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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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

To: The Commission

REPLY COMMENTS OF
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

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EXECUTIVE SUMMARY

In their Comments on the meaning of "nondiscriminatory access," numerous utilities -- both electric and telephone -- agreed that any interpretation of that term in a manner that mandates or guarantees access to utilities' infrastructure raises significant constitutional concerns. Under the Takings clause of the U.S. Constitution, a permanent invasion of private property that denies the property owner of the economic benefit of his property is unconstitutional.

Utilities (again, both electric and telephone) were united in their position that the Commission should refrain from promulgating specific, rigid regulations to implement the access provisions of Section 224(f)(1). Moreover, electric utilities strongly objected to the promulgation of specific rules or regulations to implement the denial of access provisions of Section 224(f)(2). Safety, reliability, and engineering issues are highly variable, fact-specific, and inherently unsuitable for specific, detailed regulatory treatment. Contrary to the assertions of parties seeking access to utility infrastructure, generalized guidelines such as the National Electrical Safety Code -- while a starting point -- are insufficient to protect the safety and reliability of electric service. For this reason, reliance on a single basic standard poses a significant threat of electric service outages, as well as damage to persons and property. The Commission should dismiss the simplistic approach to safety and reliability advanced by some Commenters.

Rules to implement the written notification requirement of Section 224(h), likewise, should be in the nature of general principles. A majority of utility Commenters supported a 10-day notice period or another reasonable time limitation. Those Commenters who suggested longer periods -- such as one year -- apparently misunderstand the purpose of the written notification requirement. It represents a simple attempt to divide the costs of accessibility to infrastructure. It is not an opportunity for a wholesale reassessment of a telecommunications carriers' business plans. A forced and lengthy delay in the ability of an electric utility to perform work on its infrastructure would wreak havoc on its ability to maintain the reliability of electric service. Further, utilities universally supported certain exceptions to the written notification, such as in the case of emergencies, unplanned maintenance and so forth. These exceptions do not fall within the scope of the statutory written notification provisions and, again, are necessary for the smooth operation of electric service. Finally, utilities agreed that the costs of accessibility must be apportioned among all parties benefitting from the modifications or alterations on an equal basis. Attaching parties, on the other hand, improperly attempted to expand the scope of the statute (and the scope of this proceeding) to cover replacement, rearrangement, make-ready and other unrelated costs. These parties' views are without merit and, thus, they must be ignored.

In sum, regulatory forbearance, consistent with the overall deregulatory theme of the 1996 Telecommunications Act, should be

the Commission's theme as it moves to implement the pole access and written notification requirements of Sections 224(f) and 224(h) of the Pole Attachments Act.

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WISCONSIN ELECTRIC POWER COMPANY, AND
WISCONSIN PUBLIC SERVICE CORPORATION

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 Reply Comments in response to the above-captioned Notice of Proposed Rulemaking.[1/]

INTRODUCTION

1. The Infrastructure Owners[2/] participated in the initial stage of this proceeding by filing Comments on the pole access and written notification issues raised in Paragraphs 220-225 of the Commission's Interconnection NPRM. As indicated in those Comments, the Infrastructure Owners, owners of electric energy distribution systems that include distribution poles, ducts, conduits and rights-of-way used to provide electric power service to ratepayers, are subject to regulation by the Commission under the federal Pole Attachments Act, 47 U.S.C. § 224, as amended, to the extent those facilities are used for communications and the State has not preempted the FCC's jurisdiction by making certification under Section 224(c).

2. In their Comments, the Infrastructure Owners' raised serious questions about the constitutionality, under the Takings Clause of the U.S. Constitution, of any interpretation of Section 224(f)(1) that mandates access to poles, ducts, conduits and rights-of-way.[3/] Notwithstanding that significant and threshold question, the Infrastructure Owners urged the Commission to

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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.

