ROW for telecommunications carriers must therefore be set at the same rates, and on the same terms and conditions, as are afforded to cable companies pursuant to PU Code § 767.5. The Coalition claims that competition would be severely

¹⁹ Under Section 767.5(c)(2), the annual recurring fee is computed as follows:

- i. For each pole and supporting anchor actually used by cable television operator, the annual fee shall be two dollars and fifty cents (\$2.50) or 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor, whichever is greater, except that if a public utility applies for establishment of a fee in excess of two dollars and fifty cents (\$2.50) under this rule, the annual fee shall be 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor.
- ii. For support structures used by the cable television operator, other than poles or anchors, a percentage of the annual cost of ownership for the support structure, computed by dividing the volume or capacity rendered unusable by the telecommunications carrier's equipment by the total usable volume or capacity. As used in this paragraph, "total usable volume or capacity" means all volume or capacity in which the public utility's line, plant, or system could legally be located, including the volume or capacity rendered unusable by the telecommunications carrier's equipment.

skewed if one type of telecommunications provider, (i.e. cable companies or their affiliates acting as telecommunications carriers) enjoyed access to utility ROW and support structures on more favorable rates, terms, and conditions than other telecommunications carriers.

The Coalition denies that any clear distinctions can be made between the services of a cable provider which are considered cable-only versus those which are considered telecommunications. The Coalition argues that cable operators are rapidly expanding their use of coaxial cables, optical fibers and other facilities attached to utility structures to offer both telecommunications and traditional cable (video) services. The Coalition claims that cable operators (or their telecommunications carrier affiliates) already are or soon will be using their pole attachment rights, originally obtained for the purpose of disseminating cable television programming, for provision of competitive telecommunications services. Therefore, the Coalition does not believe it is valid to charge cable television operators different rates for pole attachments depending on what services they offer.

Pacific objects to the use of the statutory formula in § 767.5 for pricing of telecommunications carrier pole attachments and believes that the Commission is under no obligation to apply the statutory formula for cable television services to all attachments by telecommunications carriers in order to ensure nondiscriminatory access. Pacific claims that § 224(e)(1) of the Act prescribes a different pricing formula to be used to develop rates for attachments by telecommunications carriers and cable companies providing telecommunication services than the one currently used for cable-only attachments.

Pacific proposes that any pricing methodology prescribed by the Commission should permit use of forward-looking costs, consistent with the

methodology approved for pricing Pacific's other services in the Open Access and Network Architectural Development (OANAD) proceeding. Pacific has used Total Service Long Run Incremental Cost (TSLRIC) to cost the ROW and support structures within its own retail services, and argues that access to ROW and support structures by telecommunications carriers should be priced to at least recover TSLRIC. Pacific proposes that the Commission consider using the formula found in §§ 224(e)(2) and (3) of the Act, which requires attaching parties to pay their share of the costs of the common portion of any support structures.

GTEC argues that the current rate for cable television attachments has no applicability to CLCs generally, and that its current tariffed access rate of \$2.92 for cable television attachments is below cost and cannot be sustained for CLCs. GTEC believes this cable access rate was established solely for cable television service prior to the entry of CLCs to reflect policy goals of an earlier era to foster cable television attachments and correspondingly, the viability of that industry. GTEC states that once its cost studies are adjudicated through an arbitration, nondiscriminatory treatment of carriers will result in a uniform rate for pole attachment for all carriers. It is only the make-ready costs, which must take into account the specific circumstances of poles and the surrounding terrain, which will vary depending on the particular poles to which a carrier desires to attach.

GTEC notes that in the past, Pacific has negotiated attachment rates with cable television and other carriers, resulting in a rate that was several dollars higher than GTEC's rate. Section 252(a) of the Act provides for such negotiation of attachment and access rates, and GTEC states that it is currently in the course of such negotiations with several carriers. Under § 252(b), if parties are unable to agree to a rate, then the Commission may determine the rate through arbitration. GTEC proposes that the rental rates for pole and

conduit/duct space should be based on TSLRIC plus a contribution to common costs. All other charges for provision of space (e.g. make-ready, audits, field surveys, record check) should be reimbursed by the requesting CLC based on the actual labor and material costs incurred, according to GTEC.

Edison believes that the pricing of access should be market-based as determined through negotiations between the parties. As long as the utility's cost structure can support a negotiated rate lower than the cost for the carrier to construct an alternate path, Edison argues, both will have an incentive to negotiate a mutually agreeable access price. In those instances where the market is unable to support a negotiated rate greater than or equal to the utility's cost, Edison proposes that the utility's after-tax cost should become the price. Edison argues that a floor price of the utility's after-tax cost will protect the utility from subsidizing the communications industry. Edison believes utilities should recover the fully allocated costs associated with permitting, implementing, and maintaining attachments, and costs associated with facility modification or make-ready work. In some cases, there are also subsequent costs incurred due to temporary or permanent relocation of third party facilities as a result of mandatory reconfigurations of the electric utility system to meet safety and reliability needs or changing rules and regulations. Edison believes the costs of these necessary activities should be borne entirely by the parties seeking access to the facilities. Edison also argues that the utility should be allowed to contractually require telecommunications carriers (and their contractors or sub-contractors) to maintain appropriate insurance and to indemnify the utility from all costs due to damage or injury to persons or property resulting from the carriers' installation, maintenance or operation of telecommunications equipment.

PG&E likewise argues that the cable television formula fails to provide fair and just compensation for telecommunications carrier's access to its distribution poles.¹¹ PG&E opposes the use of historic embedded cost pricing, arguing that such pricing does not recognize the utility's ongoing financial obligation to keep the distribution poles fit for service. PG&E advocates the use of market-based pricing through negotiation, but believes that principles such as replacement cost new less depreciation should be incorporated into the development of distribution pole pricing if market-based pricing is not allowed. At a minimum, PG&E seeks to recover fully allocated costs for the use of its ROW support structures. Anything less would raise serious constitutional questions, in PG&E's view, including the taking of property without just compensation.

B. Discussion

Utilities should be allowed to recover their actual costs for make-ready rearrangements performed at the request of a telecommunications carrier, and their actual costs for responding to requests for space availability and requests for access, including preparation of studies, maps, drawings, and plans for attachment to or use of support structures. We recognize that such types of costs are specific to the demands of a particular attachment and cannot be set at any standard rate. We shall therefore prescribe that telecommunications carriers reimburse the utility for such reasonable costs based on actual expenses incurred.

The telecommunications carrier shall also pay for the costs of required engineering studies. The carrier should not, however, be required to

¹¹ Since its current effective cable television attachment rate was established in a contract which was developed more than ten years ago, PG&E argues that the present rate would need to be updated to determine what the § 767.5 formula would produce based on current data.

pay for redundant, or unnecessary studies. Where a request for access includes an engineering review that has been performed by qualified CLC personnel, such a review does not need to be completely re-performed by the electric utility or ILEC personnel, but merely checked for accuracy. To protect CLCs from being forced to incur unnecessary expenses, the Coalition proposes that the Commission (a) require electric utilities and ILECs to publish in advance the criteria by which they would determine whether a CLC's engineering study has been performed by professional engineering personnel and (b) specify that electric utilities and ILECs should not require CLCs to pay for redundant engineering studies where a check for accuracy discloses no errors. We find these measures reasonable, and shall adopt them in order to avoid duplicative costly engineering analyses which could undermine the economic advantages of building a carrier's own facilities.

We shall direct the electric utilities and ILECs to publish objective guidelines within 180 days of its order, so that CLC personnel or third-party contractors used by CLCs can quickly and efficiently establish their engineering qualifications to do pole loading and sizing calculations. Any party seeking access should be allowed to employ its own workers which meet criteria established by the utility. In secured areas where safety or system reliability concerns are an issue, however, the utility should retain the discretion to require its own escort to supervise the work of CLC agents. When working in public, unsecured areas of a utility, the CLC should not be charged for a utility escort.

By contrast, the basic cost of attachment per pole or per linear foot of conduit usage are examples of charges which can be more readily standardized based upon the costs of each incumbent utility. We shall prescribe standards for the pricing of overhead pole and underground conduit as set forth below. As previously noted, we will not require the tariffing of these charges. Our

prescribed standards are not intended to create a disincentive for parties to negotiate their own arrangements tailored to individual circumstances, but rather are intended to provide default prices and terms in the event parties fail to reach agreement. For example, a carrier may agree to pay a higher attachment rate if acceptable concessions are made in the other terms and conditions offered through negotiations.

The parties' principal controversy over pricing centers around the rates which should be charged for attachments to poles and other support structures. The beginning point for resolving the dispute over pricing principles applicable to utility pole attachments and support structures is to identify the underlying rights, interests, and obligations of the respective parties. The incumbent utilities have a right to be fairly compensated for the use of their property. Their interest is in obtaining the most favorable rates and terms possible in order to maximize the wealth of the firm. Their obligation is to provide access to their poles and support structures at reasonable terms and prices.

The CLCs have a right to obtain access to utility poles and support structures at reasonable terms and prices which do not impose a barrier to competition. Within the bounds of what may be considered fair terms, the incumbents will seek the highest prices and the CLCs will seek to pay as little as possible. In a competitive market setting, the relative bargaining between a willing buyer and willing seller produces a market clearing price which is acceptable to both sides. We must therefore consider whether the relative bargaining power of the incumbent utilities is balanced in relation to CLCs. We conclude, that by virtue of their incumbent status and control over essential ROW and bottleneck facilities, the local exchange carriers (LECs) and electric utilities have a significant bargaining advantage in comparison to the CLC with respect to

ROW access. While theoretically the CLC could seek an alternative to attachment to utility support structures, the practical alternatives are frequently limited or cost prohibitive. For example, municipalities often resist the installation of any additional utility poles on public streets. The municipalities also are often unreceptive to repeated reopening of street surfaces for installation of new conduit systems. In such instances, CLCs would be forced to deal with the incumbent utilities for access to the utilities' facilities and would not be readily able to seek an alternative if the incumbents proposed unreasonable terms.

Once facilities-based competition becomes more established, the ROW infrastructure might evolve to where the present incumbent utilities will not be in control of bottleneck facilities. Yet, since we are only in the nascent stages of facilities-based competition, a truly competitive market for providing alternative means of access to support structures for CLCs does not yet exist. Therefore, we cannot presently rely exclusively on the negotiation process to necessarily produce reasonable prices for ROW access. Given the inherent bargaining advantage of incumbents, the next question is what pricing basis will promote a more competitively neutral outcome.

In considering the proper compensation for pole attachments, we address the dispute over whether the statutory formula for pole attachment rates in § 767.5 for cable television corporations applies to all services for which the pole attachment is used, including telecommunications services. CCTA argues that the statute dictates that cable television corporations are, by law, entitled to the same pole attachment rate whether the attachment is used for telecommunications or cable television service. The statute defines "pole attachment" as "any attachment to surplus space...by a cable television corporation for a wireline communications system...." The defining characteristic of the statute, however, is that it applies to wire communications

used by a "cable television corporation." The cable pole attachment statute was enacted in 1980, years before the telecommunications markets were opened to competition. No provision in the statute nor elsewhere in the PU Code indicates that the rate for pole attachments was intended to apply without limitation to any future service that a cable corporation might conceivably offer, other than cable television programming. Instead, PU Code Section 215.5 defines a "cable television corporation" as "any corporation or firm which transmits television programs by cable to subscribers for a fee." We find no basis to read into the statutory definition additional provisions which are not there.

Although § 767.5 does not legally require that the pole attachment formula prescribed for cable television service must be extended to every other service which may be offered by a cable corporation, neither does it prohibit the Commission from exercising discretion to apply the same pole attachment rate to other regulated services offered by a cable corporation, where appropriate, based upon public policy considerations. For the reasons discussed below, we conclude that such a policy is the most appropriate one, and we shall adopt such a policy.

We acknowledge that the FCC has prescribed a phased-in rate differential for cable operators' pole attachments based upon whether or not they also offer telecommunications services in its implementation of the provisions of the Act.

In reference to applicable rates for pole attachments, § 224(d)(3) of the Act states that:

"This subsection shall apply to any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e), this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole

attachment agreement) to provide any telecommunications service."

Under Subsection 224(e), the FCC is to prescribe new regulations within two years after enactment of the Act for pole attachments for carriers offering telecommunications services. These new regulations, however, would not apply to pole attachments used by cable operators exclusively offering cable television service. Therefore, in implementing § 224 (e) of the Act, the FCC explicitly applies different rate provisions to cable operators depending on whether they offer cable television service exclusively or whether they also offer telecommunications services.

Notwithstanding these federal actions, we are not bound by these FCC rules. Moreover, we find no convincing rationale justifying the adoption of different pole attachment rates for cable operators depending on whether or not they offer telecommunications services.

Since the opening of the local exchange market to competition, various cable corporations now offer telecommunications services over those same connections used for cable television service. There is generally no difference in the physical connection to the poles or conduits attributable to the particular service involved. In many cases, a cable operator may not be able to delineate exactly what particular services are being provided to a customer at a given time because the customer can use the connection for various services, depending on the equipment attached to the connection at the customer's premises. In such instances, it would be difficult and impractical to police how a given pole attachment is used to provide separate services offered over the same pole connection, or to delineate what portion of the usage was attributable to telecommunications versus other services offered by a cable corporation. Yet, under § 767.5, the statutory formula must apply, at least to the extent that the

pole attachment is used for cable television service. Accordingly, to avoid the problems involved in separately measuring different types of data transmission services over the same connection, we conclude that the rate prescribed by the § 767.5 for cable television pole attachments should apply where a cable corporation uses its pole attachment to provide telecommunications services. By applying a consistent rate for use of cable attachments, including provision of telecommunications services, we will avoid protracted disputes over how particular attachments are being used or how separate rates may be prorated based on different volumes of transmissions over the same connection. Moreover, such an approach promotes the incentive for facilities-based local exchange competition through the expansion of existing cable services.

Having concluded that the statutory rate for cable attachments shall apply to telecommunications services offered by the cable operator, we must next consider whether this same rate should be also be applied to other CLCs, including those not owned by or affiliated with a cable corporation. Since we are committed to ensuring that all telecommunications carriers gain access to utility attachments under nondiscriminatory rates, terms, and conditions, we conclude that all CLCs should be entitled to comparable pole attachment rates as are available to those CLCs affiliated or owned by a cable corporation. The use of the existing cable pole attachment rates for all CLCs will also avoid the need for further protracted proceedings to prepare cost studies and to adjudicate default rates. Accordingly, we will direct that the same pole attachment rate provisions applicable to cable operators providing telecommunications services be extended to all CLCs, including those not owned by or affiliated with a cable corporation.

To be consistent with our treatment of pole attachments, the same principle of embedded cost pricing should apply to underground facilities. We shall accordingly adopt the provisions of § 767.5(c)(2)(B) which prescribe that the

rate for attachments to support structures other than poles or anchors shall be equal to a percentage of the annual cost of ownership for the support structure. The percentage is to be computed by dividing the volume or capacity of duct space rendered unusable by the telecommunications carrier's equipment by the total usable duct volume or capacity.

We conclude that the adoption of attachment rates based on the § 767.5 formula provides reasonable compensation to the utility owner, and there is no basis to find that the utility would be unlawfully deprived of any property rights. Section 767.5 provides that the pole attachment rates will be based on the utilities' annual cost of ownership, including historic depreciated capital costs and annual operating expenses. Thus, the rate corresponds to the costs incurred by the utility to provide the attachment. Under the statutory pole attachment formula, the utility is allowed a rate equal to 7.4% of its annual cost of ownership. The 7.4% factor represents portion of the total pole space used to support the one foot for communications space, as typically used by an attaching party. Since the 7.4% allocation applies to the cost of the entire pole, it results in a fair cost apportionment in deriving attachment rates, for either cable or telecommunications services.

The use of the § 767.5 formula constrains the default amount that may be charged for pole and conduit attachments, and to that extent, promotes the emergence of a competitive local exchange market. While the revenues that the utility realizes from pole attachments under the § 767.5 formula may be less than the amount that could be extracted purely through negotiations, there is no reason to conclude that the reduced revenues constitute an unlawful taking of property. The § 767.5 formula has never been found to be confiscatory with respect to pole attachments for cable operators. As previously found by the courts, "[r]ates which enable [a] company to operate successfully, to maintain its

financial integrity, to attract capital, and to compensate its investors for risk assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so called 'fair value' rate base."

(FPC v. Hope Natural Gas Co. (1944) 320 U. § 591.) Likewise, there is no reason to find that the rate would be confiscatory merely by extending its application to the provision of telecommunications services over the same pole attachment.

Further, the formula does not result in a subsidy since the formula is based upon the costs of the utility. A subsidy would require that the rate be set below cost. The fact that the rate is below the maximum amount that the utility could extract for its pole attachment through market power absent Commission intervention does not constitute a subsidy. The embedded cost formula prescribed in § 767.5 applies to capital costs, net of accumulated depreciation, and also allows for recovery of the annual operating expenses of the utility's poles and support structures. This formula will therefore reasonably compensate incumbent utilities for their ongoing operating expenses related to providing access to their support structures. Lastly, the application of the formula as prescribed herein is reasonable since we have determined that CLCs are in a weaker bargaining position vis-a-vis incumbent utilities. It is our purpose as a regulator of public utilities to protect against anticompetitive pricing by utilities.

The pricing standards we prescribe under our rules should only be triggered, however, in cases where the respective parties fail to negotiate a mutually agreeable pole attachment rate on their own. Parties shall be free to negotiate pole attachment rates which deviate from the standards prescribed under our rules. If they are unable to reach agreement and submit the dispute to the Commission for resolution, we shall apply the rate standards in our rules as the default rate, based upon historical embedded costs, and straight-line depreciation accounting consistent with our findings in C.97-03-019 (CCTA vs.

SCE) unless the incumbent utility can show that the facilities being installed occupy more pole space, or otherwise encumber the property, more than do cable television facilities.

V. Obligations to Respond to Requests Concerning Facility Availability and Requests for Access

A. Parties' Positions

The parties are in dispute over how quickly the incumbent utility should respond (1) to initial inquiries from CLCs concerning the availability of space for attachments and (2) to follow-up requests seeking specific attachments.

The Coalition believes that standard time frames should be imposed for requiring ILECs and electric utilities to provide responses to a CLC inquiring about the availability of conduit or poles. The Coalition proposes that the time frames which were previously incorporated into an agreement between Pacific and AT&T should be applied as a general rule for all parties. Under the terms of this agreement, the ILEC or electric utility would provide information regarding the availability of conduit or poles within 10 business days of receiving a written request. And within 20 business days, if a field-based survey of availability is required.

If the written request sought information about the availability of more than five miles of conduit, or more than 500 poles, the incumbent utility would (1) provide an initial response within 10 business days; (2) use reasonable best efforts to complete its response within 30 business days; and (3) if the parties were unable to agree upon a longer time period for response, the incumbent utility would hire outside contractors, at the expense of the requesting party. Before proceeding with such outside hiring, however, the incumbent utility would notify the requesting party of the contractor's expected charge. If the incumbent utility provided an affirmative response to the request for space,

access would essentially be granted immediately. If, however, "make-ready work" ¹² were necessary, the incumbent utility would complete the make-ready work at a reasonable cost, generally within 30 business days. If a longer time period were required, the parties could either agree upon such longer period, or, failing that, the outside contractors would be hired by the requesting party at its expense.

