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May 17, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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Office of the Secretary
Federal Communications Commission
1919 M Street N.W.
Room 222
Washington, D.C. 20554

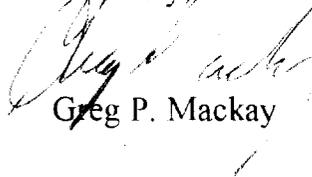
DOCKET FILE COPY ORIGINAL

**Re: Implementation of the Local Competition Provisions in the
Telecommunications Act of 1996, Docket No. 96-98**

Dear Sir/Madam:

Enclosed for filing is an original and sixteen (16) copies of the Comments of Puget Sound Power & Light Company in the above-referenced proceeding.

Sincerely,


Greg P. Mackay

GPM:jlm
Enclosures

cc: Ms. Janice Miles, Common Carrier Bureau
Ms. Gloria Shambley, Common Carrier Bureau

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United States of America
FEDERAL COMMUNICATIONS COMMISSION

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Implementation of the Local
Competition Provisions in the
Telecommunications Act of 1996

Docket No. 96-98

Access to Rights-of-Way

**COMMENTS OF
PUGET SOUND POWER & LIGHT COMPANY**

Puget Sound Power & Light Company ("Puget") is pleased to submit the comments set forth below in response to the Commission's Notice of Proposed Rulemaking issued April 19, 1996, 61 Fed. Reg. 18.311 (1996) (the "NPRM").

Party

Puget is a private, investor-owned electric utility company which provides electrical service to approximately 840,700 customers in the State of Washington.

Summary

Puget supports and endorses the Joint Comments submitted in this matter by the Telecommunications Association ("UTC") and the Edison Electric Institute ("EEI"). In addition, Puget wishes to further emphasize the need to recognize the unique position of electrical utilities in general, and Puget in particular, in the debate over issues arising out

of the Telecommunications Act of 1996 (the "Act"); specifically Section 224(f), which calls for nondiscriminatory access to poles, ducts, conduits and rights-of-ways, and Section 224(h), which requires written notification of the intent to modify or alter such poles, ducts, conduits and rights-of-way. The many considerations unique to electric utilities, as outlined below, call for the formulation of rules which ensure that electric utilities retain primary and ultimate control over the access to and use of their property.

Electrical utilities own and operate facilities which, by their nature, demand a high level of sensitivity to considerations of safety and reliability. The loss of electrical service, even if temporary, and incidents involving the improper use, maintenance or access to facilities carrying electrical current can have a real and substantial impact on the public at large. Moreover, by acting as an infrastructure resource for potential new entrants into telecommunications markets, electric utilities play only a tangential role in furthering the purpose of the Act (i.e., increasing competition in the telecommunications industry). These considerations, among others, require that determinations made by electric utilities with respect to access and use issues be afforded a high level of deference, and further establish the inequity of any rule that, in practice, would require electric utilities to subsidize the activities of telecommunications service providers.

Endorsement of Joint Comments of UTC and EEI

As stated above, Puget endorses the comments offered by the UTC and the EEI in their Joint Comments filed with the Commission in this proceeding. The facts specific to a given attachment case are likely to differ so substantially from those in any other case that it would be impractical and unwise, if not impossible, to promulgate a single nation-wide rule for handling access and notice issues. Limiting the rulemaking effort

under the NPRM to the establishment of procedures for resolving disputes when and if they arise would clearly be the most productive approach at this time.

Compliance with the Takings Provision of the Fifth Amendment

Any rules adopted to implement the access requirement of the Act must be carefully tailored to comply with the Takings Clause of the Fifth Amendment to the United States Constitution. The ability to exclude others from one's property is the fundamental right of all property owners protected by the Fifth Amendment. If the Commission interprets the Act's access requirement broadly as mandating access to the facility owner's property to all who desire it, the Takings Clause would be violated. The focus should be on rules that prevent unreasonable discrimination between entities that have attached to the facility with the permission of the facility owner.

Deference to Determinations Made by Electrical Utilities

Electrical facilities pose much different safety, reliability and engineering considerations than do the coaxial and fiber optic cables used in the telecommunications industry. The loss of electric service to the public and the inherent risks associated with operating and working around electrical facilities each presents difficulties not found with other types of facilities. The electric utility facility owner is uniquely qualified to address these considerations and to make appropriate determinations which concern the overall use of its facilities. In doing so, however, the facility owner must also be free to manage its facilities and operations and to implement standards regarding access and use without fear of being inundated with claims that it has denied access unreasonably.

