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MAIL DATE
3/17/00

Decision 00-03-055 March 16, 2000

Before The Public Utilities Commission Of The State Of California

Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service	Rulemaking 95-04-043 (Filed April 26, 1995)
Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service	Investigation 95-04-044 (Filed April 26, 1995)

ORDER MODIFYING DECISION 98-10-058 AND DENYING REHEARING

I. INTRODUCTION

Applications for rehearing of Decision (D.) 98-10-058 have been filed by the Building Owners & Managers Association of California (BOMA), the Real Estate Coalition, the League of California Cities, et al. (the Cities),[1] GTE California Incorporated (GTE), Pacific Gas and Electric Company (PG&E), and the California Cable Television Association (CCTA). A petition to modify has

[1] The League of California Cities filed on behalf of its constituent cities, including the City of Concord, the City of Hayward, the City of Los Angeles, the City of Menlo Park, the City of Sacramento, the City and County of San Francisco, the City of San Jose, the City of San Carlos, the San Mateo County Telecommunications Authority (a Joint Powers Authority representing 15 local governments in San Mateo County), and the City of Santa Monica.

been filed by Cox California Telcom, L.L.C. dba Cox Communications (Cox).[2] BOMA, Cox and CCTA requested oral argument.

Responses to the applications for rehearing were filed by BOMA, the Real Estate Coalition, Cox, GTE, PG&E, CCTA, Pacific Bell, and the Association for Local Telecommunications Services, Teligent, Inc., WinStar Wireless of California, Inc., Time Warner Telecom of California, LP and e.spire Communications, Inc. (Joint Respondents).

In D.98-10-058, the Commission adopted rules governing nondiscriminatory access to poles, ducts, conduits, and rights-of-way (ROW) applicable to competitive local carriers (CLCs) competing in the service territories of the large and mid-sized incumbent local exchange carriers (ILECs). The decision, issued in the Competition for Local Exchange Service proceeding, represents one more step in the Commission's program to open up the local exchange market within California to competition.

The ROW access provisions were adopted pursuant to a rulemaking proceeding. There were no evidentiary hearings, but parties did attend workshops. An initial workshop was held on April 8, 1996. The participants at that workshop agreed that the ROW issues also impacted municipal and investor-owned electric utilities. Thus, further notice was provided to such utilities and a second workshop was held on June 17, 1996. A list of issues was then prepared by the administrative law judge (ALJ), and comments and reply comments were filed. On March 30, 1998, an initial draft decision was issued by the ALJ for comment. A revised draft decision was issued on July 7, 1998, with another round of comments and reply comments. A final decision was issued on October 22, 1998.

Among other things, the decision addresses third party access to customer premises. In order to encourage local competition in multi-unit

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[2] Because Cox filed its application for rehearing after the statutory deadline, it is being treated as a petition to modify the decision.

buildings, the decision requires the opening of access up to the minimum point of entry (MPOE).[3] Specifically, the decision requires incumbent carriers with vacant space in existing entrance facilities into commercial buildings to make such space available to competitors up to the MPOE to the extent the incumbent has the right to assign its interest to another. In addition, the decision prohibits any carrier from entering into any type of arrangement with private property owners that has the effect of restricting the access of other carriers to the property or discriminating against the facilities of other carriers. While the decision does not disturb existing agreements directly, it allows a carrier to file a formal complaint against any carrier which is benefiting from exclusive or discriminatory access to private property. If the Commission finds that the agreement is unfairly discriminatory, the Commission will direct the parties to renegotiate. Failing that, the Commission may impose a fine for a continuing violation. (D.98-10-058 at 99-100.)[4]

The decision acknowledges the right of property owners to supervise and coordinate on-premise activity of service providers within their buildings. However, if building owners do not permit access, a carrier may seek resolution in court, or, as stated above, may file a complaint with the Commission if it appears that another carrier is benefiting from exclusive or discriminatory access. (D.98-10-058 at 101-102.)

The decision also addresses ROW access issues unique to municipalities and government agencies. The decision acknowledges that the Commission does not have the authority to order a local government body to grant

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[3] The MPOE is the physical location where the telephone company's regulated network ends and the building owner's responsibility begins. Generally, facilities on the building owner's side of the MPOE are designated as intra-building network cable (INC).

[4] We note that on October 10, 1999, Senate Bill (SB) 177 was signed by the Governor and became law. Among other things, SB 177 prohibits a public utility from entering into exclusive access agreements with owners or managers of property served by the public utility, or from committing or permitting any other act that would limit the right of any other public utility to provide service to tenants of the premises. (See Pub. Util. Code §626.) We believe that SB 177 is consistent with the approach we have taken in the ROW decision.

access to public rights-of-way. (D. 98-10-058 at p. 40.) The decision does, however, establish a procedure which allows for the Commission's intervention in disputes between carriers and local governments. The decision provides that when a carrier is unable to resolve a dispute with a local government body over access to public rights-of-way, the carrier is directed to file an application with the Commission for a site-specific certificate of public convenience and necessity (CPCN). If granted, the carrier may file suit in court if the local government still denies access, and may use the CPCN to support its case. (D.98-10-058 at pp. 38-40.)

In addition to third party access to customer premises, the ROW decision adopts a default pricing formula for the annual fees which may be charged by electric or telecommunications utilities for third-party attachments to their poles and other support structures. The default rate may be applied when parties fail to negotiate a mutually agreeable pole attachment rate and submit the dispute to the Commission. The default rate is the statutory rate for cable television pole attachments pursuant to Public Utilities Code section 767.5.[5] (See D.98-10-058 at pp. 48-57 and Rule VI.B, Appen. A at pp.11-12.)

The rules adopted by the decision provide that when disputes are submitted to the Commission for resolution, the adopted rules will be deemed "presumptively reasonable," and that the burden of proof "shall be on the party

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[5] Public Utilities Code section 767.5(c)(2) provides that "An annual recurring fee is computed as follows:

"(A) For each pole and supporting anchor actually used by the cable television corporation . . . 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 section, the annual fee shall be 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor.

