STATE OF CALIFORNIA EDMUND G. ...overnor

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

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TO PARTIES OF RECORD IN PETITION 16-07-009:

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 February 9, 2017 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/ KAREN V. CLOPTON
Karen V. Clopton, Chief
Administrative Law Judge

KVC:ek4
Attachment

Decision **PROPOSED DECISION OF COMMISSIONER PICKER**
(Mailed 1/9/2017)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition to Adopt, Amend, or Repeal General Order 95 Pursuant to Pub. Util. Code Section 1708.5.	Petition 16-07-009 (Filed July 15, 2016)

DECISION DENYING THE PETITION TO OPEN A RULEMAKING PROCEEDING TO EXTEND THE RIGHT-OF-WAY RULES ADOPTED BY DECISION 16-01-046 TO CABLE TELEVISION CORPORATIONS

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DECISION DENYING THE PETITION TO OPEN A RULEMAKING PROCEEDING TO EXTEND THE RIGHT-OF-WAY RULES ADOPTED BY DECISION 16-01-046 TO CABLE TELEVISION CORPORATIONS

Summary

This decision denies Petition 16-07-009 wherein the California Cable & Telecommunications Association (CCTA) asks the Commission to institute a rulemaking proceeding to extend the Right-of-Way Rules (ROW Rules) adopted by Decision (D.) 16-01-046 for commercial mobile radio service (CMRS) carriers to wireless facilities attached to utility poles by cable television (CATV) corporations. The Petition is denied because CATV corporations do not have a right under the California Public Utilities Code to install wireless pole attachments, because the Petition is largely moot, and because the Petition is fundamentally ambiguous.

We recognize that CATV corporations may wish to provide wireless and wireline communication services, and we encourage them to do so. Although the Petition is denied, CATV corporations may use existing procedures to obtain nondiscriminatory access to utility poles for both wireless pole attachments and wireline pole attachments that are used to provide communication services. In particular, CATV corporations may obtain status as a CMRS carrier by filing a Wireless Identification Registration (WIR). After a WIR is accepted, a CATV corporation may attach wireless facilities to utility poles in accordance with the CMRS ROW Rules adopted by D.16-01-046 and offer CMRS service. Similarly, CATV corporations may file an application for a certificate of public convenience and necessity (CPCN) to provide facilities-based local exchange service. After the Commission has granted a CPCN, a CATV corporation may

attach wireline facilities to utility poles in accordance with the ROW Rules adopted by D.98-10-058 and offer wireline communication services.

1. Procedural Background

The California Cable & Telecommunications Association (CCTA)[1] filed Petition (P.) 16-07-009 on July 15, 2016, pursuant to Pub. Util. Code § 1708.5, which allows "interested persons to petition the commission to adopt, amend, or repeal a regulation." In P.16-07-009, CCTA asks the California Public Utilities Commission (Commission) to institute a rulemaking proceeding for the purpose of extending the Right-of-Way Rules (ROW Rules) adopted by Decision (D.) 16-01-046 for commercial mobile radio service (CMRS) facilities to wireless facilities attached to utility poles by cable television corporations. Decision 16-01-046 was issued in Rulemaking (R.) 14-05-001.

CCTA served a copy of P.16-07-009 on the service list for Rulemaking (R.) 14-05-001. Notice of P.16-07-009 appeared in the Commission's Daily Calendar on July 21, 2016. There were no responses.

2. Regulatory Background

Public utilities are required by Title 47 of the United States Code, at Section 224(f) (47 U.S.C. § 224(f)), to provide "a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by" the utility,[2] unless a utility cannot provide access because of "insufficient capacity and for reasons of safety,

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[1] CCTA is a trade association of incumbent cable television corporations.

[2] 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."

reliability and generally applicable engineering principles.[3]" The Federal Communications Commission (FCC) is required by 47 U.S.C. § 224(b)(1) to "regulate the rates, terms, and conditions" for nondiscriminatory access to utility poles. The FCC's regulations for nondiscriminatory access are set forth in Title 47 of the Code of Federal Regulations, Sections 1.1401 - 1.1424, (47 C.F.R. §§ 1.1401-1.1424). The FCC has determined that the benefits and protections of 47 U.S.C. § 224 apply to wireless carriers and their wireless pole attachments.[4]

A State may opt to regulate pole attachments under state law pursuant to 47 U.S.C. § 224(c)(1) by certifying to the FCC that the State has enacted regulations that meet the following criteria 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.
>
> (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

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[3] *See also* 47 U.S.C. § 251(b)(4).