3/ Northern States Power Company, Wisconsin Electric Power Company and Wisconsin Public Service Corporation do not join in this argument.

refrain from promulgating specific regulations or standards to implement the provisions regarding access or denial of access. Those issues are highly fact-specific and vary from utility-to-utility. Thus, they are inherently unsuitable for specific, detailed regulation. Moreover, rigid or inflexible rules will discourage efforts to reach voluntary and mutual agreement between parties, counter to Congress' intent. In the event that denial of access is warranted based on Section 224(f)(2) the utility will provide a concise written statement specifically stating the rationale for denying access, but it should not be subject to rigid and unworkable rules.

3. Similarly, the Infrastructure Owners urged the Commission to refrain from issuing more than general principles to implement Section 224(h). The obligations imposed on utilities under that written notification requirement are clear from the face of the statute. The precise details -- in terms of the manner and timing of notification -- should be left to the parties involved since each situation is distinct.

4. In reviewing the Comments filed by other parties, the Infrastructure Owners note that the owners of poles, ducts, conduits and rights-of-way are virtually unanimous in their opposition to the imposition of specific standards to regulate matters of capacity, safety, reliability, and engineering purposes because of the high degree of variability regarding those matters. Not surprising to the Infrastructure Owners, other Commenters, such as the cable industry, appear all too willing to compromise utilities' infrastructure, thus compromising electric

service, telephone service, and the public safety, for the sake of making attachments. The Infrastructure Owners take serious issue with the merits of such Commenters' views.

5. The Comments submitted by many parties demonstrate significant confusion over the scope of the written notification provision. Comments addressing rearrangement/replacement costs, make-ready costs and other such issues are irrelevant, and should be ignored, since the Commission has not sought comment on those aspects of the Pole Attachments Act. The statute is clear with respect to the obligations of infrastructure owners and entities with attachments to that infrastructure. The parties themselves should be permitted to fill in the details as to how to comply with those obligations to best serve their singular circumstances. The Infrastructure Owners submit the following Reply Comments in response to opposing comments.

REPLY COMMENTS

I. The Meaning of Nondiscriminatory Access

A. Mandated Access Constitutes an Unconstitutional Taking[4/]

6. As a threshold matter, the Commission has asked for comment on the meaning of the term "nondiscriminatory access" as used in Section 224(f)(1). Commenting parties have offered a variety of possible definitions. Some Commenters suggest the term means access at comparable rates to all requesting par-

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[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' Reply Comments.

ties.[5] Other Commenters posit that it means access similar to that which the utility provides to itself or to an affiliate for similar uses of the facility.[6] Still other Commenters assert that the term means that a utility may not deny another telecommunications carrier access to its rights-of-way for any reason other than those specifically authorized by Section 224(f)(2).[7] Although a variety of views were expressed, the Infrastructure Owners have no difficulty in determining precisely what "nondiscriminatory access" cannot be.

7. "Nondiscriminatory access" cannot be mandated access or any form of access that guarantees or provides a right of access to utilities' private property. If it does, the term poses serious constitutional questions under the Takings Clause of the Fifth Amendment to the U.S. Constitution.[8] To pass constitutional muster, the access required under Section 224(f)(1) must be voluntary. If "nondiscriminatory access" means a permanent physical occupation that denies the utility infrastructure owner of the economic benefit and value of its private property, it is an unconstitutional taking.[9]

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[5] See, e.g., Ameritech at 35; GTE at 23.

[6] See, e.g., ALTS at 7; AT&T at 15; Citizens Utility Company ("Citizens") at 3; Frontier at 6; GCI at 3; MCI at 22-23; Sprint at 16; and TRA at 13.

[7] See, e.g. MFS at 10.

[8] Infrastructure Owners at 7-10.

[9] See FCC v. Florida Power Corp., 480 U.S. 245 (1987); Loretto v. Teleprompter Manhattans CATV Co., 458 U.S. 419 (1982).