"B) For support structures used by the cable television corporation, 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 cable television corporation's equipment by the total usable volume or capacity."

advocating a deviation from the rules to show the deviation is reasonable, and is not unduly discriminatory or anticompetitive." (Rule I.A, Appen. A at p. 3.) In addition, the rules state that the losing party shall reimburse the prevailing party for all costs of the arbitration, including reasonable attorney and expert witness fees. (Rule IX.A.24, Appen. A at p. 21.)

The rules also state that telecommunication carriers must obtain written authorization from the incumbent electric or telecommunications utility before making a new attachment or modifying an existing attachment. (See D.98-10-058 at pp. 72-76 and Rule VI.D, Appen. A at p. 13.) Finally, the rules provide that a telecommunication carrier or cable television company may use its own personnel to install the equipment on an incumbent utility's facilities, provided that, in the utility's reasonable judgment, the telecommunication carrier or cable television company demonstrates that its personnel or agents are trained and qualified to work on the utility's facilities. (Rule IV.C.2, Appen. A at p. 8.)

The parties allege numerous legal error in the decision. BOMA, the Real Estate Coalition, and the Cities challenge the authority of the Commission to adopt access rules which impact private property owners and local government bodies. Cox, on the other hand, contends that the decision does not go far enough in ensuring CLC access to rights-of-way. Cox contends that the decision errs in not asserting jurisdiction over private property owners. PG&E and GTE challenge the decision's adoption of the default pricing formula for pole attachments. CCTA objects to the rule which prohibits any attachments to rights-of-way or support structures of another utility without express written authorization from the utility.

The Commission held oral argument in this case on June 7, 1999 and September 14, 1999.[6] The issues addressed in oral argument were the

[6] Oral argument was initially held on June 7, 1999. However, because of insufficient notice to some of the parties, another oral argument was held on September 14, 1999.

jurisdictional issues related to third-party access to customer premises and the issue of written authorization for pole attachments.

We have reviewed each and every allegation of error raised in the rehearing applications and the petition for modification. We have determined that the applicants have not demonstrated good cause for rehearing. However, we will modify the ROW rules to indicate that the written authorization requirements, including the provision regarding penalties, apply only to pole attachments made after the date D.98-10-058 was issued. We will also modify language in the section relating to third-party access to customer premises to make it consistent with our conclusions on the issue of jurisdiction over building owners. Finally, we will make several minor modifications or clarifications in response to other issues raised by the parties.

II. DISCUSSION

A. Issues Raised by Cox, BOMA, the Real Estate Coalition and the Cities

1. Whether the Decision's Nondiscriminatory Access Provisions Constitute a Taking of Property Without Just Compensation

BOMA and the Real Estate Coalition allege that the decision violates the takings clause of the United States Constitution by removing a building owner's right to exclude others from private property. The Cities similarly allege that the decision constitutes a taking of the property of local governments without just compensation in violation of the United States and California Constitutions.

The United States Constitution and California Constitutions provide that private property may not be taken for public use without just compensation. (U.S. Const., Amends. V and XIV; Cal. Const. Art. I, § 19.) Whether a taking has occurred depends largely on the particular circumstances of each case. (Penn Central Transportation Co. v. New York City (1978) 438 U.S. 104, 124.) Factors

which are significant in this inquiry include the character of the governmental action and the extent to which regulation interferes with "investment-backed expectations." A taking is more readily found when interference with property rights is characterized as a physical invasion by government. (Ibid.)

The United States Supreme Court has held that a permanent physical occupation of real property constitutes a taking, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the property owner. (Loretto v. Teleprompter Manhatten CATV Corp. (1982) 458 U.S. 419, 427.) Loretto involved the installation of cable on a landlord's building pursuant to a New York statute. In a class action suit filed by the landlord, the United States Supreme Court held that the cable installation constituted a taking and thus required compensation. (Id. at p. 438.) To the extent the instant case involves the installation of telephone facilities in common areas of private buildings, there may be a taking under Loretto.

Cox and the Joint Respondents maintain that Loretto is not applicable to the instant case. Loretto involved a building owner's right to exclude cable television entirely. Here, the issue is whether a landlord, who has already granted access to at least one telephone service provider, may exclude competitors. Joint Respondents rely on cases which hold that where a private property owner voluntarily allows access, regulation of such access is not a per se taking such as that found in Loretto. (See FCC v. Florida Power Corp. (1987) 480 U.S. 245, 252 [where public utility voluntarily leases space on its utility poles to cable television company, government may regulate rates, terms and conditions]; Yee v. Escondido (1992) 503 U.S. 519, 527-529 [where mobile home park owner voluntarily rents land to mobile home owner, state and local laws which restrict eviction and impose rent control are a legitimate regulation of the landlord-tenant relationship].) Cox, on the other hand, points out that Civil Code section 1941.4 requires building owners to grant access to one telephone utility. Cox reasons there is no taking

because the property in question, i.e., the easement granted to the telephone utility, is already dedicated to the public use.

We need not decide whether there may be a taking under Loretto or whether the decision merely regulates existing utility service and rights-of-way. A taking is unconstitutional only if the property owner does not receive just compensation. The ROW decision does not limit rates that building owners may negotiate with telephone providers as long as those rates are not discriminatory. If a building owner refuses access on any terms, a telephone carrier may be authorized to exercise its right of eminent domain in order to gain access. However, such a procedure would result in just compensation for property owners. Indeed, BOMA does not even argue that building owners will not receive just compensation.

BOMA also points to the some of the practical difficulties with the so-called "forced access" provisions. BOMA alleges that building owners frequently find that the cost of providing state-of-the-art telecommunications infrastructure and services to many buildings may be infeasible or unduly expensive unless the carrier is assured that all tenants, or some minimum number of tenants, in a building subscribe to a single carrier's services, or unless the owner gives the carrier an exclusive arrangement on other, more attractive buildings it owns. Contrary to BOMA's implications, customers will be able to obtain service because the Commission has established carrier of last resort (COLR) requirements as part of its universal service program.

The Cities allege that the decision constitutes an unconstitutional taking of city streets and highways and public buildings, also relying on Loretto. As discussed below in relation to other claims made by the Cities, Public Utilities Code section 7901 grants a statewide franchise to telephone utilities to construct lines "along and upon any public road or highway, along or across any of the waters or lands within this State" as long as the carrier does not "incommode the

public use" of the road, highway, or waters. The Cities also suggest that the access rules will force municipalities to provide carriers with nondiscriminatory access to public buildings. However, unlike owners or managers of multi-unit buildings, cities are typically the only tenant and the only end-user on their properties. In such cases, a city has the right to choose a single carrier to provide telephone service. Nothing in the decision requires cities to grant multiple carriers access to public buildings where the city is the sole end-user.

