



STATE OF CALIFORNIA

EDMUND G. BROWN JR., Governor

PUBLIC UTILITIES COMMISSION

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TO PARTIES OF RECORD IN INVESTIGATION 17-06-027 et al.:

This is the proposed decision of Commissioner Picker. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's April 26, 2018 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

/s/ ANNE E. SIMON

Anne E. Simon

Acting Chief Administrative Law Judge

AES:ek4

Attachment

Decision **PROPOSED DECISION OF COMMISSIONER PICKER**
(Mailed 3/22/2018)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation into the
Creation of a Shared Database or
Statewide Census of Utility Poles and
Conduit in California.

Investigation 17-06-027

And Related Matters.

Rulemaking 17-06-028

Rulemaking 17-03-009

**DECISION AMENDING THE RIGHT-OF-WAY RULES
TO APPLY TO WIRELESS TELECOMMUNICATIONS FACILITIES
INSTALLED BY COMPETITIVE LOCAL EXCHANGE CARRIERS**

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**DECISION AMENDING THE RIGHT-OF-WAY RULES
TO APPLY TO WIRELESS TELECOMMUNICATIONS FACILITIES
INSTALLED BY COMPETITIVE LOCAL EXCHANGE CARRIERS**

Summary

Today's Decision amends the Right-of-Way Rules (ROW Rules) set forth in Decision 16-01-046 to provide competitive local exchange carriers (CLECs) with expanded nondiscriminatory access to public utility infrastructure for the purpose of installing antennas and other wireless telecommunications facilities. The adopted amendments to the ROW Rules include a default "per-foot fee" for CLECs' wireless pole attachments.

Today's Decision finds that the adopted amendments to the ROW Rules are in the public interest because the amendments will facilitate investment in wireless infrastructure, foster competition among providers of wireless services, expand access to wireless services in unserved and underserved areas, and encourage widespread deployment of broadband wireless services. The adopted amendments do not adversely affect worker safety, public safety, or the reliability of co-located utility facilities (e.g., electric power lines).

This proceeding is closed. The consolidated proceedings, Investigation 17-06-027 and Rulemaking 17-06-028, remain open.

1. Background**1.1. Federal Laws and Regulations**

Title 47 of the United States Code, at Section 224(f) ("47 U.S.C. § 224(f)"), requires every utility¹ to provide "a cable television system or any

¹ 47 U.S.C. § 224 (a)(1) defines the term "utility" as "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications."

telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by” the utility except in situations where a utility cannot provide access because of “insufficient capacity and for reasons of safety, reliability and generally applicable engineering principles.” The Federal Communications Commission (FCC) is required by 47 U.S.C. § 224(b)(1) to “regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and... to hear and resolve complaints concerning such rates, terms, and conditions.” The FCC has determined that 47 U.S.C. § 224 applies to wireless carriers and wireless pole attachments.²

A State may preempt the FCC’s regulation of pole attachments. Specifically, 47 U.S.C. § 224(c)(1) provides that “[n]othing in this section shall be construed to apply to, or to give the [FCC] jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way... where such matters are regulated by a State.” For such preemption to occur, a State must certify to the FCC that the State has enacted regulations that meet the following conditions set forth in 47 U.S.C. §§ 224(c)(2) and (3):

- (2) Each State which regulates the rates, terms, and conditions for pole attachment shall certify to the [FCC] 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.

² FCC 11-50 (rel. Apr. 7, 2011) at ¶¶ 12, 77, and 153.

- (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.

In Decision (D.) 98-10-058 and D.16-01-046, the California Public Utilities Commission (CPUC or Commission) provided certification pursuant to 47 U.S.C. § 224(c) that the Commission regulates the rate, terms, and conditions of access to poles, ducts, conduits, and rights-of-way in conformance with 47 U.S.C. §§ 224(c)(2) and (3).³ As a result, the Commission has preempted the FCC's regulation of pole attachments in California.

1.2. The Commission's Right-of-Way Rules

California Public Utilities Code Sections (Pub. Util. Code §§) 701 and 767 authorize the Commission to establish rates, terms, and conditions for joint use of public utility poles, ducts, conduits, and rights-of-way (together, "public utility infrastructure").

In D.98-10-058, as modified by D.16-01-046, the Commission adopted rules that provide competitive local exchange carriers (CLECs),⁴ commercial mobile

³ D.98-10-058 at Conclusions of Law (COLs) 2 and 3, and D.16-01-046 at COLs 2 and 21.

⁴ D.98-10-058 uses the terms "competitive local carrier" and "CLC" to identify a CLEC.

radio service (CMRS) carriers, and cable television (CATV) corporations with nondiscriminatory access to public utility infrastructure that is owned or controlled by (1) large and midsized incumbent local exchange carriers; and (2) three electric utilities consisting of Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company. The Commission's rules for nondiscriminatory access to public utility infrastructure are referred to as the "Right-of-Way Rules" ("ROW Rules") and address the following matters:

1. Requests to access a public utility's infrastructure by CLECs, CMRS carriers, CATV corporations, including the contents of the requests, deadlines for utility responses, and timeframes for the utility to complete make-ready work.
2. Protections for proprietary information.
3. Fees and contracts for access to public utility infrastructure.
4. Reservations of infrastructure capacity for future use.
5. Procedures for expedited resolution of disputes.
6. Safety standards for access to public utility infrastructure.

The ROW Rules are administered by the Commission in the form of preferred outcomes. Parties may negotiate access agreements that depart from these preferred outcomes, but in resolving any access dispute the Commission will consider how closely each party has conformed to these preferred outcomes.

Of importance to today's decision, the current ROW Rules apply only to the following types of facilities:

- Wireline facilities installed by CATV corporations and CLECs.
- Wireless facilities installed by CMRS carriers and related wireline facilities installed by CMRS carriers.

- Wireless facilities installed by CLECs that use fixed wireless technology to provide point-to-multipoint service at fixed locations (fixed wireless facilities). The ROW Rules do not apply to other types of CLEC wireless facilities.

1.3. Rulemaking 17-03-009

The Commission issued Order Instituting Rulemaking (OIR) 17-03-009 in response to Petition 16-08-016 filed by the Wireless Infrastructure Association pursuant to Pub. Util. Code § 1708.5.⁵ As set forth in OIR 17-03-009, the following issues are within the scope of this proceeding:

1. Whether it is in the public interest to amend the ROW Rules to encompass all CLEC wireless facilities. The ROW Rules currently apply to CLEC fixed wireless facilities, but not to other types of CLEC wireless facilities.
2. The specific amendments to the ROW Rules that are necessary to provide nondiscriminatory access to public utility infrastructure for CLEC wireless facilities. The scope of potential amendments to the ROW Rules is limited to CLEC wireless facilities and any associated CLEC wireline facilities.
3. The specific Commission authority that a CLEC must possess to install wireless facilities under the ROW Rules, such as a certificate of public convenience and necessity (CPCN) to provide facilities-based competitive local exchange service; a Wireless Identification Registration to provide facilities-based CMRS; and/or a final environmental impact report, negative declaration, or other documents that may be required by the California Environmental Quality Act for the installation or construction of wireless facilities.
4. Just and reasonable fees and charges for access to public utility infrastructure for CLEC wireless facilities.

⁵ Pub. Util. Code § 1708.5 allows “interested persons to petition the commission to adopt, amend, or repeal a regulation.”

5. Additional regulations that may be necessary, if any, to ensure that CLEC wireless facilities are designed, constructed, operated, inspected, and maintained to (A) protect worker safety and public safety, and (B) preserve the reliability of co-located utility facilities (e.g., power lines and telephone lines).
6. Certification of any adopted amendments to the ROW Rules in accordance with 47 U.S.C. 224(c).

The Commission further determined that adopted amendments to the ROW Rules, if any, will apply prospectively in accordance with Rule 6.3(a) of the Commission's Rules of Practice and Procedure, and will not apply to the contractual rates, terms, and conditions for existing CLEC installations.