8. Several other Commenters agreed. For example, GTE Service Corporation ("GTE") notes that effectively relegating the property rights of owners to the status of non-owning attaching parties, while requiring the "owner" to nonetheless bear all of the costs and responsibilities of ownership, raises constitutional takings issues.[10/] The Puget Sound Power & Light Company ("Puget") noted that the ability to exclude others from one's property is a fundamental right of all property owners protected by the Fifth Amendment.[11/] U.S. West hints that mandated access may be an unconstitutional takings[12/], and Virginia Electric and Power Company ("Virginia Power") likewise cites to the constitutional infirmities of mandated access.[13/] Finally, UTC and the Edison Electric Institute ("UTC/EEI") note that any conclusion that Section 224(f)(1) mandates access to utility infrastructure raises serious constitutional questions, implicating at least the taking of property without just compensation.[14/]

9. Although the Pole Attachments Act, as originally enacted, has once withstood constitutional scrutiny, should the Commission determine that "nondiscriminatory access" now requires mandatory access to poles, ducts, conduits and rights-of-way, the very premise of the Supreme Court's constitutional approval --

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10/ GTE at 24.

11/ Puget at 3.

12/ U.S. West at 16.

13/ Virginia Power at 4.

14/ UTC/EEI at 4.

the voluntary aspect of the statutory scheme -- will no longer exist.[15] Without the voluntary aspect, the statute must fall.

B. If "Nondiscriminatory Access" Grants a Right of Access, It Must Mean Similar Access Under Similar Circumstances[16]

1. General Principles, Not Rigid Rules, Should Prevail; Voluntary Negotiations Should Be Encouraged

10. While the FCC is authorized to adopt general rules, the Commission should refrain from adopting specific rules given the complexity of the access issue.[17] Instead, any regulations should be in the nature of general principles that follow Congress' deregulatory intent.[18] Many Commenters agreed with the Infrastructure Owners in this regard[19]; some Commenters went further, suggesting that the Commission should promulgate no (or minimal) regulations whatsoever, leaving the interpretation and

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[15] FCC v. Florida Power, 480 U.S. at 251 n.6.

[16] Without conceding whether Section 224(f)(1) is capable of a constitutionally valid interpretation 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 Reply Comments.

[17] Infrastructure Owners at 11-17.

[18] The Infrastructure Owners submit draft regulations, that are consistent with the views expressed in their Comments and Reply Comments, as Appendix II hereto.

[19] See Ameritech at 33; Bell Atlantic at 14; Bell South at 13; People of the State of California and the Public Utilities Commission of the State of California ("CPUC") at 2; Delmarva at 4-7; Michigan Public Service Commission Staff ("MPSC") at 1-2; Municipal Utilities at 22; Ohio Edison at 5-6; PacTel at 17-18; Public Service Company of New Mexico ("PNM") at 4; Puget at 2; Southwestern Bell Telephone Company ("SWB") at 15; USTA at 9; and, U.S. West at 15.

implementation of "nondiscriminatory access" to the States[20] or to individual negotiation.[21] These Commenters clearly recognize the inherent fact-specific nature of access decisions.

11. Even Commenters who urged the Commission to establish rules governing nondiscriminatory access did not come forward with concrete proposed rules that go beyond mere principles. For example, many Commenters stated that "nondiscriminatory access" should mean that access is provided equally to all entitled entities and their affiliates on the same basis as the controlling company provides to itself for similar uses of the facility.[22] Other Commenters suggested that access must be provided on a first-come, first-served basis.[23] Although the Infrastructure Owners do not necessarily agree with all of the views expressed, these views confirm the Infrastructure Owners' position that general principles, allowing for case-by-case determinations, should prevail on matters of access.

12. As a preliminary and fundamental matter, the Infrastructure Owners emphasize the role of negotiations in the access determination. The Pole Attachments Act expressly allows for mutual agreement between the infrastructure owner and the party

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[20] See Illinois Commerce Commission ("ICC") at 72-74; Kansas City Power & Light Company ("KCPL") at 3; MPSC at 1-2; Oklahoma Corporation Commission ("OCC") at 2; and, USTA at 9.

[21] See, e.g., Bell South at 13-14; ICC at 72; and, Municipal Utilities at 22.

[22] See, e.g., Citizens at 3; General Communications, Inc. ("GCI") at 3; Sprint at 16.