[4] *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, *Report and Order and Order on Reconsideration*, 26 FCC Rcd. 5240, 52 Communications Reg. (P&F) 1027, FCC 11-50 (rel. Apr. 7, 2011) (hereafter "FCC 11-50") at ¶¶ 12, 77, and 153.

(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.

A State's regulation of pole attachments does not have to conform to the FCC's rules. As set forth in 47 U.S.C. § 253(b), a State may adopt "on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

California Public Utilities Code Sections (Pub. Util. Code §§) 451, 701, 767, 767.5, 767.7, and 1702, *inter alia*, authorize the Commission to regulate public utilities and to establish reasonable rates, terms, and conditions for joint use of utility poles, ducts, conduits, and rights-of-way (together, "utility right-of-way" or "ROW"). In D.98-10-058, the Commission adopted rules to provide facilities-based competitive local exchange carriers (CLECs)[5] and cable television (CATV) corporations with nondiscriminatory access to utility ROW that is owned or controlled by (1) large and midsized incumbent local exchange carriers; and (2) major investor-owned electric utilities. D.98-10-058 also provided certification to the FCC that the Commission regulates the rates, terms, and conditions for nondiscriminatory access to utility ROW in conformance with

[5] D.98-10-058 uses the terms "competitive local carrier" and "CLC" to identify a competitive local exchange carrier.

47 U.S.C. §§ 224(c)(2) and (3). As a result of these actions, the Commission has exercised its option to regulate nondiscriminatory access to utility ROW under California state law.

The Commission's rules for nondiscriminatory access to utility ROW (referred to as the "ROW Rules") address the following matters:

1. Requests for information by CLECs and CATV corporations regarding the availability of a utility's ROW.
2. Requests to access a utility's ROW by CLECs and CATV corporations, including the contents of the requests; deadlines for utility responses and the contents of utility responses; timeframe for the utility to complete make-ready work; and the use of qualified personnel to perform make-ready work, rearrangements, attachments, and installations.
3. Protections for proprietary information.
4. Fees and contracts for access to utility ROW.
5. Reservations of ROW capacity for future use.
6. Access to customer premises.
7. Procedures for expedited resolution of disputes.
8. Safety standards for access to utility ROW, including pole attachments.

The ROW Rules are set forth in D.98-10-058, at Appendix A. Significantly, D.98-10-058 did not extend the ROW Rules to commercial mobile radio service (CMRS) carriers.[6] In D.16-01-046, the Commission revised its ROW Rules to provide CMRS carriers with nondiscriminatory access to public utility ROW.

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[6] CMRS includes cellular services, personal communication services, wide-area specialized mobile radio services, and two-way radiotelephone services. (D.98-09-024 at Footnote 1.) CMRS carriers are "telephone corporations" and therefore public utilities subject to the Commission's jurisdiction under Pub. Util. Code §§ 216, 233, and 234. 47 U.S.C. § 332(c)(3)(A) limits State jurisdiction over CMRS carriers to "other terms and conditions" of CMRS service. These "other terms and conditions" include facility siting and public safety.

With one exception, the revised ROW Rules provide CMRS carriers with the same access to utility ROW as CLECs and CATV corporations. The one exception concerns pole-attachment fees. Prior to D.16-01-046, the ROW Rules allowed public utilities to charge each CLEC and CATV pole installation an annual attachment fee equal to 7.4% of a utility's cost-of-ownership for the host pole. This annual fee is based on the assumption that a CLEC or CATV pole installation typically consists of a single attachment that occupies one foot of vertical space on a pole.

The Commission determined in D.16-01-046 that CMRS pole installations typically occupy more pole space than CLEC and CATV pole installations. To reflect the greater use of pole space by CMRS installations, D.16-01-046 revised the ROW Rules to allow public utilities to charge an annual pole-attachment fee of 7.4% for each foot of vertical pole space occupied by CMRS installations.[7] This annual 7.4% "per-foot fee" for CMRS pole installations is distinct from the annual 7.4% "per-pole fee" that applies to CLECs' and CATV corporations' pole installations pursuant to D.98-10-058 and Pub. Util. Code § 767.5(a)(3).