For all of the foregoing reasons, the access rules articulated in the ROW decision do not constitute an unlawful taking.

2. Whether Decision 98-10-058 Is An Improper Exercise of the Commission's Jurisdiction

a) Whether the Decision Asserts Jurisdiction Over Private Property Owners

BOMA and the Real Estate Coalition claim that the ROW decision improperly asserts jurisdiction over building owners. BOMA contends that building owners and managers are not "telephone corporations" as defined by Public Utilities Code section 234, nor are they public utilities as defined by Public Utilities Code section 216. The decision explicitly refrains from asserting jurisdiction over private property owners. (D.98-10-058 at p. 101.) Moreover, the decision recognizes private property rights and states that telecommunication carriers' access to multi-unit buildings is dependent on terms negotiated with building owners or managers. The decision does impact building owners. First, by prohibiting carriers from entering into exclusive or discriminatory contracts, owners will not have the opportunity to enter into exclusive contracts with carriers. Second, carriers may be authorized to use the power of eminent domain to gain access to multi-unit buildings pursuant to Public Utilities Code sections 616 and

625. However, these impacts are indirect and are not tantamount to asserting jurisdiction over building owners.

We do recognize that there is some inconsistent language in the decision. BOMA contends that the rules adopted by the decision appear to regulate only those facilities owned or controlled by the carrier, and agreements between carriers. On the other hand, BOMA asserts that the Discussion and Conclusions of Law indicate the Commission's intent to regulate inside wire and agreements between carriers and building owners.

We intended to regulate carriers' facilities and agreements between carriers and building owners. The decision prohibits discriminatory agreements between carriers and building owners on a prospective basis, and allows competitive carriers to file complaints against other carriers if existing agreements are discriminatory. To the extent any such agreements may impact the building owner or inside wire, our jurisdiction over carriers allows this. We will modify the decision as set forth in the order below to clarify the scope of our regulation.

b) Whether the Decision Legally Errs in Not Asserting Jurisdiction Over Private Property Owners as Public Utilities.

Cox claims that the decision legally errs in failing to assert jurisdiction over private property owners as public utilities. According to Cox, the Commission has the authority to regulate building owners as public utilities pursuant to Public Utilities Code sections 216(c) and 234. Public Utilities Code section 216(c) provides:

> When any person or corporation performs any service for . . . any person, private corporation, municipality, or other political subdivision of the state, that in turn either directly or indirectly . . . performs that service for . . . the public or any portion thereof, that person or corporation is a public utility subject to the jurisdiction, control, and regulation of the commission . . . .

Public Utilities Code section 234 defines a "telephone corporation" as "every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state." A "telephone line" includes:

> [A]ll conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires.

(Pub. Util. Code § 233.)

Cox has not demonstrated legal error. While we do not reach the issue of whether, under some circumstances, we could assert jurisdiction over building owners, the leading cases on the definition of a public utility do not support Cox's contentions that building owners clearly fall under that definition. (See, e.g., Richfield Oil Corp. v. Public Utilities Commission (1960) 154 Cal.2d 419; Story v. Richardson (1921) 186 Cal. 162.)

Cox's arguments are more in the nature of policy arguments than legal arguments. Much of Cox's petition addresses what Cox contends are the decision's failure to provide effective enforcement mechanisms to back up its policies. Cox presents the example of a building owner who unilaterally discriminates against a competitive carrier, without the agreement or cooperation of the ILEC. In such a case, according to Cox, the Commission would be without authority to redress the discrimination.

We believe that the ROW rules adopted in the decision strike a balance between BOMA's contention that we should allow exclusive agreements and Cox's claim that we should assert jurisdiction over building owners as public utilities. Thus, we decline to modify the decision as suggested by Cox on policy grounds.

Cox also contends that the Commission is attempting to create a private cause of action in civil court for violation of Commission policy. The decision provides that when the carrier fails to reach agreement with a building owner for access, "the carrier may seek resolution of its dispute in the appropriate court of civil jurisdiction" as an alternative to filing a complaint with the Commission against another carrier. (D.98-10-058 at pp. 101-102.) Our intent here was not to create any right of action. Rather, this is a reference to a telephone utility's eminent domain rights under Public Utilities Code section 616 (as well as section 626, which was enacted after D.98-10-058 was issued). We will modify the decision to clarify our intent.

Finally, Cox offers an alternative to asserting jurisdiction over building owners. Cox suggests that, when private property owners do not agree to access terms with CLCs, the Commission could require ILECs to reconfigure their network facilities to move the MPOE to the property line. This is merely an alternative offered by Cox and not a claim of legal error. Moreover, there is nothing in the record before us which would support such a modification.

c) Whether the Decision Asserts Jurisdiction Over Public Rights-of-Way or Reformation of Contracts

The Cities claim that the ROW decision exceeds the scope of the Commission's constitutional and legislative grant of jurisdiction because the Commission lacks the jurisdiction to adjudicate disputes over public rights-of-way or to reform contracts.

The Cities mistakenly assume that the decision allows the Commission to adjudicate disputes between carriers and local governments over public rights-of-way. The decision clearly acknowledges that it does <u>not</u> have the authority to order a local government body to grant access. (D.98-10-058 at p. 40.) As stated above, the decision does establish a procedure which allows for the

Commission's intervention in disputes between carriers and local governments. When a carrier is unable to resolve a dispute with a local government body over access to public rights-of-way, the carrier is directed to file an application with the Commission for a site-specific certificate of public convenience and necessity (CPCN). If granted, the carrier may use the CPCN in any subsequent court action to support its case. This follows the general approach used by the Commission in General Order 159A, relating to the construction of cellular radiotelephone facilities and is valid.

