

regulatory standards for denial are appropriate.^{58/} The Infrastructure Owners also agree with those Commenters who support the adoption of basic minimum standards which leave to the utilities the discretion to make individual decisions based on prevailing circumstances and their own knowledge and expertise.^{59/}

28. With regard to the appropriate standards, many Commenters agree that a violation of the NESC^{60/} is an appropriate basis for denial.^{61/} The NESC cannot, however, serve as the only accepted basis for a safety-related denial, as some Commenters contend. This point is critical. The NESC is recognized as valid and useful nationwide as establishing the minimum standards for utilities; it may be, but is not necessarily, sufficient to ensure safety in a given case.^{62/} By its own terms, the NESC is

^{58/} See, e.g., Bell South at 15; Bell Atlantic at 14; Carolina Power and Light Co. ("CPL") at 2, 4; Connecticut Light et al. at 2; Delmarva at 3; GTE at 26; Municipal Utilities at 21; Ohio Edison at 20; PNM at 22; Puget at 2; SWB at 15; U.S. West at 15; Virginia Power at 13; and, the Western Alliance at 4.

^{59/} See Puget at 3; Bell Atlantic at 14; Bell South at 15; CPL at 5; Connecticut Light et al. at 3; and, UTC/EEI at 11.

^{60/} The Infrastructure Owners have noted references to both the NESC and the NEC in comments to this proceeding. The NESC establishes the nationally recognized standards for electrical safety from the point of generation up to the customer's electric meter; it does not govern safety practices from the meter to the end-use point inside the customer's premises, those practices being the subject of the NEC. Therefore, the utility accommodates a customer that must comply with the NEC, while applying the NESC standards and utility construction standards for electrical safety.

^{61/} Ameritech at 37-38; Bell Atlantic at 14; Connecticut Light et al. at 4; Delmarva at 20; GTE at 26; GST at 7; GVNW at 9; Massachusetts Electric et al. at 11; Ohio Edison at 21; Sprint at 17; SWB at 18; CATV Operators at 17; Time Warner Communications Holdings ("Time Warner") at 14; and, Virginia Power at 11.

^{62/} See PG&E December 1995 Storm Report at 9.

"not intended as a design specification or an instruction manual."^{63/} Significantly, the NESC further advises:

For all particulars not specified in these rules, construction and maintenance should be done in accordance with accepted good practice for the given local conditions.^{64/}

The NESC, accordingly, is "not all-inclusive or definitive on all points."^{65/} Utilities face complex demands on their systems which vary from region-to-region and from system-to-system. The NESC may be a starting point for safety, but the ending point must always be the individual utility's own determination of appropriate practices, based on its longstanding experience and the circumstances at hand. The Infrastructure Owners strongly urge the Commission not to accept the NESC as the sole pertinent reference on safety, in the face of other well-recognized safety standards.

29. Furthermore, electric utilities are subject to varying degrees of safety regulation by states and municipalities. Without a specific preemption of state or local laws or regulation in this area, which Congress has not effected, it is not reasonable to conclude that utilities must permit access that violates such state or local laws, codes, or regulations.^{66/}

^{63/} NESC Rule 010.

^{64/} NESC Rule 012.C.

^{65/} Virginia Power at 13.

^{66/} State and local codes and regulations cannot, however, necessarily be relied upon to establish sufficient standards of safety to serve as a conclusive benchmark for denial. Nationwide, state regulation of the electric utility industry is not uniform; state codes may or may not be intended to establish
(continued...)

30. Significantly, no type or source of acceptable safety reasons for a denial is specified in the plain language of Section 224. There is a very good reason for this: Safety, particularly when balanced against the countervailing interest of market competition, is too important and complex to be construed narrowly or administered in accordance with a closed set of parameters. Accordingly, the Pole Attachments Act permits, and any general rules promulgated by the Commission should provide, that denial may be based on additional considerations, that are more stringent than the NESC, and State or local standards including industry, trade or other generally accepted safety standards.

31. Further, as many of the utilities point out in their Comments, it is critical that they be able to deny access based on their own internal standards, as well as on the exercise of their reasoned judgment in a given case.^{67/} Many situations and practices may not be directly or adequately covered by any outside regulation, including the NESC, NEC and state and local codes and regulations. To the extent that this is so, the utilities themselves have established safety protocols based on experience and their understanding of their systems. Even then, however, utilities cannot foresee every eventuality, particularly

^{66/} (...continued)
comprehensive safety standards. Although the electric utilities must abide by them, State and local standards, alone or in conjunction with the NESC, must only be one part of the equation.