Of importance to today's decision, D.16-01-046 did not adopt a recommendation by CCTA and certain other parties to apply the revised ROW Rules adopted by D.16-01-046 for CMRS carriers (hereafter, "the CMRS ROW Rules") to wireless facilities installed by CLECs and CATV corporations. Nonetheless, the Commission stated in D.16-01-046 that:

> "[There] is no obvious reason why the revised ROW Rules adopted by [D.16-01-046] for CMRS facilities should not apply

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[7] D.16-01-046 at 2. This revision to the ROW Rules resulted in CMRS carriers paying approximately the same amount as CLECs and CATV corporations for each foot of occupied pole space, subject to certain limitations.

> to wireless facilities installed by CLECs and CATV corporations once certain issues, identified below, are resolved. We encourage CLECs and CATV corporations to file at their earliest convenience, pursuant to Rule 6.3 of the Commission's Rules of Practice and Procedure, a petition for a rulemaking proceeding to extend the ROW Rules for CMRS facilities to the wireless facilities installed by CLECs and CATV corporations. Any such petition should address the following issues:
>
> - How to harmonize the "per-foot" pole-attachment fee adopted by [D.16-01-046] for CMRS pole attachments with the statutory provision in Pub. Util. Code § 767.5(a)(3) that establishes a 7.4% "per-pole" fee for CATV wireline communication system attachments.
> - For CLEC and CATV pole installations that include both wireline communication system components and wireless communication system components, how to distinguish the components that are subject to the "per-pole" fee and the components that are subject to the "per-foot" fee.
> - The Commission's authority to apply and enforce its ROW Rules and safety regulations with respect to CATV corporations' wireless facilities in light of the Commission's conclusion in D.15-05-002 that the term "cable" in Pub. Util. Code § 216.4 does not include satellites and other forms of wireless transmission." (D.16-01-046 at 43 – 44. Footnotes omitted.)

In addition to adopting the CMRS ROW Rules, D.16-01-046 adopted several amendments to General Order (GO) 95[8] to ensure that CMRS pole attachments are designed, constructed, and maintained in a way that protects safety and reliability.

[8] GO 95 prescribes rules for the design, construction, maintenance, repair, and replacement of overhead lines and support structures.

3. Summary of Petition 16-07-009

In P.16-07-009, CCTA asks the Commission to open a rulemaking proceeding for the purpose of extending the CMRS ROW Rules adopted by D.16-01-046 to wireless pole attachments installed by CATV corporations,[9] including the annual per-foot fee for pole-attachments adopted by D.16-01-046 for CMRS facilities.

CCTA offers several reasons for extending the CMRS ROW Rules to CATV corporations' wireless pole attachments. First, CCTA asserts "there are no material physical differences between the wireless facilities installed on poles by CMRS providers and those facilities proposed to be installed by cable operators.[10]" Given the asserted physical similarity of the wireless facilities, CCTA sees no reason for disparate legal treatment under California law.

Second, CCTA argues that federal laws and FCC regulations require the Commission to extend the CMRS ROW Rules to CATV corporations' wireless pole attachments. CCTA cites 47 U.S.C. § 224(f)(1), which states that "[a] utility shall provide a cable television system or any telecommunications carrier with non[-]discriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it.[11]" CCTA contends that nothing in federal laws or FCC regulations limits the right of non-discriminatory access to wireless attachments installed by CMRS carriers. To the contrary, 47 U.S.C. § 224(a)(4) broadly defines the term "pole attachment" to mean "***any*** attachment by a cable television

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[9] CCTA's petition uses the following terms interchangeably: Cable corporation, cable television corporation, cable company, and cable operator. Today's order uses the following terms: cable television corporation and CATV corporation unless otherwise indicated.

[10] Petition 16-07-009 at 4 and 8.

[11] Petition 16-07-009 at 9.

system or provider of telecommunications service to a pole … owned or controlled by a utility." (Emphasis added.) In addition, two FCC orders indicate that the right of non-discriminatory access extends to wireless pole attachments installed by cable operators.[12] CCTA contends that failure to extend the CMRS ROW Rules to CATV corporations' wireless pole attachments, while allowing wireless facilities to be installed by CMRS carriers, would constitute unlawful discrimination against CATV corporations under 47 U.S.C. § 253(c).