The Coalition believes that the time allotted to an incumbent utility for granting access to a CLC should not exceed 45 calendar days (alternatively, 30 business days). The Coalition proposes that make-ready work be required to commence within no more than 15 days after a utility has determined that additional attachments can be accommodated through rearrangements of existing facilities, and to be completed within 30 days, absent special circumstances. Where unusually extensive make-ready work is required, the Coalition believes that the attaching and utility parties should be able to agree on an appropriate period for completing all make-ready work, not to exceed 60 days unless parties agree otherwise. If the attaching-party and utility-party could not agree on the amount of time or cost required for make-ready work, the attaching-party would be allowed to use a qualified third-party contractor to do the make-ready work, subject to utility supervision, if the attaching-party is satisfied with the contractor's estimates of the time required and the cost of the project.

¹² "Make-ready work" is the work required (generally rearrangement and/or transfers of existing facilities) to accommodate the facilities of the party requesting space. This work may be performed by the owner of the facility or by the requesting party through approved contractors.

Pacific is willing to provide information for general planning purposes, but believes the amount of information requested at one time should be limited. In most cases, Pacific believes it would be an inefficient use of resources to require responses within 10 or 20 days for general requests for information. Moreover, in some cases the information is also available from public sources such as the County Assessor's office. Pacific seeks flexibility to negotiate a reasonable response time with each requesting party on a case-by-case basis, and expresses concern about its ability to comply with rigid response time frames in light of the possibility of simultaneous requests by multiple parties.

GTEC believes that no particular time period should be established for responding to a request because the amount of time required to respond to an applicant's inquiry will vary widely based on numerous factors. As an alternative to a set response time for all requests, GTEC proposes to provide the requesting carrier with a status report as to the availability, if certain information cannot be supplied in less than 45 days, with completion of the request or further status update within 15 days thereafter. To facilitate a shortened response time, GTEC states that a CLC's request should be framed to generate information for a specific point-to-point location, rather than general requests.

Depending on the required amount of "make-ready" and rearrangement work, GTEC believes that 30-to-60 additional days may be required after availability is confirmed for releasing the requested space to a CLC so that it may install its facilities. GTEC does not believe that response times should be differentiated based merely on whether a project involves more than five miles or 500 poles, but that other factors, such as the placement of poles on private or inaccessible property, may be much more significant in determining the time required for review. If space is available, no make-ready work is

required, and the requesting CLC is next on the first-come-first-served list for the space in question, then GTEC agrees to grant access immediately.

GTEC states that the requesting CLC should also complete a "Pole Attachment Request and/or a Conduit Occupancy Request" in order to establish the CLC on a first-come-first-served list for the facilities in question. CLCs and GTEC would need to negotiate an agreement specifying the terms and conditions of the pole attachment or conduit occupancy. Once an agreement is entered into, its terms and conditions would automatically apply to all future requests, unless otherwise agreed.

PG&E recommends that the Commission not adopt any specific time limit for responding to an applicant's request for information about space availability because of the diversity of requests involved. PG&E proposes that a request for access not be deemed made until the telecommunications carrier has provided a specific request, identifying each support structure it wishes to connect to and providing complete field information for the structure and accurate, complete engineering studies for the telecommunications facilities on the structure, including windloading, vertical loading and bending moment. PG&E argues that the utility not be obligated to respond to the request for access until the telecommunications carrier has made advance payment for the utility's engineering work.

PG&E sees no reason to burden an electric utility with requirements to respond to general requests for information by telecommunications carriers. PG&E believes telecommunication requests should in no case be given priority ahead of other types of essential electric utility work or governmental work such as municipal street widening projects.

Based upon their experience in processing access requests, Edison and SDG&E claim the utility needs at least 45 days to review drawings and

specifications and complete a field survey to determine space availability. If the utility must also determine if existing property rights are sufficient to permit third-party access (which sometimes involves locating records a century old), Edison and SDG&E argue that the utility needs additional time for review, with the flexibility to extend the processing time if an emergency condition exists, if the request is unusually large or complex, or if the volume of requests exceeds normal workload levels. Edison and SDG&E also oppose a requirement that all make-ready work be completed within 30 days of an access request, arguing that the amount of work to be done to make facilities ready will vary depending on the type, location, and number of affected facilities.

B. Discussion

We agree that, given the varying degrees of complexity and geographic coverage involved in requests for information, there is no single standard length of time for responses which will fit all situations. The rigid enforcement of response times which bear no relationship to the scope or complexity of a given request could impose unreasonable burdens or inefficient use of resources on the incumbent utility. On the other hand, if no standard for response times is imposed, there will be little incentive for incumbent utilities to provide timely information. The CLC could be faced with unreasonable delays in receiving information if the utility's response time obligations were open-ended, and there were no performance standards against which to hold the utility responsible. Such delay could impede the ability of the CLC to enter the market or expand its operations to compete efficiently.

Given our findings above that the incumbent utilities hold an advantage in negotiations, it is, therefore, appropriate to adopt standards for response times to be used as guidelines in negotiations. While the incumbent utilities objected to setting standard deadlines for responding to requests for

information, the adoption of such guidelines will help to promote greater parity in the bargaining power of CLCs relative to incumbents. At this time, we shall prescribe standard response times only for the two large ILECs, Pacific, and GTEC, since the record is insufficient to apply a specified response time to other utilities. We reserve the right to prescribe standardized response times for electric or other utilities at a later time based upon further development of the record. In the interim, we shall direct that all utilities must provide responses on a good faith basis as promptly as the conditions of each request permit. The ILECs' response time shall be considered presumptively reasonable if it falls within our adopted standard.

These guidelines for response times are not intended to preclude the parties from exercising flexibility in negotiations to tailor the time frames for providing requested information and confirming availability of access to the specific demands of each situation. Rather, the purpose of the guidelines is to discipline the negotiation process and promote more equal bargaining strength between incumbent utilities and CLCs. In the event of a dispute brought to us for resolution, we shall consider these guidelines as a starting point for evaluating parties' claims. The response time guidelines are to be used in good faith in the negotiation process. Where it is clear that the response time guidelines are not realistic for a particular situation, we expect the parties to negotiate their own mutually agreeable response times. In particular cases, either a shorter or a longer response time may be appropriate. The guidelines are not to be used as a license to demand unreasonable or unrealistic response times. We shall take a dim view of any such behavior in adjudicating any disputes that come before us. We may consider modifying or refining these adopted response time guidelines at a later date if subsequent experience of negotiations or resolved disputes provide a basis to do so.

As a preliminary step in preparing an initial inquiry regarding the availability of space, the CLC should meet and confer with the incumbent utility to help clarify and focus the scope of the request in order to make the most efficient use of the incumbent's time and resources in responding to the request. In some cases, a CLC may find it more efficient to obtain certain information from public sources instead of relying on the incumbent utility. In the event that parties are unable to agree on the terms for response time for information requested of the utility, they may bring the dispute before the Commission using the dispute resolution procedure outlined below. The incumbent utility shall have the burden of proving in such disputes why it cannot meet the requested response time, and of showing what time frame for a response is appropriate. It shall not be sufficient for the incumbent utility merely to argue for an open-ended period to respond, with no established deadline.

In setting a deadline for Pacific's and GTEC's responding to CLC general requests for information concerning ROW access, we shall adopt as guidelines the time frames proposed by the Coalition and CCTA. The Coalition's and CCTA's proposed time frames reflect the actual time frames which were mutually agreed to by Pacific and AT&T as reasonable and workable between themselves. We find no reason why these time frames should not be applied generally for Pacific and GTEC.

We shall adopt the following guidelines for response time for Pacific and GTEC based on the previously referenced Pacific/AT&T agreement. For initial requests concerning the general availability of space shall not exceed 10 business days if no field survey is required, and shall not exceed 20 business days if a field-based survey of support structures is required. In the event that more than 500 poles or 5 miles of conduit are involved, the response time shall be subject to negotiations between the carriers involved. We recognize that there

may be situations involving fewer than 500 poles or 5 miles of conduit which still involve considerable complexity and require more time than provided for in the adopted guidelines. We expect parties to take into account the time and complexity involved in negotiating response times. In the event parties cannot agree, they may submit the matter to the Commission for resolution.

In the event that a telecommunications carrier decides after the initial response concerning availability that it wishes to use the incumbent utility's space, the telecommunications carrier must so notify the incumbent in writing. The telecommunications carrier must provide sufficient detail to identify each support structure to which it wishes to connect. In order to finalize its written request, the telecommunications carrier should contact the incumbent utility to arrange for completion of any necessary preliminary engineering studies for the telecommunications facilities on the structure, including windloading, vertical loading, and bending moment. Pacific and GTEC will be required to respond to the telecommunications carrier within 45 days after receipt of the written request, with a list of the rearrangements or changes required to accommodate the carrier's facilities, and an estimate of the utility's portion of the rearrangements or changes.

We agree that the electric utilities should not compromise their primary obligations to serve their own customers in the process of complying with telecommunications carriers' requests for information or for ROW access. In the event a carriers and an electric utilities cannot agree to a response date and the dispute is submitted to the Commission for resolution, the burden shall be on the electric utility, to identify any alleged essential utility work which it claims as the cause of its delay in responding.

VI. Treatment of Confidential Information

A. Parties' Positions

The Coalition seeks a rule prohibiting both ILECs and incumbent electric utilities from disclosing CLCs' requests for information and requests for access to their ROW and support structures. The Coalition argues such information should be available only to persons with an actual, verifiable "need to know" for the purposes of responding to such requests, and proposes that violation of such regulations should be visited with harsh sanctions by the Commission, accompanied by findings of fact that violation of such regulations by ILECs are a breach of the duty to fulfill the requirements of §§ 251(b) and 251(c) of the Act, to negotiate for interconnection, in good faith.

The Coalition proposes use of a standard nondisclosure agreement to protect the confidentiality of requests for information concerning the availability of space on utility support structures, or requests for access to available space, as well as any maps, plans, drawings or other information that discloses a competitor's plans for where it intends to compete against incumbent utilities.

Pacific objects to the Coalition's proposed treatment of the CLC's confidential information as overly broad and one-sided with no reciprocal duty not to disclose the utility's proprietary information. Pacific believes in most cases, a request for access should not be considered proprietary, and a utility should not be required to erect the "Great Wall of China" around employees responsible for responding to requests for access.

Pacific proposed measures to protect the confidentiality of its own information, requiring the party requesting competitively sensitive information to sign a nondisclosure agreement. Pacific believes the party providing the information should have the right to redact any information that is non-vital to

the requesting party. Edison asserts that its pole data and inventory maps are confidential and competitively sensitive, and that utilities should be permitted to require telecommunications carriers to execute the utility's nondisclosure agreements before receiving competitively sensitive pole data and mapping information.

B. Discussion

We recognize that various sorts of data exchanged between parties in negotiating access rights may contain commercially sensitive information, and each party should be permitted to request that certain data be kept confidential. As competition for telecommunications services becomes more pervasive, the need to protect commercially sensitive information from competitors may become more of an issue. The standard for protection of confidential data should not be one-sided, but should equally apply to CLCs, incumbent utilities, and any other party to an access agreement. The dissemination of information which a party has identified as commercially sensitive should be subject to reciprocal protective orders and limited only to those persons who need the information in order to respond to or process an inquiry concerning access. Parties providing confidential information should be permitted to redact nonessential data and require that nondisclosure agreements be signed by those individuals who are provided access to such materials.

VII. Restrictions on Access to Utility Capacity

A. Safety and Reliability Issues

1. Parties' Positions

Parties expressed differing views concerning the extent to which an incumbent utility may deny or limit access to its facilities based on safety and reliability considerations. Parties generally agree that the facilities of

electric utilities pose greater and more complex safety concerns than those of the ILECs.

Edison and SDG&E seek the discretion to refuse or limit all carriers' access to facilities where, in the utility's best judgment, access would create safety concerns or pose a risk to the electric system's reliability or stability. In particular, Edison and SDG&E seek to categorically exempt facilities that are in direct proximity to primary energized voltage conductors from any mandatory access requirements,¹³ arguing that the potential harm to worker safety, public safety and system reliability outweigh the benefit of access to these facilities.

PG&E argues that the Commission's rules need to distinguish between nondiscriminatory access to telecommunications facilities as opposed to electric utility facilities to avoid detrimental consequences to a safe, reliable, and efficient electric system. Electric utilities are in a completely different business which requires different technical, engineering, and safety standards from telecommunications.

PG&E seeks to preserve the option of electric utilities to deny telecommunications carriers access based on safety, reliability, and other reasonable terms. PG&E argues that applicable GO rules need to be strictly followed, especially for underground installations, to protect the safety of its work force and the reliable and safe installation, operation and repair/replacement of power cables. The reliability of PG&E's transmission facilities is further governed by the Western Systems Coordinating Council operating guidelines which prescribe how PG&E will operate its transmission facilities to maintain the reliability of the Western regional United States

¹³ Primary energized voltage conductors "are electric distribution conductors that are energized at 600 volts or greater."

transmission grid system. Once an independent system operator assumes operational control of PG&E's transmission system, additional requirements above and beyond GOs 95 and 128 may be established. PG&E further argues that differences in legal and regulatory requirements may raise issues which are unique to Electric utilities. For example, Electric Tariff Rules 15 and 16 govern electric line and service extensions, while PU Code § 783 places procedural requirements on changes to line extension rules. PG&E also argues that any rules adopted providing for access to electric distribution facilities should not be allowed to create conflicts with electric industry restructuring.

Edison argues that no third party should install or modify an attachment without providing prior notice to, and receiving approval from, the utility. For instance, changing the size or type of any attachment, or increasing the size or amount of cable support by an attachment (including overlashing existing cable with fiber optic cable) has safety and reliability implications that the utility must evaluate before work begins. Edison and SDG&E argue that the telecommunication providers should comply with at least the same safety practices as trained and experienced electric utility workers when working on an electric utility facilities or ROW to avoid exposing the public to grave danger and potentially fatal injuries. Further, Edison believes that utilities must receive advance notice and supervise all facility installations and modifications to ensure adherence to appropriate design and safety standards.

Edison believes that the Commission's GO 95 and the provision of the California Office of Occupational Safety and Health Administration (CAL-OSHA) Title 8 adequately address the safety issues that arise from third-party access to the utility's overhead distribution facilities. GO 95 prescribes uniform requirements for overhead electrical line construction to ensure safety of workers and the general public as well as reliability. Edison

expresses reservations, however, about allowing telecommunications carrier access to underground electrical facilities without strictly-observed notification and utility supervision requirements that supplement GO 128 and CAL-OSHA Title 8, because of the confined space in underground electric facilities (e.g., underground vaults) and the associated increased safety concerns. GO 128 requires separation between the underground facilities of telecommunications carriers and those of electric utilities and prohibits the collocation of telecommunications carriers facilities in the conduit systems of electric utilities except under certain specific conditions. Edison states that each utility has developed unique operating practices tailored to the type of electric equipment contained in a particular structure and, in some cases, the type of structure itself. Installation, repairs, and maintenance performed by workers who are unfamiliar with the existing system and its unique characteristics create the danger of accidents, personal injury, damage to property, and service interruptions.

PG&E notes that installation and construction sometimes need to be done at a level slightly above the published GO standards, and that GO 95 and 128 should be viewed as the minimum standards which the utility must meet. At times, safety needs will arise from other laws or standards. In addition, PG&E believes that because not all situations can be anticipated in the GOs or other rules, electric utilities should be allowed to exercise their judgment if they determine that something is required for safety or reliability reasons.

PG&E states that, to determine if poles have adequate space and strength to accommodate a new or reconstructed attachment, the telecommunications carrier requesting the attachment should be required to give the electric utility a complete and accurate engineering analysis for each pole or anchor location. The analysis would show the loading on the pole (a) from existing telecommunications equipment, and (b) from all telecommunications

equipment after the attachment, and would consider windloading, bending moment, and vertical loading to determine if the pole(s) are or will be overloaded and overstressed. PG&E argues that, until the engineering analysis is done and the pole (s) either is found to have sufficient space and strength for the new attachment, or is upgraded as needed, the telecommunications carrier should not make its attachment. If there are potentially serious or costly consequences for allowing use of electric facilities to provide telecommunications, PG&E argues that the electric utility should not have to allow that access at its peril.

PG&E argues that the ROW access issues in this proceeding overlap to a considerable extent with issues before the Commission in Application (A.)94-12-005/Investigation (I.) 95-02-015, regarding PG&E's response to the severe storms of December 1995. During the evidentiary proceedings reviewing PG&E's response to the December 1995 storm, the Commission staff questioned the adequacy of the windloading requirements in GO 95 for wood power poles. The Division of Ratepayer Advocates (now the Office of Ratepayer Advocates (ORA)) and the Utilities Safety Branch (USB) sponsored testimony in that proceeding, expressing concern that:

"increasing numbers of joint-use wood power line poles have been found to be structurally overstressed by excessive loading of electrical and communication wires and equipment under the main electrical conductors."
(A.94-12-005, Exhibit 510, p. 5-1.)

ORA recommended a complete inspection of PG&E's entire pole inventory for overstressed poles (which would span several years), and the improvement of communications among utilities utilizing the poles. ORA and PG&E disagreed over the interpretation of GO 95 as applied to loading capacity of wire attachments to wood power line poles. ORA's interpretation would increase the threshold at which the existing poles require upgrades and

replacements to meet GO 95 standards before any additional facilities could be attached to the pole. PG&E anticipates that under ORA's interpretation, a large percentage of power poles would need to be replaced with stronger grade poles before any additional attachments could safely be made by CLCs. In that proceeding, PG&E, the ORA, and the USB filed joint testimony (Exhibit 517) proposing that the Commission establish an Order Instituting Investigation (OII) to review, among other things, GO 95 design standards on wood pole loading requirements. A Commission decision is pending in A.94-12-005. PG&E believes that there is considerable tension between the requirements and goals in A.94-12-005 and the demands by CLCs in this case for prompt, immediate access to poles, and that the potential for extensive buildout and reconstruction by CLCs complicate and aggravate the problem of overloading and overstressing the poles.

Pacific believes that for jointly owned poles, the standards agreed to by the owners in conjunction with GO 95 and national requirements adequately address safety concerns. With an increased number of parties seeking attachments, however, Pacific believes that the owners should coordinate attachments by third parties in order to ensure the continuing safety and reliability of the facilities.

The Coalition acknowledges the need for utilities to provide for the safety and reliability of their facilities - so long as the safety and reliability concerns are genuine and have not been manufactured as excuses for a plainly discriminatory access policy. The Coalition argues that any utility that contends that safety and reliability concerns preclude additional attachments should bear the burden of demonstrating that such concerns have not been fabricated as an excuse of denying access.

2. Discussion

We generally agree that the incumbent utility, particularly electric utilities, should be permitted to impose restrictions and conditions which are necessary to ensure the safety and engineering reliability of its facilities. In the interest of public health and safety, the utility must be able to exercise necessary control over access to its facilities to avoid creating conditions which could risk accident or injury to workers or the public. The utility must also be permitted to impose necessary restrictions to protect the engineering reliability and integrity of its facilities.

Telecommunications carriers must obtain express written authorization from the incumbent utility and must comply with applicable notification and safety rules before attempting to make a new attachment or modifying existing attachments. Any unauthorized new attachments or modifications of existing attachments are strictly prohibited. Before an attachment to a utility pole or support structure is made, we shall require successful completion of a fully executed contract.