Section 224(f)(2) of the Act implicitly recognizes the unique nature of jointly installing communication and electrical equipment in the same poles, ducts, conduits and rights-of-way. Electric utilities need to be able to exercise reasonable judgment and to prudently manage their facilities without undue interference, and in doing so have the right to deny access if, in the electric utility's' reasonable judgment, there is insufficient capacity or safety, reliability and engineering concerns. Further, the bases to make and examine the civil, electrical and safety determinations of insufficient capacity, reliability and engineering purpose are well established in the industry and do not warrant further complication by adding more regulations, particularly if they put the electric utility in the position of having to choose between conflicting rules. For example, electric utilities are obligated under state authority to manage their property in a way which will promote reliability and low cost service to its rate payers. Nondiscriminatory access, without deference to the judgment of the electric utility, may at times be in direct conflict with that obligation and create a contentious and, perhaps, litigious relationship between the electric and telecommunications industries that could have a chilling effect on activities aimed at furthering the procompetitive purpose of the Act.

The electric utility's obligation to manage its property so as to promote reliability and low cost service to rate payers cannot be unduly restricted in the name of providing nondiscriminatory access to the providers of telecommunications services. This notion is equally applicable to the notice provisions contained in Section 224(h). If providing notice and the implied requirement to accommodate such participation in any upgrade of existing jointly used facilities causes in any way the reliability to degrade or costs to increase, the electric utility must be freed from such unduly restrictive regulations.

Accordingly, rules promulgated by the Commission, and in particular any rules intended to give meaning to "insufficient capacity" and "reasons of safety, reliability and generally applicable engineering purposes," should expressly afford great deference to determinations made by the electrical utility in the exercise of its reasonable judgment. At the very least, electric utilities must be presumed to be acting in good faith, and the burden of proof must rest squarely with the attaching entity.

Protection from Forced Subsidization

Electric utilities that do not also provide telecommunications services are merely an infrastructure resource to those who directly participate in and benefit from the procompetitive, deregulatory policy framework established by the Act. They must not, therefore, be forced to subsidize in any way the activities of the telecommunications providers.

In order to avoid improper subsidization of the attaching entity, the facility owner must be given the widest possible latitude in allocating and recovering the fully allocated costs associated with permitting, implementing and maintaining the attachments. Costs associated with facility modification or make-ready work must be fully allocable to the attaching entity causing such modification or make-ready work. Further, the costs of modifying an attaching entities' attachment, even when required by modifications made to facilitate the facility owner's operations, must be recoverable from the attaching entity either directly or through the attachment rate as part of the overhead of pole ownership. Any other outcome would result in the facility owner incurring costs that it would not otherwise incur absent the presence of the attachment, thereby forcing the facility owner

to subsidize the activities of the attaching entity. Such a result would be unfair and is clearly not required under or contemplated by the Act.

Conclusion

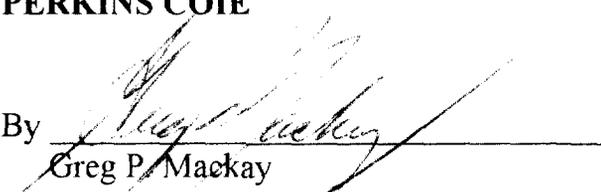
If not interpreted and applied properly, the access and notice requirements of the Act will pose unique problems for electrical utilities like Puget who are already subject to a large number of existing laws and regulations relating to safety, use and reliability. Puget joins the UTC and EEI in urging the Commission to promulgate rules which are flexible and provide primarily for the equitable resolution of conflicts between facility owners and the attaching entities. Any such rules must give deference to determinations made by the facility owners, ensure that facility owners are not in any way forced to subsidize the entry of new participants into telecommunications markets, and avoid any interpretation of the Act that would seemingly authorize the unconstitutional taking of private property.

DATED this 17th day of May, 1996.

Respectfully submitted,

PERKINS COIE

By


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Of attorneys for Puget Sound Power & Light
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