^{67/} See n.54, supra.

with regard to non-utility attachments, and must evaluate each situation on a case-by-case basis.

32. In light of the virtually unlimited possible circumstances associated with attachment, the potential for harm to life and property and the unmatched expertise of the electric utilities, the rules must permit the application of the utilities' reasoned judgment if circumstances dictate a denial that would not be fully governed by a standard of general application.

2. Safety Rules Must Consider the Relative Interests Involved

33. Several of the Commenters have advanced proposals that would jeopardize the facilities of the electric utilities from a safety standpoint. For example, Commenters have suggested (1) compressed time frames for response to requests for attachment,^{68/} (2) extended notice periods for modifications,^{69/} (3) "meaningful penalties and sanctions" for failure to meet "firm and swift deadlines" for access,^{70/} and (4) a "heavy burden" for utilities denying access.^{71/} All of these measures have potential safety implications for utilities, the attaching parties, and, most importantly, utilities' ratepayers -- the general public. These proposals must, accordingly, be rejected by the Commission.

^{68/} See ACSI at 7, suggesting a 10 day period for response.

^{69/} See Teleport Communications Group, Inc. ("Teleport") at 10, suggesting a minimum advance notice period of one year.

^{70/} See GST at 10.

^{71/} National Cable Television Association ("NCTA") at 5.

34. The Infrastructure Owners urge the Commission to keep in perspective the relative interests at stake. The safety standards that form the basis of decisions regarding access are not based on profit or a desire for market share; these standards are designed to ensure 24 hour electric service to the public while protecting life and property, not just of the utilities' own employees but those of the communications carriers and the public in general, in an undertaking which necessarily involves potential danger. In reality, utilities already carry a high burden -- the burden of liability should an individual be seriously injured or should significant property damage result from an unsafe electrical facility. To urge a "high burden" for utilities for protecting the public safety, or not subjecting employees or property to an unreasonable risk of harm, or the other measures put forth in this regard, suggests a distorted view of what is at stake in matters of safety. The FCC must develop rules that will not compromise electric utilities' ability to administer their systems safely, efficiently and with due deliberation in the interests of the public.

35. Also in this regard, several of the Commenters have suggested that attaching parties should have access to all facilities owned or controlled by utilities, in some instances on equal terms with the utilities.^{72/} The language Section 224 is clear, however, in establishing that "nondiscriminatory access" is not required by electric utilities where questions of safety arise. There are legitimate safety reasons, well established in

^{72/} See, e.g. Time Warner at 13.

the industry, that justify disparate treatment as between an electric utility and third parties; such disparate treatment must include complete, partial or conditioned denials of non-utility access to certain areas.

3. Electric Utilities Must Be Able to Deny Access Prior to, During or After Attachment if Circumstances Warrant

36. Several Commenters have addressed the issue of code or other violations on the part of attaching entities following or during attachment.^{73/} Delmarva and Ohio Edison suggest that repeated code violations should serve as justification to require that attachments be made by the utility or utility-approved contractors at the attaching entity's cost.^{74/} The Infrastructure Owners support the principle of this proposal, but emphasize that utilities must also have the ability, under the rules, to take immediate remedial measures, if necessary with regard to a code or other safety violation.^{75/} Depending upon the nature of the violation, the electric utilities must have the discretion to effect the complete removal of a nonconforming attachment immediately, upon the first occurrence of a violation, in light of the potential for harm to life or property created by some nonconforming attachments or practices, without risk of a statutory

^{73/} See Delmarva at 20-21; Ohio Edison at 22; Duquesne at 23.

^{74/} Id.

^{75/} For example, in 1995, while conducting a field survey of a sampling of Florida Power & Light's electric facilities for safety inspection, the Florida Public Service Commission noted 503 safety violations by CATV and other third party attachees. Utilities must be able to take immediate action to correct and prevent these types of safety violations, including the denial of future, or the termination of current, access.

violation.^{76/} Utilities also must be able to terminate or deny access to parties that fail to comply with applicable safety standards.