In order to provide carriers with a strong economic disincentive to attach to poles or occupy conduit without a fully signed contract and authorization to proceed, any carrier found to have engaged in such action, or which has performed an unauthorized modification, shall pay a penalty fee. GTEC has proposed a penalty of five times the recurring monthly rate for each month of the violation. Edison, PG&E, and SDG&E agree that a penalty fee is warranted, but believe that GTEC's proposed penalty is too small to deter unauthorized attachments. Edison argues that many attaching parties may believe such a small penalty is an acceptable risk for unauthorized attachment rather than to incur the costs for negotiating and administering an access request. PG&E and SDG&E propose a \$100 fee as an adequately large penalty to

discourage unauthorized attachments while Edison proposes a \$500 fee. We shall impose an automatic penalty of \$500 per violation for unauthorized attachments, based on the proposal of Edison. For purposes of applying the \$500 penalty, each unauthorized pole attachment shall constitute a separate violation. The setting of the penalty level at \$500 is consistent with PU Code Section 2107 which prescribes default penalties for violations of Commission orders of not less than \$500, or more than \$20,000, for each offense. If violations continue to occur despite the imposition of this penalty, we may consider increasing the amount of the penalty at a future time.

We shall not adopt specific detailed rules addressing a comprehensive set of safety and reliability requirements given the complexity and diversity of the technical issues involved. Historically, the Commission's GO 95 and GO 128 have dealt with safety requirements for clearances and separation between conductors on poles or in common trenches. These rules have become accepted industry practice and parties agreed generally that they should continue to be enforced. At a minimum, parties must comply with GOs 95 and 128, as well as other applicable local, state, and federal safety regulations including those prescribed by Cal/OSHA Title 8. Attachments to wood poles may be impacted by any rules or restrictions which we subsequently adopt in response to the recommendations made by parties in A.94-12-005/I.95-02-015 regarding PG&E's design standards for utility wood pole loading requirements.

We agree with PG&E that pending the resolution of the parties' dispute over the safety factor for pole attachment loading standards in A.94-12-005/I.95-02-015, an interim safety factor should be adopted. The higher the safety factor is rated, the greater the number of poles which must be replaced before an attachment can be made. The adoption of an interim minimum safety

factor for pole loadings will help avoid delays in negotiations over pole attachments relating to claims of pole overloading.

PG&E proposes that an interim windloading safety factor of 2.67 for Grade A poles be adopted in this proceeding as a minimum standard until the Commission reaches a final resolution in A.95-12-005/I.95-02-015. The Coalition concurs in PG&E's proposal to use the 2.67 windloading factor as an interim measure. The basis for the 2.67 windloading factor was explained in the report submitted by the Commission's Utility Safety Branch (USB) in A.94-12-005/I.95-02-015:

"USB believes that due to pole deterioration, G.O. 95 allows the minimum safety factor to be reduced. Section 44.2 modifies the minimum safety factor by reducing it (for Grade A and B construction) to not less than 2/3. As stated in this section, a reduction is allowed for 'deterioration or changes in construction arrangement or other condition subsequent to installation.' As an example, a safety factor of 4 can be reduced to 2.67 as allowed by Section 44.2."

Exhibit 511, USB Report, at 32

While the Commission's USB accepted PG&E's interpretation in the PG&E proceeding, ORA did not. PG&E subsequently agreed with ORA and USB in Exhibit. 507 of the PG&E proceeding to not allow facilities to be added to Grade A poles such that the safety factor would be reduced below 4.0 until an OII on GO 95 was completed.

We shall adopt an interim safety factor for utility wood pole loading requirements to equal to 2.67, based upon the proposal by PG&E and USB in A.94-12-005/I.95-02-015. This interim factor shall be subject to revision pending further action in A.94-12-005/I.95-02-015. Once a decision has been issued in that proceeding, we shall solicit comments from parties to this

proceeding concerning the general applicability in this docket of any requirements adopted in the PG&E proceeding.

We recognize that electric utility underground facilities pose particular safety hazards. A single mistake in an underground facility could result in fatal injuries to the worker and expose the public to grave danger. Telecommunication providers shall therefore be required to comply with all of the same safety practices as trained and experienced electric workers use in underground facilities. Any utility operating practice that the utility requires of its own employees shall be conclusively presumed to be reasonable and justifiable.

Telecommunications providers shall comply with utility notice, supervision, and inspection requirements for all installation, repair and maintenance activities, but especially work in underground facilities, from entry to procedures for securing the facility when work is completed. These requirements will help ensure that work can be appropriately supervised and inspected, and that it will not interfere with planned electric utility repairs or work being done by other telecommunications carriers.

In the event of an emergency (e.g. a downed pole or poles, an earthquake or power outage) electric utility repairs shall take precedence over telecommunications repairs, to the extent the electric utility determines that both types of repairs cannot occur at the same time. In an emergency situation such as downed pole, if the electric utility determines that it must disconnect, remove or repair telecommunications equipment for safety or reliability reasons, these rules permit the electric utility to do so.

We expect parties to resolve most issues relating to safety and reliability restrictions not explicitly covered in our rules through mutual negotiation among themselves. In the event that parties cannot resolve disputes

among themselves over whether a particular restriction or denial of access is necessary in order to protect public safety or ensure the engineering reliability of the system, any party to the negotiation may request Commission intervention under the dispute resolution procedures we adopt below. In the event of such dispute, the burden of proof shall be on the incumbent utility to justify that its proposed restrictions or denials are necessary to address valid safety or reliability concerns and are not unduly discriminatory or anticompetitive.

B. Reservations of Capacity

Parties' Positions

The parties generally agree that access to finite capacity should be granted on a first-come, first-serve basis, but disagree concerning whether or to what extent access to facilities may be denied based on the incumbent utility's right to reserve currently unused capacity for its own future growth needs.

Pacific and GTEC each argue that the ILEC, as a provider of last resort, must have the ability to reserve capacity for future growth of its own loop network to serve all customers. Pacific's current practice is to construct its conduit and pole lines with sufficient capacity to meet anticipated needs based only on the information available at the time of construction. Pacific does not, however, install all of the cables in all of the ducts at the time of the conduit construction. Upon a request for access, Pacific's forecasts are reviewed and updated to determine current availability. If the original forecast is no longer valid, Pacific will make available the reserved duct for use by third parties. If Pacific is unable to reserve space for future use, it will be forced either to install all of its cables at the time of construction, build additional conduit to meet its service needs, or evict users of the needed duct space under GO 69-C. GO 69-C permits a utility to grant easements, licenses or permits for the use of its

operating property without special authorization by the Commission as long as the utility retains the right to reclaim its property if necessary to serve its customers. As GO 69-C promotes both reciprocal access and a utility's continuing ability to provide service upon demand, Pacific believes it is applicable to these proceedings.

Pacific proposes that, at a minimum, ILECs and other attaching carriers be allowed to reserve space for "imminent use" if the ILEC has a construction plan in place which requires the installation of the ILEC's facilities within six months of a request for access (or within 18 months if construction will be delayed as a result of an action by a third party such as a permitting body). In such cases, Pacific proposes that the ILEC be permitted to deny the request for space.

Pacific and GTEC both contend that a complete prohibition against their ability to reserve capacity, particularly when that capacity has been reserved for a future use, is a taking of property within the meaning of the Fifth Amendment. In Federal Communications Commission v. Florida Power Corporation, (1986) 480 U. S. 245, the United States Supreme Court held that the prior requirements of § 224, which applied only to cable companies, did not effect an unconstitutional taking, since utility companies were neither required to permanently give cable companies space on utility poles nor prohibited from refusing to enter into attachment agreements: "Since the Act clearly contemplates voluntary commercial leases rather than forced governmental licensing, it merely regulates the economic relations of utility company landlords and cable company tenants, which regulation is not a per se taking." Id. at 250.

Pacific notes that the Supreme Court, however, was not deciding what the outcome would be if the FCC in the future required utilities to enter into, renew or refrain from terminating pole attachment agreements.

"[Property] law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the innovations." Id. at 252 quoting Loretto v. Teleprompter Manhattan CATV Corporation. (1982) 458 U.S. 419, 436.

Pacific and GTEC claim that denial of their right to reserve space would permit a third party to exercise dominion over the LEC's property, thereby triggering Fifth Amendment scrutiny. At the very least, Pacific argues, the Commission should permit an LEC to reclaim space previously provided to a third party that is necessary for use by the LEC to meet its own service needs.

GTEC argues that it must be able to satisfy both its current needs as well its future space requirements relative to the poles and conduits which it owns, places, and maintains. GTEC forecasts its future space requirements on the basis of a five-year horizon. In order to ensure continued investment in facilities infrastructure, GTEC argues that facilities owners must be allowed correspondingly to reserve reasonable space for future use, while treating all competitors equally. GTEC argues that depriving it of the ability to maintain reserved capacity would impair service to the public, cause an extraordinary cost increase, and have a significant adverse effect on GTEC's future investment in poles and conduits. If GTEC cannot reserve space in its own facilities, it argues, there is no incentive to construct facilities sufficient to satisfy future needs, with a resulting loss of economic and efficient investment, with long-range strategic planning rendered impossible.

GTEC objects to the FCC's interpretation of § 224(f)(1) as prohibiting GTEC from reserving space on its own facilities for its own future needs. GTEC argues that this interpretation conflicts with § 224(f)(1), which applies the nondiscrimination requirement only to those for whom access must be "provided," not to the owner, whose "access" is synonymous with its ownership right. GTEC contends that the concept of "nondiscriminatory access" does not mean that its rights as an owner of poles and conduits must be relegated to the status of a mere licensee occupant, but only that GTEC must treat equally all companies seeking access.

GTEC further argues that if the Commission were to adopt the FCC's interpretation of the term "nondiscriminatory access" (as used in 47 U.S.C. § 224(f)(1)) precluding an ILEC from reserving space on its own facilities for its own needs, the Commission would effect an unconstitutional taking of GTEC's property. GTEC contends that such a restriction would interfere with its "investment-backed expectations" and "eviscerate" a "critical expectation of GTE" that "additional space would be available as needed in the future."

The Coalition disputes GTEC's argument, noting that § 767.5 only permits attachments in "vacant space" or "excess capacity" on or in utility support structures, and that the statute requires that:

"... the cable television corporation shall either (1) pay all costs for rearrangements necessary to maintain the pole attachment or (2) remove its cable television equipment at its own expense." (PU Code § 767.5(d).)

Thus, the Coalition argues, a utility has no need to reserve vacant space or excess capacity and keep it, as it were, "lying fallow" until such time as it may need it since the utility can reclaim vacant space if needed.

CCTA notes that the FCC Interconnection Order does allow an electric utility to reserve space for its future use, but only if it is in accordance

with a "bona fide development plan" for the delivery of electricity through specific projects.¹⁴ CCTA argues that for purposes of providing any communications services, an electric utility should be on equal terms with other telecommunications companies and the reservation of space for communications would not qualify as a "bona fide development plan." The electric utility must allow the space to be used until it has an actual need for it.

Edison and SDG&E propose that the amount of capacity made available for access be limited to only what is expected to be needed by the telecommunications carrier within a specified time period. Any capacity that the telecommunications provider does not use within that period would revert to the electric utility and become available for another telecommunications provider's use. PG&E also states that the electric utility should be allowed to call back capacity that a telecommunications carrier has utilized in the interim when the need materializes.

PG&E's present practice is to allow telecommunications providers access to overhead distribution facilities until PG&E needs the capacity for electric service. Each telecommunication provider thereby decides between incurring the upgrade costs at the outset, or deferring upgrade until the electric utility's need materializes. PG&E argues that this approach makes sense because future electric distribution capacity needs usually are planned on an area basis, and not on a specific pole/line basis.

¹⁴ In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, and Interconnection between LECs and Commercial Mobile Radio Service providers, First Report and Order, CC Docket No. 95-185, FCC 96-325, ¶ 1170 (August 8, 1996) ("Interconnection Order").

PG&E also proposes that the following matters should be completed before a first-come-first-served access authorization is applied in a particular situation: (a) successful completion of negotiations with a fully executed contract; (b) identification of the specific ROW support structures for which an attachment is requested; and (c) payment of the attachment fee in accordance with the executed contract. (PG&E Comments, p. 27.)

The Coalition believes that the Commission should not permit reservations of capacity or, if allowed at all, that they should be strongly disfavored, and permitted only for electric utilities that can demonstrate there is no other feasible solution and that they had a bona fide development plan prior to the request justifying the reservation. The Coalition argues that adoption of such a policy is critical to the vigorous development of facilities-based competition in California. The Coalition argues that permitting reservations of capacity for an incumbent's own use enables the incumbent to discriminate against all carriers as long as it has treated them all in an equally harsh and equally discriminatory manner.

Edison and SDG&E oppose the Coalition's proposal requiring the electric utility to demonstrate it has a "bona fide development plan" prior to requesting a reservation of capacity. Edison and SDG&E argue that electric utilities' obligation to provide safe and reliable electric service can only be met if the utilities can reserve capacity for future use or take back the capacity when needed for electric utility purposes.

Both Edison and SDG&E conduct their capacity planning based on five-year forecasts of the need for additional capacity within different parts of the system. Detailed planning that identifies the specific facilities affected by the need to provide additional capacity usually does not occur until shortly before the need for additional capacity arises. Edison and SDG&E argue

that it would be time-consuming and expensive for the utility to make detailed annual capacity forecasts for every facility within its service territory. Moreover, even if there is no anticipated need for additional capacity at a specific facility within a particular one-year period, there will frequently be occasions when there is a need for the capacity after the one-year window. Edison and SDG&E believe "take-back" provisions are essential for meeting these future needs; the utility must either have the ability to "reclaim" such space, or be entitled to construct additional space at the expense of the carrier(s) that otherwise would be "displaced" to make additional room for the utility.

Discussion

We must balance two opposing interests in resolving the dispute over reservations of capacity for future use, those of the incumbent utilities and those of the CLCs. On the one hand, incumbent utilities need to be able to exercise reasonable control over access to their facilities in order to meet their obligation to provide reliable service to their customers over time and plan for capacity needs to accommodate future customer growth. On the other hand, CLCs need to be able to gain access to the ROW and support structures of the incumbent utilities in order to provide local exchange service on a nondiscriminatory basis. We shall separately discuss the obligations of ILECs and electric utilities.

The ILEC's reservation of capacity for its own future needs could conflict with the nondiscrimination provisions in § 224(f)(1) of the Act which prohibit a utility from favoring itself or affiliates over competitors with respect to the provision of telecommunications and video services. If the ILEC were permitted to deny access to CLCs by reserving capacity for its own needs under more favorable terms than are offered to the CLCs, the ability of CLCs to compete effectively with the incumbent could be significantly compromised. By

virtue of their previous status as monopoly providers of utility service, ILECs have significant control of bottleneck facilities. New competitors lack the advantages of incumbency, and must build and interconnect their systems. The ILECs could use the reservation-of-capacity defense as a means of staving off competitors and perpetuating their competitive advantage over CLCs.

Accordingly, we shall not permit the ILECs to deny access to other telecommunications carrier based on general claims that capacity must be reserved for their own future needs.

While we shall not permit ILECs to deny requests for access based on the need to reserve capacity for extended periods, we recognize that ILECs should maintain control over their facilities to plan for their own future growth and to provide for sufficient capacity to serve future customers in a reliable manner. Likewise, CLCs also may require a certain lead time for the actual utilization of space beyond the date at which an access agreement is executed with an incumbent utility.

Just as ILECs should not be permitted to favor themselves in reserving capacity at the expense of CLCs, likewise, CLCs should not be permitted more favorable terms in their ability to reserve capacity than are the ILECs. Thus, CLCs should not be permitted to engage in indefinite delay in the utilization of pole space or conduit capacity following the execution of an agreement with an ILEC authorizing access. We recognize that both ILECs and CLCs may require a certain interval between the time a determination is made that space is needed and the actual use of that space to serve customers. In the interests of nondiscriminatory treatment for both the ILECs and CLCs, we shall impose on them all the same requirements with respect to the time interval for reserving capacity.

We shall require that once CLCs have been granted access, these carriers must make use of the capacity that they leased, within a specified period, or the capacity will revert for use by other carriers. Such a requirement is necessary so that particular carriers do not "bank" capacity, and permit it to be idle while it could be used by other carriers to provide service. GTEC has proposed a period of nine months, beginning from the date on which a CLC receives its access authorization from the ILEC, within which the CLC must either place facilities in use and attach to poles or the facilities will revert to the ILEC. We find the nine-month period reasonable for CLCs' use of capacity of an ILEC and will adopt it for that purpose. This period will allow for the uncertainties of customer service demands and weather limitations in scheduling attachments or installations for ILEC facilities.

Since we are placing this nine-month time limitation on the CLCs with respect to the utilization of capacity, a similar time limitation should likewise apply to the ILECs' utilization of their own capacity in order to assure nondiscriminatory treatment among telecommunications carriers. Our guiding principle is that any discretion ILECs have to reserve capacity be no greater, nor lesser, than that provided to the CLCs. We shall therefore allow both ILECs and CLCs the same nine-month period within which to utilize capacity which is subject to a request for access from competing carriers. In the case of an ILEC, the nine months shall count from the date of any denial of a request submitted by a CLC for a specific attachment to pole space or conduit capacity.

To justify denial of access to a CLC, the ILEC must demonstrate that plans are in place for *actual utilization or construction* to begin within nine months. The ILEC must verify that construction is actually imminent, and not merely "contemplated." If substantial construction activity is not commenced within nine months, the party requesting access must be allowed

access to the pole or other support structure forthwith, ahead of the ILEC or other requesting party, unless the delay is demonstrably attributable to severely inclement weather or the delay of a government agency in issuing a needed construction or similar permit. In the latter case, the ILEC may be able to reserve the capacity for an additional period not to exceed nine more months. This same provision shall apply to CLCs.

In the case of any telecommunications carrier's use of capacity of a electric utility, however we conclude that a deadline shorter than nine months is warranted. As noted by SDG&E, particularly in the case of electric utility distribution poles, conditions existing at the time access is granted do not remain static for long. The longer the delay in a telecommunications carrier's exercise of its access rights to poles or conduit, the more significant the potential for major changes to take place in those facilities that could affect the carrier's ability to attach or the safety and engineering aspects of the attachment. Based on review of both GTEC's and SDG&E's comments, we conclude that a shorter duration for telecommunications carriers to exercise their access rights may be more critical in the case of electric utilities. We shall therefore adopt SDG&E's proposal to permit a period of no more than 90 days for a telecommunications carrier to exercise its access rights to the poles and conduits in the case of an electric utility.

We shall permit a somewhat less restrictive policy regarding the electric utilities' ability to reserve capacity for their own use. Since electric utilities have traditionally been engaged in a separate industry from telecommunications, electric utilities have not been in direct competition with CLCs. Accordingly, the specific anticompetitive concerns regarding ILECs' ability to favor themselves at the expense of CLCs have not applied in the case of electric utilities as long as they applied only to core electric service. More

recently, however, at least one electric utility has sought entry into the local exchange market.¹⁵ While electric utilities shall not unfairly discriminate against CLCs in responding to CLCs requests for access to pole space or conduit capacity, electric utilities do not violate the nondiscriminatory provisions of the Act, but only so long as they are giving preference to the needs of their own core electric customers over the requests of CLCs. Consistent with the approach followed in the FCC First Report and Order (paragraph 1169), we will permit an electric utility to reserve the space if such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core electric utility service within one year. Each electric utility must permit use of its reserved space by telecommunications carriers until such time as the utility has an actual need for that space. At that time, the utility may recover the reserved space for its own use per the rules in the next section of this order.