[23] See, e.g., NYNEX at 13; PacTel at 19; Public Utilities Commission of Ohio Staff ("PUCO") at 12.

seeking access.[24] Good faith negotiations between these parties represent the most effective and mutually beneficial way of resolving access issues. Rather than FCC-imposed regulations, as suggested by the cable industry, the Commission should enact a regulatory scheme that requires negotiation to be pursued before the FCC's jurisdiction is triggered. Such a scheme is consistent with the overall deregulatory thrust of the 1996 Act.

13. If, however, the FCC decides to promulgate regulations to implement the nondiscriminatory access provisions of the statute, general principles that follow the deregulatory intent of Congress should apply, rather than regulations that attempt to govern all situations. General principles might include the following:

(1) Parties seeking access shall engage in good faith negotiations to reach agreement on the rates, terms and conditions of access before resorting to the FCC's complaint procedures and any complaint filed with the Commission shall include a certification of the steps taken to attempt to reach agreement;

(2) "Nondiscriminatory access" requires, to the extent access is granted, a carrier to be afforded the opportunity to gain access on comparable rates, terms and conditions as other competing carriers, consistent with capacity, safety, reliability and generally applicable engineering concerns;

(3) Infrastructure owners can deny access to infrastructure, where safety, reliability or generally applicable engineering purposes warrant;

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[24] 47 U.S.C. § 224(e)(1).

(4) Nondiscriminatory access requirements shall be fulfilled when the infrastructure owner, or a party with existing access, offers communications capacity in lieu of access, thereby eliminating unnecessary duplication of facilities and conserving infrastructure capacity;

(5) All parties seeking access to utilities' infrastructure must enter into an agreement with the utility on the rates, terms and conditions of access and obtain a pole or other specific permit, before attaching to any infrastructure; and,

(6) Infrastructure owners can require an applicant for access to comply with all applicable federal, state and local laws, and applicable safety, reliability and engineering standards before granting access to infrastructure.

2. Expansive Interpretations of the Scope of the Pole Attachments Act Must Be Rejected

14. Several Commenters assert that "nondiscriminatory access" includes access to all facilities owned or controlled by utilities including building risers, vault access/building entrances,[25] equipment rooms, remote terminals, cable vaults, telephone closets or any other pathway owned or controlled by the utility.[26] The Commission should reject these suggestions. The Pole Attachments Act covers poles, ducts, conduits and rights-of-way and nothing more. Words not defined in a statute

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[25] See American Communications Services, Inc. ("ACSI") at 6-8.

[26] MCI at 22-23; See also NEXTLINK Communications, L.L.C. ("NEXTLINK") at 5.

should be given their ordinary or common meaning.[27] Thus, "poles" means poles,[28] "ducts" means ducts, and so forth. The statute says nothing about buildings, vaults, equipment rooms, or similar infrastructure mentioned by various Commenters. Those facilities clearly are outside the scope of the law and, accordingly, the FCC has no jurisdiction.[29]

15. Moreover, the utility must not be required to expand upon easements or rights-of-way granted by private property owners. As Ohio Edison correctly notes, restrictive easements may not permit the attachment of the equipment of various telecommunications carriers.[30] Electric utility easements or rights-of-way may limit the use of the easement to purposes related to the provision of electric service. The Pole Attach-

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[27] See Smith v. United States, 113 S. Ct. 2050, 2054 (1993) (citing Perrin v. United States, 444 U.S. 37, 44 (1979)).

[28] Under the Pole Attachments Act as originally enacted in 1978, the term "pole" means distribution poles, not transmission poles. See In the Matter of Capital Cities Cable, Inc. v. Mountain States Tel. and Tel. Co., 56 Rad. Reg. 2d (P&F) 393, 399 n.10 (1984); In the Matter of Logan Cablevision, Inc. v. Chesapeake and Potomac Tel. Co. of West Virginia, 1984 FCC Lexis 2400 (1984). The 1996 Act did not amend the definition of the term "pole."

[29] WinStar suggests that the Pole Attachments Act encompasses microwave transmission and other facilities of wireless carriers. WinStar at 3. That suggestion has no merit. The term "pole attachment" under the federal statute has never been interpreted to include radio antennas or satellite/microwave dishes. Instead, "pole attachment" has referred to the stringing of coaxial cable along a utility's distribution pole system. Moreover, in practical terms, the placement of antennas or dishes on utility poles present different and unique issues and concerns that are outside the scope of the Pole Attachments Act.