C. Reliability Issues

37. A majority of the Commenters agreed with the Infrastructure Owners that reliability concerns may justify a denial of access in many instances.^{77/} Reliability is a matter unique to each utility that, working with its State PUC, must meet standards of reliability unique to the utility's own electric system.^{78/} Reliability decisions must be based on a variety of safety and engineering sources and must take into consideration factors within the specific utility's service territory, such as local or regional conditions, population density, age of infrastructure, customer mix and requirements, and location of the customer.^{79/} A utility must have the flexibility to establish

^{76/} In virtually all cases, field inspections of utilities' distribution poles reveal scores of unauthorized CATV attachments. Unauthorized attachments pose grave safety risks because the utility has no opportunity of assessing whether the attachments comport with safety and reliability standards. The failure to obtain approval from the utility pole owner prior to making attachment to a utility pole, thus potentially compromising the structural integrity of the pole, must be grounds for terminating access and denying future access to infrastructure.

^{77/} See e.g., Bell Atlantic at 14; Delmarva at 18; and, Massachusetts Electric et al. at 12.

^{78/} Infrastructure Owners at 36-37.

^{79/} (that is, wires and equipment under the electric utility's main conductors) impact both safety and reliability. PG&E December 1995 Storm Report at 1-2. The DRA also noted that increasing numbers of joint-use wood power line poles have been found to be structurally overstressed by excessive loading of electrical and communications wires and equipment under the main electrical conducts. Id. at 5-1. The DRA recommended to the
(continued...)

and uphold its own, more rigorous reliability standards apart from any trade or industry standards or practices.

38. The Infrastructure Owners agree with Connecticut Light et al. that reliability considerations must be reviewed on a case-by-case basis, and that the safe, reliable operation of the electric system must take precedence over the provision of access.^{80/} Compromising the reliability of an electric system can be extremely dangerous or, if not dangerous, cause serious adverse consequences. For example, recently a cable television company attached its cable to a new Florida Power & Light pole line. Although the CATV company maintained NESC clearances, it failed to properly account for the sag between two poles, based on pole distance. Because of the miscalculation, the CATV company's cable contacted the energized conductor, causing an extensive electric service outage, which in turn disrupted the operations of local residents and businesses.^{81/}

39. On the question of whether regulations should be established that require a certain minimum or quantifiable threat

^{79/} (...continued)

CPUC that it order a state-wide investigation into the overload problem due to its concerns for personnel and public safety and power supply reliability, Id. at 5-6, 5-10.

^{80/} Connecticut Light et al. at 3.

^{81/} In the event property or personal injury results from events such as the one described, the utility is oftentimes brought into ensuing lawsuits. For example, in one recent circumstance, a cable operator attempting to string line across a street, after having made attachment on one side of the street, improperly tied the cable to a ladder while trying to make attachment on the other side of the street and allowed the cable to sag. The cable became entangled on a passing city bus, pulling down the cable, the ladder and the contractor who was mounted on the ladder. The contractor sued the utility pole owner.

to reliability before a utility may deny access under Section 224(f)(2) of the Pole Attachments Act, the Infrastructure Owners resoundingly state no, as they did in their original Comments.^{82/} Because great variations exist within any one utility's infrastructure, specific standards cannot be determined for application or use on a universal basis.^{83/} Other Commenters support this view.^{84/} Bell Atlantic correctly comments that no telecommunications carrier should be required to permit access under terms that would threaten reliability.^{85/} The integrity of an electric system should never be sacrificed for the sake of competition in the telecommunications industry, however important that may be.^{86/}

40. Additionally, Duquesne properly notes that reliability of the electric grid is not simple in concept or execution, but is the product of many power engineering factors.^{87/} As a result, if one of those factors changes, other factors must be

^{82/} Infrastructure Owners at 35.

^{83/} Infrastructure Owners at 35.

^{84/} See ConEd at 11. Carolina Power and Light at 4 (reliability standards are not, and should not be, the same for all utilities, because of various construction specifications, such as geography, weather conditions, and so forth).

^{85/} Bell Atlantic at 14.

^{86/} GVNW Inc./Management at 10.

^{87/} Duquesne at 21.

controlled to ensure reliability.^{88/} Accordingly, establishing standardized reliability tests is difficult and impractical.^{89/}

41. Moreover, the NESC and individual state law provisions provide only minimal requirements.^{90/} Many utilities have more stringent internal requirements. Utilities must not be forced to compromise their standards of reliability -- which are necessary to prevent electrical outages.