On June 29, 2017, the Commission issued the combined Order Instituting Investigation (OII) 17-06-027 and OIR 17-06-028. The combined OII/OIR consolidated the instant proceeding, Rulemaking 17-03-009, with Investigation (I.) 17-06-027 and Rulemaking (R.) 17-06-028, subject to the condition that such consolidation would not affect the scope and schedule for R.17-03-009.⁶

1.4. Procedural Background

The Commission approved OIR 17-03-009 at its business meeting on March 23, 2017, and issued OIR 17-03-009 on April 3, 2017. The OIR, or a notice of availability of the OIR, was served on the following:

- The service lists for Petition 16-08-016, Petition 16-07-009, and R.14-05-001.
- All CLECs that have a CPCN to provide full facilities-based or limited facilities-based local exchange service.
- All CMRS carriers that have a CPCN or Wireless Identification Registration to provide facilities-based CMRS.

⁶ Combined OII/OIR at 1, 23, 38, and Ordering Paragraph 4.

- All California counties, incorporated cities, and incorporated towns, to the extent practical.

Combined prehearing conference statements and opening comments were filed on May 3, 2017, by the following parties:

- AT&T California (U-1001-C) and AT&T Mobility (together, "AT&T").
- California Association of Competitive Telecommunications Companies (CALTEL).
- The California Cable and Telecommunications Association.
- Cox California Telcom, LLC (U-5684-C) (Cox)
- Pacific Gas and Electric Company (PG&E).
- San Diego Gas & Electric Company (SDG&E).
- Southern California Edison Company (SCE).
- The Wireless Infrastructure Association (WIA).

Reply comments were filed on May 15, 2017, by the following parties:

AT&T, Cox, PG&E, SCE, SDG&E, WIA, the City and County of San Francisco, and the Commission's Safety and Enforcement Division (SED). The Commission also received letters from the City of Rancho Cucamonga and the County of Los Angeles Department of Public Works.⁷

A prehearing conference was held on June 12, 2017, and the *Assigned Commissioner's Scoping Memo and Ruling* was issued on June 26, 2017 (Scoping Memo). In accordance with the Scoping Memo, WIA arranged an all-party meeting on July 12, 2017, where WIA's and Cox's subject matter experts responded to interested parties' written discovery requests and follow-up questions regarding CLEC wireless facilities and services.

⁷ These letters are part of the administrative record for this proceeding.

The following parties filed supplemental comments on August 4, 2017: CALTEL, Cox, ExteNet Systems (California), LLC (U-6959-C) (ExteNet), WIA, and jointly by PG&E, SCE, and SDG&E (together, “the investor-owned electric utilities” or “Electric IOUs”). The following parties filed supplemental reply comments on August 18, 2017: Cox, ExteNet, and WIA.

There were no requests for evidentiary hearings and none were held.

2. Issues

2.1. Amending the ROW Rules to Encompass All CLEC Wireless Telecommunications Facilities

2.1.1. Background

The ROW Rules provide CLECs with nondiscriminatory access to public utility infrastructure for the purpose of installing (1) wireline telecommunications facilities, and (2) fixed wireless telecommunications facilities. The scope of this proceeding includes the issue of whether the ROW Rules should be amended to encompass other types of CLEC wireless telecommunications facilities.

2.1.2. Positions of the Parties

Most parties – including AT&T, CALTEL, Cox, WIA, and the Electric IOUs – recommend that the ROW Rules be amended so that the Rules apply to all CLEC wireless facilities, regardless of technology, that are used to provide telecommunications services authorized by the CLECs’ CPCNs. There is no opposition to this recommendation.

2.1.3. Discussion

We conclude for the following reasons that it is in the public interest to amend the ROW Rules to encompass all CLEC wireless facilities that are necessary or useful for the provision of telecommunications services authorized

by CLECs' CPCNs. First, as telecommunications carriers, CLECs have a right under federal law and FCC regulations to access public utility infrastructure on a nondiscriminatory basis for purpose of installing wireless telecommunications facilities.⁸ In D.98-10-058 and D.16-01-046, the Commission asserted jurisdiction under federal law to regulate nondiscriminatory access.⁹ By asserting such jurisdiction, the Commission assumed the obligation to promulgate regulations for nondiscriminatory access that apply to all CLEC wireless telecommunications facilities. Today's decision fulfills our obligation.

Second, in D.16-01-046 the Commission amended the ROW Rules to encompass CMRS carriers. The record of the instant proceeding demonstrates that CLEC wireless telecommunications facilities are essentially identical to CMRS carrier wireless facilities.¹⁰ We conclude that because CLECs install the same types of wireless facilities as CMRS carriers, it is reasonable to amend the ROW Rules to encompass CLEC wireless telecommunications facilities, too.

Third, providing CLECs with nondiscriminatory access to public utility infrastructure for the purpose of installing wireless telecommunications facilities will help to achieve the following public-interest goals for telecommunications services embodied in Pub. Util. Code § 709:

- Provide affordable, high quality telecommunications services to all Californians. (§ 709(a).)
- Encourage the deployment of new technologies and the equitable provision of services in a way that efficiently meets consumer needs and encourages the ubiquitous availability of a wide choice of state-of-the art services. (§ 709(c).)

⁸ 47 U.S.C. § 224(f) and FCC 11-50 at ¶¶ 12, 74-77, 136, 153.

⁹ D.98-10-058 at COLs 2 and 3, and D.16-01-046 at COLs 2 and 21.

¹⁰ WIA Comments dated May 3, 2017, at 4 and 8.

- Bridge the digital divide by encouraging expanded access to state-of-the art technologies for rural, inner-city, low-income, and disabled Californians. (§ 709(d).)
- Promote economic growth, job creation, and the substantial social benefits that result from information and communications technologies by adequate investment in the necessary infrastructure. (§ 709(e).)
- Remove barriers to competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice. (§ 709(g).)

A related and equally important public-interest goal is the widespread deployment of broadband service. Like electricity a century ago, broadband is a foundation for new industries, economic growth, global competitiveness, improved education, and a better life for all Californians. Most Californians use a wireless device as their primary Internet access tool, and many Californians live in wireless-only households. A large majority of calls to 911 are made with wireless devices.¹¹ The strong and growing demand for wireless services requires constant augmentation of wireless infrastructure. In an urban setting, the wireless infrastructure must be particularly dense in order to provide the wireless services demanded by the public, from basic voice communications to broadband intensive services. Oftentimes, the most efficient way to obtain the required density is to use existing public utility infrastructure, especially utility poles. Amending the ROW Rules to encompass CLEC wireless facilities will facilitate the ability of CLECs and their wireless service-provider customers (e.g., CMRS carriers) to meet growing demand for vital wireless services.

¹¹ Cox Comments dated May 3, 2017, at 1.

Fourth, investment in wireless infrastructure increases public safety by enhancing the public's ability to notify public-safety agencies of emergencies (e.g., vehicle accidents) and first responders' ability to communicate with each other during emergencies (e.g., wildfires). Nondiscriminatory access to public utility infrastructure will help CLECs to provide a robust network of wireless facilities for communicating life-saving information.

Finally, the current ROW Rules that apply to CLECs were adopted 20 years ago in D.98-10-058. Since then, there has been a tremendous increase in the use of wireless technology to provide telecommunications services. Just as telegraph lines were replaced by telephone lines, and copper wires supplanted by fiber-optic cables, wireline technology is being displaced by wireless technology. The ROW Rules need to be updated to reflect CLECs' use of wireless technology.

In accordance with Commission precedent, the CLEC wireless telecommunications facilities that are installed under the amended ROW Rules adopted by today's Decision may be used to provide other services (e.g., wireless broadband service) besides local exchange service.¹² We caution, however, that the amended ROW Rules do not provide unbounded access to public utility infrastructure for CLEC wireless facilities. Inherent in the ROW Rules is the presumption that CLECs' access to public utility infrastructure under the ROW Rules is limited to facilities that are necessary or useful for the provision of the telecommunications services that CLECs may provide pursuant to their Commission-issued CPCNs. The ROW Rules do not apply to facilities that are wholly unrelated to the provision of such telecommunications services.

¹² See, for example, D.15-05-028 at 6, Findings of Fact 10-14 and 19, and COLs 1-3.

Today's Decision does not provide a comprehensive list of the specific wireless telecommunications facilities that CLECs may install pursuant to the amended ROW Rules adopted by today's Decision. Such a list would become obsolete over time and thereby stifle new technologies and services. Such a list would also be inconsistent with the Commission's practice of issuing CPCNs to provide facilities-based competitive local exchange service (CLEC service) in a technology neutral manner, i.e., without regard to whether the CLEC will use wireline¹³ or wireless¹⁴ telecommunications facilities to provide CLEC service.

