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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of the Local) CC Docket No. 96-98
Competition Provisions in the)
Telecommunications Act of 1996)

To: The Commission

COMMENTS OF
AMERICAN ELECTRIC POWER SERVICE CORPORATION,
BALTIMORE GAS AND ELECTRIC COMPANY,
COMMONWEALTH EDISON COMPANY, DUKE POWER COMPANY,
ENERGY SERVICES, INC., FLORIDA POWER & LIGHT COMPANY,
METROPOLITAN EDISON/PENNSYLVANIA ELECTRIC COMPANY,
MONTANA POWER COMPANY, NORTHERN STATES POWER COMPANY,
OTTER TAIL POWER COMPANY, PACIFIC GAS & ELECTRIC COMPANY,
THE SOUTHERN COMPANY, TAMPA ELECTRIC COMPANY,
UNION ELECTRIC COMPANY, WASHINGTON WATER POWER COMPANY,
WISCONSIN ELECTRIC POWER COMPANY, AND
WISCONSIN PUBLIC SERVICE CORPORATION

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EXECUTIVE SUMMARY

The Telecommunications Act of 1996 amended the Pole Attachments Act, 47 U.S.C. § 224, to require "nondiscriminatory access" to the poles, ducts, conduit and rights-of-way of certain utilities, including investor-owned electric utilities. The statute provides that electric utilities subject to this provision may deny access if insufficient capacity exists, or for reasons of safety, reliability, or generally applicable engineering purposes. In a distinct and separate section of the new law, local exchange carriers are required to afford access to poles, ducts, conduits, and rights-of-way consistent with the provisions of the Pole Attachments Act. The insufficient capacity, safety, reliability, and generally applicable engineering purposes exceptions do not apply to local exchange carrier infrastructure.

The statutory term "nondiscriminatory access," if interpreted to mandate or guarantee access to utilities' infrastructure, raises serious constitutional concerns. Supreme Court and other court decisions are clear that any law that removes the voluntary aspect of the decision as to whether to grant access to private property -- such as a law that "requires utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements" -- is constitutionally suspect.

Notwithstanding the significant question as to the constitutionality of the "nondiscriminatory access" provision, the statute provides electric utilities with certain exceptions to access. Although objective, the statutory bases under which access may be denied are highly variable and, to a certain degree, unpredictable. For example, the determination of whether sufficient capacity exists to accommodate an additional attachment to a pole involves, but is not limited to, a consideration of the height of the pole, the construction of the pole (wood, steel, fiberglass, etc.), the classification of the pole, the number of parties already attached to the pole, the size and weight of the facilities attached, the particular terrestrial and climatic conditions of the area in question, and the safety standards applied to determine the structural integrity of the pole. The determination is equally complicated in the case of ducts, and conduits. The determination in the case of rights-of-way is wholly dependent on the applicable state law (thus, varying from state-to-state) and the terms of each individually negotiated agreement for the right-of-way.

In sum, the calculation required to determine the capacity of each type of infrastructure is highly variable and fact specific. The calculations required to determine the safety and reliability of access and whether access comports with generally applicable engineering purposes are no less fact specific or variable. While a strong argument can be made that because of

the fact-specific nature of these issues no general rules should be adopted, should the Commission determine to adopt any regulations to implement the capacity, safety, reliability and engineering purposes provisions of Section 224, those regulations should set general principles, not specific standards that would only prove unworkable. Flexibility must be given to the infrastructure owner to evaluate the suitability of access, based on the precise facts in question.

The amended Pole Attachments Act also requires infrastructure owners to provide notice to parties with attachments to their conduit or rights-of-way when they intend to make a modification or alteration to their poles, ducts, conduits and rights-of-way. In implementing this requirement, the Commission should clarify that it only applies to scheduled or planned modifications or alterations, not to emergency situations, responses to customer complaints, routine maintenance runs, and other types of unplanned work on infrastructure. Because the circumstances of each owner of infrastructure and the number and nature of attached parties are unique, the Commission is again encouraged to adopt flexible rules, if at all. The timing and manner of notice should be left to the agreement of the particular parties. To the extent the parties cannot reach agreement, a maximum notice period of 10-days is reasonable.