42. The Infrastructure Owners strongly disagree with Teleport's statement that basic reliability standards should be enacted to avoid anticompetitive behavior in denying access.^{91/} Teleport fails to suggest how the enactment of generalized reliability standards would prevent anticompetitive behavior. Moreover, Teleport fails to recognize that setting reliability standards that are insufficient to account for variances in utilities' reliability requirements (based on demographics, geographical location and so forth) would jeopardize a utility's ability to provide safe, adequate, reliable electric service to the public. To the extent reliability is compromised, all parties on the pole, or in a duct or conduit, are affected. Teleport's facilities will go down with those of the electric utility. Additionally, Teleport ignores the role the State PUCs play in regulating electric service -- most utilities work in conjunction with the State PUCs to determine specific guidelines

^{88/} Id.

^{89/} See also Massachusetts Electric et al. at 12.

^{90/} Connecticut Light et al. at 4.

^{91/} Teleport at 9.

for utilities in their jurisdiction, with consideration given to local, site-specific conditions. Due to a myriad of variances, the utility is the best judge to determine the effect on reliability of allowing access.

43. When denying access, a utility should not be forced to cite exclusively to the NESC in stating the basis for its denial, as some Commenters recommend.^{92/} As in the safety area, the NESC, by itself, should not be viewed as the authoritative source of electric reliability standards.^{93/} Commenters like the CATV Operators, who suggested that reliability standards be based exclusively on the NESC, fail to acknowledge that reliability standards extend beyond general voluntary guidelines. Apparently, the CATV Operators do not sufficiently understand the electric industry to know that measures of reliability are subject to many factors outside a utility's control, and that forcing a utility to adhere solely to the NESC fails to account for other factors that are vital to a utility's maintenance of safe, adequate and reliable electric service. The absence of industry-wide standards with respect to electric system reliability supports the position that establishing national reliability standards is problematic and impractical.

44. The Infrastructure Owners object to the suggestions advanced by some Commenters that they will improperly use reli-

^{92/} Time Warner at 14-15; GST at 6; MFS Communications Company, Inc. at 11; CATV Operators at 18.

^{93/} See Comments II.B.1, infra.

ability standards as a basis for denying access.^{94/} This notion is, at best, misplaced. When access must be denied based on reliability concerns, the utility will provide a reasoned basis for its decision, as discussed in Section II.E., infra. However, it should not be forced to justify its decision based on an incomplete, generalized set of safety or reliability standards.

D. Engineering Purposes

45. With respect to the engineering purposes on which access could be denied consistent with Section 224(f)(1) of the Pole Attachments Act, any rule purporting to limit the universe of legitimate denials based on generally applicable engineering purposes may conflict with standards established by other agencies, regulatory bodies and industry standards.^{95/} FCC rules are unnecessary in light of these standards, developed by bodies with special electric industry expertise. Denials under Section 224(f)(2) of the Pole Attachments Act must be evaluated on a case-by-case basis.^{96/}

46. The Infrastructure Owners concur with Massachusetts Electric et al. that there are limits to what can be reasonably built and maintained on a utility's facilities.^{97/} Any doubts as to whether attachments would comport with generally applicable engineering purposes should be resolved in favor of the utility's

^{94/} See GST at 6; and, Teleport at 9.

^{95/} See GTE at 26.

^{96/} GTE at 26.

^{97/} Massachusetts Electric at 13.

own reasoned determination in the matter.^{98/} Utilities are held responsible for the performance of their systems by federal, state and local regulators; moreover, the potential liability exposure is significant.^{99/}

47. The Infrastructure Owners agree with Virginia Power that the FCC should not develop standardized regulations to determine when an attachment violates engineering principles.^{100/} Instead, owners of infrastructure subject to the Pole Attachments Act must comply with the NESC, the NEC, OSHA regulations, other applicable state and local legal requirements and their internal safety standards developed in conjunction with the State PUC. Taking these sources into consideration and in the exercise of their independent engineering expertise and understanding of local conditions, the utility must determine whether access can be granted without compromising electric service.^{101/}

E. Utilities Should Not Bear the Burden of Proving that Denial of Access Was Proper

48. Comments by owners of infrastructure were virtually unanimous in stating that the burden of proof concerning denial of access should rest with the party who sought but was denied

^{98/} Massachusetts Electric et al. at 13.

^{99/} The determination of whether access comports with engineering purposes might include a review of the basic design of the telecommunications providers' facilities and system, to ensure the most efficient use of the Infrastructure Owners' capacity (e.g., conduit). Such a review would prevent telecommunications providers from designing inefficient systems as a means of hoarding capacity.