We emphasize that regardless of the types of wireless telecommunications facilities installed by CLECs or the services provided by CLECs, the Commission may regulate CLEC wireless facilities in accordance with (1) Pub. Util. Code §§ 701, 761, 762, 767, and 768, and (2) GOs 95 and 128.

2.2. Required Authority

2.2.1. Background

The ROW Rules provide nondiscriminatory access to public utility infrastructure for CATV corporations, CMRS carriers, and telecommunications carriers. The ROW Rules define a "telecommunications carrier" as follows:

¹³ The following are examples of recent Commission decisions that granted applications for CPCNs to provide facilities-based CLEC service. Each of the following decisions notes the applicant's intent to install fiber-optic cable facilities to provide facilities-based CLEC service as well as broadband service. Importantly, none of the following decisions requires the applicant, as condition for being granted a CPCN, to use fiber-optic cables facilities (or any particular type of facility) to provide facilities-based CLEC service: D.17-07-009, D.17-05-023, D.17-05-007, D.17-02-012, D.17-02-008, and D.16-05-034.

¹⁴ The following are examples of recent Commission decisions that granted applications for CPCNs to provide facilities-based CLEC service. Each of the following decisions notes the applicant's intent to install wireless facilities. Importantly, none of the following decisions requires the applicant, as condition for being granted a CPCN, to use wireless facilities (or any particular type of facility) to provide facilities-based CLEC service: D.17-09-009, D.17-07-009, D.17-02-008, D.16-12-018, D.16-09-024, D.16-09-025, and D.16-04-009.

“Telecommunications carrier” generally means any provider of telecommunications services that has been granted a [CPCN] by the [Commission]. These rules... exclude interexchange carriers from the definition of “telecommunications carrier.” (D.16-01-046, Appendix A, Section II, at A-25.)

CLECs are “telecommunications carriers” as defined by the ROW Rules because CLECs provide telecommunications services and have been granted a CPCN by the Commission to provide CLEC service.¹⁵

The Commission issues three types of CPCNs to provide CLEC service. These are a CPCN to provide (1) resold CLEC service, (2) limited facilities-based CLEC service,¹⁶ or (3) full facilities-based CLEC service.¹⁷ A CPCN to provide resold CLEC service does not provide authority to install or construct telecommunications facilities. In order to install telecommunications facilities on existing support structures, a CLEC must possess a CPCN to provide either limited facilities-based CLEC service or full facilities-based CLEC service. In order to construct support structures, a CLEC must possess a CPCN to provide full facilities-based CLEC service. The current ROW Rules do not specify what

¹⁵ The ROW Rules and the Cal. Pub. Util. Code do not define “telecommunications service.” The FCC defines “telecommunications service” to mean “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” (47 U.S.C. § 153(53).) The FCC defines “telecommunications” to mean “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” (47 U.S.C. § 153(50).)

¹⁶ A CPCN to provide limited facilities-based CLEC service authorizes the CLEC to install telecommunications facilities on existing support structures such as utility poles and underground conduit.

¹⁷ A CPCN to provide full facilities-based CLEC service authorizes the CLEC to (i) install telecommunications facilities on existing support structures, and (ii) and construct new support structures such as new utility poles and underground conduit, subject to review and approval of such construction pursuant to the California Environmental Quality Act.

type of CPCN a CLEC must possess in order to obtain nondiscriminatory access to public utility infrastructure.

The scope of this proceeding includes the topic of whether a CLEC that seeks to access public utility infrastructure under the ROW Rules for the purpose of installing wireless facilities must have (1) a CPCN that provides explicit authorization for wireless facilities; (2) a Wireless Identification Registration (WIR) to provide facilities-based CMRS on file at the Commission¹⁸; and/or (3) a final environmental impact report, negative declaration, or other documents that may be required by the California Environmental Quality Act (CEQA)¹⁹ for the installation or construction of wireless facilities.

2.2.2. Positions of the Parties

Those parties that addressed this topic – including CALTEL, Cox, ExteNet, the Electric IOUs, and WIA – agree that a CPCN to provide facilities-based CLEC service is sufficient to gain access to public utility infrastructure under the ROW Rules for the purpose of installing wireless facilities. Most of these parties contend that there is no need for a CLEC to possess a CPCN that provides explicit authority to install wireless facilities. No party disputes this contention.

Cox and WIA assert that CLECs should not be required to possess a WIR in order to install wireless facilities under the ROW Rules. They state that D.94-10-031 instituted the WIR so the Commission could monitor CMRS carriers, and that the requirement to possess a WIR has always been limited to CMRS

¹⁸ D.13-05-035, Attachment D, describes the process for submitting a WIR to the Commission and the required contents of a WIR.

¹⁹ CEQA is codified in Cal. Public Resources Code § 21000 *et seq.*

carriers. Cox and WIA acknowledge, however, that if a CLEC were to offer CMRS, the CLEC would have to possess a Commission-issued WIR.

Cox represents that as a CLEC, it intends to access public utility infrastructure in California for the purpose of installing antennas and other wireless facilities that are connected to Cox's fiber network. Cox anticipates that CMRS carriers will use Cox's wireless facilities to transmit radio frequency (RF) signals to end users using the CMRS carriers' FCC-licensed spectrum. Cox states that the Commission has authorized CLECs to offer the previously described service to CMRS carriers.²⁰ Cox adds that while the FCC requires a spectrum license to provide CMRS, the FCC does not require CLECs to have a spectrum license in order to install, own, or manage antennas.

Cox believes that adequate safeguards are in place to ensure that extending the ROW Rules to all CLEC wireless facilities will not lead to CLECs offering unauthorized wireless services or to degraded safety. Cox notes that at the state level, the CPUC requires CMRS carriers to obtain a WIR in order to provide CMRS in California. At the federal level, FCC rules specify which entities may provide wireless services; impose limits on equipment power levels and RF emissions to prevent interference with other licensed RF transmissions; establish maximum RF exposure limits to protect workers and the public; ensure that all RF equipment is appropriately authorized; and impose construction, marking, and lighting requirements for antennas.²¹ Cox states that if a CLEC were to provide CMRS without the appropriate federal spectrum license and

²⁰ Cox cites D.16-12-018 re: Ridge Communications, Inc.

²¹ Cox cites Title 47 the Code of Federal Regulations, Parts 2, 15, 17, 20, and 101.

CPUC-issued WIR, the CLEC would be subject to significant fines and other sanctions at both the federal and state level.²²

ExteNet comments that amending the ROW Rules to encompass all CLEC wireless facilities will not affect the Commission's responsibilities and procedures for reviewing CLEC construction activities in accordance with CEQA. No party disagrees with ExteNet's position.

2.2.3. Discussion

The issue before us is whether CLECs must possess the following in order to install wireless telecommunications facilities under the amended ROW Rules adopted by today's Decision: (1) a CPCN that provides explicit authorization for wireless facilities; (2) a WIR to provide facilities-based CMRS; and/or (3) a final environmental impact report, negative declaration, or other documents that may be required by CEQA for the installation or construction of wireless facilities. We address these matters below.

2.2.3.1 CPCN Requirement

Prior to today's Decision, the ROW Rules provided CLECs with nondiscriminatory access to public utility infrastructure for the purpose of installing (1) wireline facilities, and (2) fixed wireless facilities.²³ While the ROW Rules require CLECs to possess a CPCN, there is no requirement in the ROW Rules that a CPCN must include explicit authorization for either wireline facilities or fixed wireless facilities.

²² Cox cites 47 U.S.C. §§ 501, 503, and 510, and Pub. Util. Code § 2107.

²³ D.16-01-046, Appendix A at A-25; D.13-05-035, Attachment A at 2; and D.98-10-058 at Section III.F.2.

We conclude that amending the ROW Rules to encompass all CLEC wireless telecommunications facilities does not necessitate a new requirement in the ROW Rules that CLECs' CPCNs must include explicit authorization for wireless facilities. The central purpose of the ROW Rules is to provide nondiscriminatory access to public utility infrastructure. To achieve this goal, access must be provided in a way that is competitively neutral, technology neutral, and regulatory neutral. Such neutrality is achieved, in part, by treating all CLEC facilities – both wireline and wireless – uniformly in terms of the CPCN that is required to obtain nondiscriminatory access.