The Cities rely in part on Public Utilities Code section 7901.1, which confirms the right of municipalities "to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." However, the Cities fail to acknowledge Public Utilities Code section 7901, which grants a statewide franchise to telephone utilities. Section 7901 provides that a telephone corporation may construct lines "along and upon any public road or highway, along or across any of the waters or lands within this State" as long as the carrier does not "incommode the public use" of the road, highway, or waters. Section 7901.1 explicitly states that the rights of municipalities to control the time, place, and manner of access must be consistent with 7901. The Cities also do not discuss Pacific Telephone and Telegraph Co. v. City and County of San Francisco (1959) 51 Cal.2d 766, 774, which holds that although cities may control the particular location and manner in which telephone facilities are constructed, the right and obligation to construct and maintain telephone lines is a matter of "state concern" and thus a city cannot exclude telephone lines from the public street.

Finally, the Cities imply that General Order 159A, which is the basis for the ROW procedures outlined here, also constitutes an improper exercise of the Commission's authority. On the contrary, General Order 159A was promulgated in order to give greater deference to local governments in cellular siting issues, even though the Commission was authorized to preempt local government

determinations on such issues under section 8 of article XII of the California Constitution.

The Cities argument that the Commission's "reformation of contracts" between carriers and property owners exceeds the Commission's jurisdiction is also without merit. The Cities rely on cases such as Camp Meeker Water System, Inc. v. Public Utilities Commission (1990) 51 Cal.3d 845, 861-862, which define the nature and the parameters of the Commission's authority. However, the ROW decision does not purport to give the Commission the power to reform contracts. The decision simply sets up a process whereby carriers may be directed to renegotiate contracts with property owners to eliminate discriminatory terms. This is well within the Commission's regulatory authority.

3. Whether Decision 98-10-058 Violates the Telecommunications Act of 1996

BOMA alleges that the decision violates the section 253(a) of the Telecommunications Act of 1996 (Act), which provides: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." BOMA argues that if building owners cannot enter into exclusive agreements with carriers, carriers may choose not to provide service to certain buildings. Thus, the access rules would have the effect of prohibiting telecommunications services.

This argument stands section 253(a) of the Act on its head. The clear intent of section 253(a) is to prohibit states from restricting competition in telecommunications services. The ROW decision complies with section 253(a) by encouraging open access to competitive carriers. Moreover, as stated above, the Commission's universal service rules, which provide for a carrier of last resort, will ensure that all customers are served. Thus, BOMA's claims are without merit.

4. Whether Decision 98-10-058 Violates the Contracts Clauses of the California or United States Constitution

As stated above, although the ROW decision does not require renegotiation of all existing contracts, it does allow any carrier to file a complaint with the Commission against any other carrier that has a discriminatory agreement with a building owner. If the Commission finds that the agreement is discriminatory, the Commission will direct the carrier to renegotiate the agreement within 60 days. After that, the Commission will impose a fine until the agreement is renegotiated. BOMA and the Cities contend that these provisions violate the contracts clauses of the United States and California Constitutions, which provide that the state may not pass any law impairing the obligation of contracts. (Cal. Const., art. I, §10 and U.S. Const., art. I, §9.)

Even assuming the contracts clause is applicable in the instant case, we find no violation under the circumstances presented here.[7] Although the contracts clause appears to proscribe any impairment of contracts, the prohibition is not absolute. The first inquiry is whether the state requirement has substantially impaired a contractual relationship. "Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." (Allied Structural Steel v. Spannaus (1977) 438 U.S. 234, 244-245; see also Allen v. Board of Administration (1983) 34 Cal.3d 114, 119.) Even a severe impairment may be constitutional if it serves a legitimate public purpose. (United States Trust Co. v. New Jersey (1976) 431 U.S. 1, 21-22.) In determining

[7] The contracts clause only applies to acts of legislative power, not to the decisions of courts or administrative bodies. (Smith v. Sorensen (8thCir. 1984) 748 F.2d 427, 436.) Cox contends that the contracts clause does not apply here because the Commission may require renegotiation of pre-existing contracts only after a carrier files a complaint. However, because the Commission is acting in its legislative capacity in promulgating the rules which would form the basis of a complaint, we will address the contracts clause issue.

whether the purpose of the state requirement justifies impairment of contracts, a reviewing court will defer to legislative judgment as to the necessity and reasonableness of the measure. (Id. at p. 23.)

In the instant case, the policies articulated in the ROW decision may, after a complaint is filed, require carriers to renegotiate contract terms which are discriminatory or which grant the carrier exclusive rights to serve a building. We do not believe that this will result in a substantial impairment of contractual obligations. Even if the impairment were substantial, the public purpose of encouraging competition – which, as we articulated in the decision, is important to the health of the California economy and will provide consumers higher quality service at a lower cost – justifies any such impairment to contracts. Thus, the applicants have not demonstrated a violation of the contracts clause.

5. Whether Decision 98-10-058 Violates the Due Process Clauses of the California or United States Constitution

BOMA claims that the decision violates its due process rights because BOMA was not involved in the workshops held in 1996, and became involved only after a draft decision was issued on March 30, 1998. After two workshops were held in 1996, a list of issues was prepared by the ALJ, and comments and reply comments were filed. On March 30, 1998, an initial draft decision was issued by the ALJ for comment. BOMA first intervened in the case to file reply comments to the draft decision on May 18, 1998. Thereafter, a revised draft decision was issued on July 7, 1998. After another round of comments and reply comments, the final decision was issued on October 22, 1998.

Due process requires notice and opportunity to be heard before the government may deprive a person of life, liberty or property. However, BOMA points to no authority which would require the Commission to specifically notify every property owner in the state of its proposed rules on access. The rulemaking

would have been noticed on the Commission's calendar, and BOMA was never denied the opportunity to be heard.

Moreover, when BOMA did file comments in May of 1998, many of the issues it raised were addressed and resolved in its favor in the final decision.

BOMA's May 18, 1998 comments focused primarily on issues relating to the degree of control the building owner may exercise over carrier access. BOMA raised concerns about safety code compliance, tenant security, coordination of tenants' needs, effective property management and interference with services provided by competing carriers.