^{100/} See Virginia Power at 13.

^{101/} See also Virginia Power at 11-12.

attachment.^{102/} Not surprisingly, those Commenters generally in the position of seeking access to poles, conduits, ducts and rights-of-way urged the Commission to place the burden of proof on the utility who denies access.^{103/} These Commenters offered no compelling reason for placing the burden of proof on the utility, but instead merely stated their view.^{104/} In fact, the position is contrary to established legal principles.

49. Generally, the plaintiff, petitioner, or proponent in a legal proceeding bears the burden of proof unless, by statute, the burden of proof is shifted.^{105/} In the regulatory arena, this principle is codified in the Administrative Procedure Act ("APA"). Specifically, the APA states "[e]xcept as otherwise

^{102/} Infrastructure Owners at 40-42; ConEd at 11; Massachusetts Electric et al. at 14; Puget at 5; CPL at 5; UTC/EEI at 11; and, Virginia Power at 14-15.

^{103/} ALTS at 8; Citizens at 3; GST at 5; NEXTLINK at 5; PUCO at 12; CATV Operators at 14; TRA at 13; Teleport at 9; and WinStar at 7; Time Warner at 14 and Sprint at 16.

^{104/} For example, TRA merely asserted that a high burden of proof must be overcome for denial of access. TRA at 13. It proffered no legal basis for its view point, nor a specific reason why such burden should be placed on the infrastructure owners. Likewise, NEXTLINK sought to place the burden of proof on the utility, and asked the Commission narrowly construe Section 224(f)(2) in light of the procompetitive nature of the 1996 Act. NEXTLINK at 5. Notwithstanding that, in many instances, the infrastructure owner is not in competition with the party seeking access to its facilities, this rationale is not relevant to the question of who should bear the burden of proof.

^{105/} See Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 668 (1989).

provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d).^{106/}

50. The APA burden of proof provision was recently addressed by the Supreme Court in Director, Office of Workers' Compensation Programs v. Maher Terminals, Inc., 114 S. Ct. 2251 (1994) (Mahe Terminals). There, the Supreme Court held that the APA burden of proof provisions apply to adjudications under the Longshore and Harbor Workers' Compensation Act and the Black Lung Benefits Act, because no burden of proof provision was contained in either of the statutes. The Court held that the claimants for disability and wrongful death benefits under these federal statutes carried the burden of proving that the injuries and death were a direct result of employment. The Court further held that the Department of Labor's evidentiary and procedural requirements, giving claimants the benefit of reasonable doubt, were insufficient to overcome the presumption that adjudications are subject to the APA.

51. The prevailing principle that the plaintiff or petitioner bears the burden of proof also is found in the Commission's current Pole Attachment Complaint Procedures.^{107/} Pursuant to those regulations, complaining parties carry the

^{106/} "Order" is defined in the APA as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6). Clearly, an FCC decision on a pole access complaint would fall within the definition of an "order" under the APA.

^{107/} See 47 C.F.R. § 1.1401 et seq.

burden of establishing a prima facie case.^{108/} The complainant must provide specific data to support its allegation and failure to do so results in dismissal of the complaint.

52. Because the Pole Attachments Act, just as the statutes in the Maier Terminals case, lacks a specific provision shifting the burden of proof from the petitioner to the respondent, the APA provision should govern in denial of access claims. Like the claimants in Maier Terminals, entities seeking to attach to utility infrastructure who are denied access must carry the burden of proof that denial was improper.

53. The above discussion reveals the error of those Commenters who suggested that Section 224(f) requires utilities to bear the burden of proof.^{109/} Congress did not obligate the electric utilities to carry the burden with respect to the showing required under Section 224(f)(2) of the Pole Attachments Act. Section 224(f)(2) merely provides the bases for denying access; it says nothing about who should bear the burden of proof. In the absence of express statutory language, the prevailing principles discussed above must apply.

54. The Infrastructure Owners agree, however, that in denying access, the utility cannot simply deny access without justification. Rather, the utility must provide a concise written statement specifically stating the rationale for denying access (i.e., insufficient capacity, reasons of safety, reliability or engineering purposes consistent with the 1996 Act). Once

^{108/} 47 C.F.R. § 1.1409(b).

^{109/} See, e.g., GST at 5.

this written justification has been provided to the party seeking access, a "presumption of correctness" lies with the utility. Any party that believes access was improperly denied must seek redress through the FCC's pole attachment complaint procedures and that party must bear the burden of proof.