Our conclusion is supported by the Commission decisions that grant CPCNs to provide limited facilities-based CLEC service or full facilities-based CLEC service (together, “facilities-based CLEC service”). These decisions do not specify the particular types of facilities that a CLEC is authorized to use.²⁴ Consequently, CLECs have authority under their facilities-based CPCNs to install both wireline and wireless telecommunications facilities, including antennas, radios, and fiber-optic cables to transport telecommunications traffic to and from CLEC-installed antennas. This authority makes it unnecessary to

²⁴ Although applications for facilities-based CPCNs usually state that the applicant intends to install wireline and/or wireless facilities to provide CLEC service, the Commission decisions that grant facilities-based CPCNs typically do not specify any particular types of facilities or technology that must be used by the CLEC to provide CLEC service. See, for example, the Commission decisions listed in Footnotes 13 and 14 in Section 3.1.3 of today's Decision. We note that Commission decisions granting facilities-based CPCNs may limit authority to construct to specifically identified facilities when required by CEQA.

include in the ROW Rules a requirement that CLECs' CPCNs must include explicit authorization for wireless facilities.²⁵

2.2.3.2 WIR Requirement

The only entities that are required by the Commission to obtain a WIR are CMRS carriers.²⁶ CMRS is not within the scope of telecommunications services that CLECs may provide pursuant to their Commission-issued CPCNs. Therefore, we conclude that it is not necessary for CLECs to possess a WIR in order to obtain nondiscriminatory access to public utility infrastructure for the purpose of installing CLEC wireless telecommunications facilities under the amended ROW Rules adopted by today's Decision.

We note that the record of this proceeding shows that many CLECs intend to install wireless telecommunications facilities to serve CMRS carriers.²⁷ Such facilities include antennas, radios, and fiber-optic cable for RF transport and backhaul.²⁸ We affirm our previous determination that facilities-based CLECs have authority under their CPCNs to install and manage such facilities as a telecommunications service provided to CMRS carriers.²⁹

²⁵ Regardless of the ROW Rules, CLECs must possess a facilities-based CPCN in order to install wireline or wireless telecommunications facilities on existing support structures or to construct new support structures.

²⁶ D.13-05-035, Attachment D, describes the process for submitting a WIR to the Commission and the required contents of a WIR. An entity submitting a facilities-based WIR must include with its WIR the entity's FCC Federal Registration Number and Universal Licensing System wireless license call sign.

²⁷ Cox Comments dated August 4, 2017, at 10, 17-18, and 21; ExteNet Comments dated August 4, 2017, at 2-3; and WIA Comments dated August 4, 2017, at 13-14, 30-31, 38, and 42.

²⁸ CMRS carriers transmit/receive RF signals to/from end-user mobile devices using the CMRS carriers' licensed spectrum. (WIA Comments dated August 4, 2017, at 30.)

²⁹ See, for example, D.11-01-027, D.10-10-007, and D.06-01-006.

CLECs also have authority under their CPCNs to provide fixed wireless service to the public and to install wireless facilities, in addition to wireline facilities, as part of their telecommunications networks. Consistent with our existing regulatory framework for CLECs, there is no need for CLECs to possess a WIR in order to obtain nondiscriminatory access under the ROW Rules for the purpose of installing wireless facilities that are (1) used to provide fixed wireless service to the public, or (2) part of the CLECs' telecommunications networks.

2.2.3.3 CEQA Requirement

Pursuant to CEQA and Rule 2.4 of the Commission's Rules of Practice and Procedure, the Commission examines projects to determine any potential environmental impacts so that adverse effects are avoided and environmental quality is restored or enhanced to the fullest extent possible.

The amended ROW Rules adopted by today's Decision are not a "project" under CEQA because no physical construction activities are involved. Rather, today's Decision amends the ROW Rules to provide CLECs with nondiscriminatory access to public utility infrastructure for CLEC wireless facilities. Today's Decision does not adopt new construction authority for CLECs or affect the Commission's existing procedures for reviewing CLEC construction activities under CEQA. All CLECs must comply with applicable CEQA procedures and requirements prior to installing or constructing facilities.

2.3. Fees and Charges

2.3.1. Background

The ROW Rules require public utilities to negotiate with CATV corporations, CLECs, and CMRS carriers regarding the fees and charges for access to public utility infrastructure. If parties cannot agree, the ROW Rules

authorize parties to bring their dispute to the Commission where the Commission will apply a default pricing rule consisting of three components.

The first component is a “make-ready charge” that consists of the actual costs incurred by a utility to make its support structures ready for attachments. The make-ready charge may include the utility’s costs for responding to requests for space availability; preparing engineering studies for proposed attachments; rearranging existing attachments to make room for new attachments; and installing new poles and conduits, if needed, to accommodate new attachments.

The second component is an annual fee for use of support structures other than poles (e.g., underground conduits). This fee is equal to the percentage of the support structure’s usable capacity that is occupied by the attachment multiplied by the utility’s annual cost-of-ownership for the structure.

The third component is an annual fee for pole attachments. There are two pole-attachment fees. These are (1) the “per-pole fee,” and (2) the “per-foot fee.” The per-pole fee applies to (A) wireline pole attachments installed by CATV corporations and CLECs, and (B) fixed wireless facilities installed by CLECs. With the per-pole fee, the attacher pays one annual fee for all of its attachments on a utility pole. The annual fee is equal to the greater of \$2.50 or 7.4% of the utility’s annual cost-of-ownership for the host pole and supporting anchor.³⁰ As a practical matter, the 7.4% fee is always greater than \$2.50. The per-pole fee

³⁰ The annual cost-of-ownership used to calculate the 7.4% pole-attachment fee includes all of the utility’s pole-related costs. Such costs include pole-related administrative and general costs; operations and maintenance costs; straight-line depreciation; cost of capital; franchise fees and taxes; and offsetting credits for contributed capital and deferred income taxes. The annual cost-of-ownership is an average cost for all of the utility’s poles; it is not pole specific. And because the annual cost-of-ownership can change from year to year, the annual 7.4% pole-attachment fee may likewise change from year to year.

applies separately to each CATV corporation and CLEC that attaches to a pole.³¹ The per-pole fee is based on the assumption that a CATV corporation or CLEC will typically install one wireline attachment on a pole, and that each wireline attachment occupies one foot of vertical pole space.

The per-foot fee applies to all wireline and all wireless pole attachments installed by CMRS carriers (with certain exceptions and limitations). With the per-foot fee, the CMRS carrier pays an annual attachment fee for each vertical foot of pole space occupied by the CMRS carrier's attachments on a pole. The annual fee for each vertical foot is 7.4% of the utility's annual cost-of-ownership for the host pole. For example, if a CMRS carrier has multiple attachments on a pole that together occupy 4 feet of vertical space, the CMRS carrier would pay an annual pole-attachment fee of 29.6% (i.e., 4 feet x 7.4% = 29.6%).

The scope of this proceeding includes just and reasonable fees for CLEC wireless facilities. To this end, OIR 17-03-009 invited parties to comment on the following matters:

- Whether the per-foot fee for CMRS pole attachments should apply identically to CLEC wireless pole installations, including a CLEC's wireline attachments installed on the same pole as the CLEC's wireless pole attachments.
- Whether the per-pole fee adopted by D.98-10-058 for CLEC fixed wireless facilities should remain in effect, or whether all CLEC wireless pole attachments, including fixed wireless facilities, should be subject to the per-foot fee adopted by D.16-01-046 for CMRS carrier pole attachments.³²

³¹ For example, if a CATV corporation and CLEC each install a wireline attachment on a pole, each will pay an annual pole-attachment fee of 7.4%, resulting in the pole owner receiving an annual pole-attachment fee of 14.8% (i.e., 2 x 7.4% = 14.8%).

³² OIR 17-03-009 at 22-23, Topics 8 and 9.

2.3.2. Positions of the Parties

Those parties that addressed this topic agree that the existing fees and charges set forth in the ROW Rules are reasonable and should apply to CLEC wireless facilities. The only dispute is whether the per-pole fee or the per-foot fee should apply to CLEC wireless pole attachments.

AT&T and Cox state that to ensure nondiscriminatory treatment, the per-foot fee that the Commission adopted in D.16-01-046 for CMRS carrier pole attachments should apply to all CLEC wireless pole attachments, including fixed wireless facilities. On the other hand, Cox contends that Pub. Util. Code § 767.5 mandates a per-pole fee for CLEC wireline attachments.