The final decision addresses these issues, recognizing the private property rights of building owners and acknowledging that building owners must retain authority to supervise and coordinate on-premise activities of service providers. (D.98-10-058 at p. 101.) The decision concludes that carrier access is subject to the terms of access the carrier negotiates with the building owner or manger. (Ibid.) Furthermore, the adopted rules state that a carrier shall provide access to building entrance facilities it owns or controls up to the MPOE on a nondiscriminatory basis, "provided that the requesting telecommunications carrier or cable TV provider has first obtained all necessary access and/or use rights from the underlying property owner(s)." (Rule X, Appen. A of D.98-10-058 at p. 21.)

We also conclude that BOMA's due process rights have not been violated because the decision does not deprive building owners of any property rights. As stated above, if a carrier wants to gain access to a building without consent of the building owner, the carrier would have to institute an eminent domain proceeding. If any property were taken, it would be the result of that proceeding. The decision does establish a complaint procedure which may result in a change of contract terms to eliminate any discriminatory or exclusive provisions. However, at most, the complaint procedure would result in an order requiring a carrier to renegotiate a contract which is found to be discriminatory.

The Cities claim a due process violation because (1) the decision was adopted without evidentiary hearings, (2) the decision allows the Commission to exceed its jurisdiction, and (3) because the decision deprives local governments of vested rights in property without providing adequate procedural safeguards. The Cities have failed to demonstrate legal error. The Cities do not even attempt to support their statement that the lack of evidentiary hearings deprived them of due process. Their other two arguments rely on their jurisdiction and takings claims, which, as discussed above, we reject.

6. Whether Decision 98-10-058 Violates the Separation of Powers and Judicial Powers Clauses of the California or United States Constitution

In addition to their jurisdictional arguments, the Cities contend that the Commission's adjudication of disputes over public rights-of-way and the Commission's "reformation of contracts" violate the separation of powers and judicial powers clauses of the United States and California Constitutions. (See Cal. Const., art. III, § 3; Cal. Const., art. VI, § 1; U.S. Const., art. III, § 1.) Specifically, the Cities argue that the Commission's adjudication of disputes over public rights-of-way violates the separation of powers and judicial powers clauses because the decision (1) allows the Commission to exercise judicial power over local governments, which are not subject to the Commission's jurisdiction; (2) allows the Commission to exercise legislative power without proper jurisdiction by creating a "private right of action" for carriers in the event a local government refuses to grant access; and (3) improperly establishes the Commission as finder of fact for subsequent court cases between a carrier and a local government by allowing a carrier to use a CPCN order granted by the Commission in support of its case.

The Cities argue that the Commission's "reformation of contracts" between carriers and property owners violates the separation of powers and

judicial powers clauses because adjudicating and reforming contracts is outside of the Commission's jurisdiction. BOMA joins the Cities in asserting that the Commission's interpretation and adjudication of contracts between carriers and building owners violates the separation of powers and judicial powers clauses.

We conclude that there is no merit to these arguments, which are largely premised on the Cities' misreading of the decision, as discussed above in our discussion of jurisdictional issues. The decision does not purport to adjudicate disputes between carriers and local governments, does not create any rights of action, and does not give the Commission the power to reform contracts. For the foregoing reasons, the Cities and BOMA have failed to demonstrate that the decision violates the separation of powers and the judicial powers clauses of the state and federal Constitutions.

7. Whether the Commission's Treatment of Access to INC and Inside Wire Modifies the Inside Wire Decision

Cox argues that the decision errs by not requiring property owners to provide CLCs free access to INC and inside wire as is required for ILECs. Cox relies on D.92-01-023, which adopted a settlement agreement relating to inside wire. Under the settlement, "the utility" is granted access to INC and inside wire without charge. (D.92-01-023, Appen. A, at p. 19.) Because the ROW decision provides that CLCs cannot access facilities of a property without an agreement with the property owner, Cox contends that the decision amends the inside wire settlement agreement without notice or opportunity to be heard.[8] We disagree. As Cox points out in its petition, the inside wire settlement was adopted before there was competition in the local exchange market. The ROW decision does not impact the access granted in the inside wire settlement and, therefore, does not modify the settlement agreement.

[8] Cox cites Public Utilities Code section "1702," but apparently intends to rely on section "1708."

8. Other Claims of Vagueness or Inconsistency Relating to Access to Multi-Unit Buildings

BOMA and Cox both argue that rehearing should be granted in order to provide additional guidelines as to whether various treatments between carriers might be unlawfully "discriminatory." Neither party argues that the decision is so vague that it is unconstitutional, nor do they specifically allege legal error. Rather, BOMA and Cox appear to assert that as a matter of policy, the guidelines are insufficient. Cox, in particular, contends that if the Commission were to assert jurisdiction over building owners, it could draw on cases decided under Public Utilities Code section 453(a).[9]

Whether or not actions are discriminatory depend on the facts of each case. The Commission may look to section 453(a) for guidance, but must necessarily decide these issues on a case-by-case basis. We do not believe that Cox or BOMA has demonstrated that the Commission should either grant rehearing or modify the decision in order to provide additional guidelines on what constitutes discriminatory conduct.

Cox has pointed out several inconsistencies and minor errors in the decision which we will correct. Conclusion of Law No. 71, dealing with prospective contracts between carriers and building owners, prohibits "any type of arrangement" which has the effect of restricting the access of other carriers to the property. Conclusion of Law No. 72, dealing with existing contracts, provides a complaint process to address "an access agreement" which has the effect of restricting access. Cox asserts that this difference in wording indicates the Commission's intent to prohibit both written agreements and informal arrangements which are restrictive on a prospective basis, while allowing complaints against carriers only if there are existing formal, written agreements

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[9] Public Utilities Code section 453(a) provides: "No public utility shall, as to rates, charges, services, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice, or disadvantage."

which are restrictive. Cox alleges that existing agreements do not state that the ILEC has exclusive access. Rather, there is some informal, verbal arrangement regarding exclusivity.

Cox reads too much into the choice of words used in the decision. We did not intend to distinguish between past and future agreements/arrangements as Cox suggests. Rather, if a carrier and building owner have an existing informal arrangement which restricts access, another carrier may file a complaint. The issue would then be whether the complainant can prove that there is such an informal arrangement. We will modify Conclusion of Law Nos. 71 and 72 to indicate that they are both applicable to agreements and arrangements.