To conclude, the Commission is urged to follow the guiding principles and philosophy of the 1996 Act in considering the nondiscriminatory access and written notification issues of Section 224 -- to let parties negotiate under market forces, to provide maximum flexibility and to avoid unnecessary, unworkable and burdensome regulations.

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American Electric Power Service Corporation, Baltimore Gas and Electric Company, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Florida Power & Light Company, Metropolitan Edison/Pennsylvania Electric Company, Montana Power Company, Northern States Power Company, Otter Tail Power Company, Pacific Gas & Electric Company, The Southern Company, Tampa Electric Company, Union Electric Company, Washington Water Power Company, Wisconsin Electric Power Company, and Wisconsin Public

Service Corporation (collectively referred to as the "Infrastructure Owners"), through their undersigned counsel and pursuant to Section 1.415 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission") respectfully submit the following Comments in response to the above-captioned Notice of Proposed Rulemaking.^{1/}

STATEMENT OF INTEREST

1. The Infrastructure Owners are investor-owned electric or power utilities (or parents, subsidiaries or affiliates of electric or power utilities) engaged in the generation, transmission, distribution, and sale of electric energy.^{2/} Collectively, their service territories are located in virtually every region of the United States and together they provide electric service to millions of residential and business customers. The Infrastructure Owners own electric energy distribution systems that include millions of distribution poles, thousands of miles of conduits, ducts and rights-of-way, all of which is used to provide electric power service to ratepayers. This infrastructure also is used in whole or in part for wire communications. As such, to the extent those facilities are used for communications and the state in question has not preempted

^{1/} In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Notice of Proposed Rulemaking, CC Docket No. 96-98, released April 19, 1996 (referred to here as the "Interconnection NPRM").

^{2/} A general description of each of the Infrastructure Owners is attached hereto as Appendix I.

the FCC's jurisdiction, the Infrastructure Owners are subject to regulation by the Commission under the federal Pole Attachments Act, 47 U.S.C. § 224, as amended.^{3/}

2. In general, the Interconnection NPRM seeks comment on rules to implement Sections 251, 252, and 253 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (referred to here as the "1996 Act"). However, in view of the Section 251(b)(4) requirement that local exchange carriers ("LECs") afford access to poles, ducts, conduits, and rights-of-way to competing providers of telecommunications services on rates, terms, and conditions that are consistent with Section 224, 1996 Act, sec. 101, Paragraphs 220-225 of the Interconnection NPRM seek comment on Sections 224(f)(1), 224(f)(2) and 224(h) of the Pole Attachments Act, 1996 Act, sec. 703.

3. The Infrastructure Owners have a vital interest in the requirements of Section 224, in general, and in the provisions of Sections 224(f) and 224(h), in particular. Those sections could involve significant changes in the manner in which the Commission

^{3/} As noted above, some of the Infrastructure Owners provide energy service in States that have preempted the Commission's jurisdiction under Section 224 by making the certification required by 47 U.S.C. § 224(c)(2), and are therefore subject to state regulation of pole attachments. Nonetheless, because the federal statute serves as the loose "benchmark" on pole attachment and related issues, all of the Infrastructure Owners have a significant interest in the Commission's actions concerning such issues.

has regulated pole attachments in the past, and could impose significant new obligations on the Infrastructure Owners. While the language of Section 224(f) appears to be simple, its provisions and substance are particularly complex when electric facilities are involved. Consideration of complex technical standards is required, including (as indicated in the statute) electric service safety, reliability and engineering concerns. Any standards the Commission might develop to implement Section 224(f) directly and indirectly implicate critical issues involving the potential for loss of life, serious bodily harm, and significant property damage, as well as the potential for impaired electric service reliability. Thus, the Infrastructure Owners are concerned that any standards or regulations relating to Sections 224(f) provide flexibility while fully protecting service reliability and the safety of individuals and property.

4. Because of the potentially significant administrative burdens posed by Section 224(h), the Infrastructure Owners have a strong interest in ensuring that the Commission's regulations in that area, if any, facilitate compliance in the least burdensome and costly way. The Infrastructure Owners appreciate this opportunity to comment on the issues raised by the Commission in this rulemaking proceeding.