55. Finally, notwithstanding that legal authority supports the position that the complaining party (presumably the party who has been denied access) should bear the burden of proof, placing the burden of proof on utilities makes for poor public policy. It sends the dangerous message that the private interests of prospective attachers supersede the public interest in safe and reliable electric service.^{110/}

F. Regulations to Ensure that Utilities Fairly and Reasonably Allocate Capacity Are Unnecessary

56. Regulations allocating capacity would be cumbersome, unworkable and could undermine the integrity, reliability and safety of electric utility equipment, personnel and operations.^{111/} Decisions regarding allocation should be left to the utilities to make in light of NESC, NEC, OSHA, state and local regulations, the utilities' own internal standards (which often exceed the standards set by federal and state regulators) and the utilities' own future plans for the use of their facilities, as discussed above.^{112/} Many Commenters agreed that the utilities themselves are in the best position to fairly allocate capacity

^{110/} See Virginia Power at 15.

^{111/} Infrastructure Owners at 42.

^{112/} See Comments II.A., Insufficient Capacity.

based on all applicable factors,^{113/} because of their vast experience in maintaining their infrastructure.^{114/}

57. Other Commenters support allowing allocation issues to be resolved on a first-come, first-served basis.^{115/} For example, PNM asserts that the uncertainties of knowing when a request for access will be made requires consideration of such requests on a first-come, first-served, and case-by-case basis.^{116/} The Infrastructure Owners do not disagree with this approach, inasmuch as it recognizes the necessity of the case-by-case approach. However, the principle must be applied in the context of all relevant circumstances and criteria relating to conditions of safety, reliability, and engineering concerns; in every instance, it may not be the case that the first request received is the first attachment afforded access or that access will be granted at all.

58. The Infrastructure Owners oppose the views of Commenters who recommend that the Commission adopt regulations to ensure that a utility fairly and reasonably allocates capacity.^{117/} For example, WinStar asserts that such regulations

^{113/} Infrastructure Owners at 43; Delmarva at 17; PNM at 16-17; Virginia Power at 17; USTA at 10; KCPL at 4; and, CPL at 5.

^{114/} Municipal Utilities at 22. Moreover, consideration of future capacity needs is paramount to the success and continued reliability of the electric utility operations, and utilities must be able to plan for the future use of their own facilities.

^{115/} Massachusetts Electric *et al.* at 14; PUCO at 12; PNM at 18-19; Ohio Edison Company at 17; CPL at 5; and, Infrastructure Owners at 43.

^{116/} PNM at 18-19.

^{117/} TRA at 13 and WinStar at 7.

would speed negotiations over rights-of-way, alleviating the need for Commission intervention. The Infrastructure Owners disagree. The adoption of unworkable rules that cannot possibly anticipate and settle every conceivable allocation scenario would likely result in the filing of more, not fewer, complaints before the Commission. Good faith negotiations, in conjunction with the factors set forth in Section 224(f)(2), should be the mechanism for allocating capacity in the first instance.

59. In sum, the Infrastructure Owners suggest that in view of the multiplicity of factors to be considered in allocating capacity, regulatory forbearance is the most prudent course.^{118/}

III. The Majority of Commenters Oppose the Promulgation of Specific, Burdensome Regulations Under Section 224(h)

60. In their Comments, the Infrastructure Owners urged the Commission not to adopt specific regulations to implement Section 224(h) that will only unnecessarily burden utilities and other owners of poles, ducts, conduits or rights-of-way.^{119/}

This position was overwhelmingly supported by numerous other Commenters who agreed that the Commission need not and should not establish detailed rules under Section 224(h).^{120/} Owners of infrastructure and attaching entities should not be tied to

^{118/} Delmarva at 16; Massachusetts Electric et al. at 14; Virginia Power at 17; Duquesne at 18; UTC/EEI at 12; PNM at 22.

^{119/} Infrastructure Owners at 44-58.

^{120/} See, e.g., GTE at 27; CPUC at 2; Massachusetts Electric et al. at 16; Sprint at 18; Rural Telephone Coalition at 12. Many Commenters also argued that the Commission should address issues raised under Section 224(h) in the more comprehensive pole attachment rulemaking, if at all, that the Commission expects to initiate in June 1996. See, e.g., BellSouth at 17-18.

specific regulations which may not suit the needs or desires of the respective parties.