[30] Ohio Edison at 12.

ments Act does not require that rights-of-way be construed to accommodate telecommunications purposes.[31]

16. Further, the suggestion that the FCC adopt regulations that prohibit utilities from entering into exclusive non-public rights-of-way (*i.e.*, private easement)[32] is not only impractical, but without foundation in the statute or its legislative history. Utilities are not required, by the Pole Attachments Act or otherwise, to consider whether their rights-of-way are sufficient to accommodate other non-electric service purposes. That burden must be borne by the telecommunications carrier seeking access. A policy prohibiting private rights-of-way again raises constitutional concerns, notwithstanding the fact that it represents a subsidy to telecommunications carriers.[33]

C. The Needs of the Electric Utility Constitute a Legitimate Basis, Among Others, For Distinguishing Conditions of Access

17. In their initial Comments, the Infrastructure Owners emphasized that legitimate bases exist for distinguishing conditions of access to utilities' poles, ducts, conduits and rights-

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[31] *Cf.* 47 U.S.C. § 541(a)(2) (expressly providing that public rights-of-way shall be construed to accommodate cable television purposes). The Pole Attachments Act contains no similar provision.

[32] Sprint at 18.

[33] ACSI argues that all applicants for "exempt telecommunications company" ("ETC") status, the Public Utility Holding Company Act of 1935, as added by Section 103 of the 1996 Act, should be required to demonstrate that they and their affiliates provide nondiscriminatory access to all applicants. This position is untenable. The requirements for ETC status, clear on the face of the statute, do not include any type of demonstration with respect to nondiscriminatory access. The FCC has no authority to impose requirements beyond the scope of the statute Congress enacted. Accordingly, ACSI's suggestion must be rejected.

of-way.[34] The most important point in this context is that the owner of the pole, duct, conduit or right-of-way must be able to reserve capacity for its own future use. Utilities, telephone companies and other owners of infrastructure overwhelmingly agreed with the Infrastructure Owners.[35] Parties seeking access to poles, ducts, conduits and rights-of-way, not surprisingly, disagreed.[36] Their position, however, is unreasonable and unjust.

18. The infrastructure owned or controlled by electric utilities exists for the use of the electric utilities in providing electric service to residential and business customers. Its use for the facilities of telecommunications carriers and cable television operators is secondary. Thus, consideration of future capacity needs is paramount to the success and continued reliability of the nation's electric system, and reasonable reserve capacity for future demand must be preserved.[37] The rules governing insufficient capacity, if any, must recognize and incorporate this concept. Moreover, arbitrary limits on the amount of reserves allowed should not be set; rather, consistent with the variable nature of the capacity determination, the

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[34] Infrastructure Owners at 12-15.

[35] See, e.g., Ameritech at 36-37; Bell Atlantic at 13; Cincinnati Bell Telephone at 7; Connecticut Light et al. at 5; Commonwealth Edison Company ("ConEd") at 9; Delmarva at 12; GVNW Inc./Management at 9; KCPL at 4; Massachusetts Electric et al. at 10; Ohio Edison at 16-17; PacTel at 20; PNM at 16-17; SWB at 18; USTA at 10; U.S. West at 19; Virginia Power at 7.

[36] See, e.g., ACSI at 6-8; GST Telecom, Inc.("GST") at 6; MCI at 23.

[37] Delmarva at 17; PNM at 16-17.

amount of reserves needed should be left to the exclusive determination of the individual utility.