In those situations where parties cannot agree on the terms of access due to a claim by an electric utility asserting the need to reserve capacity for its own future needs, we shall resolve such situations through our dispute resolution process. In order to justify its capacity reservation claim, the electric utility will be required to show that it had a bona fide development plan for the use of the capacity prior to the request for access, and that the reservation of capacity is needed for the provision of its core utility services within one year of the date of the request for access. In cases where the capacity will be needed at a future date beyond one year, the electric utility may not assert the reservation of

¹⁵ On August 19, 1998, SCE filed a petition in this docket seeking certification as a facilities-based CLC. SCE's petition is the first California electric utility to competitively seek entry into the local exchange telecommunications market.

capacity claim as a basis to deny access. As we have stated above, our preferred outcome for meeting future capacity needs is the expansion of facilities rather than reclamation.

We conclude that the above policy regarding reservations of capacity in no way constitutes an unlawful taking in violation of the incumbent utilities' constitutional rights under the fifth amendment. The rules we establish merely constitute regulation of the terms under which parties may negotiate for access. The access policy we establish does not eliminate the incumbents' ownership of their property nor does it give CLCs dominion over the incumbents' property. Property ownership rights, however, do not give incumbent utilities unlimited discretion to deny access to telecommunications carriers unilaterally. As noted by the Coalition, public utilities are affected with a public interest and are therefore subject to regulation for the public good. The incumbents still retain autonomy over their planning and forecasting of future capacity requirements. Under the rules we establish, the incumbents still retain ultimate control over their property by virtue of their rights to require a signed contract expressly granting permission before third-party access may proceed.

Moreover, third parties which elect to remain on the pole shall be required to pay for the cost of any rearrangements to the extent they benefit there-from as discussed below. Therefore, the incumbents are fairly compensated for the use of their property, and there is no unlawful taking.

VIII. Capacity Expansion, and Modification, and Reclamation

A. Parties' Positions

An issue which is closely related to reservation of capacity is that of expansion or modification of existing capacity to accommodate third party carriers' requests for access or to accommodate the incumbent utility's needs for existing space which is being used by an attaching carrier. If there is no available

space on a given utility facility for which access is requested, it may become necessary to expand or rearrange the existing facility to make room for a new attachment. The principle of nondiscrimination set forth in § 224(f)(1) requires that a utility cannot simply deny requests for access on the basis that no space is available without first seeking to accommodate the request through modification of existing facilities or expansion of existing capacity for telecommunications carriers just as it would to meet its own needs for growth.

Pacific and PG&E believe that the party or parties for whose benefit special modifications to facilities are made should assume the cost of the modifications including the cost of rearranging the facilities of parties not participating in the modification. GTEC believes the carriers which require the capacity should incur the expense of new construction once capacity is exhausted. Because of the many variables associated with expanding capacity, GTEC believes no minimum time frames should be set for completion of the expansion. Alternatively, if minimum time frames are to be established, GTEC proposes that a CLC which desired to further expedite the process should be required to pay any extra charges associated with the escalation.

The Coalition proposes that the costs of support structure capacity expansion and other modifications, including joint trenching, be shared by parties attaching to utility support structures according to the principles set forth in the FCC Rules (First Report Secs. 1161-1164; 1193-1216). Under the FCC rules, parties must bear their proportionate share of the cost of a modification to the extent that the modification is made for the specific benefit of the participating parties.

As a general principle, the Coalition believes that the proportionate share of cost assigned to each carrier should correspond to the proportion of total usable capacity used by that carrier. In the case of joint trenching costs, however,

the Coalition argues this approach may not always be appropriate in the case of electric utilities. Due to safety considerations, trenching and installation of conduit for the placement of underground gas pipelines and electric conductors is more elaborate than for direct burial or placement of conduit wire for communications facilities. A deeper and wider trench is required for power utilities' conduits or pipelines. The different requirements for underground placement of power utilities' facilities result in higher costs being incurred than would be the case if only communications facilities were involved. The Coalition argues that telecommunications carriers should not have to pay more than the costs they would have incurred, based on an independent bid, had they done their own trenching for their own facilities.

Under the FCC rules, written notification of a modification is required at least 60 days prior to the commencement of the physical modification itself, absent a private agreement to the contrary. The Coalition proposes this Commission adopt the FCC notification requirement. Notice is to be specific enough to apprise the recipient of the nature and scope of the planned modification. The notice requirement would not apply if the modification involved an emergency situation.

GTEC would support a type of simple voluntary notification plan, much like a docket service list, to notify companies of joint trench work, with most carriers agreeing to participate in view of the cost savings. GTEC does not believe ILECs should be placed in the position of being the sole coordinators of such functions for the industry.

B. Discussion

In the interest of promoting a competitive market, our preferred approach to meeting needs for new capacity is through expansion or rearrangement of existing capacity rather than through reclamation and eviction

of a CLC currently occupying space on an attachment or in conduit. We shall require that the costs of capacity expansion and other modifications, including joint trenching, be shared among only those parties specifically benefiting from the modifications on a proportionate basis corresponding to the share of new usable space taken up by each benefiting carrier. In the event an energy utility incurs additional costs for trenching and installation of conduit due to safety or reliability requirements which are more elaborate than a telecommunications-only trench, the telecommunications carriers should not pay more than they would have incurred for their own independent trench. Likewise, electric utilities should not bear the cost of modifications which benefit only telecommunications carriers.

In the case where an incumbent utility (either ILEC or electric) has need of existing space which is being occupied by the equipment of attaching CLCs, we shall require that the incumbent utility first give the option to the attaching CLCs to pay for the costs of rearrangements or expansions necessary to maintain their attachment. In order to justify a reclamation of existing space, the incumbent utility must justify that the space is reasonably and specifically needed to serve its customers. Electric utilities must show the space is needed to serve core electric utility service. The incumbent utility must also show that there are no other cost effective feasible solutions to meet its needs, or there are no technological means of increasing capacity of the support structure for additional attachments. The incumbent utility must also show that it has attempted to negotiate a cooperative solution to the capacity problem in good faith with the party being evicted from the incumbent's pole or conduit.

We shall permit incumbent utilities to reclaim space in cases where they have met the above conditions, and in addition where some or all of the attaching parties have refused to pay the costs of rearrangements necessary to

maintain their pole attachment or use of conduit. In the latter case, the attaching parties shall be required to promptly remove their telecommunications equipment from the attachment at their own expense subject to the restrictions described below. This approach is consistent with prescriptions of PU Code § 767.5 (d) with respect to the treatment of cable television attachments.

We remind CLCs, however, that all carriers have an obligation to complete the calls of their customers, even if they disagree with the underlying interconnection arrangements, as prescribed in D.97-11-024. Therefore, even in the event a CLC is notified by the incumbent utility of its intention to reclaim space currently occupied by the CLC's equipment, the CLC still has a primary obligation to ensure the service continuity of its customers. If continuation of the use of the incumbent's space is no longer feasible, the CLC is obliged to find other means to provide uninterrupted service to its customers before removing its equipment from the incumbent's space.

In the event of disputes over reclamation of space and displacement of a CLC, we shall require that the incumbent shall not displace the CLC without first notifying the Commission and obtaining authorization to do so. We shall permit parties to use our dispute resolution procedure to resolve disputes over CLC displacements due to reclamation of space. In resolving any dispute, we shall place the burden of proof on the ILEC or electric utility to show whether the incumbent has adequately satisfied the prerequisites for reclamation, as described above. Nonetheless, irrespective of the disposition of any disputes concerning forced displacement of CLC equipment due to reclamation, the primary service obligation remains with the CLC whose customers are potentially affected by a displacement. Any order of this Commission granting the incumbent utility the right to reclaim space must contain a plan for continued telecommunications service to affected end-users of the CLC.

We shall adopt an advance notice requirement of at least 60 days prior to the commencement of a physical modification, except in the case of emergencies where shorter notice may be necessary.

IX. Obtaining Third-Party Access to Customer Premises

A. Parties' Positions

During the ROW workshops, various parties raised the issue of how the Commission could assist utilities seeking to obtain access to the full pathway up to and including the minimum point of entry (MPOE) to a customer's premises.

Pacific states that the pathway up to and including the MPOE to a customer's premises usually includes facilities in the public ROW and facilities on the property to be served. An LEC only controls the supporting structure that is in the public way; the property owner provides and owns the supporting structure on his or her property. Pacific claims it cannot supercede the property rights of owners by permitting access to third parties. If the utility is able to successfully negotiate access with the property owner, Pacific offers to provide access to its equipment rooms and other facilities as long as the security and safety of its equipment is not compromised.

In some cases the property owner has determined that a single entity shall provide service to the premises. While acknowledging this can create difficulties if a tenant desires service from a different carrier, Pacific claims this is an issue between the tenant and the property owner, and cannot be resolved by the carrier.

Pacific believes that the Commission should require all utilities to permit nondiscriminatory access to facilities on private property that they own or control, but should not dictate to owners which carrier they must choose to provide service. Pacific proposes that the Commission consider limiting the

amount of access or rental fees a carrier is permitted to pay a property owner for access rights.

GTEC agrees to provide access up to the MPOE, to the extent that GTEC owns and there is availability on the poles, conduits, ducts, or the ROW in question. Since the property owner is responsible for facilities beyond the MPOE, however, GTEC opposes a Commission regulation that would abrogate private agreements between such property owners and a carrier which would allow other carriers the ability to trespass on such property without negotiating their own agreement.

While the Coalition acknowledges that this Commission lacks jurisdiction to require non-utility third parties to grant utilities access to their properties, the Coalition argues that there are still important actions the Commission can take to assist CLCs in this area. First, the Coalition asks the Commission to make findings of fact regarding the importance of the development of a new telecommunications infrastructure and deployment of alternative facilities to customer premises by CLCs. The Coalition believes such findings would be useful in eminent domain proceedings to gain access to tenants' facilities.

The Coalition further asks the Commission to require utilities that have vacant space (excess capacity) in existing entrance facilities (e.g., conduit) into commercial buildings to make such space available up to the MPOE so that competitors may gain access to building cellars, telephone closets (or cages) and risers, network interconnection devices and/or frames, and so forth, in such buildings. Further, the Coalition asks the Commission to require that ILECs not impede such access where it is requested by landlords on behalf of their tenants. Finally, the Coalition asks that ILECs and incumbent electric utilities be required to exercise their own powers of eminent domain, just as they would on their own

behalf to obtain or expand an existing ROW over private property, in order to accommodate a CLC's request for access.

The Coalition argues that under no circumstances should a building owner or manager be allowed to charge CLCs for use of its inside wire while allowing ILECs unlimited use of the same facilities at no charge. The Coalition suggests that the Commission can exercise its influence to prevent such discriminatory treatment in the following manner. Assuming that the Commission has the authority to regulate building owners as "telephone corporations" as defined under PU Code § 234, the Coalition suggests that the Commission could declare it will refrain from such regulation if, but only if, the building owner makes access to inside-wire available to ILECs and CLCs alike on a nondiscriminatory basis.

As a basis for this recommendation, the Coalition cites the Commission's "shared tenant services" ("STS") decision, D.87-01-063.²⁴ In the STS decision, the Commission adopted a set of guidelines aimed at ensuring that, among other things, tenants in buildings or campus-like settings where the landlord provides PBX services to tenants (via a PBX switch and inside wire owned by the landlord) continue to have options for obtaining telephone services from the provider of their own choosing. The decision provided that landlords would not be regulated as a public utilities, even though they appeared to fit within the literal terms of PU Code §§ 233 and 234, *if but only if*, they complied with the STS guidelines. The rationale underlying the decision is that the Commission could have asserted jurisdiction, had it wanted to do so, over such telecommunications services providers under the statutory definitions of a

²⁴ *Re Pacific Telephone and Telegraph Company* (D.87-01-063) 23 CPUC 2d 554, 1987 Cal. PUC LEXIS 838 ("the STS decision"), modified (D.87-05-009) CPUC 2d 179, 1987 Cal. PUC LEXIS 725.

"telephone line" in PU Code § 233 and of a "telephone corporation" in PU Code § 234. The Coalition claims that a similar sort of Commission authority should apply to any landlord who is charging certificated telephone corporations, ILECs and/or CLCs, for access to a building system or systems of entrance facilities, tie down blocks, frames, wires, fibers, closets, conduits, risers, etc. The Coalition argues that the building owner or manager is not providing such service to tenants, but to telecommunications carriers. The Coalition characterizes such as directly akin to a special access service through which situation, the building owner or manager is, or, if necessary in a given case, certainly could be held to be, operating a "telephone line," and offering service to the public or a portion thereof (*i.e.*, to certified carriers) within the meaning of PU Code § 233.

Edison and SDG&E argue that an electric utility must be allowed to deny access requests when its property rights do not allow use of the property by a third party. Edison and SDG&E also oppose being required to exercise their powers of eminent domain in order to accommodate a telecommunications provider's request for access, claiming that such an exercise of powers would go beyond the legally authorized limits for electric utilities. Edison argues that its powers of eminent domain do not allow it to condemn property for the benefit of telecommunications providers. Edison believes that since certificated telecommunication providers have the power of eminent domain, they should not depend upon the electric utilities to secure their access rights.

Electric utilities also frequently obtain easements or licenses containing provisions that limit use of the property to operations directly related to the generation, transmission or distribution of electricity. Edison argues that it should not be obligated to negotiate broader easements or licenses to allow telecommunications carriers to access the property, since this would impose additional costs on the utility and its customers and shareholders.

Comments were also filed jointly by a group known as the "Real Estate Coalition"¹⁶ representing the interests of owners and managers of multiunit real estate. The Real Estate Coalition concurrently filed a motion for leave to intervene and become a party in the proceeding. Separate comments were filed by the Building Owners and Managers Association of California (BOMA) with a similar motion to intervene. There is no opposition to either of the motions for leave to intervene, and the motions shall be granted. Both parties represent very similar interests.

The Real Estate Coalition argues that the Commission lacks jurisdiction to regulate building owners, and opposes rules permitting telecommunications carriers to enter the premises of multiunit buildings and install facilities without the express consent of the underlying property owner. The Real Estate Coalition believes forced access by telecommunications carriers would constitute an unlawful taking under *Loretto v. TelePrompTer Manhattan CATV Corp*, 458,US 420 (1982), because it would entail a physical occupation without the owner's consent.

The Real Estate Coalition identifies a number of effects that are triggered by telecommunication carriers' access to buildings, including fire and safety code compliance, tenant security, and the ability of building owners to manage finite physical space needs.

BOMA argues that the Commission should not attempt to regulate access issues between the telecommunications industry and private property

¹⁶ The Real Estate Coalition is composed of the Building Owners and Managers Association International, the Institute of Real Estate Management, the National Apartment Association, the National Association of Real Estate Investment Trusts, the National Multihousing Council

owners in order to avoid distorting an otherwise free and functioning market. BOMA argues that the real estate industry is highly competitive, and building owners have a strong incentive to satisfy the telecommunications needs of their tenants, and have no incentive to ban or restrict telecommunications service providers. BOMA argues that building owners must have the freedom and power to select and coordinate which telecommunications companies have access to their buildings .

B. Discussion

We recognize, that the development of a competitive telecommunications infrastructure and deployment of alternative facilities to customers' premises by CLCs are important to the health of California's economy. The adoption of rules to facilitate the CLCs' ability to negotiate access to customer premises is consistent with our policy of opening all telecommunications markets to competition. To the extent that owners of buildings and their tenants are able to choose among multiple telecommunications carriers, they are likely to benefit from higher quality service at lower cost and with greater responsiveness to customers' needs.

We agree that one way to facilitate competition within the multi-unit buildings is to require the opening of access up to the MPOB of the building.

Requirements for establishing demarcation points, or MPOEs, at multi-unit properties are governed by regulations adopted by this Commission and by the FCC. On June 14, 1990, the FCC released a report in CC Docket No. 88-57 establishing a new definition for demarcation points. This Commission in Decision (D.) 90-10-064 and D.92-01-023 added clarification to the demarcation point ruling, including approval of a Demarcation Settlement Agreement among Pacific and other telephone carriers. The changes were to become effective on August 8, 1993, and were intended to foster competition by transferring

ownership and responsibility for certain telephone cable and inside wire to property owners, who then more easily would be able to connect to the networks of competitive telephone providers.

For multi-unit properties built or extensively remodeled after August 8, 1993, the rules generally required Pacific to establish a single MPOE as close as practical to the property line. The MPOE became the physical location where the telephone company's regulated network facilities ended and the point at which the building owner's responsibility for cable, wire, and equipment began. Generally speaking, facilities on the building owner's side of the MPOE are designated as Intrabuilding Network Cable (INC), which in all instances, was to be owned by the property owner.

For existing buildings constructed before August 8, 1993, Pacific was required to convey to property owners any cabling that was identified as INC on Pacific's books." Pacific's investment in this transferred INC was to be recovered over a five-year amortization period (from August 1993 to August 1998) from the general rate base.

Generally, Pacific's practice prior to 1993 was to install a local loop demarcation point at each building in a multi-unit complex. That meant that Pacific maintained ownership (and responsibility) for INC that often ran hundreds of feet into multi-unit property until reaching an MPOE. It also meant that competing telephone companies had no single point at which to

" The Demarcation Settlement Agreement defined INC as "sheathed cables located on utility's side of the current demarcation point inside buildings or between buildings on one customer's continuous property." (See D.92-01-023, Appendix A, p. 10.) The INC that the local carriers were obligated to relinquish was identified by their then-existing specified accounting treatment, i.e., that which was booked to "Part 32 capital account 2426 and expense account 6426." (*Id.*, at p. 10.)

cross-connect to the owner's cabling in these properties. Other carriers were free, of course, to purchase and install their own cable at these properties.

The Demarcation Settlement Agreement approved by the Commission in D.92-01-023 provides that for multi-unit properties built prior to August 8, 1993, the only network plant that was to be unbundled and conveyed to property owners consisted of "INC within building (riser and lateral) that was in place prior to August 8, 1993." (D.92-01-023, Attachment B (proposed tariffs), at No. A2, 2.1.20(E)(3)(b).) Pacific was required to relinquish ownership of this embedded INC to the building owner upon full recovery of the utility's capital investment. (*Id.* at No. A8, 8.4.3(A)(3).) However, other utility-owned network plant (described as "Non-INC") -- and this included network cable stretching from a utility's central office to each MPOE at individual buildings -- was not affected by the tariff or the Commission's order."

To facilitate the development of the competitive telecommunications infrastructure, we shall require that incumbents with vacant space in existing entrance facilities (e.g., conduit) into commercial buildings make such space available to competitors up to the MPOE to the extent the incumbent has the right to assign its interest to another. This requirement will enable CLCs to gain access to building cellars, telephone closets, and network interconnection devices (NIDs) in such buildings. THE MPOE shall be defined in accordance with the demarcation points as prescribed in D.90-10-064 and D.92-01-023.

We shall also prohibit all carriers from entering into any type of arrangement with private property owners that has the effect of restricting the

"Utility owned plant facilities (Non INC) between buildings on existing continuous property" remains the property of Pacific, but non-INC plant that is no longer useful can be sold to property owners as set forth in Schedule Cal. P.U.C. No. A2.8. (See Tariff A2, 2.1.20(E)(3)(b)(1); 2.8.1(B)(1).)

access of other carriers to the owners' properties or discriminating against the facilities of other carriers such as CLCs. For example, an agreement which provides for the exclusive marketing of ILEC services to building tenants may be improper if the agreement has the effect of preventing a CLC from accessing, and providing service to, a building because of the building owner's financial incentives under the marketing agreement. Similarly, a situation in which a building owner, either for convenience or by charging disparate rates for access, favors the access of the ILEC to the detriment of a CLC will also be in violation of our rules herein. Such arrangements conflict with our stated policy promoting nondiscriminatory ROW access.