In addition, Cox notes that Conclusion of Law No. 67 states that ILECs "with vacant space in existing entrance facilities (e.g., conduit) into commercial buildings" should make such space available to competitors, subject to consent of the building owner or manager. The text of the decision also refers to "commercial buildings." (D.98-10-058 at p. 99.) The word "commercial" in this context was intended to refer to any multi-unit building in which units are rented or leased, including residential buildings. We will therefore eliminate the word "commercial" in these two instances to clarify that the decision applies to both residential and commercial multi-unit buildings.

Finally, the following modifications will be made in response to claims of error raised by Cox. First, on pages 97-98, the decision states that the Commission's 1990 and 1992 decisions affecting the demarcation point transferred cable and inside wire to property owners "who then more easily would be able to connect to the networks of competitive telephone providers." We will eliminate the quoted language because, as Cox asserts, there was no competition in the provision of local exchange service in 1990 and 1992. Second, the reference to the utility's "inside wire" in Conclusion of Law No. 68 should be changed to the utility's "regulated network facilities" consistent with the text of the decision at

page 98. Third, Conclusion of Law No. 70 inadvertently refers to properties built "after prior to August 8, 1993." We will modify this conclusion to eliminate the word "after."

B. PG&E's and GTE's Applications for Rehearing

1. Whether the Rules Requiring Access to a Utility's Rights-of-Way and Support Structures Constitute a Taking of Property Without Just Compensation

PG&E argues that (1) the decision's rules requiring a utility to grant telecommunications carriers or cable television companies access to its rights-of-way and support structures to on a nondiscriminatory basis constitutes a physical taking under Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419, and that such a taking cannot be justified as merely a regulatory taking because PG&E has not dedicated its facilities to providing access to CLCs; (2) the procedures for determining just compensation paid for access were legally deficient because just compensation under the takings clause must be determined judicially rather than legislatively; and (3) the default attachment fee does not provide adequate compensation because just compensation for a physical taking is the property's market value or replacement cost at the time of the taking. GTE also argues that the default rate constitutes a taking and that the rate will not allow it to recover the costs of maintaining pole attachments.

In Gulf Power Co. v. United States (1999) 187 F.3d 1324, the Eleventh Circuit Court of Appeals reviewed 1996 amendments to the Federal Pole Attachments Act (47 U.S.C. § 224(f)) requiring a public utility to provide nondiscriminatory access to its poles and rights-of-way. In that case, the electrical utility plaintiffs challenged the processes for obtaining just compensation under the Pole Attachments Act on similar grounds as those relied upon by PG&E in this case. Those arguments were rejected by the court.

First, the court held that the Pole Attachment Act does effect a physical taking of utility property under Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419.[10] However, as stated by the court, the taking of property is not unconstitutional; only the taking of property without just compensation. "All that is required is that a reasonable, certain and adequate provision for obtaining just compensation exists at the time of the taking." (Gulf Power, supra, at p. 1331, quoting Williamson County Regional Planning Com'n v. Hamilton Bank (1985) 473 U.S. 172, 194.) The court concluded that the Pole Attachment Act provides an adequate process for obtaining just compensation.

The court rejected plaintiffs' argument that the Pole Attachment Act was invalid because the constitution requires the judiciary to determine just compensation. The court found that although the judiciary has the ultimate responsibility under the constitution for ensuring that just compensation is awarded, allowing the Federal Communications Commission (FCC) to make an initial determination on compensation does not in itself render the process constitutionally inadequate. "The more relevant issue is whether the judicial review of the FCC's determination that is available ensures that the final and conclusive determination of the just compensation owed to a utility is made by the judicial branch." (Gulf Power, supra, at p. 1334.) The court determined that the federal appeals court to which an appeal is taken has the jurisdiction to determine if an FCC rate order is constitutionally invalid because it does not provide just compensation.

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[10] We do not necessarily agree that a pole attachment is a physical taking of PG&E's and GTE's property. As PG&E points out, the ROW decision does not make any findings or conclusions about whether PG&E has dedicated its property to supporting the facilities of telecommunications carriers, and GTE clearly has dedicated its property to the public use of providing telecommunications. However, we need not resolve this issue because even if there were a physical taking, the processes for determining just compensation are "reasonable, certain and adequate" as set forth in Gulf Power.

The court also rejected plaintiffs' argument that the Pole Attachment Act's provisions limiting the FCC to awarding a "just and reasonable" rate within a range of rates set by statute will prevent the court from awarding the constitutionally required rate of just compensation. The court found that this issue was not ripe for decision. "[I]t would require sheer speculation for us to conclude that the actual rates ordered by the FCC will fail to provide just compensation." (Id. at p. 1338.) Finally, the court concluded that, in any event, the FCC's determination of the compensation the utility receives is not conclusive because of the availability of judicial review.

Although the instant decision does not apply the federal statutes or rules in determining a formula for compensation,[11] we believe that Gulf Power supports the Commission's ROW decision. Here, the Commission has adopted a default rate formula, rather than the range of rates set up by the federal statute. However, parties are free to negotiate rates and may bring any dispute to the Commission. At that time, parties will have the opportunity to present evidence demonstrating that a rate other than the default rate is appropriate.

Furthermore, a decision establishing compensation in a given case may be appealed to the state court of appeal. Under Public Utilities Code section 1760, the court may exercise independent judgment on the law and facts when constitutional questions are involved. Subsequent judicial review of an administrative decision on compensation satisfies the requirement that compensation be determined judicially. (See Gulf Power, supra, at pp. 1396-1397; Wisconsin Central Ltd. v. Public Service Com'n (7th Cir. 1996) 95 F.3d 1359, 1369-1370; Bragg v. Weaver (1919) 251 U.S. 57, 60-61.) Thus, the processes for

[11] Under the Pole Attachment Act, a state may regulate the rates, terms, and conditions for pole attachments upon certification to the FCC. (See 47 U.S.C. § 224(c).) The ROW decision's adoption of regulations governing access to rights-of-way constitutes such certification. (See D.98-10-058 at p. 119, Conclusions of Law Nos. 1-3.)

obtaining just compensation are constitutionally adequate under the reasoning of Gulf Power.