Third, CCTA notes that in D.98-10-058, the Commission certified to the FCC that the Commission regulates the "rate[s], terms, and conditions of access to poles, ducts, conduits, and ROW in conformance with [47 U.S.C.] § 224(c)(2) and (3).[13]" In so doing, the Commission committed to affording non-discriminatory access to utility poles.[14]

Fourth, CCTA avers that extending the CMRS ROW Rules to CATV corporations' wireless pole attachments will advance the State's policy articulated in Pub. Util. Code § 709(g) of enhancing competition among telecommunications providers and promoting the deployment of broadband to the public. CCTA submits that extending the CMRS ROW Rules to CATV corporations' wireless pole attachments will help to achieve the State's policy because it will enable CATV corporations to offer (1) new and innovative

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[12] In 2011, the FCC stated, "We address those concerns by adopting two modifications to our basic timeline for wireless attachments by telecommunications carriers ***and cable operators*** that are located above the communications space." (Emphasis added. FCC 11-50, at ¶ 42.) In 1998, the FCC ruled that the term "pole attachment" encompasses wireless devices. (*Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd. 6777 at ¶¶ 39-40, *affirmed, National Cable & Telecommunications Ass'n v. Gulf Power*, 534 U.S. 327, 339-341 (2002).)

[13] D.98-10-058 at 9.

[14] D 16-01-046 at 13.

wireless broadband services directly to the public, and (2) competitive options for small CMRS providers who at times must rely on incumbent local exchange carriers for access to utility ROW. CCTA adds that the Commission recognized in D.98-10-058 that "[n]ondiscriminatory access to the incumbent utilities' poles, ducts, conduits, and rights-of-way is one of the essential requirements for facilities-based competition to succeed."[15]

Finally, CCTA notes that D.16-01-046 identified three issues that should be addressed in a petition to extend the CMRS ROW Rules to CATV corporations. For the reasons explained below, CCTA asserts that none of these issues prevents the extension of the CMRS ROW Rules to CATV corporations.

Issue 1. D.16-01-046 directed any petition to extend the CMRS ROW Rules to CATV corporations' wireless pole attachments to address the issue of how to harmonize the 7.4% "per-foot" fee adopted by D.16-01-046 for CMRS pole installations with the 7.4% "per-pole" fee adopted by Pub. Util. Code § 767.5(a)(3) for CATV pole installations. CCTA proposes that CATV corporations pay the same per-foot fee for wireless pole attachments that CMRS carriers pay pursuant to D.16-01-046, and that CATV corporations pay the per-pole fee for cable pole attachments adopted by Pub. Util. Code § 767.5(a)(3).

Issue 2. D.16-01-046 directed petitioners to address how to identify pole attachments installed by CATV corporations that would be subject to the "per-foot" fee for wireless facilities in the CMRS ROW Rules.[16] CCTA recommends a "but for" test. If an attachment would not be installed on the pole "but for" its

[15] D.98-10-058 at 113, Finding of Fact 2.

[16] D.16-01-046 at 43.

support of wireless transmission, it should be subject to the CMRS per-foot fee. Otherwise, the attachment should be subject to the per-pole wireline fee.

Issue 3. D.16-01-046 directed any petition to extend the CMRS ROW Rules to CATV corporations' wireless pole attachments to address the Commission's authority to enforce its CMRS ROW Rules and safety regulations with respect to CATV corporations' wireless facilities in light of the Commission's conclusion in D.15-05-002 that the term "cable" in Pub. Util. Code § 216.4[17] does not include satellites and other forms of wireless transmission.[18]

CCTA opines that D.15-05-002 does not prohibit the Commission from applying the CMRS ROW Rules to CATV corporations' wireless pole attachments. This is because D.15-05-002 was issued in a context of deciding whether video service providers have pole-attachment rights, and not in the context of whether, as a matter of state and federal law, CATV corporations' pole-attachment rights extend to wireless facilities. CCTA argues that these are fundamentally different issues.

CCTA states there is no question that the Commission has authority to enforce its safety regulations with respect to CATV corporations' pole attachments, including wireless pole attachments. As the Commission recognized in D.15-05-002, Pub. Util. Code § 768.5 gives the Commission broad safety jurisdiction over a CATV corporation's facilities.[19]

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[17] Pub. Util. Code § 216.4 states: "'Cable television corporation' shall mean any corporation or firm which transmits television programs by cable to subscribers for a fee."