On a prospective basis, we will prohibit all carriers from entering into any kind of arrangement or sign any contract with building owners that result in exclusive or discriminatory access. Although we will not disturb any agreements predating the effective date of this order, we will permit any carrier to file a formal complaint against another carrier that the complainant believes is benefiting from exclusive or discriminatory access to private property. The complainant carrier will have the burden of proving that the defendant carrier, either by its actions or the actions of the building owner, is the exclusive provider of service or the beneficiary of better terms of access in violation of the policies of this order. If after hearing the evidence we find that the agreement or arrangement is unfairly discriminatory with respect to other carriers, we shall direct that the agreement be renegotiated or use Commission authority under PU Code §§ 2107 and 2108 to impose a fine for continuing violations against the carrier for everyday that the agreement or arrangement is in effect. Such fine would be based on the number of lines served in the building multiplied by the number of days of violation, and be levied in the range of \$500 to \$20,000 per day

per statute. A carrier will have 60 days to renegotiate a contract deemed discriminatory by the Commission or else the fine will begin to accrue.

This solution permits the Commission to employ its jurisdiction over telecommunications carriers to effectuate the desired policy for nondiscriminatory access to buildings without addressing our jurisdiction if any, over private property.

We recognize, however, that the private property rights of building owners must be observed. Building owners must retain authority to supervise and coordinate on-premise activities of service providers within their building. Installation and maintenance of telecommunications facilities within a building may disrupt tenants and residents, and could cause physical damage to the building. Unauthorized entry into a private building by a third party whether an ILEC or a CLC could compromise the integrity of the safety and security of occupants of the building. The building owner or manager is uniquely positioned to coordinate the conflicting needs of multiple tenants and multiple service providers. Telecommunications carriers' access to private buildings shall therefore be subject to the negotiation of terms of access with the building owner or manager.

While building owners are entitled to exercise due discretion in managing and controlling access to their premises for the protection and security of the building occupants, they may not abuse such discretion in a manner that would unfairly or capriciously discriminate against carriers seeking ROW access in order to offer competitive local exchange service. In the event a carrier is unable to reach a mutually satisfactory arrangement with a building owner for access to the building premises to serve customers, then the carrier may seek resolution of its dispute in the appropriate court of civil jurisdiction or file a

complaint as described above if the carrier believes that another carrier is benefiting from exclusive or unfairly discriminatory access.

Lastly, incumbent utilities shall not be required to exercise their powers of eminent domain to expand their existing ROW over private property to accommodate a CLC's request for access. The CLC, as a telephone corporation, has independent authority sufficient to pursue its own eminent domain litigation, and there is no basis to require contracting for such litigation through the incumbent. The eminent domain powers of a CLC are covered under PU Code § 616, which states that "a telephone corporation may condemn any property necessary for the construction and maintenance of its telephone system."

We will not at this time extend the requirements and procedural vehicles described above to electric-utility access to private property for the purpose of providing electric service only. We may do so in a future order in this docket or on a case-by-case basis.

X. Third Party Access to Jointly-Owned Facilities

A. Parties' Positions

Utility distribution poles and anchors have been traditionally owned under joint ownership agreements between two or more entities with a need to have their lines or equipment strung on common poles to reach customers throughout a given geographic area. Joint pole associations have traditionally fostered access to and the joint ownership of pole facilities. Membership is comprised of ILECs, CLCs, wireless providers, municipalities, and electric and water utilities. Pursuant to such joint pole associations, third parties have acquired access to jointly owned poles as tenants of one of the owners. In their comments, parties addressed the issue of whether existing joint pole associations

were an adequate vehicle to protect the interests of third parties seeking access to facilities.

GTEC recommends that the existing process of access through joint pole associations has worked well and should continue and not be supplanted with an untested method. Those third parties who are non-members may apply to become members of the association. GTEC argues that it is not necessary for yet another organization to be established to protect the interest of third parties, as this would be incompatible with the current joint pole association process, and would needlessly complicate a currently effective system.

PG&E believes that provisions addressing the rights and responsibilities of a joint owner are needed when allowing third parties access to the jointly owned poles as tenants. PG&E argues that third party connections also must comply with safety and reliability requirements, and should not take precedence over the use of the pole by any joint owner for its current or future utility service.

PG&E believes that, with the restructuring of the telecommunications and the electric industry, the Commission needs to carefully consider how the obligations and compensation for pole ownership and/or use should be structured to provide a reasonable balance between responsibility for and benefits from the pole system. PG&E believes that ultimately all users will need to pay for their pole use in a manner that is either market based or economically equivalent to sharing fully the ownership costs and responsibilities for facilities subject to shared ownership.

PG&E argues that third party tenants' quality of access cannot exceed the access which their licensor or lessor enjoys under the Joint Pole Agreement, and that the joint owner must be able to provide for its own capacity requirement before accommodating third party requests. PG&E suggests that a

telecommunications entity which does not wish to join the Joint Pole Association, but still desires the same quality of access as an owner, can negotiate a separate joint ownership agreement with the entity or entities holding ownership interests in the pole.

The Coalition states that new distribution facilities constructed by a member of a joint pole organization will ordinarily be subject to the rules governing members of that organization, whereas new distribution facilities constructed by a party that is not a member of a joint pole organization would not be subject to joint pole association rules. Since several of the members of the Coalition are also members of joint pole associations, the Coalition states it is not in a position to comment on whether a different vehicle is needed to protect the interests of third parties.

Since such organizations are controlled by regulated utilities, they are agents of parties subject to the Commission's jurisdiction. Even though joint pole organizations are not themselves public utilities, the Coalition argues they are fully subject to Commission jurisdiction and control, through the operation of the ordinary principles of agency law. Therefore, the Coalition believes the Commission can take whatever steps it deems necessary to protect the interest of third parties. The Coalition further claims that the Commission has authority to provide for reciprocal access by privately-owned utilities to the ROW and support structures owned by local governmental agencies to the extent those agencies are members of joint pole associations and receive benefits from such membership.

The Coalition argues that the utility members of any joint pole organization must not be permitted to degrade access to utility support structures and ROW directly or indirectly, simply because an attaching party has chosen not to become a full member of such an organization.

B. Discussion

Based on parties' comments, we find no need at this time to make any further modifications in the existing arrangements governing joint pole associations to protect third parties that do not belong to a joint pole association. Likewise, no party seeking access to a utility pole should be discriminated against merely because it is not a member of such an association. We may at a later time consider the needs for additional rules to protect against unfair discriminatory treatment for nonmembers of joint pole associations. As we have stated previously, the ALJ shall solicit further comments concerning the implications of joint pole associations as they relate to nondiscriminatory access.

XI. Expedited Dispute Resolution

A. Parties' Positions

Parties present differing views regarding how the Commission should facilitate the resolution of disputes in the event parties cannot reach agreement through negotiations over the terms and conditions of ROW access.

In its proposal, the Coalition distinguishes disputes over requests for initial access versus all other disputes over access. The Coalition recommends that the Commission develop a new type of expedited and informal proceeding for resolving disputes concerning initial access to utility support structures, patterned after the Commission's existing Law and Motion procedure for discovery dispute resolution. This new type of proceeding would be presided over by an ALJ, assisted by Telecommunications Division or the Safety and Enforcement Division staff with relevant experience and knowledge of utility support structures. The hearing would not be reported. The ALJ would hear the initial access dispute and resolve it, either at the hearing or within no more than three working days, employing such fact finding techniques as necessary for expeditious resolution of the initial access dispute.

The Coalition claims that the Commission's existing formal complaint process is much too slow and cumbersome for resolution of such disputes. Absent an expedited dispute resolution procedure, the Coalition argues, the CLC must either comply with the terms of access, which may be difficult, expensive and time-consuming, or file a complaint for relief at this Commission, which may be an equally difficult, expensive, and time-consuming process, while, in the meantime, access is denied.

For all other disputes between ILECs and telecommunications carrier involving access to ILEC utility support structures (*i.e.*, disputes concerning other than initial access), the Coalition agrees that arbitration is a useful alternative to the use of the Commission's existing complaint process. (See, Interconnection Order 1, ¶¶ 1227, 1228; see also, Commission Resolution ALJ-174 (adopting arbitration procedures for resolution of interconnection agreement disputes).)

CCTA believes that the process established by the Act and the FCC provide a good starting point for expedited resolution by this Commission of disputes involving denial of access. The FCC Order requires the requesting party to provide the ROW or facility owner a written request for access. If access is not granted within 45 days of the request, the ROW or facility owner must confirm the denial in writing by the 45th day. Upon the receipt of a denial notice from the ROW or facility owner, the requesting party has 60 days to file its complaint with the FCC, and final decisions relating to access are to be resolved by the FCC expeditiously. (Interconnection Order ¶ 1225.) The requesting party also may seek arbitration pursuant to § 252 of the Act which governs procedures for the negotiation, arbitration, and approval of certain agreements between ILECs and telecommunications carriers. If arbitration is undesirable or proves unsuccessful, then court proceedings are an alternative.

CCTA proposes additional dispute resolution procedures for situations in which parties have already entered into contracts for access to ROW. Specifically, CCTA proposes that such disputes be negotiated by field personnel first. If the dispute remained after two days, it could be forwarded to the supervisor of the field representative. After five days, it would go to the Engineering Manager. After five more days, it would go to the Utility Manager-General Agreements. If the dispute remained after five more days, it would go to arbitration.

Pacific supports an expedited dispute resolution process, but argues that parties must be required to attempt to resolve their differences in good faith before bringing them before the Commission. Pacific proposes that if the Commission adopts a similar expedited review process as prescribed by the FCC, the Commission should require the parties to first attempt to resolve any dispute themselves before going to the Commission. Pacific also argues that it may take longer than 45 days to determine availability for more complicated requests for access.

GTEC does not oppose an expedited process to resolve disputes concerning access to ROW that arise out of negotiated or arbitrated agreements, but asks the Commission not to permit such a dispute resolution process to improperly circumvent or replace of the negotiation process required by § 252 of the Act.

Edison believes that the procedures prescribed in § 252 have the potential to distort the negotiating process and to impose a significant additional burden on the Commission and its staff. Rather than negotiating in earnest, Edison argues, parties may be tempted to state their demands and then insist that the Commission arbitrate a solution. Unless all parties to the negotiation request the Commission's assistance as mediator, Edison argues, the Commission should

refrain from any role in the parties' negotiations. If negotiations fail to produce an agreement, Edison believes the Commission's role as arbitrator should be limited to imposing appropriate conditions to prevent discrimination among competing carriers and unreasonable restrictions to access, and the Commission should limit inquiry to the two following issues:

1. Is the utility insisting on a prohibitive pricing arrangement as a means of favoring one carrier over another?
2. Are the non-pricing terms and conditions sought by the utility reasonably related to legitimate concerns about safety, limitations on liability and system reliability and stability, and are they being applied in a non-discriminatory manner to all similarly situated carriers?

Edison argues that the carrier should have the burden of demonstrating that the utility has discriminated against that carrier or sought to impose unreasonable restrictions to access.

PG&E believes that to the extent a dispute involves expert engineering issues such as those relating to GO 95, responsibility and authority for hearing and resolving the dispute should be referred to Commission-designated experts whose education and training qualify them to decide engineering matters. Moreover, PG&E believes their interpretations should have precedential authority for GO 95 purposes generally. PG&E therefore recommends that the Commission designate specific members of its engineering staff experienced in GO 95 to be responsible for GO 95 interpretation and implementation, including resolution of disagreements about the application of GO 95 to any specific ROW access dispute,¹⁹ to achieve technically sound,

¹⁹ In making this suggestion, PG&E recognizes that the parties to the December storm proceeding have recommended an OII into design standards in GO 95. Pending the resolution of the OII proposal, however, PG&E argues that users of poles need a way to

Footnote continued on next page

consistent and timely interpretations. PG&E also recommends that the expedited proceeding allow for an evidentiary record to be transcribed.

B. Discussion

The rules, guidelines, and performance standards adopted herein should reduce the extent of disputes and impasses among the parties in negotiating ROW access agreements. Nonetheless, our adopted rules leave discretion to the parties to negotiate individual agreements, and leave the potential for disputes to arise. We shall therefore adopt an expedited procedure for resolving disputes relating to access to ROW and support structures as set forth below. We expect parties to make a good faith effort to resolve their disputes before bringing them before the Commission. As a condition of the Commission's accepting a dispute for resolution, the moving party must show that it has attempted in good faith to negotiate an arrangement which is consistent with the rules and policies set forth in this decision. This showing must be included in the request for dispute resolution. The burden of proof shall generally be on the party which asserts that a particular constraint exists preventing it from complying with the proposed terms for granting ROW access. Earlier in this order, we have provided specific guidelines regarding who will shoulder the burden of proof regarding certain ROW disputes.

The following prerequisites must be satisfied as evidence of good faith negotiations prior to the Commission's acceptance of a request for resolution of a ROW dispute. The party seeking access must first submit its request to the utility in writing. As discussed previously, we are establishing a

resolve GO 95 questions which will result in sound engineering results, while also supporting construction of new telecommunication lines, to the extent consistent with GO 95 and other applicable standards.

default deadline of 45 days for a utility to confirm or deny whether it has space available to grant requests for access to its support structures or ROW. If the request is denied, the utility shall state the reasons for the denial or why the requested space is not available, and include all the relevant evidence supporting the denial. In the event of a denial, Step 1 of the dispute resolution process is invoked. We shall expect the parties to escalate the dispute to the executive level within each company to attempt to negotiate an alternative access arrangement to accommodate their mutual needs. If the parties are unable to reach a mutually agreeable solution after five days of good-faith efforts at negotiation, any party to the negotiations may request the Commission to arbitrate the dispute.

For purposes of arbitrating ROW access disputes, we shall generally follow our arbitration rules previously adopted as Rule 3 of Resolution ALJ 174, effective June 25, 1997. These rules were adopted to provide parties with guidance concerning the Commission's process for mediating and arbitrating disputes involving interconnection agreements between ILECs and CLCs pursuant to Section 251 and 252 of the Act. We conclude that those rules are likewise useful as a vehicle for Commission resolution of ROW access disputes. We shall modify the time requirements prescribed under ALJ 174, as appropriate, to accommodate the specific needs for ROW dispute resolution. Subsequent references to subsections of Rule 3 in the discussion below relate to Resolution ALJ 174. In Appendix A of this decision, we have incorporated a separate section addressing detailed dispute resolution procedures for ROW access issues patterned after Resolution ALJ 174.

A request for arbitration may be submitted at the end of the five-day period for negotiations at the executive level within each company, as noted above. The request for arbitration shall be filed in the form of an application, which shall be served on the other party or parties to the dispute not later than

the date the Commission receives the request. The request for arbitration shall contain the information prescribed in Rule 3.3 of the Resolution ALJ 174.

An arbitrator shall be appointed as prescribed in Rule 3.4 and discovery shall proceed under Rule 3.5. Parties shall have an opportunity to respond as set forth in Rule 3.6, except that the response shall be due within 15 days (instead of 25 days) of the request for arbitration. Within three days (instead of seven days) of receiving the response, the applicant and respondent shall file a revised statement of unresolved issues, per Rule 3.7.

Within seven days (instead of 10 days) after the revised statement is filed, the arbitration conference shall begin per Rule 3.9. The arbitration conference and hearings shall be limited to three days. Within 15 days following the hearings, the Draft Arbitrator's Report shall be filed per Rule 3.17. Each party may file comments on the Draft Report within 10 days of its release. The arbitrator shall file the Final Arbitrator's Report no later than 15 days after the filing date for comments per Rule 3.19. A final Commission decision on the Arbitrator's Report shall be placed on the Commission's agenda 30 days thereafter.

Based on the schedule outlined above, the following sequence of events may be summarized:

<u>Event</u>	<u>Day Number</u>
Request for Arbitration is filed	0
Responses are filed	15
Revised Arbitration Statement is filed	18
Arbitration hearings conducted	25-27
Draft Arbitrator's Report Issued	42
Comments on Report filed	52
Final Arbitrator's Report Issued	67
Agreement Reflecting arbitrator's report	74
Commission Decision Placed on Agenda	104.

A Commission decision resolving ROW access disputes can be issued within approximately 100 days of the filing of a request for arbitration. We believe this procedure will provide for expedited resolution of ROW disputes in the most efficient manner.

Our normal rules of practice and procedures should be followed at all times during the dispute resolution process.

We shall not adopt PG&E's request that only Commission-designated experts with education and training in engineering be assigned to resolve disputes involving engineering issues. We shall continue to rely on the Commission's long established practice to use ALJs to adjudicate and to mediate contested proceedings which come before the Commission. The ALJ is specifically equipped to resolve contested issues dealing with a variety of technical disputes as well as legal matters. The assigned ALJ routinely consults with technical staff employed by the Commission with education and training in the area of expertise called for by the nature of the dispute as necessary to understand and resolve technically complex disputes. It would not be the best use of Commission resources to deviate from this successful practice by assigning a Commission staff expert with training in engineering matters to be responsible for mediating or arbitrating such contested issues. Therefore, all disputes regarding ROW access, including those dealing with engineering or safety issues shall be referred to an ALJ for resolution. The ALJ shall consult with the Commission's technical staff as appropriate to deal with engineering, safety, or other technically complex issues in dispute among the parties.

Findings of Fact

1. Under § 224 of the Telecommunications Act of 1996, both incumbent local exchange carriers and electric utilities have an obligation to provide any

telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

2. Nondiscriminatory access to the incumbent utilities' poles, ducts, conduits, and rights of way is one of the essential requirements for facilities-based competition to succeed.

3. Given the complexities and the diversity of ROW access issues, it is not practical to craft uniform tariff rules which address every situation which may arise.

4. The adoption of general guiding principles, and minimum performance standards concerning ROW access will promote a more level competitive playing field in which individual negotiations may take place.

5. The general provisions of PU Code § 767 relating to reciprocal access of utility support structures and ROW apply to all public utilities subject to the rules in Appendix A.

6. On an interim basis, corporations providing solely cable TV services over their facilities will not be subject to the reciprocal access provisions of § 767 vis-a-vis incumbent telephone and electric utilities.

7. On an interim basis, corporations providing solely cable TV services and CLCs will not be obligated to provide each other with reciprocal access to ROW.

8. CMRS providers will be using poles and other utility facilities in ways perhaps not contemplated by traditional land-line providers.

9. Exclusive reliance on the negotiation process will not necessarily produce fair prices for ROW access.

10. Given the advances in technological capabilities of cable television network, it has become increasingly difficult to clearly delineate a cable television provider's offering of "cable" service as opposed to "telecommunications" service on the same wireline communications system.

11. Cable television corporations' provision of different services on their wireline communication system does not normally add any additional physical burden to the use of their facilities attached in the ROW of a public utility company.

12. PU Code § 767.5(a)(3) applies the term "pole attachment" to any attachment to surplus space, or use of excess capacity, by a cable television corporation for a wire communication system on or in any support structure or ROW of a public utility.

13. Requiring telecommunications carriers and cable operators that provide telecommunications services to pay more for pole and conduit attachments than cable operators that do not provide telecommunications services when their attachments are made in the identical manner and occupy the same amount of space would subject such carriers and cable operators to prejudice and disadvantage, would deter innovation and efficient use of scarce resources, and would harm the development of competition in California's telecommunications markets.