CALTEL opines that pole-attachment fees should be applied in a nondiscriminatory manner to all telecommunications carriers. ExteNet suggests that CLECs should be free to choose either the per-pole fee or the per-foot fee.

WIA recommends that the per-foot fee apply when a CLEC has wireless facilities attached to a pole. In that situation, the per-foot fee would apply to all of the CLEC's wireline and wireless attachments on the pole, which is identical to how the per-foot fee applies to CMRS carrier pole attachments. On the other hand, when a CLEC has wireline attachments on a pole but no wireless attachments, WIA recommends that the per-pole fee continue to apply to the CLEC wireline pole attachments.

The Electric IOUs propose that the per-pole fee apply to all CLEC wireline pole attachments, and that the per-foot fee apply to all CLEC wireless pole attachments, including fixed wireless facilities.

2.3.3. Discussion

The ROW Rules authorize public utilities and attachers to negotiate the fees and charges for access to public utility infrastructure. If an agreement

cannot be reached, the ROW Rules establish default fees and charges (default fees). The issue before us is the default fees that should apply to CLEC wireless facilities.

In D.16-01-046, the Commission adopted just and reasonable default fees for CMRS carrier wireless facilities.³³ The principle of nondiscriminatory access embodied in the ROW Rules requires that the default fees for CMRS carrier wireless facilities should apply to CLEC wireless facilities if CMRS carrier wireless facilities are similar to CLEC wireless facilities.

The record of this proceeding shows that CMRS carrier wireless facilities are essentially identical to CLEC wireless facilities. Cox and WIA describe the similarity as follows:

Cox's description: "Cox's wireless pole attachment installations will be identical to those that the Commission considered in D.16-01-046 [for CMRS carriers]. Specifically, Cox's equipment is comprised of an antenna attached to a pole or pole top and the ancillary equipment directly supporting the antenna, including but not limited to a shut-off switch, power meter, battery backup, radio amplifier, power cabinet and risers for communication and power cable to connecting with the antenna. CLECs and CMRS carriers commonly buy off-the-shelf wireless equipment from the same limited group of small cell equipment manufacturers, including Nokia and Ericsson." (Cox Comments filed on May 3, 2017, at 11-12. Footnotes omitted.)

WIA's description: "The components of a CLEC wireless pole installation are the same as those identified by the Commission in D.16-01-046 for CMRS carriers, and consist of: antenna(s) attached to a pole or pole top; radio amplifier and cabinet; power supply and cabinet; ancillary equipment

³³ D.16-01-046 at COL 4.

(*e.g.*, combiners, splitters, attenuators, mounting brackets, etc.); shut-off switch; power meter; battery backup; risers for communications and power cables; and communication cable for backhaul.” (WIA Comments filed on May 3, 2017, at 11. Footnote omitted.)

For the preceding reasons, we conclude that it is reasonable to amend the ROW Rules so that the default fees adopted by D.16-01-046 for CMRS carrier facilities apply to CLEC wireless facilities, including fixed wireless facilities. The default fees adopted by today’s Decision are just and reasonable because these fees (A) provide CLECs with nondiscriminatory access to public utility infrastructure, and (B) compensate the owners of public-utility infrastructure for the costs they incur to provide such access.

The default fees adopted by today’s Decision include a pole-attachment fee of 7.4% per-foot that applies to (1) all CLEC wireless facilities, including fixed wireless facilities; and (2) a CLEC’s wireline facilities attached to the same pole as the CLEC’s own wireless facilities. The 7.4% per-foot fee for CLEC pole attachments is subject to the same conditions and limitations that apply to CMRS carrier pole attachments.³⁴ The per-pole fee will continue to apply to a CLEC’s wireline facilities that are not attached to the same poles as the CLEC’s own wireless facilities. Although today’s Decision results in CLEC wireline pole attachments being subject to the per-foot fee or the per-pole fee, depending on circumstances, the per-foot fee and the per-pole fee are identical for wireline pole attachments in most situations.³⁵

³⁴ These conditions and limitations are set forth in D.16-01-046, Appendix A, Section VI.B.2, at A-32 and A-33, and carryover to the amended ROW Rules adopted by today’s Decision.

³⁵ WIA Reply Comments dated August 18, 2017, at 4.

We disagree with Cox's position that Pub. Util. Code § 767.5 mandates the per-pole fee for CLEC wireline pole attachments. This statute does not mention, let alone mandate, any particular pole-attachment fee for CLECs.

2.4. Safety and Reliability

2.4.1. Background

To maintain safety and reliability, the ROW Rules stipulate that access to public utility infrastructure "shall be governed at all times by... 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.³⁶"

The scope of this proceeding includes the topic of whether additional regulations are necessary to ensure that CLEC wireless facilities are designed, constructed, operated, and maintained to (i) protect worker safety and public safety, and (ii) preserve the reliability of co-located utility facilities.

2.4.2. Positions of the Parties

Those parties that addressed this topic believe the FCC's and the Commission's existing regulations together ensure that CLEC wireless facilities are safe and do not adversely affect co-located utility facilities (e.g., power lines). No party asserts that extending the ROW Rules to all CLEC wireless telecommunications facilities will negatively affect safety or reliability.

SED cautions that the Commission's safety regulations are revised regularly in response to changing conditions, new technology, legislative

³⁶ D.16-01-046, Appendix A, Section XI, at A-43.

mandates, and experience. Consequently, CLEC wireless facilities may become subject to new Commission safety regulations as time goes by.

2.4.3. Discussion

The FCC and the CPUC have split jurisdiction regarding the safety and reliability of wireless facilities. In general, the FCC regulates RF power levels, emissions, and exposure limits. The CPUC regulates the design, installation, operation, and maintenance of pole attachments. The record of this proceeding establishes that existing FCC and CPUC regulations together ensure that CLEC wireless facilities are safe and do not interfere with the operation and reliability of co-located utility facilities such as communications lines and power lines.

Based on the record of this proceeding, we find there is no need for additional regulations at this time to ensure that CLEC wireless facilities are designed, constructed, operated, and maintained to (1) protect worker safety and public safety, and (2) preserve the reliability of co-located utility facilities. We remind CLECs that they have a statutory duty under Pub. Util. Code § 451 to furnish and maintain wireless facilities that are safe for their employees and the public.³⁷ This statutory duty includes compliance with General Orders 95 and 128, and with any reasonable safety and construction standards that may be required by the owners of public utility infrastructure.

As noted by SED, the Commission's safety regulations are revised regularly in response to changing conditions, new technology, legislative

³⁷ Pub. Util. Code § 451 states, in relevant part, as follows: "Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities... as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public."

mandates, and experience. The Commission can and will adopt new safety regulations for wireless facilities when necessary.

2.5. Adopted Amendments to the Text of the ROW Rules

Today's Decision adopts the following amendments to the text of the ROW Rules. First, we amend the definition of "telecommunications carrier" in Section II of the ROW Rules so that the definition explicitly incorporates facilities-based CLECs. The amended definition of "telecommunications carrier" is shown below in redline form:

"Telecommunications carrier" generally means any provider of telecommunications services that has been granted a certificate of public convenience and necessity (CPCN) by the California Public Utilities Commission (Commission). The definition of "telecommunications carrier" includes Competitive Local Exchange Carriers (CLEC) that have been granted a CPCN by the Commission to provide facilities-based competitive local exchange service. These rules, however, exclude interexchange carriers from the definition of "telecommunications carrier."

Second, we revise Section IV.D.1 of the ROW Rules so that it applies to both wireline and wireless facilities installed by telecommunications carriers.

Third, we make non-substantive revisions to Section VI.B.1 of the ROW Rules to better reflect the purpose and intent of this section.

Fourth, we add the term "cable TV company" to Section VI.B.1.a to correct the erroneous omission of this term.

Fifth, we add a new Section VI.B.1.b.3 that separately lists the annual pole-attachment fees for poles that host a CLEC's wireless facilities so that it is clear that such fees are distinct from, and do not apply to, poles that host only a CLEC's wireline attachments. The existing sections are renumbered, as necessary, to reflect the addition of the new Section VI.B.1.b.3.

