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

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OPINION

By this decision, we take a further significant step in our program to open the local exchange market within California to competition. We adopt rules herein governing the nondiscriminatory access to the poles, ducts, conduits, and rights-of-way (ROW) applicable to all competitive local carriers (CLCs) competing in the local exchange market within the service territories of the large and midsized incumbent local exchange carriers (ILECs): Pacific Bell (Pacific) and GTE California Incorporated (GTEC), Roseville Telephone Company (RTC) and Citizens Telecommunications Company of California (CTC). In order for broadly available facilities-based competition to succeed, CLCs need access to the poles, ducts, conduits, and ROW, owned not only by the ILECs, but those owned by other entities controlling essential ROW including electric utilities and by local governments. The rules adopted herein shall apply to the major investor-owned electric utilities[1] as well as to the above-referenced ILECs. The obligations of the ILECs and electric utilities to provide nondiscriminatory access to CLCs shall also extend to cable companies. Thus, our rules shall apply uniformly, without the need to distinguish whether a given attachment is used to provide cable television, as opposed to telecommunications services. We also address herein ROW access issues relating to municipal utilities and local governments. At this time, we shall not apply these rules to other categories of investor-owned public utilities such as gas, water, or steam utilities. We will consider expanding the scope of the rules at a later time to cover additional classes of utilities.

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

I. Procedural Background

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

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

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

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

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

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

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

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

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

II. Statutory Authority For ROW Access Rulemaking

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

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

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

[5] 47 U.S.C. §§ 224(a)(4) and (f).

[6] 47 U.S.C.§ 224 (f)(1).

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

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

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

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

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachment, as well as the interests of the consumers of the utility service.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments - -

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) With respect to any individual matter, unless the State takes final action on a complaint regarding such matter - -

i. within 180 days after the complaint is filed with the State or

ii. within the application period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint."

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

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

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

A. The Need For Rules and Tariffs

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

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

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

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

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

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

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

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

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

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

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

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

B. Discussion

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

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

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

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

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

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

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

III. General Definitions and Applicability of Rules

A. Utility Categories Covered Under ROW Rules

1. Parties' Positions

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

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

2. Discussion

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

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

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

B. Definition of Rights of Way

1. Parties' Positions

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

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

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

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

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

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

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

2. Discussion

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

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

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

C. Definition of Nondiscriminatory Access

1. Parties' Positions

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

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

* First Report and Order, para. 1185

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

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

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

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

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

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

2. Discussion

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

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

D. Renegotiation of Existing Agreements to Conform to Commission Rules

1. Parties' Positions

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

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

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

2. Discussion

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

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

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

E. Applicability of Rules to Cable Companies

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

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

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

1. Discussion

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

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

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

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

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

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

1. Parties' Positions

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

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

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

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

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

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

2. Discussion

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

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

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

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

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

G. Applicability of Rules to Municipalities and Governmental Agencies

1. Parties' Positions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the City and County of San Francisco, and the San Mateo County Telecommunications Authority ("the Cities").[8]

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

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

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

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

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

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

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

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

2. Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Parties' Positions

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

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

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

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

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

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

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

2. Discussion

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

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

IV. Pricing Issues

A. Parties' Positions

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

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

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

Commission only to "prescribe a reasonable compensation and reasonable terms and conditions for the joint use" of facilities in the event parties fail to negotiate an agreement. The Coalition believes, however, that there is no legislative prohibition on the Commission's adopting the cable television formula (when it acts pursuant to § 767) for fixing the rate for pole attachments generally by all telecommunications carriers. Moreover, the Coalition argues that such an approach is mandated by nondiscrimination principles. Since the Commission cannot, by statute, vary from the pricing formula set forth in PU Code § 767.5(c)(2) [10] when it sets pole attachment rates applicable to cable television systems, the Coalition argues that all telecommunications carriers, including those that are not cable operators, must be given the same nondiscriminatory rate treatment. The Coalition claims that access to utility support structures and ROW for telecommunications carriers must therefore be set at the same rates, and on the same terms and conditions, as are afforded to cable companies pursuant to PU Code § 767.5. The Coalition claims that competition would be severely

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

i. For each pole and supporting anchor actually used by cable television operator, the annual fee shall be two dollars and fifty cents ($2.50) or 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor, whichever is greater, except that if a public utility applies for establishment of a fee in excess of two dollars and fifty cents ($2.50) under this rule, the annual fee shall be 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor.

ii. For support structures used by the cable television operator, other than poles or anchors, a percentage of the annual cost of ownership for the support structure, computed by dividing the volume or capacity rendered unusable by the telecommunications carrier's equipment by the total usable volume or capacity. As used in this paragraph, "total usable volume or capacity" means all volume or capacity in which the public utility's line , plant, or system could legally be located, including the volume or capacity rendered unusable by the telecommunications carrier's equipment.