14. Sections 224(d) and (e) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (47 Y.S.C. § 224(d) and (e)), do not require states to provide for different rate provisions for cable operators commencing February 8, 2001, depending on whether they offer cable television service exclusively or whether they also offer telecommunications services. Attempting to distinguish "cable television service" from "telecommunications service" would entangle the Commission in semantic disputes and would not represent the best use of the Commission's resources.

15. Since the enactment of the Telecommunications Act of 1996 on February 8, 1996, the California Legislature has not amended California's pole

20. The terms of the Pacific/AT&T agreement regarding the time frame for responding to requests about access to ROW provide a reasonable basis for formulating generic rules for response times for Pacific and GTEC.

21. It is in the interests of public health and safety for the utility to exercise necessary control over access to its facilities to avoid creating conditions which could risk accident or injury to workers or to the public.

22. When working on an electric utility's facilities or ROW, telecommunications providers' compliance with at least the same safety practices as trained and experienced electric utility workers is necessary to avoid exposing the public to grave danger and potentially fatal injuries.

23. Changing the size or type of any attachment, or increasing the size or amount of cable support by an attachment has safety and reliability implications that the utility must evaluate before work begins.

24. Commission GO 95 and CAL-OSHA Title 8 generally address the safety issues that arise from third-party access to the utility's overhead distribution facilities.

25. In addition to the requirements of GO 128 and CAL-OSHA Title 8, because of the confined space in underground electric facilities (e.g., underground vaults) and the associated increased safety concerns, advance notification and utility supervision is required as conditions of granting telecommunications carriers access to underground electrical facilities.

26. To determine if poles have adequate space and strength to accommodate a new or reconstructed attachment, an engineering analysis may be needed for each pole or anchor location to show the loading on the pole (a) from existing telecommunications equipment, and (b) from all telecommunications equipment

after the attachment, accounting for windloading, bending moment, and vertical loading.

27. Any engineering analysis that is required by incumbent utilities must be reasonably required and actually necessary. If such engineering analysis is performed within reasonable written industry guidelines by qualified CLC engineers, it should be deemed acceptable unless a check for accuracy discloses errors.

28. The ROW access issues in this proceeding interrelate with issues before the Commission in Application (A.) 94-12-005/Investigation (I.) 95-02-015, regarding PG&E's response to the severe storms of December 1995.

29. Parties in A.94-12-005 proposed that the Commission establish an Order Instituting Investigation (OII) to review, among other things, the adequacy of GO 95 design standards on wood pole loading requirements.

30. Incumbent utilities need to be able to exercise reasonable control over access to their facilities in order to meet their obligation to provide reliable service to their customers over time and to plan for capacity needs to accommodate future customer demand.

31. The incumbents' reservation of capacity for their own future needs could conflict with the nondiscrimination provisions in § 224(f)(1) of the Act which prohibit a utility from favoring itself or affiliates over competitors with respect to the provision of telecommunications and video services.

32. Since electric utilities have not traditionally been in direct competition with CLCs, but have been engaged in a separate industry, the potential concerns over a reservation policy permitting discriminatory treatment of a competitor have not been as pronounced as compared with ILECs.

33. On August 19, 1998, SCB filed a petition in this docket as the first California electric utility seeking certification to become a facilities-based CLC offering local exchange service.

34. The development of a new telecommunications infrastructure and deployment of alternative facilities to customer premises by CLCs is important to the development of a competitive market.

35. Unauthorized entry into a private building by a third party whether an ILEC or a CLC could compromise the integrity of the safety and security of occupants of the building.

36. The building owner or manager is uniquely positioned to coordinate the conflicting needs of multiple tenants and multiple service providers

37. Utility distribution poles and anchors have been traditionally owned under joint ownership agreements between two or more entities with a need to have their lines or equipment strung on common poles to reach customers throughout a given geographic area.

38. New distribution facilities constructed by a member of a joint pole organization, will ordinarily be subject to the rules governing members of that organization, whereas new distribution facilities constructed by a party that is not a member of a joint pole organization, would not be subject to joint pole association rules.

39. The Commission has the constitutional mandate to insure the availability of public utility services throughout the State of California including within municipalities.

40. The Commission has previously asserted jurisdiction over the placement of facilities within the rights of way of municipalities in General Order 159.

41. There is a need for an additional expedited resolution process on ROW issues where a limited number of facilities, or at least one customer, are involved.

Conclusions of Law

1. This Commission has jurisdiction under the Act to exercise reverse preemption regarding rules governing nondiscriminatory access to ROW, and is not obligated necessarily to conform to the FCC rules.

2. In order to establish its jurisdiction, the Commission must satisfy the conditions of § 224(c)(2) and (3) which requires the state to certify to the FCC that:

- A. The rules herein that govern the rates, terms and conditions of access to incumbent utilities' ROW should apply to cable TV companies regardless of whether they offer telecommunications services; and
- B. in so regulating, that it has the authority to consider and does consider the interests of the subscribers of the services offered via such attachment, as well as the interests of the consumers of the utility service.

3. The rules adopted in the instant order meet the requirements of § 224(c)(2) and (3), and constitutes certification to the FCC of this Commission's assertion of its jurisdiction.

4. Consistent with the intent of Congress in enacting § 224(f), cable operators and telecommunications providers should be permitted to "piggyback" along distribution networks owned or controlled by utilities subject to the telecommunications provider having first obtained the necessary access and/or use rights from the underlying property owner(s) as opposed to having access to every piece of equipment or real property owned or controlled by the utility.

5. No party may attach to the ROW or support structure of a utility without the express written authorization from the utility. The incumbent utility may not

deny access simply to impede the development of a competitive market and to retain its competitive advantage over new entrants.

6. Telecommunications carriers access to private buildings shall therefore be subject to the negotiation of terms of access with the building owner or manager.

7. Under the nondiscrimination principles of the Act, incumbent utilities must provide all telecommunications carriers, the same type of access they would afford themselves.

8. The rules herein that govern the rates, terms, and conditions of access to incumbent utilities' ROW should apply to cable TV companies regardless of whether they offer telecommunications services.

9. CMRS providers should not be covered by the ROW rules adopted in this order, until the record is further developed regarding these providers' specific ROW needs.

10. While it is beyond the jurisdiction of this Commission to compel municipally-owned utilities to provide access to their poles, the municipally-owned utilities must, by law, set just and reasonable terms of access.

11. PU Code Section 7901 grants telephone corporations authority to construct telephone lines and erect poles and other support structures along and upon public highways, but to do so in a manner which does not incommode the public use of highways.

12. In § 7901.1(a), the California Legislature stated that "municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed," but under § 7901.1(b), the "control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner."

13. If a municipal corporation fails to discharge its duty to treat "all entities in an equivalent manner" when exercising its powers (§ 7901.1(b)), then a carrier

should be able to invoke any available regulatory, administrative, and civil remedies that govern allegedly unlawful actions by the municipality.

14. PU Code Section 762 authorizes this Commission to order the erection and to fix the site of facilities of a public utility where necessary to secure adequate service or facilities.

15. If a telecommunications carrier cannot resolve a dispute with a local governmental body over access to a public ROW, the carrier should file an application with this Commission for a certificate of public convenience and necessity for specific siting authority to gain access to the public ROW. Consideration of such applications will be limited to an inquiry of whether the actions of the local governmental body impede a statewide interest in the development of a competitive market.

16. In the event an application is filed by a telecommunications carrier seeking specific siting authority within the jurisdiction of a given municipality or local government, the carrier should be required to show that it engaged in good-faith efforts to obtain all necessary permits from said municipality or local government.

17. In resolving such applications, the Commission's order shall be directed toward the telecommunications carrier, since the Commission does not regulate local governments.

18. In the event that such an application is granted, and the local governmental body refuses to grant access in accordance with the Commission order, the telecommunications carrier's recourse shall be to file a lawsuit in the appropriate court of civil jurisdiction for resolution. The Commission's order authorizing access may be used in support of its case in civil court.

19. Parties to pre-existing arrangements for access to utility ROW and support structures shall be bound by the terms of such arrangements even though they may differ from the provisions of this decision, unless the ROW contract expressly provides for amendment or renegotiation to conform to subsequent Commission orders.

20. Consistent with the requirements of PU Code § 767, a CLC may not arbitrarily deny an ILEC's request for access to the CLC's facilities or engage in discrimination among carriers.

21. The incumbent utilities have a right to be fairly compensated for providing third-party access to their poles and support structures.

22. By virtue of their incumbent status and control over essential ROW and bottleneck facilities, the local exchange carriers (LECs) and electric utilities have a significant bargaining advantage in comparison to the CLC with respect to negotiating the terms of ROW access.

23. The pricing formula prescribed in PU Code § 767.5(c) is applicable under the statute only to cable television providers, but the statute does not prescribe any rate for the provision of telecommunications services by cable operators.

24. Apart from any statutory requirements, the pricing formula prescribed in PU Code § 765.5 for pole attachments and for use of conduits should be made available to cable operators providing telecommunications services, and to other telecommunications carriers as a matter of public policy.

25. Requiring telecommunications carriers and cable operators that provide telecommunications services to pay more than cable operators that do not provide telecommunications services when their pole attachments are identical in all relevant respects would subject such carriers and operators to prejudice and

disadvantage, would be unfair and discriminatory, and would violate the letter and spirit of PU Code § 453.

26. Having certified to the Federal Communications Commission that it regulates pole attachments in compliance with 47 U.S.C. § 224(c), this Commission is not required to follow the provisions of the federal pole attachment statute, 47 U.S.C. § 224(e), that would require the application of a higher pole attachment rate to telecommunications carriers and cable operators that provide telecommunications services than to cable operators that do not offer telecommunications services.

27. Utilities should be allowed to recover their actual expenses for make-ready rearrangements performed at the request of a telecommunications carrier, and their actual costs for preparation of maps, drawings, and plans for attachment to or use of support structures.

28. The Coalition's proposed measures to prevent CLCs' paying for unnecessary up-front expenses, including the incumbent utilities publishing of the criteria for evaluating engineering studies, should be adopted.

29. Pricing principles applicable to pole and support structure attachment rates should be determined in a manner which guards against an unbalanced bargaining position between incumbent utilities and telecommunications providers.

30. Distinction in the rate treatment of cable versus telecommunications attachments based on the nature of the service that a cable operator or telecommunications carriers provides could be unfairly discriminatory to the extent there is no difference in the manner that a cable operator and a telecommunications carrier attach their strand and cables (either copper, fiber, or coaxial) to a utility pole.

31. Utility pole attachments for telecommunications services priced on the basis of historic or embedded costs of the utility less accumulated depreciation will help ensure nondiscriminatory treatment among all telecommunications carriers.

32. Parties may negotiate pole attachment rates which deviate from the cost standards prescribed under this order, but, if having been unable to reach agreement, they submit the dispute to the Commission for resolution, the Commission's rules should apply as the default rate based upon the use historical embedded costs.

33. Prices based on the recovery of operating expenses and embedded capital costs reasonably compensate the utility for the provision of access to its poles and support structures.

34. Embedded cost data used to derive attachment rates shall be gathered from publicly filed documents, and pole attachment rates shall be calculated pursuant to the Commission's Decision in 97-03-019.

35. Given the varying degrees of complexity and of geographic coverage involved in requests for information concerning facility availability and requests for access, there is no single standard length of time for utility responses which will fit all situations.

36. The CLC could suffer unreasonable delays in receiving information concerning ROW access inquiries if the utility's response time obligation was open-ended, with no performance standards against which to hold the utility, thereby impeding the ability of the CLC to enter the market or to expand its operations to compete efficiently.

37. The major ILECs' guideline for response time for initial requests concerning availability of space should not exceed 10 business days if no field survey is

required, and should not exceed 20 business days if a field-based survey of support structures is required. The corresponding response times for electric utilities and midsized ILECs should be subject to parties' negotiations.

38. In the event that an initial inquiry to an ILEC involves more than 500 poles or 5 miles of conduit, the response time shall be subject to the negotiations of the parties involved.

39. If an incumbent utility is required to perform make-ready work on its poles, ducts or conduit solely to accommodate a carrier's request for access, the utility shall perform such work at the carrier's sole expense within 60 business days of receipt of an advance payment for such work, except that this period will be subject to negotiation for extraordinary conditions such as storm-related service restoration. If the work involves more than 300 poles or conduit, the parties will negotiate a mutually satisfactory time frame to complete such make-ready work.

40. In the event that a telecommunications carrier decides after the initial response concerning availability that it wishes to use the incumbent utility's space, the telecommunications carrier must so notify the incumbent in writing, providing the necessary identifying and loading information and copies of pertinent documents showing the attacher's right to occupy the right of way.

41. The work of a CLC to execute make ready work and the subsequent attachment and installation of the CLC's wire communication facilities on a utility's poles, conduits or rights-of-way in connection with a request for access that has been granted, shall be deemed sufficient for purposes of the granting utility if such personnel or third-party contractors meet an incumbent utility's published guidelines for qualified personnel.

42. The major ILECs shall then respond to the telecommunications carrier within 45 days, thereafter, with a list of the rearrangements or changes required to accommodate the carrier's facilities, and an estimate of the utility's portion of the rearrangements or changes, except as noted in the following COL. The response times for electric utilities and midsized ILECs shall be subject to negotiation.

43. In the event that a request for space involves more than 500 poles or 5 miles of conduit, requires the calculation of pole loads by a joint owner, or the scope and complexity of the request warrant longer deadlines, the response time shall be subject to the negotiations of the parties involved.

44. The standard for protection of confidential data should not be one-sided, but should be equally applied to CLCs, incumbent utilities, and any other party to a ROW access agreement.

45. The dissemination of information which has been identified as commercially sensitive should be limited only to those persons who need the information in order to respond to or to process an inquiry concerning access.

46. The incumbent utility should be permitted to impose conditions on the granting of access which are necessary to ensure the safety and engineering reliability of its facilities.

47. Telecommunications carriers seeking to attach to utility poles and support structures should comply with applicable Commission GOs 95 and 128, and other applicable local, state, and federal safety regulations including those prescribed by Cal/OSHA.

48. The rules governing attachments to wood poles should be evaluated relative to any restrictions on access subsequently adopted in A.94-12-005/I.95-02-015 regarding design standards for utility wood pole loading

requirements subject to the affected parties having an opportunity to comment on the applicability such restrictions or standards.

49. Until the evaluation of design standards for utility wood pole loading requirements are completed in A. 94-12-005/I.95-02-015 or other proceedings, incumbent utilities are authorized to use an interim designated safety factor of 2.67 for Grade A poles in accordance with GO 95.

50. A fine of \$500 per each unauthorized pole attachment should be imposed on carriers that attach to such poles without a fully signed contract with the incumbent utility.

51. In resolving disputes over ROW access, the burden of proof shall be on the incumbent utility to justify any proposed restrictions or denials of access which it claims are necessary to address valid safety or reliability concerns and to show they are not unduly discriminatory or anticompetitive.

52. All other factors being equal, competing carriers' access to utility facilities should be granted on a first-come, first-served basis.

53. The ILECs should not be permitted to deny access to other telecommunications carrier based on claims that the capacity must be reserved for their own future needs, provided than ILEC may reserve space for immediate need within nine months of the denial of an access request. Likewise, CLCs must utilize space within nine months the denial of an access by an ILEC.

54. In the case of a grant of access by an electric utility, any telecommunications carrier, whether an ILEC or CLC must exercise its access rights within 90 days of a grant of access.

55. The Commission's preferred approach for meeting new capacity needs is through new construction rather than the reclamation of existing space occupied by CLCs.

56. In order to justify a capacity reservation claim, the electric utility should show that it had a bona fide development plan for the use of the capacity prior to the request for access, and that the reservation of capacity is needed for the provision of its core utility services within one year of the date of the request for access.

57. Because rearrangements for electric facilities can be substantially more expensive than for telecommunications facilities, it may be more cost effective for an electric utility to reserve capacity for some defined period rather than to provide interim access to a CLC with subsequent eviction or to incur related costs for rearrangements.

58. The restrictions regarding reservations of capacity adopted in this order in no way constitute an unlawful taking in violation of the incumbent utilities' constitutional rights, but merely constitute regulation of the terms under which parties may negotiate for access.

59. All costs of capacity expansion and other modifications, including joint trenching, should be shared among the particular parties benefiting from the modifications on a proportionate basis corresponding to the share of usable space taken up by each benefiting party.

60. In the event an energy utility incurs additional costs for trenching and installation of conduit due to safety or reliability requirements which are more elaborate than a telecommunications-only trench, the telecommunications carriers should not pay more than they would have incurred for their own independent trench.

61. An advance notice should be given at least 60 days prior to the commencement of a physical modification to a ROW to apprise affected parties, except in the case of emergencies where shorter notice may be necessary.

62. In order to justify a reclamation of space being occupied by a CLC, the incumbent utility should be required first to permit the CLC the option of paying for necessary rearrangements or expansions to maintain the attachment. The utility must also show that the space is reasonably and specifically needed to serve its customers, and that there is no other cost effective solutions to meet its needs.

63. In the event of disputes over reclamation of space and displacement of a CLC, the incumbent shall not displace the CLC without first notifying the Commission's Telecommunications Division and obtaining Commission authorization to do so.

64. Parties may use our dispute resolution procedure to resolve disputes over CLC displacements due to reclamation of space.

65. The burden of proof in disputes over reclamation of space shall be on the incumbent utility to show that it has met all the applicable requirements.

66. Any order of this Commission granting an incumbent utility the right to reclaim space in its ROW should contain a plan for continued telecommunications service to affected end-users of those services.

67. Incumbent utilities with vacant space in existing entrance facilities (e.g., conduit) into commercial buildings should make such space available to competitors, subject to consent of the building owner or manager, up to the minimum point of entry to the extent the incumbent utility owns or controls such facilities.

68. The minimum point of entry, as defined in D.90-10-064, is the demarcation point in or about a customer's premise where the utility's inside wire stops and the customer's inside wire begins.

69. As prescribed by D.92-01-023, for multi-unit properties built or extensively remodeled after August 8, 1993, Pacific was to establish a single MPOE as close as practical to the property line of the multi-unit building, and to transfer ownership and responsibility for certain telephone cable and inside wire to property owners.

70. For multi-unit properties built after prior to August 8, 1993, the only network plant that was to be unbundled and conveyed to property owners consisted of Intrabuilding Network Cable within the building that was already in place. However, other utility-owned network plant including network cable stretching from a utility's central office to each MPOE at individual buildings - was not affected by the tariff or the Commission's order.

71. All carriers should be prohibited on a prospective basis from entering into any type of arrangement with private property owners which has the effect of restricting the access of other carriers to the owners' properties or discriminating against the facilities of other carriers such as CLCs.

72. Any carrier may file a formal complaint against any other carrier with an access agreement with a private building owner, including any executed prior to the date of this decision, that allegedly has the effect of restricting access of other carriers or discriminating against the facilities of other carriers, such as CLCs.

73. In the case of such complaints, the complainant will have the burden of proving that the defendant carrier is the exclusive provider of service or the beneficiary of better terms of access in violation of the policies of this order.

74. If, after a hearing, we find that a carrier's agreement or arrangement with a private building owner is unfairly discriminatory with respect to other carriers, we shall direct that within 60 days, the agreement be renegotiated. Failing that, at the end of 60 days, a fine shall be imposed ranging from \$500 to \$20,000 per day based on the number of lines served in the building until the agreement is renegotiated to remove the discrimination.