61. A few Commenters recommended that the Commission adopt strict or burdensome requirements regarding written notice and the costs of accessibility.^{121/} These suggestions run contrary to, and are beyond, the specific language of Section 224(h). For example, the CATV Operators contend that Sections 224(h) and 224(i) should be harmonized in such a manner that "a utility that plans to replace NESC-compliant poles with taller poles [] must offer existing parties the right to share in increased space on the pole."^{122/} Simply put, the CATV Operators are attempting to advance their own agenda through the written notification requirement of Section 224(h). Section 224(i) is not a part of this rulemaking.^{123/} Moreover, Section 224(h) is clear on its face. Notwithstanding the dubious merits of the CATV Operators' statutory interpretation, the CATV Operators' misguided attempt to expand the scope of this proceeding should be ignored.^{124/}

^{121/} See, e.g., TRA at 13; and, CATV Operators at 19.

^{122/} CATV Operators at 19 (emphasis included in original).

^{123/} In the interconnection NPRM, the Commission only addressed "issues raised by new Sections 224(f) and 224(h)" and noted that the other Section 224 subsections would be addressed in a separate proceeding. Interconnection NPRM at ¶ 221.

^{124/} The CATV Operators also have proposed to reduce rental costs in the event attaching entities share in the costs of accessibility under Section 224(h). Id. at 20. If Congress had intended such a reduction, it would have included specific language to that effect in Section 224(h). The Commission must not attempt to expand its authority in this area beyond the clear language of Section 224(h) in promulgating its rules.

A. Written Notification Guidelines Should Only Apply in the Absence of Alternative Notification Arrangements

62. A significant number of Commenters agreed with the Infrastructure Owners' proposal to allow attaching entities and owners of infrastructure to mutually agree on the timing and manner of notice.^{125/} Section 224(h) does not require the Commission to promulgate regulations regarding written notice and, as the Infrastructure Owners noted, voluntary notification practices have been successful, notwithstanding the lack of specific Commission regulations.^{126/} Clearly then, there is no need for the Commission to impose additional written notification burdens on owners that reach mutual agreement with attaching entities regarding the preferred form or timing of notice.

63. The Infrastructure Owners and other Commenters recognize that parties may not always be able to reach agreement on the details of the written notification requirement. In this regard, it may be appropriate for the Commission to adopt notification guidelines. However, the "manner and timing of notice in any particular case [] depends upon local factors such as the specific facility, the attachment, and the nature, extent and

^{125/} Infrastructure Owners at 46-47; see also GTE at 27; GVNW at 11; PacTel at 21; USTA at 10; Frontier Corporation at 7; Virginia Power at 18; Massachusetts Electric et al. at 16 ("Any universal requirements on the manner and timing of these notifications could restrict the parties from developing methods that both parties find more efficient than the prescribed method.")

^{126/} Infrastructure Owners at 46. See also Virginia Power at 18 ("Pole owners and attachers historically have been able to resolve these [notification] matters through good faith negotiation").

reason for the change."^{127/} Consequently, the Commission must tread lightly in promulgating specific notification guidelines. "Any rule that sets an arbitrary notice requirement will unfairly (and in many cases, unnecessarily) prevent owners from doing any work until that time has expired, whether or not the job could have been completed earlier."^{128/}

64. With regard to the timing of notice, the Infrastructure Owners strongly urge the adoption of a 10-day notification guideline (subject to the exceptions discussed below). A number of other Commenters supported a similar notice period.^{129/} Any longer notice period would unnecessarily delay the ability of utilities to provide safe and dependable electric service to their customers and would disserve the public in general.

65. Other Commenters have urged the Commission to adopt longer notification periods.^{130/} For example, Teleport recommends a 12-month notice period stating that "[t]his time period will enable a user to determine its future business and economic needs and if it wants to make any additions or alterations."^{131/}

^{127/} Ameritech at 39.

^{128/} GTE at 27.

^{129/} See ConEd at 13; Duquesne at 24; Northeast Utilities at 6; Delmarva at 23; PNM at 26.

^{130/} See, e.g., MCI at 24 (180 days); GCI at 4 (six months); MFS at 12 (90 days); and, Teleport at 10 (12 months). AT&T proposes two different notice periods (60 days and 10 days) depending on the type of modification the infrastructure owner is making. AT&T at 20. AT&T observes, however, that 10 days will "permit an attaching entity to perform a site visit, assess the scope of work, and alert the utility to any concerns it may have." AT&T at 20.