Finally, as the court concluded in Gulf Power, the issue of whether the adopted formula will yield just compensation is not ripe for decision. The Fifth Amendment does not require that just compensation be paid in advance of a taking. "If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." (Williamson County Regional Planning Com'n v. Hamilton Bank, supra, 473 U.S. at p. 195.) For these reasons, we reject the contention that the ROW decision violates the takings clause of the United States or California Constitutions.

2. Whether Decision 98-10-058 Complies with Public Utilities Code Section 767

PG&E also contends that the ROW decision violates Public Utilities Code section 767. Under section 767, the Commission has the authority to order joint use of the public utility facilities by other public utilities and to prescribe reasonable compensation for such use. Section 767 provides that whenever the commission, "after a hearing had upon its own motion or upon complaint of a public utility affected," finds that "public convenience and necessity" require the use by one public utility of facilities of another public utility, and that "such use will not result in irreparable injury to the owner or other users of such property or in any substantial detriment to the services," the Commission may order such joint use.

PG&E asserts that the decision violates section 767 procedurally, because there were no evidentiary hearings. PG&E also argues that the decision violates the substantive provisions of section 767 because it fails to find that nondiscriminatory access to poles and rights-of-way is required by public

convenience and necessity or that nondiscriminatory access will not result in irreparable injury.

The procedural and substantive provisions of Public Utilities Code section 767 apply to cases in which the Commission orders the use of the facilities of one public utility by another public utility. In contrast, the ROW decision adopts default rules which apply generically to all utilities affected. The Commission has not directed a use or prescribed compensation in a given case. As stated above, before the Commission issues any such orders, the parties may request a hearing.

Furthermore, although there were no evidentiary hearings prior to adoption of the default rules, there were technical workshops and written comments. The workshops and written comments provide a basis for findings which support adoption of the default rules under section 767. For example, the decision finds that nondiscriminatory access is essential to the success of facilities-based competition. (D.98-10-058 at p. 113, Finding of Fact No. 2.) In addition, the decision allows incumbent utilities to impose conditions on the granting of access which are necessary to ensure safety and engineering reliability (D.98-10-058 at p. 126, Conclusion of Law No. 46), and allows incumbent utilities to restrict access based on capacity restraints and safety, engineering, and reliability requirements (Rule VI. A.1, Appen. A of D.98-10-058 at p. 11). Therefore, we do not believe that PG&E has demonstrated legal error on the basis of Public Utilities Code section 767.

3. Whether Decision 98-10-058 Unlawfully Delegates Responsibility to Incumbent Utilities

PG&E argues that the ROW rules unlawfully delegates the Commission's responsibility to regulate telecommunications utilities and cable television corporations. PG&E points to Rule IV.C.2 of the ROW decision, which

provides that a telecommunication carrier or cable television company may use its own personnel to attach or install the carrier's facilities on a utility's facilities if, "in the utility's reasonable judgment," the personnel demonstrate that they are trained and qualified to do the work. (Appen. A of D.98-10-058 at p. 8.) The rules further require incumbent utilities to adopt written guidelines to ensure that carriers' personnel and third-party contractors are qualified. (Rule IV.C.3, Appen. A at p. 9.) The incumbent utilities are required to publish such guidelines within 180 days of the decision. (D.98-10-058 at p. 133, Ordering Paragraph No. 5.) PG&E relies on a number of statutory provisions which give the Commission the authority over the safety and sufficiency of equipment, practice and facilities of public utilities. However, PG&E includes virtually no discussion of the law on improper delegation.

PG&E's argument is without merit. The ROW decision properly delegates authority to an incumbent utility to prohibit a carrier's employees or agents from working on the utility's property or facilities if the utility believes the employees or agents are not qualified. Obviously, the incumbent utility has the best expertise and opportunity to determine this firsthand. Indeed, according to the decision, PG&E, Southern California Edison Company (Edison), and San Diego Gas & Electric Company (SDG&E) all commented that they should have the option of denying access to carriers based on safety or reliability concerns. (D.98-10-058 at pp. 67-68.)

Moreover, the incumbent utilities are required to publish objective written guidelines which are equally applicable to their own personnel as well as carriers' personnel. (Rule IV.C.3, Appen. A at p. 9.) Delegation of authority is often upheld, as long as it is not completely unfettered. (7 Witkin Summary of Cal. Law (9th Ed. 1988) Constitutional Law §§ 129-135. Compare Schecter Poultry Corp. v. United States (1935) 295 U.S. 495, 541-542 [holding that

unfettered delegation of code-making authority by Congress to the President is unconstitutional].)

Finally, the Commission has not delegated its responsibility to ultimately resolve issues of sufficiency and safety. If a dispute arises regarding the incumbent utility's guidelines or implementation of those guidelines, any party may request Commission intervention under the expedited dispute resolution procedures set forth in Rule IX of the ROW rules (Appen. A at pp. 16-20). (See D.98-10-058 at pp. 75-76.)

4. PG&E's Request for Clarification

PG&E asserts that the Commission should clarify the procedure that parties are directed to use to file agreements on pole attachments. Rule VI.C.2 provides that parties shall file contracts pursuant to General Order 96. (Appen. A at p. 13.) Rule VII.B provides that access to a utility's support structures and rights-of-way shall be subject to the requirements of Public Utilities Code section 851 and General Order 69C. (Appen. A at p. 14.)

Public Utilities Code section 851 relates to the sale or leasing of utility property. General Order 69C gives blanket section 851 authorization for easements on utility property. General Order 96 sets forth the procedures for filing contracts with the Commission. These requirements are complementary and are not inconsistent. Therefore, there is no need to modify the decision in this respect.

C. CCTA's Application for Rehearing

1. Whether the Requirement for Written Authorization for Pole Attachments Is Unlawful

CCTA objects to the rule which prohibits any attachments to rights-of-way or support structures of another utility without express written authorization from the utility. (Rule VI.D.1, Appen. A of D.98-10-058 at p. 13.) In particular, CCTA challenges the written authorization requirement for "overlashing."

According to CCTA, a cable operator does not physically attach a coaxial or fiber conductor itself to a pole. Rather, a wire support strand is attached to the pole. The operator then places communications conductors on the strand and secures them by wrapping the strand and conductors with a thin filament applied by a lashing machine. Through the life of the plant, communications conductors are periodically altered. This is referred to as "overlashing."