BACKGROUND

5. In this rulemaking, the Commission seeks comment on the requirements of Sections 251, 252, and 253 of the 1996 Act to assist it in the development of regulations to implement the statutory requirements. By statute, the Commission must take all actions necessary to implement the requirements of Section 251 by August 8, 1996. Because Section 251(b)(4) requires LECs to afford access to poles, ducts, conduits, and rights-of-way to competing providers of telecommunications services on rates, terms, and conditions that are consistent with Section 224, the Commission apparently intends to promulgate regulations implementing Sections 224(f) and 224(h) of the 1996 Act in this proceeding. The Commission seeks comment on a number of issues raised by the new requirements of Sections 224(f) and 224(h). The Interconnection NPRM does not indicate, however, that the Commission has reached any tentative conclusions on the issues raised.

COMMENTS

I. The Meaning of Nondiscriminatory Access

6. Pole attachments were unregulated by any Federal authority until the late 1970s. In the mid-to-late 1970s, the then nascent cable television industry launched a campaign to enact federal legislation delegating jurisdiction over pole attachment disputes to the FCC. Cable television ("CATV")

operators claimed that they had no forum in which to bring complaints.

7. In 1978, Congress responded by enacting the Pole Attachments Act, 47 U.S.C. § 224. The Pole Attachments Act directed the FCC to regulate the rates, terms and conditions for attachments by cable television systems to the poles of investor-owned utilities, to ensure that they are just and reasonable. The 1978 statute did not directly or indirectly provide for nondiscriminatory access.

8. In the 1996 Act, Congress' goal was to promote competition and reduce regulation in the telecommunications industry. As part of that goal, Congress mandated, in Section 251(b)(4), that LECs allow access to their poles, ducts, conduits and rights-of-way to competing providers of telecommunications services in a manner consistent with the Pole Attachment Act. In its interconnection NPRM, the Commission recognizes that the right of access to a LEC's facility is "vital to the development of local competition." As part of the 1996 Act and consistent with its overall goals and Section 251, the Pole Attachment Act was amended to encompass not only cable television systems, but all providers of telecommunications services and, for the first time, to directly require, in a new Section 224(f), that access to utility facilities be "nondiscriminatory."

A. Interpretation or Application of "Nondiscriminatory Access" in a Manner that Creates a Right of Access Constitutes an Unconstitutional Taking

1. The FCC should not impose a definition of "nondiscriminatory access" that restricts the ability of electric utilities to freely contract with telecommunications providers for occupation of pole, duct, conduit or right-of-way space. Any such interpretation is constitutionally suspect.^{4/}

2. To pass constitutional muster, the access required under Section 224(f)(1) must be voluntary. Voluntary access means that the owner of the infrastructure makes case-by-case determinations, distinguishing between and among applicants for access, as appropriate. Voluntary access means access will be allowed based on the infrastructure owner's best business judgment and in its sole discretion. Voluntary access does not depend on whether or not any other party has been afforded access to the infrastructure, past or present. Voluntary access means that the infrastructure owner can grant access to one applicant only, to multiple applicants, or to no one. Voluntary access gives the infrastructure owner the right to terminate access at any time.

^{4/} Northern States Power Company, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation do not join in the constitutional arguments set forth in this Section of the Infrastructure Owners' Comments.

3. Takings jurisprudence dictates that Section 224(f)(1) cannot be interpreted as preventing companies from exercising their right to exclude persons or entities from their property.^{5/} The FCC's new pole attachment regime can be analyzed under two relevant categories of takings cases: (1) physical invasions or "per se takings," and (2) takings by regulation or "regulatory takings."^{6/} Per se takings are those that compel a property owner to suffer a physical occupation of its property, and require just compensation, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it..." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992). Regulatory takings occur where a law denies the owner substantial productive use of its property. Id. at 1015; see also Yee v. City of Escondido, 503 U.S. 255 (1992); Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

4. The Supreme Court has found a per se taking under the Takings Clause under factual scenarios similar to those presented

^{5/} The Takings Clause of the Fifth Amendment to the U.S. Constitution provides in relevant part: "[P]rivate property [shall not] be taken for public use without just compensation." U.S. Const. amend. V.