75. Incumbent utilities are not required to exercise their powers of eminent domain to expand the incumbent existing ROW over private property to accommodate a telecommunications carrier's request for access.

76. For purposes of resolving disputes between telecommunications carriers and pure cable companies and incumbent electric utilities or ILECs regarding ROW accesses, the rules adopted in Appendix A of this order patterned after Resolution ALJ 174, should generally apply.

77. The arbitration rules previously adopted in Resolution ALJ 174, effective June 25, 1997, for mediating and arbitrating disputes involving interconnection agreements pursuant to Section 251 and 252 of the Act, are likewise useful as a vehicle for Commission resolution of ROW access disputes.

78. The time requirements prescribed under ALJ 174 should be modified as appropriate, to accommodate the specific needs for ROW dispute resolution.

79. Before the Commission will process a dispute resolution, the parties must show they were unable to reach a mutually agreeable solution consistent with the rules and policies set forth in this decision after good faith efforts at negotiation.

80. The burden of proof should generally be on the party which asserts that a particular constraint exists which is preventing it from complying with the proposed terms for granting ROW access.

81. Any party to a negotiation for ROW access covered under these rules may request this Commission to arbitrate the dispute pursuant to the process set forth in the Appendix A Rules.

O R D E R

IT IS ORDERED that:

1. The rules set forth in Appendix A concerning the rights and obligations of the major electric utilities and incumbent local exchange carriers to provide access to telecommunications carriers to their poles, ducts, conduits, and rights of way are hereby adopted.

2. The assigned Administrative Law Judge shall solicit further comments concerning the outstanding issues raised in this decision.

3. The Motion of the Real Estate Coalition and of the Building Owners and Managers Association of California, each requesting to become a party, is granted.

4. The motion of the League of California Cities, the Cities of Los Angeles, Sacramento, San Carlos, San Jose, Santa Monica, the City and County of San Francisco, and the San Mateo County Telecommunications Authority ("the Cities"), requesting to become parties is granted.

5. Pacific, GTEC, Pacific Gas & Electric, Southern California Edison, and San Diego Gas & Electric shall each publish objective guidelines within 180 days of its order, so that CLC personnel or third-party contractors used by CLCs can quickly and efficiently establish their engineering qualifications.

Dated October 22, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

I concur in part and dissent in part.

/s/ HENRY M. DUQUE
Commissioner

APPENDIX A

**COMMISSION-ADOPTED RULES GOVERNING ACCESS
TO RIGHTS-OF-WAY AND SUPPORT STRUCTURES OF
INCUMBENT TELEPHONE AND ELECTRIC UTILITIES**

- I. PURPOSE AND SCOPE OF RULES
- II. DEFINITIONS
- III. REQUESTS FOR INFORMATION
- IV. REQUESTS FOR ACCESS TO RIGHTS OF WAY AND SUPPORT STRUCTURES
 - A. INFORMATION REQUIREMENTS OF REQUESTS FOR ACCESS
 - B. RESPONSES TO REQUESTS FOR ACCESS
 - C. TIME FOR COMPLETION OF MAKE READY WORK
 - D. USE OF THIRD PARTY CONTRACTORS
- I. NONDISCLOSURE
 - A. DUTY NOT TO DISCLOSE PROPRIETARY INFORMATION
 - B. SANCTIONS FOR VIOLATIONS OF NONDISCLOSURE AGREEMENTS
- I. PRICING AND TARIFFS GOVERNING ACCESS
 - A. GENERAL PRINCIPLE OF NONDISCRIMINATION
 - B. MANNER OF PRICING ACCESS
 - C. CONTRACTS
- VII. RESERVATIONS OF CAPACITY FOR FUTURE USE
- VIII. MODIFICATIONS OF EXISTING SUPPORT STRUCTURES
 - A. NOTIFICATION TO PARTIES ON OR IN SUPPORT STRUCTURES
 - B. NOTIFICATION GENERALLY
 - C. SHARING THE COST OF MODIFICATIONS

IX. EXPEDITED DISPUTE RESOLUTION PROCEDURES

X. ACCESS TO CUSTOMER PREMISES

XI. SAFETY

I. PURPOSE AND SCOPE OF RULES

- A. These rules govern access to public utility rights-of-way and support structures by telecommunications carriers and cable TV companies in California, and are issued pursuant to the Commission's jurisdiction over access to utility rights of way and support structures under the Federal Communications Act, 47 U.S.C. § 224(c)(1) and subject to California Public Utilities Code §§ 767, 767.5, 767.7, 768, 768.5 and 8001 through 8057. These rules are to be applied as guidelines by parties in negotiating rights of way access agreements. Parties may mutually agree on terms which deviate from these rules, but in the event of negotiating disputes submitted for Commission resolution, the adopted rules will be deemed presumptively reasonable. The burden of proof shall be on the party advocating a deviation from the rules to show the deviation is reasonable, and is not unduly discriminatory or anticompetitive.

II. DEFINITIONS

- A. "Public utility" or "utility" includes any person, firm or corporation, privately owned, that is an electric, or telephone utility which owns or controls, or in combination jointly owns or controls, support structures or rights-of-way used or useful, in whole or in part, for telecommunications purposes.
- B. "Support structure" includes, but is not limited to, a utility distribution pole, anchor, duct, conduit, manhole, or handhole.
- C. "Pole attachment" means any attachment to surplus space, or use of excess capacity, by a telecommunications carrier for a communications system on or in any support structure owned, controlled, or used by a public utility.
- D. "Surplus space" means that portion of the usable space on a utility pole which has the necessary clearance from other pole users, as required by the orders and regulations of the Commission, to allow its use by a telecommunications carrier for a pole attachment.

- E. "Excess capacity" means volume or capacity in a duct, conduit, or support structure other than a utility pole or anchor which can be used, pursuant to the orders and regulations of the Commission, for a pole attachment.
- F. "Usable space" means the total distance between the top of the utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance.
- G. "Minimum allowable vertical clearance" means the minimum clearance for communication conductors along rights-of-way or other areas as specified in the orders and regulations of the Commission.
- H. "Rearrangements" means work performed, at the request of a telecommunications carrier, to, on, or in an existing support structure to create such surplus space or excess capacity as is necessary to make it usable for a pole attachment. When an existing support structure does not contain adequate surplus space or excess capacity and cannot be so rearranged as to create the required surplus space or excess capacity for a pole attachment, "rearrangements" shall include replacement, at the request of a telecommunications carrier, of the support structure in order to provide adequate surplus space or excess capacity. This definition is not intended to limit the circumstances where a telecommunications carrier may request replacement of an existing structure with a different or larger support structure.
- I. "Annual cost of ownership" means the sum of the annual capital costs and annual operation costs of the support structure which shall be the average costs of all similar support structures owned by the public utility. The basis for computation of annual capital costs shall be historical capital cost less depreciation. The accounts upon which the historical capital costs are determined shall include a credit for all reimbursed capital costs of the public utility. Depreciation shall be based upon the average service life of the support structure. As used in this definition, "annual cost of ownership" shall not include costs for any property not necessary for a pole attachment.

- J. "Telecommunications carrier" generally means any provider of telecommunications services that has been granted a certificate of public convenience and necessity by the California Public Utilities Commission. These rules, however, exclude Commercial Mobile Radio Service (CMRS) providers and interexchange carriers from the definition of "telecommunications carrier."
- K. "Cable TV company" as used in these rules refers to a privately owned company, that provides cable service as defined in the PU Code and is not certified to provide telecommunications service.
- L. "Right of way" means the right of competing providers to obtain access to the distribution poles, ducts, conduits, and other support structures of a utility which are necessary to reach customers for telecommunications purposes.
- M. "Make ready work" means the process of completing rearrangements on or in a support structure to create such surplus space or excess capacity as is necessary to make it usable for a pole attachment.
- N. "Modifications" means the process of changing or modifying, in whole or in part, support structures or rights of way to accommodate more or different pole attachments.
- O. "Incumbent local exchange carrier" refers to Pacific Bell and GTE California, Inc., Roseville Telephone Company, and Citizens Telecommunications Company of California, for purposes of these rules, unless explicitly indicated otherwise.

III. REQUESTS FOR INFORMATION

- A. A utility shall promptly respond in writing to a written request for information ("request for information") from a telecommunications carrier or cable TV company regarding the availability of surplus space or excess capacity on or in the utility's support structures and rights of way. The utility shall respond to requests for information as quickly as possible consistent with applicable legal, safety, and reliability requirements, which, in the case of Pacific or GTEC, shall not

exceed 10 business days if no field survey is required and shall not exceed 20 business days if a field-based survey of support structures is required. In the event the request involves more than 500 poles or 5 miles of conduit, the parties shall negotiate a mutually satisfactory longer response time.

- B. Within the applicable time limit set forth in paragraph III.A and subject to execution of pertinent nondisclosure agreements, the utility shall provide access to maps, and currently available records such as drawings, plans and any other information which it uses in its daily transaction of business necessary for evaluating the availability of surplus space or excess capacity on support structures and for evaluating access to a specified area of the utility's rights of way identified by the carrier.
- C. The utility may charge for the actual costs incurred for copies and any preparation of maps, drawings or plans necessary for evaluating the availability of surplus space or excess capacity on support structures and for evaluating access to a utility's rights of way.
- D. Within 20 business days of a request, anyone who attaches to a utility-owned pole shall allow the pole owner access to maps, and any currently available records such as drawings, plans, and any other information which is used in the daily transaction of business necessary for the owner to review attachments to its poles.
- E. The utility may request up-front payments of its estimated costs for any of the work contemplated by Rule III.C., Rule IV.A. and Rule IV.B. The utility's estimate will be adjusted to reflect actual cost upon completion of the requested tasks.

IV. REQUESTS FOR ACCESS TO RIGHTS OF WAY AND SUPPORT STRUCTURES

A. INFORMATION REQUIREMENTS OF REQUESTS FOR ACCESS

The request for access shall contain the following:

1. Information for contacting the carrier or cable TV company, including project engineer, and name and address of person to be billed.
2. Loading information, which includes grade and size of attachment, size of cable, average span length, wind loading of their equipment, vertical loading, and bending movement.
3. Copy of property lease or right-of-way document.

B. RESPONSES TO REQUESTS FOR ACCESS

1. A utility shall respond in writing to the written request of a telecommunications carrier or cable TV company for access ("request for access") to its rights of way and support structures as quickly as possible, which, in the case of Pacific or GTEC, shall not exceed 45 days. The response shall affirmatively state whether the utility will grant access or, if it intends to deny access, shall state all of the reasons why it is denying such access. Failure of Pacific or GTEC to respond within 45 days shall be deemed an acceptance of the request for access.
2. If, pursuant to a request for access, the utility has notified the telecommunication carrier or cable TV company that both adequate space and strength are available for the attachment, and the entity seeking access advises the utility in writing that it wants to make the attachment, the utility shall provide this entity with a list of the rearrangements or changes required to accommodate the entity's facilities and an estimate of the time required and the cost to perform the utility's portion of such rearrangements or changes.

3. If the utility does not own the property on which its support structures are located, the telecommunication carrier or cable TV company must obtain written permission from the owner of that property before attaching or installing its facilities. The telecommunication carrier or cable TV company by using such facilities shall defend and indemnify the owner of the utility facilities, if its franchise or other rights to use the real property are challenged as a result of the telecommunication carrier's or the cable TV company's use or attachment.

B. TIME FOR COMPLETION OF MAKE READY WORK

1. If a utility is required to perform make ready work on its poles, ducts or conduit to accommodate a carrier's or a cable TV company's request for access, the utility shall perform such work at the requesting entity's sole expense. Such work shall be completed as quickly as possible consistent with applicable legal, safety, and reliability requirements, which, in the case of Pacific or GTEC shall occur within 30 business days of receipt of an advance payment for such work. If the work involves more than 500 poles or 5 miles of conduit, the parties will negotiate a mutually satisfactory longer time frame to complete such make ready work.

C. USE OF THIRD PARTY CONTRACTORS

1. The ILEC shall maintain a list of contractors that are qualified to respond to requests for information and requests for access, as well as to perform make ready work and attachment and installation of wire communications or cable TV facilities on the utility's support structures. This requirement shall not apply to electric utilities. This requirement shall not affect the discretion of a utility to use its own employees.
2. A telecommunications carrier or cable TV company may use its own personnel to attach or install the carrier's communications facilities in or on a utility's facilities, provided that in the utility's reasonable judgment, the carrier's or cable TV company's personnel or agents demonstrate that they are trained and qualified to work on or in the utility's facilities. To use its own personnel or contractors on electric utility poles, the

telecommunications carrier or cable TV company must give 48 hours advance notice to the electric utility, unless an electrical shutdown is required. If an electrical shutdown is required, the telecommunications carrier or cable TV company must arrange a specific schedule with the electric utility. The telecommunications carrier or cable TV company is responsible for all costs associated with an electrical shutdown. The inspection will be paid for by the attaching entity. The telecommunications carrier or cable TV company must allow the electric utility, in the utility's discretion to inspect the telecommunication's attachment to the support structure. This provision shall not apply to electric underground facilities containing energized electric supply cables. Work involving electric underground facilities containing energized electric supply cables or the rearranging of overhead electric facilities will be conducted as required by the electric utility at its sole discretion. In no event shall the telecommunications or cable TV company or their respective contractor, interfere with the electric utility's equipment or service.

3. Incumbent utilities should adopt written guidelines to ensure that telecommunication carriers' and cable TV companies' personnel and third-party contractors are qualified. These guidelines must be reasonable and objective, and must apply equally to the incumbent utility's own personnel or the incumbent utility's own third-party contractors. Incumbent utilities must seek industry input when drafting such guidelines.

V. NONDISCLOSURE

A. DUTY NOT TO DISCLOSE PROPRIETARY INFORMATION

1. The utility and entities seeking access to poles or other support structures may provide reciprocal standard nondisclosure agreements that permit either party to designate as proprietary information any portion of a request for information or a response thereto, regarding the availability of surplus space or excess capacity on or in its support structures, or of a request for access to such surplus space or excess capacity, as well as any maps, plans, drawings or other information, including those that disclose the telecommunications carrier's or cable TV company's

plans for where it intends to compete against an incumbent telephone utility. Each party shall have a duty not to disclose any information which the other contracting party has designated as proprietary except to personnel within the utility that have an actual, verifiable "need to know" in order to respond to requests for information or requests for access.

B. SANCTIONS FOR VIOLATIONS OF NONDISCLOSURE AGREEMENTS

1. Each party shall take every precaution necessary to prevent employees in its field offices or other offices responsible for making or responding to requests for information or requests for access from disclosing any proprietary information of the other party. Under no circumstances may a party disclose such information to marketing, sales or customer representative personnel. Proprietary information shall be disclosed only to personnel in the utility's field offices or other offices responsible for making or responding to such requests who have an actual, verifiable "need to know" for purposes of responding to such requests. Such personnel shall be advised of their duty not to disclose such information to any other person who does not have a "need to know" such information. Violation of the duty not to disclose proprietary information shall be cause for imposition of such sanctions as, in the Commission's judgement, are necessary to deter the party from breaching its duty not to disclose proprietary information in the future. Any violation of the duty not to disclose proprietary information will be accompanied by findings of fact that permit a party whose proprietary information has improperly been disclosed to seek further remedies in a civil action.

VI. PRICING AND TARIFFS GOVERNING ACCESS

A. GENERAL PRINCIPLE OF NONDISCRIMINATION

1. A utility shall grant access to its rights-of-way and support structures to telecommunications carriers or cable TV company and cable TV companies on a nondiscriminatory basis. Nondiscriminatory access is access on a first-come, first-served basis; access that can be restricted only on consistently applied nondiscriminatory principles relating to capacity constraints, and safety, engineering, and reliability requirements. Electric utilities' use of its own facilities for internal communications in support of its utility function shall not be considered to establish a comparison for nondiscriminatory access. A utility shall have the ability to negotiate with a telecommunications carrier or cable TV company the price for access to its rights of way and support structures.
2. A utility shall grant access to its rights-of-way and support structures to telecommunications carriers and cable TV companies on a nondiscriminatory basis, access to or use of the right-of-way, where such right-of-way is located on private property and safety, engineering, and reliability requirements. Electric utilities' use of their own facilities for internal communications in support of their utility function shall not be considered to establish a comparison for nondiscriminatory access. A utility shall have the ability to negotiate with a telecommunications carrier or cable TV company the price for access to its rights-of-way and support structures.

B. MANNER OF PRICING ACCESS

1. Whenever a public utility and a telecommunications carrier, or cable TV company, or associations, therefore, are unable to agree upon the terms, conditions, or annual compensation for pole attachments or the terms, conditions, or costs of rearrangements, the Commission shall establish and enforce the rates, terms and conditions for pole attachments and rearrangements so as to assure a public utility the recovery of both of the following:

- a. A one-time reimbursement for actual costs incurred by the public utility for rearrangements performed at the request of the telecommunications carrier.
- b. An annual recurring fee computed as follows:
 - (1) For each pole and supporting anchor actually used by the telecommunications carrier or cable TV company, the annual fee shall be two dollars and fifty cents (\$2.50) or 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor, whichever is greater, except that if a public utility applies for establishment of a fee in excess of two dollars and fifty cents (\$2.50) under this rule, the annual fee shall be 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor.
 - (2) For support structures used by the telecommunications carrier or cable TV company, other than poles or anchors, a percentage of the annual cost of ownership for the support structure, computed by dividing the volume or capacity rendered unusable by the telecommunications carrier's or cable TV company's equipment by the total usable volume or capacity. As used in this paragraph, "total usable volume or capacity" means all volume or capacity in which the public utility's line, plant, or system could legally be located, including the volume or capacity rendered unusable by the telecommunications carrier's or cable TV company's equipment.
- c. A utility may not charge a telecommunications carrier or cable TV company a higher rate for access to its rights of way and support structures than it would charge a similarly situated cable television corporation for access to the same rights of way and support structures.

C. CONTRACTS

1. A utility that provides or has negotiated an agreement with a telecommunications carrier or cable TV company to provide access to its support structures shall file with the Commission the executed contract showing:
 - a. The annual fee for attaching to a pole and supporting anchor.
 - b. The annual fee per linear foot for use of conduit.
 - c. Unit costs for all make ready and rearrangements work.
 - d. All terms and conditions governing access to its rights of way and support structures.
 - e. The fee for copies or preparation of maps, drawings and plans for attachment to or use of support structures.
2. A utility entering into contracts with telecommunications carriers or cable TV companies or cable TV company for access to its support structures, shall file such contracts with the Commission pursuant to General Order 96, available for full public inspection, and extended on a nondiscriminatory basis to all other similarly situated telecommunications carriers or cable TV companies. If the contracts are mutually negotiated and submitted as being pursuant to the terms of 251 and 252 of TA 96, they shall be reviewed consistent with the provisions of Resolution ALJ-174.

D. Unauthorized Attachments

1. No party may attach to the right of way or support structure of another utility without the express written authorization from the utility.
2. For every violation of the duty to obtain approval before attaching, the owner or operator of the unauthorized attachment shall pay to the utility a penalty of \$500 for each violation. This fee is in addition to all other costs which are part of the attacher's responsibility. Each unauthorized pole attachment shall count as a separate violation for assessing the penalty.