19. In addition, utilities should be allowed to deny access for duplicative facilities (e.g., additional fiber optic cable) in order to retain some infrastructure capacity for future, advanced telecommunications technologies.[38] If another party with access has sufficient excess communications capacity, the Commission should require carriers seeking access to use that capacity on a resale basis before permitting an additional attachment on a pole or access to other infrastructure.[39]

20. The Infrastructure Owners also concur with Duquesne Light Company ("Duquesne") insofar as it suggests that certain of the FCC's decisions in the common carrier context are relevant to the issue of distinguishing conditions of access.[40] For example, in the proceeding to establish rules governing LEC/interexchange carrier ("IXC") joint-use calling cards,[41] the Commission adopted rules to require provision of (1) calling card agreements with the requesting IXCs and (2) customer billing name and address ("BNA") information on a "nondiscriminatory basis."[42] Significantly, the Commission expressly permitted

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[38] Delmarva at 14-15; PNM at 20.

[39] PNM at 19-20.

[40] Duquesne at 5.

[41] In the Matter of Policies and Rules Concerning Local Exchange carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket 91-115.

[42] Report and Order and Request for Supplemental Comment, 7 FCC Rcd 3528, 3535 (Released May 8, 1992), Second Report and Order, 8 FCC Rcd 4478, 4482-4483 (Released June 9, 1993).

LECs to make distinctions among IXCs in the manner of making BNA and card honoring agreements available. With regard to BNA, the Commission indicated:

> ...both the LECs and the IXCs have a variety of network configurations and usage patterns which could justify different methods for making BNA available...
>
> * * * * *
>
> We believe the LECs, in consultation with the IXCs, are in the best position to determine how BNA can be provided in the most useful manner. We also believe the LECs should be able to experiment with different BNA offerings based on customer need...[43]

With regard to card honoring agreements, the Commission held: "...of course, the terms of those agreements may reasonably vary depending upon the requirements of the LEC and the particular IXC."[44]

21. The Infrastructure Owners urge the Commission to take a similar approach in interpreting "nondiscriminatory access". Parties seeking access will request a "variety of network configurations" and the utilities must be able to deal with access issues in a flexible and dynamic manner so that the interests of all parties may be best served.[45]

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[43] Second Report and Order, supra, at 4483.

[44] Report and Order and Request for Supplemental Comment, supra, at 3535.

[45] Contrary to the suggestions of some Commenters, the Commission should not enact rules that would interfere with existing attachment contracts. Other Commenters agree. See ICC at 73; U.S. West at 15. These contracts do not fall under the purview of the 1996 Act, see Infrastructure Owners at 16 (citing James Cable Partners v. City of Jamestown, 43 F.3d 277, 280 (6th Cir. 1995)). A comprehensive "fresh look" at existing contracts, ACSI at 7, n.9., is neither appropriate nor necessary. Congress intended to preserve, not rewrite, existing agreements. See (continued...)

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

A. Insufficient Capacity

22. The majority of infrastructure owners -- utilities and telephone companies alike -- agree with the Infrastructure Owners[46] that capacity is a variable issue requiring a case-by-case determination.[47] Because of this variability, the issue is not susceptible to across-the-board federal standards. Thus, the FCC should refrain from promulgating rules that attempt to regulate capacity.[48]

23. The determination as to whether capacity exists should be made, in part, by reference to applicable engineering standards, like the NESC.[49] Contrary to several Commenters suggestions, however,[50] the NESC alone is not a sufficient basis for determining whether capacity exists to accommodate another attachment. The NESC is a voluntary standard[51] covering basic provisions for safeguarding persons from hazards arising from the

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[45] (...continued)
47 U.S.C. § 224 (d)(3). Revisiting pole attachment contracts would disrupt the parties' settled expectations, which were freely reached through negotiations under the prior statutory and regulatory scheme.

[46] Infrastructure Owners at 21.

[47] See, e.g., Connecticut Light et al. at 7; Municipal Utilities at 22.

[48] See Municipal Utilities at 22.

[49] See Ohio Edison at 15.

[50] See, e.g., CATV Operators at 14-17.

[51] The NESC has been adopted in some States by statute.

installation, operation, or maintenance of conductors and equipment in electric supply stations, and overhead and underground electric supply and communications lines. On the subject of the joint use of structures, the NESC states:

> The choice between joint use of structures and separate lines shall be determined through cooperative consideration of all the factors involved, including the character of circuits, the total number and weight of conducts, tree conditions, number and location of branches and service drops, possible structure conflicts, availability of right-of-way, etc.[52]

Recognizing that issues of capacity, safety and reliability are highly variable, the NESC provides basic guidance and highlights issues that ought to be considered, among others, in reaching a determination as to the suitability of a structure for multiple attachments. Thus, reference also must be made to other safety laws[53] and particularly to the internally-developed, utility-specific safety standards.