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

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

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

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

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

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

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

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

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

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

B. Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

attachment agreement) to provide any telecommunications service."

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

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

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

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

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

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

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

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

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

financial integrity, to attract capital, and to compensate its investors for risk assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so called 'fair value' rate base." (FPC v. Hope Natural Gas Co. (1944) 320 U. § 591.) Likewise, there is no reason to find that the rate would be confiscatory merely by extending its application to the provision of telecommunications services over the same pole attachment.

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

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

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

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

A. Parties' Positions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Discussion

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

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

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

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

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

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

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

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

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

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

VI. Treatment of Confidential Information

A. Parties' Positions

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

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

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

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

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

B. Discussion

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

VII. Restrictions on Access to Utility Capacity

A. Safety and Reliability Issues

1. Parties' Positions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. **Discussion**

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

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

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

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

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

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

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

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

> "USB believes that due to pole deterioration, G.O. 95 allows the minimum safety factor to be reduced. Section 44.2 modifies the minimum safety factor by reducing it (for Grade A and B construction) to not less than 2/3. As stated in this section, a reduction is allowed for 'deterioration or changes in construction arrangement or other condition subsequent to installation.' As an example, a safety factor of 4 can be reduced to 2.67 as allowed by Section 44.2."
>
> Exhibit 511, USB Report, at 32

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

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

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

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

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

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

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

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

B. Reservations of Capacity

Parties' Positions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

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

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

virtue of their previous status as monopoly providers of utility service, ILECs have significant control of bottleneck facilities. New competitors lack the advantages of incumbency, and must build and interconnect their systems. The ILECs could use the reservation-of-capacity defense as a means of staving off competitors and perpetuating their competitive advantage over CLCs. Accordingly, we shall not permit the ILECs to deny access to other telecommunications carrier based on general claims that capacity must be reserved for their own future needs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIII. Capacity Expansion, and Modification, and Reclammation

A. Parties' Positions

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

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

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

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

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

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

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

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

B. Discussion

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

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

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

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

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

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

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

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

IX. Obtaining Third-Party Access to Customer Premises

A. Parties' Positions

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

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

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

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

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

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

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

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

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

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

As a basis for this recommendation, the Coalition cites the Commission's "shared tenant services" ("STS") decision, D.87-01-063.[24] In the STS decision, the Commission adopted a set of guidelines aimed at ensuring that, among other things, tenants in buildings or campus-like settings where the landlord provides PBX services to tenants (via a PBX switch and inside wire owned by the landlord) continue to have options for obtaining telephone services from the provider of their own choosing. The decision provided that landlords would not be regulated as a public utilities, even though they appeared to fit within the literal terms of PU Code §§ 233 and 234, *if but only if,* they complied with the STS guidelines. The rationale underlying the decision is that the Commission could have asserted jurisdiction, had it wanted to do so, over such telecommunications services providers under the statutory definitions of a

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

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

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

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

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

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

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

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

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

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

B. Discussion

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

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

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

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

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

For existing buildings constructed before August 8, 1993, Pacific was required to convey to property owners any cabling that was identified as INC on Pacific's books.[17] Pacific's investment in this transferred INC was to be recovered over a five-year amortization period (from August 1993 to August 1998) from the general rate base.

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

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

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

The Demarcation Settlement Agreement approved by the Commission in D.92-01-023 provides that for multi-unit properties built prior to August 8, 1993, the only network plant that was to be unbundled and conveyed to property owners consisted of "INC within building (riser and lateral) that was in place prior to August 8, 1993." (D.92-01-023, Attachment B (proposed tariffs), at No. A2, 2.1.20(E)(3)(b).) Pacific was required to relinquish ownership of this embedded INC to the building owner upon full recovery of the utility's capital investment. (Id. at No. A8, 8.4.3(A)(3).) However, other utility-owned network plant (described as "Non-INC") – and this included network cable stretching from a utility's central office to each MPOE at individual buildings -- was not affected by the tariff or the Commission's order.[18]

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

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

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