[18] D.16-01-046 at 44, citing D.15-05-002 at Conclusion of Law No. 5.

[19] D.15-05-002 at 24.

4. Discussion

The issue before us is whether to grant CCTA's Petition to institute a rulemaking proceeding to consider the extension of the CMRS ROW Rules adopted by D.16-01-046 to CATV corporations' wireless pole attachments. CCTA has the burden of demonstrating that it is in the public interest to institute the requested rulemaking proceeding.

The Commission has elected to regulate pole attachments under California State law pursuant to 47 U.S.C. § 224(c)(1). Therefore, our decision to grant or deny Petition 16-07-009 must apply the California Public Utilities Code.

CATV corporations are not public utilities. Rather, Pub. Util. Code § 216.4 defines a CATV corporation as follows:

> "'Cable television corporation' shall mean any corporation or firm which transmits television programs **by cable** to subscribers for a fee." (Emphasis added.)

This statutory definition of "cable television corporation" is narrowly confined to entities that use "cable" facilities to transmit television programs. Conspicuously absent from this definition is any mention of wireless facilities.

The only provision in the California Public Utilities Code that provides CATV corporations with a right to attach facilities to utility poles is Pub. Util. Code § 767.5(b), which states as follows:

> "The Legislature finds and declares that public utilities have dedicated a portion of such support structures to cable television corporations for **pole attachments** in that public utilities have made available, through a course of conduct covering many years, surplus space and excess capacity on and in their support structures for use by cable television corporations for **pole attachments**, and that the provision by such public utilities of surplus space and excess capacity for such **pole attachments** is a public utility service delivered by public utilities to cable television corporations. The Legislature

> further finds and declares that it is in the interests of the people of California for public utilities to continue to make available such surplus space and excess capacity for use by cable television corporations." (Emphasis added.)

The above-quoted provision in Pub. Util. Code § 767.5(b) authorizes CATV corporations to use surplus space and excess capacity on utility support structures for "pole attachments." Pub. Util. Code § 767.5(a)(3) defines CATV corporations' "pole attachments" as follows:

> "Pole attachment" means any attachment to surplus space, or use of excess capacity, **by a cable television corporation for a wire communication system** on or in any support structure located on or in any right-of-way or easement owned, controlled, or used by a public utility. (Emphasis added.)

This statutory definition of CATV corporations' "pole attachments" is limited to a "wire communication system." Significantly, this definition does not mention a wireless communication system or wireless facilities.

The Commission has authority under Pub. Util. Code § 767.5(c) to establish terms and conditions for CATV corporations' pole attachments:

> "Whenever a public utility and a cable television corporation or association of cable television corporations are unable to agree upon the terms, conditions, or annual compensation for **pole attachments…** the commission shall establish and enforce the rates, terms, and conditions for **pole attachments**…." (Emphasis added.)

As explained previously, the California Public Utilities Code's definition of CATV corporations' "pole attachments" is limited to a "wire communication system"; the statutory definition does not include wireless facilities. Accordingly, the Commission's authority under Pub. Util. Code § 767.5(c) to establish terms and conditions for CATV corporations' pole attachments does not include wireless pole attachments.

We conclude that the previously cited provisions of the California Public Utilities Code do not provide CATV corporations with a right to attach wireless facilities to utility poles. We believe it is dispositive that the Legislature included the terms "cable" and "wire" in the previously cited statutes, but omitted the term "wireless." If the Legislature had intended to provide CATV corporations with a right to attach wireless facilities to utility poles – either by statute or by Commission regulations – the Legislature would have done so.