^{131/} Teleport at 10.

Commenters such as Teleport have clearly mistaken the purpose of Section 224(h) -- to provide an opportunity for attaching entities to make modifications or alterations to their facilities without bearing the full costs of accessibility.^{132/} It is unimaginable that Congress truly intended for an infrastructure owner to wait 12 months, 90 days or even 30 days to replace a rotting pole so that an attaching entity could "determine its future business and economic needs." Public safety issues demand otherwise. The Commission should not allow attaching entities to use Section 224(h) to obstruct owners of infrastructure from making modifications to their poles, ducts, conduits and rights-of-way in a timely fashion as required by state and local laws and regulations, as well as the overall public interest.

66. The Infrastructure Owners concur with the notification guidelines advanced by PNM and Delmarva. Specifically, the lack of a response from an attaching entity within the 10-day notice period should be considered a negative response.^{133/} The Infrastructure Owners strongly suggest that notification be permitted by first-class mail, facsimile or electronic mail.

67. The Infrastructure Owners note the almost universal support for an emergency exception to the written notification requirement.^{134/} Commenters clearly recognized that "a rigid notification requirement for unplanned changes could deny to

^{132/} H.R. Rep. No. 458, 104th Cong., 2d. Sess. 207 (1996).

^{133/} Delmarva at 23, and New Mexico at 26.

^{134/} See, e.g., MFS at 12; Ameritech at 39; Bell Atlantic at 15; Northeast Utilities at 6; ConEd at 14; KCPL at 6; Ohio Edison at 24; PNM at 27; Virginia Power at 19; and, USTA at 10.

carriers the ability to promptly respond to emergency situations.^{135/} Section 224(h) should only apply to those situations in which owners of poles, ducts, conduits, or rights-of-way actually intended to modify or alter a facility.^{136/} Owners of infrastructure must be allowed to respond to emergency situations immediately in order to preserve vital electric service and to protect the public health, safety and welfare.^{137/}

68. A number of other Commenters, like the Infrastructure Owners, proposed other exceptions to the notification requirement.^{138/} Exceptions should apply in the following circumstances:

(1) The owner of the pole, duct, conduit, or right-of-way is conducting routine maintenance work, including the installation of temporary facilities;

(2) The owner of the pole, duct, conduit, or right-of-way is fulfilling specific customer service requests;

(3) The owner of the pole, duct, conduit, or right-of-way is responding to an emergency situation;

(4) The attaching entity is unauthorized or is in violation of its attachment agreement with the owner of the pole, duct, conduit, or right-of-way; and,

^{135/} Ameritech at 39.

^{136/} Infrastructure Owners at 48-50.

^{137/} See Virginia Power at 19.

^{138/} See, e.g., Delmarva at 24; PNM at 27; and, Virginia Power at 19.

(5) The attaching entity has failed to keep the owner fully apprised of its current address and contact person(s).

These exceptions are consistent with the language of Section 224(h).^{139/}

B. Proportionate Share Runs to Accessibility Costs Only

69. Rampant confusion exists over the meaning of the proportionate share aspect of Section 224(h). Specifically, Section 224(h) refers only to "the costs incurred by the owner in making such pole, duct, conduit, or right of way accessible."^{140/} It says nothing about modification, rearrangement, replacement, or make-ready costs. The Commission should disregard the remarks of those Commenters who have attempted to expand the scope of proportionate accessibility costs to include any such costs.^{141/} Accessibility is a cost incurred before modification even begins. Congress did not intend for other costs to be governed by Section 224(h); if it had, it would have mentioned them.^{142/}

^{139/} The Infrastructure Owners submit that an owner of a pole, duct, conduit or right-of-way is not subject to Section 224(h) if it permits access at the express request of an existing or new attaching entity, so that entity can perform (or have the utility perform) modifications or alterations to its facilities. In this situation, the infrastructure owner does not intend to modify its facility; rather, it is responding to the request of an attaching entity. Therefore, the written notice requirement is not triggered because the owner has not modified its facilities.

^{140/} 47 U.S.C. § 224(h) (emphasis added).

^{141/} See, e.g., CATV Operators at 19-20; MCI at 23-24; and, Summit Communications at 1.

^{142/} The Infrastructure Owners recognize that a discussion of modification or alteration costs may be appropriate in the
(continued...)