Sixth, we amend Sections VI.B.1.b.1, VI.B.1.c, and VI.B.1.d to incorporate (i) cross references to the newly added Section VI.B.1.b.3, and (ii) other conforming changes.

Seventh, we replace the term “CLC” with “CLEC” in Section VII.C.

Finally, we make the following non-substantive revisions:

- Formatting changes to reduce the amount of paper needed to print the ROW Rules.
- Adding hyphens to the terms “cost-of-ownership” and “right-of-way” in cases where hyphens are not included.

The adopted amendments to the text of the ROW Rules are shown in redline form in Appendix A of today’s Decision, and in final form (without redline) in Appendix B.

2.6. Regulatory Accounting for Public Utilities

The owners of public utility infrastructure will receive revenues from the fees and charges that CLECs pay pursuant to the amended ROW Rules adopted by today’s Decision. Consistent with the regulatory accounting that we adopted in D.16-01-046, public utilities shall record the annual attachment fees paid by CLECs as Other Operating Revenues, and record the make-ready charges paid by CLECs as either Other Operating Revenue or contributed plant, depending on whether the utility’s make-ready expenditures are expensed or capitalized. This accounting treatment benefits the customers of cost-of-service public utilities by reducing the revenue requirement for cost of service.

2.7. Certification of Compliance with 47 U.S.C. § 224(c)

Pursuant to 47 U.S.C. § 224(c)(1), the FCC does not have “jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way... in any case where such matters are regulated by a State.” In

D.98-10-058, the Commission certified that it regulates such matters in conformance with 47 U.S.C. §§ 224(c)(2) and (3).³⁸ The Commission reiterated its certification in D.16-01-046.³⁹ We affirm our certification in today's Decision.

2.8. Implementation of the Amended ROW Rules

Pursuant to Rule 6.3(a) of the Commission's Rules of Practice and Procedure, the amendments to the ROW Rules adopted by today's Decision shall apply prospectively beginning 120 days after the effective date of today's Decision. The adopted amendments do not apply to the contractual rates, terms, and conditions for existing CLEC installations.

3. Coordination with I.17-06-027 and R.17-06-028

Today's Decision is being issued in the consolidated dockets of R.17-03-009, I.17-06-027, and R.17-06-028. Today's Decision closes the docket for R.17-03-009. The dockets for I.17-06-027 and R.17-06-028 remain open.

Pursuant to the Scoping Memo for R.17-03-009, the amended ROW Rules adopted by today's Decision may be superseded by regulations that the Commission may adopt in I.17-06-027 and R.17-06-028.⁴⁰

4. Comments on the Proposed Decision

The proposed decision of the assigned Commissioner in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code, and comments were allowed pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on _____, by _____. Reply comments were filed on _____, by _____.

³⁸ D.98-10-058 at COLs 2 and 3.

³⁹ D.16-01-046 at COL 21.

⁴⁰ *Assigned Commissioner's Scoping Memo and Ruling* for R.17-03-009 dated June 26, 2017, at 6.

5. Assignment of the Proceeding

Michael Picker is the assigned Commissioner for this proceeding and Timothy Kenney is the assigned Administrative Law Judge.

Findings of Fact

1. The purpose of the ROW Rules is to provide CATV corporations, CMRS carriers, and telecommunications carriers with nondiscriminatory access to public utility infrastructure at reasonable rates, terms, and conditions.
2. The ROW Rules currently apply to CLEC wireline facilities and fixed wireless facilities, but not to other CLEC wireless facilities.
3. The ROW Rules apply to CMRS carrier wireless facilities generally.
4. CLEC wireless telecommunications facilities are essentially identical to CMRS carrier wireless facilities.
5. Amending the ROW Rules to provide nondiscriminatory access to public utility infrastructure for all CLEC wireless telecommunications facilities will benefit California for the reasons stated in Section 3.1.3 of today's Decision.
6. Existing FCC and CPUC regulations together ensure that CLEC wireless facilities are safe and do not interfere with the operation or reliability of co-located utility facilities such as communications lines and power lines.
7. There is no need at this time for additional regulations to ensure that CLEC wireless facilities do not adversely affect worker safety, public safety, or the reliability of co-located utility facilities.
8. The amended ROW Rules in Appendix B of today's Decision are just, reasonable, and in the public interest because they provide nondiscriminatory access to public utility infrastructure for CLEC wireless telecommunications facilities; protect the safety of workers and the public; and preserve the reliability of co-located utility facilities.

9. The owners of public utility infrastructure will receive revenues from the fees and charges that CLECs pay pursuant to the amended ROW Rules adopted by today's Decision.

Conclusions of Law

1. For the reasons stated in Section 3.1.3 of today's Decision, it is in the public interest to amend the ROW Rules to apply to all CLEC wireless facilities that are necessary or useful for the provision of telecommunications services that CLECs may provide pursuant to their Commission-issued CPCNs.

2. CLEC wireless telecommunications facilities may be used to provide services (e.g., wireless broadband service) besides the telecommunications services that CLECs may provide pursuant to their Commission-issued CPCNs.

3. CLECs' nondiscriminatory access to public utility infrastructure under the ROW Rules is limited to facilities that are necessary or useful for the provision of the telecommunications services that CLECs may provide pursuant to their Commission-issued CPCNs. The ROW Rules do not apply to facilities that are wholly unrelated to the provision of such telecommunications services.

4. The Commission may regulate CLEC wireless facilities in accordance with (i) Pub. Util. Code §§ 701, 761, 762, 767, and 768, and (ii) GOs 95 and 128.

5. Facilities-based CLECs have authority under their CPCNs to provide CLEC service using both wireline and wireless telecommunications facilities.

6. CMRS is not within the scope of telecommunications services that CLECs may provide pursuant to their Commission-issued CPCNs.

7. The ROW Rules should not include a new requirement that facilities-based CLECs, in order to access public utility infrastructure under the ROW Rules for the purpose of installing wireless facilities, must possess (i) a CPCN that includes explicit authority to provide CLEC service using wireless facilities, or (ii) a WIR.

8. The amended ROW Rules adopted by today's Decision do not affect the Commission's existing procedures and requirements for reviewing CLEC construction activities under CEQA.

9. All CLECs must comply with applicable CEQA procedures and requirements prior to installing or constructing wireless facilities.

10. Because CMRS carrier wireless facilities are substantially similar to CLEC wireless facilities, the principle of nondiscriminatory access embodied in the ROW Rules requires that the default fees adopted by D.16-01-046 for CMRS carrier wireless facilities should apply to CLEC wireless facilities, including fixed wireless facilities.

11. The default fees adopted by today's Decision for CLEC wireless facilities are just and reasonable because these fees provide CLECs with non-discriminatory access to public utility infrastructure and compensate the owners of public utility infrastructure for their costs to provide such access.

12. The 7.4% per-foot fee should apply to (i) CLEC wireless pole attachments, including fixed wireless facilities, and (ii) a CLEC's wireline facilities attached to the same poles as the CLEC's own wireless facilities. The 7.4% per-foot fee for CLEC pole attachments should be subject to the same conditions and limitations adopted by D.16-01-046 for CMRS carrier pole attachments.

13. The 7.4% per-pole fee should apply to a CLEC's wireline facilities that are not attached to the same poles as the CLEC's own wireless facilities.

14. CLECs have a statutory duty under Pub. Util. Code § 451 to furnish and maintain wireless facilities that are safe for their employees and the public. This statutory duty includes compliance with (i) General Orders 95 and 128, and (ii) any reasonable safety and construction standards that may be required by the owners of public utility infrastructure.

15. Public utilities should record attachment fees for CLEC facilities as Other Operating Revenues, and record make-ready charges for CLEC facilities as either Other Operating Revenue or contributed plant, depending on whether the utility's make-ready expenditures are expensed or capitalized.

16. Pursuant to 47 U.S.C. § 224(c)(1), the FCC does not have jurisdiction with respect to rates, terms, and conditions for access to public utility infrastructure where such matters are regulated by a State. The CPUC has affirmatively regulated such matters in accordance with 47 U.S.C. §§ 224(c)(1), (2) and (3) since the CPUC's adoption of the ROW Rules in D.98-10-058.

17. The amended text of the ROW Rules set forth in Appendix B of today's Decision is reasonable and should be adopted.

18. The amendments to the ROW Rules adopted by today's decision should apply prospectively beginning 120 days after the effective date of today's Decision. The adopted amendments should not apply to the contractual rates, terms, and conditions for existing CLEC installations.