We further conclude that CCTA's Petition does not meet the requirement established by D.16-01-046 to demonstrate that: The Commission may apply the CMRS ROW Rules to CATV corporations' wireless pole attachments, even though the Commission held in D.15-05-002 that the term "cable" in Pub. Util. Code § 216.4 does not include satellites and other forms of wireless transmission.[20]

Arguably, CATV corporations' right under the California Public Utilities Code to attach wireline facilities to utility poles could encompass wireless pole attachments if such attachments were an integral part of a "wire communication system" that is used to provide "cable" television service. However, CCTA's Petition indicates that CATV corporations intend to use their wireless pole attachments predominantly, if not exclusively, for services other than "cable" television service. For example, the Petition states at page 11:

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[20] D.16-01-046 at 43 – 44, citing D.15-05-002 at 28 and Conclusion of Law (COL) 5. COL 5 of D.15-05-002 states: "The term 'cable' in Pub. Util. Code § 216.4 applies to any type of cable facility (e.g., coaxial cable, fiber optic cable, or wired facility) that is used to transmit television programs to subscribers for a fee, regardless of whether the "cable" is also used to provide other services (in addition to transmitting television programs) such as broadband internet service. **The term 'cable' in § 216.4 does not include satellites and other forms of wireless transmission**." (Emphasis added.)

> "The extension of the [CMRS] ROW Rules to cable operators' wireless facilities will enhance competition among broadband providers in furtherance of state policy… More specifically extending non-discriminatory pole access rights and rates to cable companies **will enable those companies to offer new and innovative wireless broadband services directly to the public**." (Emphasis added. Footnotes omitted.)

The above-quoted passage states that CATV corporations intend to use wireless pole attachments to provide "wireless broadband services directly to the public." The above-quoted passage does not indicate that CATV corporations intend to use wireless pole attachments for "cable" television service.

In the same vein, CCTA's Petition at page 12, Footnote 26, cites the following passage from CCTA's written comments filed in R.14-05-001:

> "The policies underlying both state and federal [*sic*] are intended to expand broadband and competition. **Cable operator-owned antennas** promise to deliver both by providing a new level of competition to those CMRS providers who are also pole owners. That competition includes not only new and innovative wireless broadband services that utilize cable television lines to provide competitive wireless access and services directly to the public, but also includes competitive options for [non-incumbent local exchange carrier (ILEC)] CMRS providers who at times must rely on the ILEC, with whom they also compete, for access to CMRS antennas and to **fiber used to connect those antennas**." (R.14-05-001, CCTA Comments filed on July 7, 2014, at 7. Emphasis added.)

The above-quoted passage states that CATV corporations intend to use "cable operator-owned antennas" and the "fiber used to connect those antennas" to:

- Compete with CMRS carriers that are affiliated with ILECs.
- Provide wireless broadband services directly to the public.

- Provide fiber-based backhaul service for CMRS antennas.[21]

There is nothing in the above-quoted passage that indicates CATV corporations intend to use wireless pole attachments for "cable" television service. Rather, the opposite is intended: CATV corporations plan to "utilize cable television lines" to support wireless services and backhaul services.

It is important to note at this juncture that although CATV corporations do not have a right under the California Public Utilities Code to install wireless pole attachments, they have the option of becoming a CMRS carrier by filing a Wireless Information Registration (WIR) at the Commission.[22] Once a CATV corporation has obtained status as a CMRS carrier it may install wireless pole attachments in accordance with the CMRS ROW Rules adopted by D.16-01-036. This would enable a CATV corporation, in its capacity as a CMRS carrier, to offer wireless services to the public.

CATV corporations also have the option of becoming a competitive local exchange carrier (CLEC) by filing an application at the Commission for a certificate of public convenience and necessity (CPCN) to provide facilities-based local exchange service.[23] Once a CATV corporation has obtained a CPCN it may attach fiber optic cables to utility poles in accordance with the ROW Rules for CLECs adopted by D.98-10-058. This would enable a CATV corporation, in its capacity as a certificated CLEC, to offer wireline communication services to the public, including fiber-based backhaul service for CMRS antennas.

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[21] *See* the description of backhaul service in D.16-12-025, D.15-12-005, and Order Instituting Investigation 15-11-007.

[22] The WIR process is set forth in D.13-05-035, Appendix D.

[23] The CPCN process is set forth in D.13-05-035, Appendices A - C.

We are concerned that CCTA's Petition does not explain why CATV corporations cannot access utility poles under the existing ROW Rules by filing a WIR or obtaining a CPCN. This raises the question of whether CCTA seeks through its Petition to provide CATV corporations with the ability to offer wireless and wireline communication services to the public, and obtain all the benefits and protections of the ROW Rules, without filing a WIR as required by D.13-05-035 or obtaining a CPCN as required by D.13-05-035 and Pub. Util. Code § 1001.[24] Because of this significant ambiguity, we conclude that it is premature to open a rulemaking proceeding to consider if the CMRS ROW Rules should be extended to CATV corporations.