CCTA alleges that overlashing is a customary, routine and non-intrusive practice. CCTA contends that overlashing does not use more pole space or alter the actual pole attachment. CCTA also asserts that the owner of the strand wire is responsible for assessing the impact that new cable will place on the pole. While, CCTA recognizes there are cases in which there may be safety concerns associated with overlashing, CCTA claims that the industry has dealt with these on more of a case-by-case basis. What CCTA objects to is the blanket written authorization requirement for all attachments. CCTA contends that this will result in a competitive imbalance among telecommunication ventures.

CCTA's application is opposed by Pacific Bell, GTE and PG&E, each of whom assert written authorization is needed to ensure safety and reliability. Furthermore, as Pacific Bell points out, parties are free to negotiate terms of agreement which differ from the preferred outcomes set forth in the rules. (See Rule I.A, Appen. A at p. 3.) Thus, a utility may agree with CCTA that prior written authorization is not required under specified circumstances.

CCTA's argument is essentially a policy argument. It does not demonstrate legal error in the decision's adoption of a written authorization requirement for all pole attachments.

CCTA's application does have merit in regard to the imposition of penalties for unauthorized attachments. Rule VI.D.2 (Appen. A at p. 13) states that penalties of $500 shall be paid to the incumbent utility for each unauthorized attachment. Rule VI.D.3 (Appen. A at p. 14) provides that the Commission may

also impose sanctions and that incumbent utilities may seek further remedies in a civil action for unauthorized attachments. Rule VI.D.4 (Appen. A at p. 14) states that this section is applicable to existing attachments as of the effective date of these rules.

CCTA asserts that Rule VI.D.4 allows the Commission to impose penalties retroactively for past attachments that were placed without written authorization, but which were legally placed at the time. This was not our intent. Instead, the rules should apply only to any pole attachments made after the date the decision was issued. We will modify the rules accordingly.

2. CCTA's Request for Modification

CCTA contends that the decision contains dicta which implies that cable operators are not "cable television corporations" under the law if they provide services other than video services. (See D.98-10-058 at pp. 51-52.) According to CCTA, the decision ignores the fact that cable companies have provided, and continue to provide, non-video communications services that have never been regulated by the Commission, such as intranet, internet, and other data enhanced services. CCTA argues that the decision must be revised so that there can be no argument that cable operators are "written out" of Public Utilities Code section 767.5 because they provide non-video services as part of their franchise obligations.

The section referred to by CCTA discusses whether Public Utilities Code section 767.5, the statutory formula for cable television pole attachments, must be applied to attachments that are used by a cable television corporation when providing competitive local exchange carrier services. The decision concludes that section 767.5 does not require the pole attachment formula to be applied to every service offered by a cable television corporation. CCTA has not demonstrated that the decision should be modified. The issue of the statute's applicability to non-regulated data-enhanced services is not relevant to this

decision, which only determines the pole attachment rate for regulated telecommunications services.

III. CONCLUSION

For all of the foregoing reasons, we are of the opinion that legal error has not been demonstrated. Therefore, rehearing of D.98-10-058 is denied. However, we will modify the decision as discussed above.

THEREFORE, IT IS ORDERED that:

1. Decision (D.) 98-10-058 is modified as follows:

a. On pages 97, the last sentence which begins on page 97 and ends on page 98 is modified to read: "The changes were to become effective on August 8, 1993, and were intended to foster competition by transferring ownership and responsibility for certain telephone cable and inside wire to property owners."

b. On page 99, in the first sentence of the last full paragraph, "commercial" is deleted and replaced with "multi-unit."

c. On page 100, the last sentence of the first partial paragraph is modified to read: "Similarly, an agreement between a building owner and a carrier which favors access of the ILEC to the detriment of the CLC by charging disparate rates for access may be in violation of our rules."

d. On page 100, the second and third sentences of the second paragraph are modified to read: "Although we will not disturb any agreements predating the effective date of this order, we will permit any carrier to file a formal complaint against another carrier that is allegedly benefiting from an exclusive or discriminatory agreement with a private property owner. The complainant carrier will have the burden of proving that the defendant carrier has an arrangement or agreement with the building which is exclusive or discriminatory in violation of this order."

e. On page 101, the last paragraph which begins on page 101 and continues to page 102 is modified to read: "While building owners are entitled to exercise due discretion in managing and controlling access to their premises for the protection and security of the building occupants, our policy is to encourage competition in local exchange service. In the event a carrier is unable to reach a mutually satisfactory arrangement with a building owner for access to a building to serve customers, the carrier may pursue its eminent domain rights under relevant statutory authority in order to gain access.

f. On page 130, Conclusion of Law No. 68 is modified to read: "The minimum point of entry, as defined in D.90-10-064, is the demarcation point in or about a customer's premise where the utility's regulated network facilities end the customer's inside wire begins."

g. On page 130, in the first line of Conclusion of Law No. 70, delete the word "after."

h. On page 130, Conclusion of Law No. 71 is modified to read: "All carriers should be prohibited on a prospective basis from entering into any type of arrangement or agreement with private property owners that has the effect of restricting the access of other carriers to the owners' properties or discriminating against the facilities of other carriers, such as CLCs."

i. On page 130, Conclusion of Law No. 72 is modified to read: "Any carrier may file a formal complaint against any other carrier who has an access arrangement or agreement with a private building owner, including any executed prior to the date of this decision, that allegedly has the effect of restricting access of other carriers or discriminating against the facilities of other carriers, such as CLCs."

j. On page 14 of Appendix A, Rule VI.D.4 should be modified to read: "This Section applies to any attachment made after the date of issuance of this decision."

k. On page 22 of Appendix A, add the following sentence to the beginning of Rule X.C: "No telecommunications carrier shall enter into any arrangement or agreement with a building owner which restricts access of other carriers or contains discriminatory terms."

2. Rehearing of D.98-10-058, as modified, is denied.

This order is effective today.

Dated March 16, 2000, at San Francisco, California.

RICHARD A. BILAS
President
CARL W. WOOD
LORETTA M. LYNCH
Commissioners

I dissent.

/s/ HENRY M. DUQUE
Commissioner

I dissent.

/s/ JOSIAH L. NEEPER
Commissioner