19. The amended ROW Rules adopted by today's Decision may be superseded by regulations that the Commission may adopt in I.17-06-027 and R.17-06-028.

20. The following Order should be effective immediately so that the public may benefit expeditiously from the amended ROW Rules adopted by the Order.

21. I.17-06-027 and R.17-06-028 should remain open.

O R D E R**IT IS ORDERED** that:

1. The amended Right-of-Way Rules in Appendix B of this Decision are adopted. The adopted amendments apply to all Competitive Local Exchange Carriers' (CLEC) wireless facilities that are necessary or useful for the provision of telecommunications services authorized by CLECs' certificates of public convenience and necessity.
2. The amended Right-of-Way Rules adopted by this Decision shall apply prospectively beginning 120 days after the effective date of this Order, stated below. The adopted amendments do not apply to the contractual rates, terms, and conditions for existing Competitive Local Exchange Carrier installations.
3. Public utilities shall record the fees and charges that they receive pursuant to the amended Right-of-Way Rules adopted by this Decision as follows:
 - (i) Record attachment fees as Other Operating Revenues;
 - (ii) record make-ready charges as Other Operating Revenue if the utility's associated make-ready costs are expensed; and
 - (iii) record make-ready charges as contributed plant if the utility's associated make-ready costs are capitalized.
4. The amendments to the Right-of-Way Rules that are adopted by this Decision may be superseded by regulations that the Commission may adopt in the consolidated dockets of Investigation 17-06-027 and Rulemaking 17-06-028.

5. The docket for Rulemaking 17-03-009 is closed. The consolidated dockets for Investigation 17-06-027 and Rulemaking 17-06-028 remain open.

This Order is effective today.

Dated _____, at San Francisco, California

Appendix A: Adopted Amendments to the ROW Rules (redline)

Note: The amendments to the Right-of-Way Rules adopted by today's Decision begin on page A-4. The amendments are shown in redline form with bold font and underline for new text, and bold font and strikethrough for deleted text. The following non-substantive changes are not shown in redline: (i) Inserting hyphens into the terms "cost-of-ownership" and "right-of-way" in cases where hyphens are not already included; and (ii) formatting changes to reduce the amount of paper needed to print the Right-of-Way Rules.

Adopted Amendments – Redline Form

**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
- V. NONDISCLOSURE
 - A. DUTY NOT A DISCLOSE PROPRIETARY INFORMATION
 - B. SANCTIONS FOR VIOLATIONS OF NONDISCLOSURE AGREEMENTS
- VI. PRICING AND TARIFFS GOVERNING ACCESS
 - A. GENERAL PRINCIPLE OF NONDISCRIMINATION
 - B. MANNER OF PRICING ACCESS
 - C. CONTRACTS
 - D. UNAUTHORIZED ATTACHMENTS
- 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

These rules govern access to public utility rights-of-way and support structures by telecommunications carriers, Commercial Mobile Radio Service (CMRS) 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

"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.

"Support structure" includes, but is not limited to, a utility distribution pole, anchor, duct, conduit, manhole, or handhole.

"Pole attachment" means any attachment to surplus space, or use of excess capacity, by a telecommunications carrier or CMRS carrier for a communications system on or in any support structure owned, controlled, or used by a public utility.

"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 or CMRS carrier for a pole attachment.

"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.

"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.

"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.

“Rearrangements” means work performed, at the request of a telecommunications carrier or CMRS 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 or CMRS 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 or CMRS carrier may request replacement of an existing structure with a different or larger support structure.

“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.

“Telecommunications carrier” generally means any provider of telecommunications services that has been granted a certificate of public convenience and necessity (**CPCN**) by the California Public Utilities Commission (**Commission**). **The definition of “telecommunications carrier” includes Competitive Local Exchange Carriers (CLEC) that have been granted a CPCN by the Commission to provide facilities-based competitive local exchange service.** These rules, however, exclude interexchange carriers from the definition of “telecommunications carrier.”

“Commercial Mobile Radio Service (CMRS) carrier” is an entity that holds (1) a current Wireless Identification Registration with the California Public Utilities Commission, or (2) a current Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission that authorizes the holder to provide Commercial Mobile Radio Service.

“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.

“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.

“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.

“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.

“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 utility shall promptly respond in writing to a written request for information (“request for information”) from a telecommunications carrier, CMRS 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.

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.

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.

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.

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 telecommunications carrier, CMRS 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, CMRS 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, CMRS 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, CMRS carrier, or cable TV company must obtain written permission from the owner of that property before attaching or installing its facilities. The telecommunication carrier, CMRS 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, CMRS carrier's, or the cable TV company's use or attachment.

C. 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 telecommunications carrier's, CMRS 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.

D. 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** telecommunications **carrier facilities-communications**, CMRS facilities, 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, CMRS 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 telecommunications carrier's, CMRS 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, CMRS 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, CMRS carrier, or cable TV company must arrange a specific schedule with the electric utility. The telecommunications carrier, CMRS 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, CMRS carrier, or cable TV company must allow the electric utility, in the utility's discretion to inspect the 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

carrier, CMRS carrier, 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', CMRS carrier's, 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, CMRS 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 judgment, 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, CMRS carriers, 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, CMRS 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, CMRS 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, CMRS 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 cannot reach an agreement with and a telecommunications carrier, CMRS carrier, or cable TV company, or associations thereof, therefore, are unable to agree upon regarding 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, cable TV company, or CMRS carrier.
- b. An annual recurring fee computed as follows:
 - (1) Except as provided in Section 3 below, fFor 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 each pole and supporting anchor actually used by a CMRS carrier, the annual fee for each foot of vertical pole space occupied by the CMRS installation 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. The per-foot fee for CMRS installations is subject to the following conditions and limitations:
 - (i) The vertical pole space occupied by each CMRS attachment shall be rounded to the nearest whole foot, with a 1-foot minimum.
 - (ii) The 7.4% per-foot fee applies to the pole space that a CMRS attachment renders unusable for non-CMRS attachments, including (A) the pole space that is physically occupied by the CMRS attachment; and (B) any pole space that cannot be used by communication and/or supply conductors due solely to the installation of the CMRS attachment.
 - (iii) The 7.4% per-foot fee applies to CMRS attachments anywhere on the pole.
 - (iv) The 7.4% per-foot fee applies once to each foot of pole height. If multiple CMRS pole attachments are placed on different sides of a pole in the same horizontal plane, the 7.4% per-foot attachment fee shall be allocated to each CMRS attachment in the same horizontal plane based on the total number of attachments in the horizontal plane.

- (v) The total pole-attachment fees for all CMRS attachments on a particular pole shall not exceed 100% of the pole's cost-of-ownership, less the proportion of the pole's cost-of-ownership that is allocable to the pole space occupied by all other pole attachments.
 - (vi) The 7.4% per-foot fee does not apply to electric meters, risers, and conduit associated with CMRS installations.
- (3) For each pole and supporting anchor actually used by a telecommunications carrier for wireless attachments, the annual fee for each foot of vertical pole space occupied by the telecommunications carrier's wireless and wireline attachments 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. The per-foot fee for the telecommunications carrier's wireless and wireline attachments is subject to the following conditions and limitations:
- (i) The vertical pole space occupied by each of the telecommunications carrier's wireless and wireline attachments shall be rounded to the nearest whole foot, with a 1-foot minimum.
 - (ii) The 7.4% per-foot fee applies to the pole space that the telecommunications carrier's attachment renders unusable for other pole attachments, including (A) the pole space that is physically occupied by the telecommunications carrier's attachment; and (B) any pole space that cannot be used by communication and/or supply conductors due solely to the installation of the telecommunications carrier's pole attachment.
 - (iii) The 7.4% per-foot fee applies to the telecommunications carrier's wireless and wireline attachments anywhere on the pole.
 - (iv) The 7.4% per-foot fee applies once to each foot of pole height. If multiple pole attachments are placed on different sides of a pole in the same horizontal plane, the 7.4% per-foot attachment fee shall be allocated to each telecommunications carrier pole attachment in

the same horizontal plane based on the total number of attachments in the horizontal plane.