We conclude for the previous reasons that CCTA has not met its burden to demonstrate that it is in the public interest to institute the rulemaking proceeding requested by Petition 16-07-009. Therefore, we deny the Petition. Importantly, our denial of CCTA's Petition does not affect the existing ability of CATV corporations to obtain nondiscriminatory access to utility poles as CMRS carriers by filing a proper WIR at the Commission; and to obtain nondiscriminatory access to utility poles as CLECs by applying for a CPCN from the Commission. In fact, regardless of whether we grant or deny CCTA's Petition, any CATV corporation that uses pole attachments to provide intrastate communication services in California—which is clearly contemplated by CCTA's Petition—must file a WIR in order to offer wireless communication services[25] and

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[24] The principle of nondiscriminatory access to utility ROW indicates that the requirement to file a WIR and/or to obtain a CPCN should apply equally to CMRS carriers, CLECs, and CATV corporations.

[25] D.13-05-035, Appendix D. ("The Commission now requires Commercial Mobile Radio Service providers who did not hold a Certificate of Public Convenience and Necessity prior

Footnote continued on next page

obtain a CPCN in order to offer wireline communication services.[26] Any CATV corporation that files a proper WIR and obtains a CPCN will be able to offer most, if not all, of the new, innovative, and competitive services described in Petition 16-07-009.[27]

We disagree with CCTA's argument that we must grant its Petition because federal laws and regulations, State policy, and Commission precedent require that CATV corporations have the same nondiscriminatory access to utility poles as CMRS carriers. As explained previously, the California Public Utilities Code does not provide CATV corporations with a statutory right to install wireless pole attachments. This does not hamstring CATV corporations, however. CATV corporations that wish to provide CMRS service can file a WIR at the Commission and thereby obtain the same nondiscriminatory access to utility poles as all other CMRS carriers. Similarly, CATV corporations can apply for a CPCN from the Commission to provide facilities-based local exchange service and thereby obtain the same nondiscriminatory access to utility poles as all other facilities-based CLECs. Consequently, we may deny CCTA's Petition

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to August 10, 1994, and who intend to offer intrastate wireless telecommunications services within California, to file a Wireless Identification Registration containing the following information concurrent with undertaking such service. This information must clearly describe type of service to be offered (e.g. facilities based or resale), and be signed by at least one officer of the company.") See also D.94-10-031 at Ordering Paragraph 1.

[26] Pub. Util. Code § 1001 and D.13-05-035, Appendices A - C.

[27] Today's decision does not address (i) where wireless service and facilities end and backhaul service and facilities begin; and (ii) the nature and extent of the wireless-related facilities that may be attached to poles under the CMRS ROW Rules by carriers that possess a CPCN for facilities-based wireline services but not a WIR for wireless services. These may be appropriate topics for the rulemaking proceeding that is requested in the pending Petition 16-08-016 in the event the Commission grants that petition.

without running afoul of federal laws and regulations, State policy, or Commission precedent.

Finally, we disagree with CCTA's reliance on the United States Supreme Court's decision in *NCTA v. Gulf Power.* That case involved the Supreme Court's interpretation of the FCC's jurisdiction under federal law to regulate pole attachments that provide (1) commingled cable television and cable Internet service, or (2) wireless telecommunications service.[28] CCTA's Petition requires the Commission to construe California State law because the Commission has elected to regulate pole-attachments under State law pursuant to 47 U.S.C. 254(c)(2).

5. Compliance with Pub. Util. Code § 1708.5(c)

Pub. Util. Code § 1708.5(c) states:

> If the commission denies a petition, the order or resolution of the commission shall include a statement of the reasons of the commission for that denial.

Today's decision denies Petition 16-07-009 for the following reasons:

- CATV corporations do not have a right under the California Public Utilities Code to install wireless pole attachments.
- Petition 16-07-009 does not satisfy the requirement established by D.16-01-046 to demonstrate that the Commission may apply the CMRS ROW Rules to CATV corporations' wireless pole attachments, even though the Commission held in D.15-05-002 that the term "cable" in Pub. Util. Code § 216.4 does not include satellites and other forms of wireless transmission.