^{6/} The lines between these two frameworks and Due Process analyses are not always clearly demarcated by the courts. Mandated access pursuant to Section 224(f)(1) may run afoul of the Due Process clause, which provides that no person may be "deprived of . . . property, without due process of laws," as well as the Takings clause. See U.S. Const. amend. V.

by Section 224(f)(1). In Loretto v. Teleprompter Manhattans CATV Co., 458 U.S. 419 (1982), the plaintiff brought a class action to challenge the constitutionality of a New York statute which required landlords to allow the installation of cable television (CATV) facilities on their property. In addition, the statute prohibited landlords from receiving payments for the CATV installation in excess of the rate set by the State Commission on Cable Television. The Loretto Court established the rule that "a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." 458 U.S. at 432. Notably, the Supreme Court in Loretto refused to consider whether the permanent physical occupation served any public interest and specifically stated that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." Id. Moreover, the Supreme Court would not even consider the magnitude of the physical occupation. It stated that "whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox." Id. at 438 n.16.

5. In FCC v. Florida Power Corp., 480 U.S. 245 (1987), the Supreme Court discussed Loretto in the context of the Pole Attachments Act. Importantly, the Supreme Court found the Pole Attachments Act did not effect an unconstitutional taking under Loretto because the Act (as interpreted by the FCC) did not

permit CATV companies to permanently occupy utility company property. The Court based its ruling on the fact that under the Act, the CATV companies did not have the right to occupy space on utility poles, and utility companies could refuse to enter into attachment agreements with CATV companies. Id. at 251-52 (emphasis added) (the language of the Act "provides no explicit authority to the FCC to require pole access for cable operators"). The Court emphasized, however, that the per se rule articulated in Loretto would apply to a government regulation which requires the landowner to acquiesce in the occupation. Id., 480 U.S. at 253. Indeed, the Court explicitly reserved decision on the Pole Attachments Act's constitutionality in the event the Act was subsequently applied to compel "utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." Id. at 251 n.6. Amended Section 224 (f) (1) raises this precise question.

6. Mandating access to the private property of investor-owned utilities -- poles, ducts, conduits and rights-of-way -- constitutes a permanent physical occupation which denies the utility infrastructure owner of the economic benefit and value of its private property. As such, it is an unconstitutional taking.

B. The Most Favorable Treatment of "Nondiscriminatory Access" If the Term Guarantees a Right of Access

7. Without conceding that Section 224(f) (1) can be interpreted in a constitutionally permissible way and without

waiving any right to challenge the constitutionality of Section 224(f)(1) in any other proceeding or forum, the Infrastructure Owners offer the following comments.

8. To the extent "nondiscriminatory access" is interpreted to require or guarantee a right of access, "nondiscriminatory access" should provide that similarly-situated entities seeking to attach to the identical utility infrastructure under substantially similar circumstances are afforded access based on an impartially applied set of criteria. "Nondiscriminatory access" can be viewed as the provision of similar space and attachment opportunities to a telecommunications carrier or cable operator on a first-come, first-served basis, where the utility (in compliance with the clearance provisions of the NESC and other applicable safety standards) has determined that there is sufficient pole capacity and subject to certain limitations imposed by applicable industry operational, safety, reliability, and engineering standards, as determined by the infrastructure owner (or utility), all of which are considered on a pole-by-pole and attachment-by-attachment basis. This understanding of the term "nondiscriminatory access," while still mandating access and thus constitutionally suspect, gives infrastructure owners the flexibility needed to manage the safety and reliability of electric operations, protects the public against electrical hazards or power outages, and concurrently ensures equitable consideration with respect to access.