3. Any violation of the duty to obtain permission before attaching shall be cause for imposition of sanctions as, in the Commissioner's judgment, are necessary to deter the party from in the future breaching its duty to obtain permission before attaching will be accompanied by findings of fact that permit the pole owner to seek further remedies in a civil action.
4. This Section D applies to existing attachments as of the effective date of these rules.

VII. RESERVATIONS OF CAPACITY FOR FUTURE USE

- A. No utility shall adopt, enforce or purport to enforce against a telecommunications carrier or cable TV company any "hold off," moratorium, reservation of rights or other policy by which it refuses to make currently unused space or capacity on or in its support structures available to telecommunications carriers or cable TV companies requesting access to such support structures, except as provided for in Part C below.
- B. All access to a utility's support structures and rights of way shall be subject to the requirements of Public Utilities Code § 851 and General Order 69C. Instead of capacity reclamation, our preferred outcome is for the expansion of existing support structures to accommodate the need for additional attachments.
- C. Notwithstanding the provisions of Paragraphs VII.A and VII.B, an electric utility may reserve space for up to 12 months on its support structures required to serve core utility customers where it demonstrates that: (i) prior to a request for access having been made, it had a bona fide development plan in place prior to the request and that the specific reservation of attachment capacity is reasonably and specifically needed for the immediate provision (within one year of the request) of its core utility service, (ii) there is no other feasible solution to meeting its immediately foreseeable needs, (iii) there is no available technological means of increasing the capacity of the support structure for additional attachments, and (iv) it has attempted to negotiate a cooperative solution to the capacity problem in good faith with the party

seeking the attachment. An ILEC may earmark space for imminent use where construction is planned to begin within nine months of a request for access. A CLC or cable TV company must likewise use space within nine months of the date when a request for access is granted, or else will become subject to reversion of its access.

VIII. MODIFICATIONS OF EXISTING SUPPORT STRUCTURES

A. NOTIFICATION TO PARTIES ON OR IN SUPPORT STRUCTURES

1. Absent a private agreement establishing notification procedures, written notification of a modification should be provided to parties with attachments on or in the support structure to be modified at least 60 days prior to the commencement of the modification. Notification shall not be required for emergency modifications or routine maintenance activities.

B. NOTIFICATION GENERALLY

1. Utilities and telecommunications carriers shall cooperate to develop a means by which notice of planned modifications to utility support structures may be published in a centralized, uniformly accessible location (e.g., a "web page" on the Internet).

C. SHARING THE COST OF MODIFICATIONS

1. The costs of support structure capacity expansions and other modifications shall be shared only by all the parties attaching to utility support structures which are specifically benefiting from the modifications on a proportionate basis corresponding to the share of usable space occupied by each benefiting carrier. In the event an energy utility incurs additional costs for trenching and installation of conduit due to safety or reliability requirements which are more elaborate than a telecommunications-only trench, the telecommunications carriers should not pay more than they would have incurred for their own independent trench. Disputes regarding the sharing of the cost of capacity expansions and modifications shall be subject to the dispute resolution procedures contained in these rules.

IX. EXPEDITED DISPUTE RESOLUTION PROCEDURES

A. Parties to a dispute involving access to utility rights of way and support structures may invoke the Commission's dispute resolution procedures, but must first attempt in good faith to resolve the dispute. Disputes involving initial access to utility rights of way and support structures shall be heard and resolved through the following expedited dispute resolution procedure.

1. Following denial of a request for access, parties shall escalate the dispute to the executive level within each company. After 5 business days, any party to the dispute may file a formal application requesting Commission arbitration. The arbitration shall be deemed to begin on the date of the filing before the Commission of the request for arbitration. Parties to the arbitration may continue to negotiate an agreement prior to and during the arbitration hearings. The party requesting arbitration shall provide a copy of the request to the other party or parties not later than the day the Commission receives the request.

2. Content

A request for arbitration must contain:

- a. A statement of all unresolved issues.
- b. A description of each party's position on the unresolved issues.
- c. A proposed agreement addressing all issues, including those upon which the parties have reached an agreement and those that are in dispute. Wherever possible, the petitioner should rely on the fundamental organization of clauses and subjects contained in an agreement previously arbitrated and approved by this Commission.
- d. Direct testimony supporting the requester's position on factual predicates underlying disputed issues.
- e. Documentation that the request complies with the time requirements in the preceding rule.

3. Appointment of Arbitrator

Upon receipt of a request for arbitration, the Commission's President or a designee in consultation with the Chief Administrative Law Judge, shall appoint and immediately notify the parties of the identity of an Arbitrator to facilitate resolution of the issues raised by the request. The Assigned Commissioner may act as Arbitrator if he/she chooses. The Arbitrator must attend all arbitration meetings, conferences, and hearings.

4. Discovery

Discovery should begin as soon as possible prior to or after filing of the request for negotiation and should be completed before a request for arbitration is filed. For good cause, the Arbitrator or Administrative Law Judge assigned to Law and Motion may compel response to a data request; in such cases, the response normally will be required in three working days or less.

5. Opportunity to Respond

Pursuant to Subsection 252(b)(3), any party to a negotiation which did not make the request for arbitration ("respondent") may file a response with the Commission within 15 days of the request for arbitration. In the response, the respondent shall address each issue listed in the request, describe the respondent's position on these issues, and identify and present any additional issues for which the respondent seeks resolution and provide such additional information and evidence necessary for the Commission's review. Building upon the contract language proposed by the applicant and using the form of agreement selected by the applicant, the respondent shall include, in the response, a single-text "mark-up" document containing the language upon which the parties agree and, where they disagree, both the applicant's proposed language (bolded) and the respondent's proposed language (underscored). Finally, the response should contain any direct testimony supporting the respondent's position on underlying factual predicates. On the same day that it files its response before the Commission, the respondent must serve a

copy of the Response and all supporting documentation on any other party to the negotiation.

6. Revised Statement of Unresolved Issues

Within 3 days of receiving the response, the applicant and respondent shall jointly file a revised statement of unresolved issues that removes from the list presented in the initial petition those issues which are no longer in dispute based on the contract language offered by the respondent in the mark-up document and adds to the list only those other issues which now appear to be in dispute based on the mark-up document and other portions of the response.

7. Initial Arbitration Meeting

An Arbitrator may call an initial meeting for purposes such as setting a schedule, simplifying issues, or resolving the scope and timing of discovery.

8. Arbitration Conference and Hearing

Within 7 days after the filing of a response to the request for arbitration, the arbitration conference and hearing shall begin. The conduct of the conference and hearing shall be noticed on the Commission calendar and notice shall be provided to all parties on the service list.

9. Limitation of Issues

The Arbitrator shall limit the arbitration to the resolution of issues raised in the application, the response, and the revised statement of unresolved issues (where applicable). In resolving the issues raised, the Arbitrator may take into account any issues already resolved between the parties.

10. Arbitrator's Reliance on Experts

The Arbitrator may rely on experts retained by, or on the Staff of the Commission. Such expert(s) may assist the Arbitrator throughout the arbitration process.

11. Close of Arbitration

The arbitration shall consist of mark-up conferences and limited evidentiary hearings. At the mark-up conferences, the arbitrator will hear the concerns of the parties, determine

whether the parties can further resolve their differences, and identify factual issues that may require limited evidentiary hearings. The arbitrator will also announce his or her rulings at the conferences as the issues are resolved. The conference and hearing process shall conclude within 3 days of the hearing's commencement, unless the Arbitrator determines otherwise.

12. Expedited Stenographic Record

An expedited stenographic record of each evidentiary hearing shall be made. The cost of preparation of the expedited transcript shall be borne in equal shares by the parties.

13. Authority of the Arbitrator

In addition to authority granted elsewhere in these rules, the Arbitrator shall have the same authority to conduct the arbitration process as an Administrative Law Judge has in conducting hearings under the Rules of Practice and Procedure. The Arbitrator shall have the authority to change the arbitration schedule contained in these rules.

14. Participation Open to the Public

Participation in the arbitration conferences and hearings is strictly limited to the parties negotiating a ROW agreement pursuant to the terms of these adopted rules.

15. Arbitration Open to the Public

Though participation at arbitration conferences and hearings is strictly limited to the parties that were negotiating the agreements being arbitrated, the general public is permitted to attend arbitration hearings unless circumstances dictate that a hearing, or portion thereof, be conducted in closed session. Any party to an arbitration seeking a closed session must make a written request to the Arbitrator describing the circumstances compelling a closed session. The Arbitrator shall consult with the assigned Commissioner and rule on such request before hearings begin.

16. Filing of Draft Arbitrator's Report

Within 15 days following the hearings, the Arbitrator, after consultation with the Assigned Commissioner, shall file a Draft Arbitrator's Report. The Draft Arbitrator's Report will include (a) a concise summary of the issues resolved by the Arbitrator, and (b) a reasoned articulation of the basis for the decision.

17. Filing of Post-Hearing Briefs and Comments on the Draft Arbitrator's Report

Each party to the arbitration may file a post-hearing brief within 7 days of the end of the mark-up conferences and hearings unless the Arbitrator rules otherwise. Post-hearing briefs shall present a party's argument in support of adopting its recommended position with all supporting evidence and legal authorities cited therein. The length of post-hearing briefs may be limited by the Arbitrator and shall otherwise comply with the Commission's Rules of Practice and Procedure. Each party and any member of the public may file comments on the Draft arbitrator's Report within 10 days of its release. Such comments shall not exceed 20 pages.

18. Filing of the Final Arbitrator's Report

The arbitrator shall file the Final Arbitrator's Report no later than 15 days after the filing date for comments. Prior to the report's release, the Telecommunications Division will review the report and prepare a matrix comparing the outcomes in the report to those adopted in prior Commission arbitration decisions, highlighting variances from prior Commission policy. Whenever the Assigned Commissioner is not acting as the arbitrator, the Assigned Commissioner will participate in the release of the Final Arbitrator's Report consistent with the Commission's filing of Proposed Decisions as set forth in Rule 77.1 of the Commission's Rules of Practice and Procedure.

19. Filing of Arbitrated Agreement

Within 7 days of the filing of the Final Arbitrator's Report, the parties shall file the entire agreement for approval.

- 20. Commission Review of Arbitrated Agreement**
Within 30 days following filing of the arbitrated agreement, the Commission shall issue a decision approving or rejecting the arbitrated agreement (including those parts arrived at through negotiations) pursuant to Subsection 252(e) and all its subparts.
- 21. Standards for Review**
The Commission may reject arbitrated agreements or portions thereof that do not meet the requirements of the Commission, including, but not limited to, quality of service standards adopted by the Commission.
- 22. Written Findings**
The Commission's decision approving or rejecting an arbitration agreement shall contain written findings. In the event of rejection, the Commission shall address the deficiencies of the arbitrated agreement in writing and may state what modifications of such agreement would make the agreement acceptable to the Commission.
- 23. Application for Rehearing**
A party wishing to appeal a Commission decision approving an arbitration must first seek administrative review pursuant to the Commission's Rules of Practice and Procedure.
- 24. The party identified by the arbitrator as the "losing party" shall reimburse the party identified by the arbitrator as the "prevailing party" for all costs of the arbitration, including the reasonable attorney and expert witness fees incurred by the prevailing party.**

X. ACCESS TO CUSTOMER PREMISES

- A. No carrier may use its ownership or control of any right of way or support structure to impede the access of a telecommunications carrier or cable TV company to a customer's premises.**
- B. A carrier shall provide access, when technically feasible, to building entrance facilities it owns or controls, up to the applicable minimum point of entry (MPOE) for that property, on a nondiscriminatory, first-come, first-served basis, provided that the requesting**

telecommunications carrier or cable TV provider has first obtained all necessary access and/or use rights from the underlying property owners(s).

- C. A carrier will have 60 days to renegotiate a contract deemed discriminatory by the Commission in response to a formal complaint. Failing to do so, this carrier will become subject to a fine ranging from \$500 to \$20,000 per day beyond the 60-day limit for renegotiation until the discriminatory provisions of the arrangement have been eliminated.

XI. SAFETY

- A. Access to utility rights of way and support structures shall be governed at all times by the provisions of Commission General Order Nos. 95 and 128 and by Cal/OSHA Title 8. Where necessary and appropriate, said General Orders shall be supplemented by the National Electric Safety Code, and any reasonable and justifiable safety and construction standards which are required by the utility.
- B. The incumbent utility shall not be liable for work that is performed by a third party without notice and supervision, work that does not pass inspection, or equipment that contains some dangerous defect that the incumbent utility cannot reasonably be expected to detect through a visual inspection. The incumbent utility and its customers shall be immunized from financial damages in these instances.

(END OF APPENDIX A)

R.95-04-043; I.95-04-044
D.98-10-058

Henry M. Duque, Commissioner, concurring in part and dissenting in part:

The policies set in Decision 98-10-058 to facilitate access by carriers to public rights of way and to permit the fair use of existing utility infrastructure constitute an important achievement. D.98-10-058 will further open local telecommunications markets to competition. This decision has my concurrence except for the policies developed in two areas, where I must note my dissent.

The first policies that I cannot support arise from Conclusions of Law 72-74. These conclusions of law change the rules of competition midway through the game. They invite formal complaints against carriers already having marketing arrangements with businesses or residences whenever a competitor believes that the agreement restricts access to the facilities or is discriminatory. The ex post facto regulation exemplified by Conclusion of Law 72 is wrong, and a court will clearly conclude that it constitutes legal error.

Further, Conclusions of Law 72 through 74 cast a shadow over many agreements that constitute standard marketing arrangements. Will the marketing arrangements that have produced Pacific-Bell Ball Park and the AT&T Pebble Beach Open be the first two contracts that we order renegotiated? Conclusions of Law 72 through 74 are worded too broadly, and only litigation will permit the market to understand the scope of practices that the Commission deems suspect. This approach to the making of regulatory policy is unwise.

Conclusion of Law 74 is particularly unwise. It imposes the risk of a high fine on a carrier whenever a carrier with a contract fails to negotiate changes within 60 days of a ruling by the Commission. Under this regulatory scheme, fines can mount up for the carrier when the building owner refuses to renegotiate. This outcome is not fair. It fines a carrier for actions that are beyond the carrier's control.

Moreover, Conclusions of Law 72 through 74 may well lead to docket-busting work. The Commission has no idea how many existing marketing or access agreements are affected by these new rules. Thus, these regulations make an open-ended promise of regulatory review of actions taken long before the Commission issued any rules. Such a limitless commitment of regulatory resources is unwise, especially when made by a

R.95-04-043; I.95-04-044
D.98-10-058

government agency that has found its budgets and personnel decreasing. It will either prove a hollow promise or delay other regulatory actions mandated by statute.

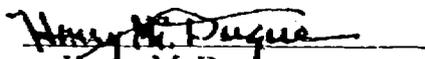
The second policies that I cannot support are those that arise from the failure of D.98-10-058 to assert jurisdiction to protect consumers from those building owners who use their control over access for unfair advantage. This Commission has seen abuses by mobile home owners who control access to gas, water, and electricity through submetering. In these areas, laws and Commission decisions have made the rules clear and have charted a well-worn path.

Because of laws passed to prevent abuses such as these, the Commission already has the authority under PU Code Sections 233 and 234 to assert its regulatory jurisdiction over owners or managers of multiple dwelling units who in exchange for compensation, own, manage, lease, operate or control any part of a "telephone line." A "telephone line" would include a system's entrance facilities, tie down blocks, frames, wires, fibers, closets, conduits, risers, and all other fixtures for the purpose of facilitating communication. Our failure to exercise our authority today means that our next opportunity to act will likely come when abused consumers appear before us. Moreover, those causing the harm will claim that they have done nothing illegal or prohibited – they have merely profited from their ability to provide access to customers. Our inaction today gives merit to these claims.

In summary, although I vote in support of Decision 98-10-057, my analysis leads me to two conclusions:

1. Conclusions of Law 72 through 74 constitute legal error and unwise policy;
2. The failure of this Commission to exercise its legal jurisdiction to prevent abuses of consumers by building owners or managers is a mistake.

These conclusions compel me to file this partial dissent.


Henry M. Duque
Commissioner

October 22, 1998

San Francisco

R.95-04-043; I.95-04-044
D.98-10-058

Henry M. Duque, Commissioner, concurring in part and dissenting in part:

The policies set in Decision 98-10-058 to facilitate access by carriers to public rights of way and to permit the fair use of existing utility infrastructure constitute an important achievement. D.98-10-058 will further open local telecommunications markets to competition. This decision has my concurrence except for the policies developed in two areas, where I must note my dissent.

The first policies that I cannot support arise from Conclusions of Law 72-74. These conclusions of law change the rules of competition midway through the game. They invite formal complaints against carriers already having marketing arrangements with businesses or residences whenever a competitor believes that the agreement restricts access to the facilities or is discriminatory. The ex post facto regulation exemplified by Conclusion of Law 72 is wrong, and a court will clearly conclude that it constitutes legal error.

Further, Conclusions of Law 72 through 74 cast a shadow over many agreements that constitute standard marketing arrangements. Will the marketing arrangements that have produced Pacific-Bell Ball Park and the AT&T Pebble Beach Open be the first two contracts that we order renegotiated? Conclusions of Law 72 through 74 are worded too broadly, and only litigation will permit the market to understand the scope of practices that the Commission deems suspect. This approach to the making of regulatory policy is unwise.

Conclusion of Law 74 is particularly unwise. It imposes the risk of a high fine on a carrier whenever a carrier with a contract fails to negotiate changes within 60 days of a ruling by the Commission. Under this regulatory scheme, fines can mount up for the carrier when the building owner refuses to renegotiate. This outcome is not fair. It fines a carrier for actions that are beyond the carrier's control.

Moreover, Conclusions of Law 72 through 74 may well lead to docket-busting work. The Commission has no idea how many existing marketing or access agreements are affected by these new rules. Thus, these regulations make an open-ended promise of regulatory review of actions taken long before the Commission issued any rules. Such a limitless commitment of regulatory resources is unwise, especially when made by a

R.95-04-043; I.95-04-044
D.98-10-058

government agency that has found its budgets and personnel decreasing. It will either prove a hollow promise or delay other regulatory actions mandated by statute.

The second policies that I cannot support are those that arise from the failure of D.98-10-058 to assert jurisdiction to protect consumers from those building owners who use their control over access for unfair advantage. This Commission has seen abuses by mobile home owners who control access to gas, water, and electricity through submetering. In these areas, laws and Commission decisions have made the rules clear and have charted a well-worn path.

Because of laws passed to prevent abuses such as these, the Commission already has the authority under PU Code Sections 233 and 234 to assert its regulatory jurisdiction over owners or managers of multiple dwelling units who in exchange for compensation, own, manage, lease, operate or control any part of a "telephone line." A "telephone line" would include a system's entrance facilities, tie down blocks, frames, wires, fibers, closets, conduits, risers, and all other fixtures for the purpose of facilitating communication. Our failure to exercise our authority today means that our next opportunity to act will likely come when abused consumers appear before us. Moreover, those causing the harm will claim that they have done nothing illegal or prohibited – they have merely profited from their ability to provide access to customers. Our inaction today gives merit to these claims.

In summary, although I vote in support of Decision 98-10-057, my analysis leads me to two conclusions:

1. Conclusions of Law 72 through 74 constitute legal error and unwise policy;
2. The failure of this Commission to exercise its legal jurisdiction to prevent abuses of consumers by building owners or managers is a mistake.

These conclusions compel me to file this partial dissent.

/s/ HENRY M. DUQUE
Henry M. Duque
Commissioner

October 22, 1998

San Francisco