[28] *NCTA v. Gulf Power*, 534 U.S. 327, 331, 342 (2002).

- Petition 16-07-009 is largely moot because (i) CATV corporations that wish to offer CMRS service can obtain nondiscriminatory access to utility poles in accordance with the CMRS ROW Rules adopted by D.16-01-046 by filing a WIR; and (ii) CATV corporations that wish to offer wireline communication services, including backhaul service for CMRS antennas, can obtain nondiscriminatory access to utility poles in accordance with the ROW Rules adopted by D.98-10-058 by applying for a CPCN.
- Petition 16-07-009 is fundamentally ambiguous as to whether CCTA seeks to provide CATV corporations with the ability to offer wireless and wireline communication services, and obtain all the benefits and protections of the ROW Rules, without having to file a WIR or obtain a CPCN.
- CCTA has not met its burden to demonstrate that it is in the public interest to institute the rulemaking proceeding requested in Petition 16-07-009.

6. Petition Denied without Prejudice

Petition 16-07-009 is denied without prejudice with respect to issues that are not decided by today's decision.

7. Comments on the Proposed Decision

The proposed decision 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 _____.

8. 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. Petition 16-07-009 indicates that CATV corporations intend to use wireless pole attachments to provide CMRS service.

2. Petition 16-07-009 does not explain why CATV corporations cannot obtain nondiscriminatory access to utility poles under the CMRS ROW Rules adopted by D.16-01-046 by filing a WIR.

3. Petition 16-07-009 indicates that CATV corporations intend to use fiber optic cables to provide backhaul service for CMRS antennas.

4. Petition 16-07-009 does not explain why CATV corporations cannot obtain nondiscriminatory access to utility poles for the purpose of attaching fiber optic cables under the ROW Rules adopted by D.98-10-058 by obtaining a CPCN.

5. Petition 16-07-009 is fundamentally ambiguous as to whether CCTA seeks to provide CATV corporations with the ability to offer wireless and wireline communication services, and obtain all the benefits and protections of the ROW Rules, without having to file a WIR or obtain a CPCN.

6. D.16-01-046 requires CCTA to demonstrate in Petition 16-07-009 that: The Commission may apply the CMRS ROW Rules to CATV corporations' wireless pole attachments, even though the Commission held in D.15-05-002 that the term "cable" in Pub. Util. Code § 216.4 does not include satellites and other forms of wireless transmission.

Conclusions of Law

1. Petition 16-07-009 must be evaluated within the context of California State law because the Commission has elected to regulate pole-attachments under State law pursuant to 47 U.S.C. 254(c)(2).

2. CATV corporations do not have a statutory right under the California Public Utilities Code to install wireless pole attachments.

3. Petition 16-07-009 does not satisfy the requirement established by D.16-01-046 to demonstrate that: The Commission may apply the CMRS ROW Rules to CATV corporations' wireless pole attachments, even though the Commission held in D.15-05-002 that the term "cable" in Pub. Util. Code § 216.4 does not include satellites and other forms of wireless transmission.

4. Any CATV corporation that files a proper WIR and obtains a CPCN may offer most, if not all, of the new, innovative, and competitive services described in Petition 16-07-009.

5. Petition 16-07-009 is largely moot because (i) CATV corporations that seek to offer CMRS service can obtain nondiscriminatory access to utility poles in accordance with the CMRS ROW Rules adopted by D.16-01-046 by filing a proper WIR; and (ii) CATV corporations that seek to offer wireline communication services, including backhaul service for CMRS antennas, can obtain nondiscriminatory access to utility poles in accordance with the ROW Rules adopted by D.98-10-058 by applying for a CPCN.

6. CCTA has not met its burden to demonstrate that it is in the public interest to institute the rulemaking proceeding requested by Petition 16-07-009.

7. Petition 16-07-009 should be denied without prejudice with respect to issues that are not decided by today's decision.

8. The following Order should be effective immediately to ensure compliance with the six-month statutory deadline for concluding this proceeding set forth in Pub. Util. 1708.5(b).

O R D E R

IT IS ORDERED that:

1. Petition 16-07-009 is denied. The denial of the Petition is without prejudice to issues that are not decided by today's decision.
2. The docket for Petition 16-07-009 is closed.

This Order is effective today.

Dated _____, at San Francisco, California.