- (v) The total pole-attachment fees for all telecommunications carrier attachments on a particular pole shall not exceed 100% of the pole's cost-of-ownership, less the proportion of the pole's cost-of-ownership that is allocable to the pole space occupied by all other pole attachments.
- (vi) The 7.4% per-foot fee does not apply to electric meters, risers, and conduit associated with telecommunications carrier wireless pole installations.
- (vii) The annual fee in Section VI.B.1.b.1, above, shall apply to a telecommunications carrier that has only wireline facilities attached to a pole, even if another telecommunications carrier has wireless facilities attached to the same pole.

- (4) For support structures used by the telecommunications carrier, CMRS 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, CMRS 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, CMRS carrier's, or cable TV company's equipment.
- c. Except as allowed by Sections VI.B.1.b.2 and 3, above, a utility may not charge a telecommunications carrier, CMRS 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.
- d. Except as allowed by Sections VI.B.1.b.2 and 3, above, **A a** utility may not charge a telecommunications carrier or CMRS carrier a higher rate for access to its rights-of-way and support structures

than it would charge a similarly situated telecommunications carrier or CMRS carrier 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, CMRS 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, CMRS 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, CMRS 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, CMRS 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, CMRS 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 CLEC, CMRS carrier, 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).

A. 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.

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.

14. **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.
15. **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.
16. **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.
17. **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.
18. **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.
19. **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.

20. **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.
21. **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.
22. **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.
23. 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, CMRS 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, CMRS 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

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.

- A. 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)

Appendix B: Adopted Amendments to the ROW Rules (final)

Appendix B shows the amended ROW Rules adopted by today's Decision in final form (i.e., without redline).

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

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I. PURPOSE AND SCOPE OF RULES

These rules govern access to public utility rights-of-way and support structures by telecommunications carriers, Commercial Mobile Radio Service (CMRS) 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

"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.

"Support structure" includes, but is not limited to, a utility distribution pole, anchor, duct, conduit, manhole, or handhole.

"Pole attachment" means any attachment to surplus space, or use of excess capacity, by a telecommunications carrier or CMRS carrier for a communications system on or in any support structure owned, controlled, or used by a public utility.

"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 or CMRS carrier for a pole attachment.

"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.

"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.

“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.

“Rearrangements” means work performed, at the request of a telecommunications carrier or CMRS 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 or CMRS 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 or CMRS carrier may request replacement of an existing structure with a different or larger support structure.

“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.

“Telecommunications carrier” generally means any provider of telecommunications services that has been granted a certificate of public convenience and necessity (CPCN) by the California Public Utilities Commission (Commission). The definition of “telecommunications carrier” includes Competitive Local Exchange Carriers (CLEC) that have been granted a CPCN by the Commission to provide facilities-based competitive local exchange service. These rules, however, exclude interexchange carriers from the definition of “telecommunications carrier.”

“Commercial Mobile Radio Service (CMRS) carrier” is an entity that holds (1) a current Wireless Identification Registration with the California Public Utilities Commission, or (2) a current Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission that authorizes the holder to provide Commercial Mobile Radio Service.

“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.

“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.

“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.

“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.

“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 utility shall promptly respond in writing to a written request for information (“request for information”) from a telecommunications carrier, CMRS 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.

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.

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.

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.

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 telecommunications carrier, CMRS 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, CMRS 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, CMRS 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, CMRS carrier, or cable TV company must obtain written permission from the owner of that property before attaching or installing its facilities. The telecommunication carrier, CMRS 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, CMRS carrier's, or the cable TV company's use or attachment.

C. 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 telecommunications carrier's, CMRS 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.

D. 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 telecommunications carrier facilities, CMRS facilities, 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, CMRS 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 telecommunications carrier's, CMRS 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, CMRS 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, CMRS carrier, or cable TV company must arrange a specific schedule with the electric utility. The telecommunications carrier, CMRS 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, CMRS carrier, or cable TV company must allow the electric utility, in the utility's discretion to inspect the 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 carrier, CMRS carrier, 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', CMRS carrier's, 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, CMRS 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 judgment, 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, CMRS carriers, 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, CMRS 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, CMRS 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, CMRS 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 cannot reach an agreement with a telecommunications carrier, CMRS carrier, or cable TV company, or associations thereof, regarding 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, cable TV company, or CMRS carrier.
 - b. An annual recurring fee computed as follows:
 - (1) Except as provided in Section 3 below, 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 each pole and supporting anchor actually used by a CMRS carrier, the annual fee for each foot of vertical pole space occupied by the CMRS installation 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. The per-foot fee for CMRS installations is subject to the following conditions and limitations:
 - (i) The vertical pole space occupied by each CMRS attachment shall be rounded to the nearest whole foot, with a 1-foot minimum.
 - (ii) The 7.4% per-foot fee applies to the pole space that a CMRS attachment renders unusable for non-CMRS attachments, including (A) the pole space that is physically occupied by the CMRS attachment; and (B) any pole space that cannot be used by communication and/or supply conductors due solely to the installation of the CMRS attachment.
 - (iii) The 7.4% per-foot fee applies to CMRS attachments anywhere on the pole.
 - (iv) The 7.4% per-foot fee applies once to each foot of pole height. If multiple CMRS pole attachments are placed on different sides of a pole in the same horizontal plane, the 7.4% per-foot attachment fee shall be allocated to each CMRS attachment in the same horizontal plane based on the total number of attachments in the horizontal plane.
 - (v) The total pole-attachment fees for all CMRS attachments on a particular pole shall not exceed 100% of the pole's cost-of-ownership, less the proportion of the pole's cost-of-ownership that is allocable to the pole space occupied by all other pole attachments.

- (vi) The 7.4% per-foot fee does not apply to electric meters, risers, and conduit associated with CMRS installations.
- (3) For each pole and supporting anchor actually used by a telecommunications carrier for wireless attachments, the annual fee for each foot of vertical pole space occupied by the telecommunications carrier's wireless and wireline attachments 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. The per-foot fee for the telecommunications carrier's wireless and wireline attachments is subject to the following conditions and limitations:
- (i) The vertical pole space occupied by each of the telecommunications carrier's wireless and wireline attachments shall be rounded to the nearest whole foot, with a 1-foot minimum.
 - (ii) The 7.4% per-foot fee applies to the pole space that the telecommunications carrier's attachment renders unusable for other pole attachments, including (A) the pole space that is physically occupied by the telecommunications carrier's attachment; and (B) any pole space that cannot be used by communication and/or supply conductors due solely to the installation of the telecommunications carrier's pole attachment.
 - (iii) The 7.4% per-foot fee applies to the telecommunications carrier's wireless and wireline attachments anywhere on the pole.
 - (iv) The 7.4% per-foot fee applies once to each foot of pole height. If multiple pole attachments are placed on different sides of a pole in the same horizontal plane, the 7.4% per-foot attachment fee shall be allocated to each telecommunications carrier pole attachment in the same horizontal plane based on the total number of attachments in the horizontal plane.
 - (v) The total pole-attachment fees for all telecommunications carrier attachments on a particular

pole shall not exceed 100% of the pole's cost-of-ownership, less the proportion of the pole's cost-of-ownership that is allocable to the pole space occupied by all other pole attachments.

- (vi) The 7.4% per-foot fee does not apply to electric meters, risers, and conduit associated with telecommunications carrier wireless pole installations.
 - (vii) The annual fee in Section VI.B.1.b.1, above, shall apply to a telecommunications carrier that has only wireline facilities attached to a pole, even if another telecommunications carrier has wireless facilities attached to the same pole.
- (4) For support structures used by the telecommunications carrier, CMRS 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, CMRS 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, CMRS carrier's, or cable TV company's equipment.
- c. Except as allowed by Sections VI.B.1.b.2 and 3, above, a utility may not charge a telecommunications carrier, CMRS 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.
 - d. Except as allowed by Sections VI.B.1.b.2 and 3, above, a utility may not charge a telecommunications carrier or CMRS carrier a higher rate for access to its rights-of-way and support structures than it would charge a similarly situated telecommunications carrier or CMRS carrier 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, CMRS 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, CMRS 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, CMRS 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, CMRS 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, CMRS 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 CLEC, CMRS carrier, 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).

A. 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.

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.
 14. **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.

15. **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.
16. **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.
17. **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.
18. **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.

19. **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.
 20. **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.
 21. **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.
 22. **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.
 23. 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, CMRS 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, CMRS 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

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.

- A. 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 B)