9. In the electric utility context, if capacity is available, is not required for the utility's own current or anticipated needs, and access is compatible with safety, reliability, and generally applicable engineering standards, then access to the available space should be granted to a requesting telecommunications carrier or cable operator, assuming a right of access is found to exist. The utility has an economic incentive to grant access under such conditions. Each type of infrastructure and each attachment will be different, however. Furthermore, the infrastructure of each utility is distinct. Therefore, utilities must retain the discretion and flexibility to apply "nondiscriminatory access" principles on a case-by-case basis, consistent with the underlying goals of the 1996 Act.^{2/}

C. Distinguishing Conditions of Access

10. As noted above, the Infrastructure Owners do not concede the constitutionality of any mandated right of access to their infrastructure. Nonetheless, to the extent the Commission interprets or applies Section 224(f)(1) in a manner that mandates access to utilities' infrastructure, it is clear that Congress intended that electric utilities be permitted to condition and

^{2/} Access granted to one part of a utility's infrastructure structure must not be construed as access granted to the whole. Just because a utility has granted LECs or any other telecommunications provider access to its poles, for instance, does not mean that it must grant anyone access to its conduits, ducts, or rights-of-way. Each type of infrastructure must be considered independently. Moreover, the utility must be free to deny access to all, where access has not previously been granted to anyone.

even to refuse access to their infrastructure in certain circumstances. The comments offered by the Infrastructure Owners below are intended to address these circumstances, again, without waiving their right to further constitutional challenges on any mandated access in other proceedings or forums.

11. In its Interconnection NPRM, the Commission asks whether there are legitimate bases for distinguishing conditions of access and, further, whether the terms of access must be the same as the carrier applies to itself or an affiliate for similar uses. As noted above, Section 224(f)(2) is a recognition by Congress that utilities that provide electric service must be able not only to distinguish conditions of access, but to deny access.

12. Electric utility poles, ducts, conduits and rights-of-way must, first and foremost, be available for use by the electric utility for the protection and control of the electric system. The provision of electric service is, of course, the principal reason for the existence of the infrastructure in the first instance and it must remain a central purpose for which the poles, ducts, conduits and rights-of-way may be used. In short, the supplying of electric service to residential and business customers -- a basic need with safety overtones -- must take priority over the provision of any other service.

13. The electric utility must be able to make decisions about the use of its infrastructure that, in its sole discretion, are necessary to protect the public interest and safety and to ensure its ability to fulfill its primary mission -- the provision of electric service to its residential and business customers. Any installation needed at any time as a requirement of the electrical system must take priority over any other installation. Correspondingly, the electric utility must be able to use its poles, ducts, conduits and rights-of-way not only for electrical distribution but also for the installation of communications facilities that provide internal company communications critical to the company's operations and the control and provision of safe and reliable electric service. Indeed, if the utility does not have the right to use its own facilities for its own electric system purposes at any point in time, the electric utility could later be found to be in violation of state statutory duties. See, e.g., Fla. Rev. Stat. § 366.03 (electric utility has a statutory duty to provide reasonably sufficient, adequate and efficient electric service to its customers).

14. In addition to the provision of reliable electric service, the electric utility has an obligation to its ratepayers and investors to provide the best service, at the least possible cost. Indeed, utilities are required by state law to be prudent; their business decisions are scrutinized by the respective state

public utility commissions ("PUCs") in this regard. Because the rates of the electric utilities are determined, in part, on the basis of assets in rate base and the costs of poles, ducts, conduits and rights-of-way are included in that rate base, the utility must be permitted to exercise its business judgment about the use of those assets in a manner that will best serve and benefit its ratepayers and investors. For example, if two entities seek access to poles concurrently and capacity exists to accommodate only one, the electric utility should be permitted to select the entity that offers the most favorable terms. Such legitimate business decisions should not be construed as unfairly discriminating against any particular entity, but the electric utility should be allowed to make decisions based on its business judgment as to what will best promote the interests of its ratepayers and investors. The Commission should find that the exercise of sound business judgment is not discriminatory.