24. Matters of capacity are complex. Contrary to the assertions of some Commenters, such as the CATV Operators, insufficient capacity cannot always be remedied by make-ready or

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[52] NESC (Institute of Electrical and Electronics Engineers, Inc., 1993 Edition) at 70.

[53] For example, the California Public Utilities Commission ("CPUC") has adopted General Order ("GO") 95 governing overhead transmission and distribution lines. In a recent report on Pacific Gas and Electric Company's Response to a December 1995 storm, the CPUC's Division of Ratepayer Advocates ("DRA") noted that it does not know "if the NESC is adequate in its specification of Medium loading area and how that compares to the Heavy loading, as defined by the GO 95. Report on Pacific Gas and Electric Company's Response to the December 1995 Storm, California Public Utilities Commission, Division of Ratepayer Advocates, Application No. 94-12-005, San Francisco, California, May 24, 1996, at 5-9 ("referred to as "PG&E December 1995 Storm Report").

rearrangements to the pole.[54] In the case of conduit, congestion is not necessarily relieved by pulling inner duct.[55] Experts in the electric industry confirm this point. On the contrary, capacity issues must be handled on a case-by-case basis, in part by looking to national standards and federal, state and local laws and regulations. Because of the grave concern for the public safety, however, the utility also must be permitted to exercise its judgment as to whether an additional attachment or other access is consistent with the capacity, safety, reliability and generally applicable engineering concerns of the infrastructure, based on all available information.[56]

25. Several Commenters stated that where capacity is not available to accommodate additional attachments, the owner of the infrastructure should be required to expand the capacity of the

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[54] CATV Operators at 16. The CATV Operators also state that Duke Power Company ("Duke") has announced that it will require any operator seeking access to a pole to install a pole which is taller by at least 5 feet, regardless of current pole capacity. CATV Operators at 9. That assertion is false. Duke has merely indicated that because the new amendments to the Pole Attachments Act require an owner to bear the rearrangement/replacement costs if the rearrangement/replacement is sought by the owners, Duke is forced to discontinue its previous policy of allowing its reserve capacity to be used on a temporary basis. Unless that change were made, Duke would be required to pay the CATV Operators' relocations costs in order to occupy space that is reserved for electric purposes. Duke should not be responsible for the costs of another party and it strongly objects to the mischaracterization of its actions of the CATV Operators.

[55] Id.

[56] The Infrastructure Owners, other electric utilities, telephone companies, and other owners of infrastructure subject to Section 224(f) unfailingly agree that the determination as to whether capacity exists to permit access must involve a consideration of the infrastructure owners' own needs, as discussed in Section I.B. above.

infrastructure by, for example, installing taller poles or expanding conduit space. GST takes the position that any FCC rules should provide that access may not be refused due to insufficient capacity if it is possible to rearrange the existing facilities using the rights-of-way to accommodate the new user and/or to construct new facilities. This position goes beyond the scope of the term "nondiscriminatory access." Nothing in the statute, its legislative history or any other legal authority requires the owner of property to expand the scope or alter the nature or configuration of its property to accommodate a party desiring, in effect, to lease space.[57]

B. Safety Issues

1. General Principles Governing Denials Based on Safety Considerations Are Appropriate

26. In their Comments filed in this proceeding, the Infrastructure Owners submitted that the Commission's rules, if any, should permit denials of access based on (1) potential or actual violations of accepted safety standards (including applicable federal, state or local laws, codes and regulations); (2) a requesting party's inability or refusal to adequately establish its ability to operate safely; and, (3) a utility's determination of unacceptable risk posed by an attachment or practice.

27. Many Commenters agree with the Infrastructure Owners that safety is not an area in which specific, all-inclusive

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[57] SWB at 18.