15. Electric utilities frequently have reciprocal joint use agreements in place with LECs. Some also have joint ownership agreements. The purpose of these agreements is to avoid the unnecessary duplication of two systems of poles, ducts, conduits and rights-of-way and, therefore, to benefit the ratepayers and investors of electric and telephone service. Under these agreements, each party gives the other a right of first refusal with respect to space for electric or telephone attachments on a newly placed pole, as each party equally bears in the full costs

associated with pole ownership. In addition to benefitting ratepayers and investors of both electric and telephone service, joint use agreements are frequently required by state or local laws for safety reasons, as well as for aesthetic considerations. These agreements, especially the joint use and ownership agreements that benefit electric and telephone customers, must be allowed to remain in place under any "nondiscriminatory access" scheme the Commission may promulgate.

16. The Commission's rules must recognize that the pole attachment provisions of the 1996 Act apply only to new agreements, entered into after the effective date of the 1996 Act, and do not reach existing pole attachment contracts between electric utilities, cable television systems and telecommunications providers. Without "'strong, and imperative language... so clear and positive as to leave no room [for] doubt,'" James Cable Partners v. City of Jamestown, 43 F.3d 277, 280 (6th Cir. 1995) (citing Landgraf v. USI Film Prod., 114 S.Ct. 1483, 1497 (1994)), which is lacking in Section 224 of the 1996 Act, the pole attachment provisions only apply prospectively, to new contracts entered into after the effective date of the provisions.^{8/} Congress has given no indication of an intent to

^{8/} In James Cable Partners v. City of Jamestown, supra, the court found that certain provisions of the Cable Television Consumer Protection Act of 1992 ("CTCPA"), Pub. L. No. 102-385, 106 Stat. 1460, did not apply to existing cable contracts. The court, citing Landgraf, supra, upheld the enforcement of an exclusive franchise granted before the enactment of the CTCPA,
(continued...)

apply the pole attachment provisions so as to disturb established agreements. Accordingly, in implementing rules pursuant to these provisions, the Commission must also respect these agreements and not seek to impose new regulatory obligations or review upon them.

17. Administrative agencies, like the FCC, can and have interpreted "nondiscriminatory access" as permitting distinct conditions or classifications of access to requesting parties. For example, in American Gas Ass'n v. Federal Energy Regulatory Comm'n ("FERC"), 912 F.2d 1496 (D.C. Cir. 1990), the United States Court of Appeals for the D.C. Circuit interpreted the term "nondiscriminatory access," as used in the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1334(e)-(f) (1982), in this fashion. Despite contentions from the litigants that the plain language of "nondiscriminatory" precluded any access restriction, the court held that FERC had the interpretive power to permit restrictions on access consistent with the overall pro-

^{8/}(...continued)

the CTCPA's prohibition on unreasonable refusals to award additional competitive franchises notwithstanding. Significantly, the court noted the "disruption of the parties' settled expectations" which would occur if the CTCPA applied retroactively. James Cable, supra, at 280.

competitive Congressional purpose in enacting OCSLA.^{9/} AGA, 912 F.2d at 1512. The court noted that:

...statutory bans on discrimination by natural monopolies have always allowed the regulatory agencies discretion to permit differing categories, including, for example, rate classifications based on customers' differing elasticities of demand.

Id. (citing American Gas Distributors I, 824 F.2d 981 (D.C. Cir. 1986)).

18. The term "nondiscriminatory access" as used in Section 224(f) allows for flexibility and the Commission may, and should, implement regulations which account for differences among classes of requesting carriers, utilities and facilities, as well as other relevant nondiscriminatory criteria.

II. Because Specific Standards Are Problematic, the FCC Should Establish General Principles Defining When Access May Be Denied

19. Under Section 224(f)(2), an electric utility may deny access when there is insufficient capacity to permit access, and for reasons of safety, reliability and generally applicable engineering purposes. The Commission seeks comment on a number of issues regarding these exceptions, including whether specific standards govern when a utility has insufficient capacity to

^{9/} OCSLA Section 1334(f) requires natural gas pipeline entities, to be entitled to a right-of-way across the outer Continental Shelf, to provide "open and nondiscriminatory access to both owner and non-owner shippers." At issue in AGA, supra, was a FERC Order permitting pipeline entities to refuse to transport gas on the outer Continental Shelf for producers who themselves had refused to give the pipeline entities credits for such gas. AGA, 912 F.2d at 1511.