Order ¶ 263 (footnote omitted). It is precisely to avoid this result that the Commission found that services cannot be separated from their network functions and/or capabilities.

The LEC Coalition's argument that directory assistance and operator services are not features, functions or capabilities because they are only mentioned specifically in the § 251(b)(3) dialing parity requirements is nonsensical. Section 251(b) deals specifically with the obligations of all LECs, not just incumbent LECs.[12] The unbundling requirement, however, applies only to incumbent LECs, and the language employed by Congress to describe network elements included within that requirement is expansive.

The LEC Coalition also argues that the Commission should "clarify" that the SMS/800 database is not subject to unbundling. They assert that such unbundling is not "necessary" because SMS/800 is available under a tariff administered by Bellcore. That is simply wrong. The Commission found that SMS/800 is a network element that it is technically feasible for incumbent LECs to unbundle. Thus, access to that element on an unbundled basis is required by the Act.

Moreover, the Commision correctly found that access by competitors to the SMS databases is "necessary for competitors to effectively use call-related databases, which (the Commission) already found to be critical to entry in the local

---

[12] The definition of network element found in section 3(29) includes features, functions or capabilites that are provided by means of a facility or equipment used in the provision of a telecommunications service, and specifically includes databases.

exchange market." Order ¶ 493. That is correct. MCI needs equal access to incumbent LECs' SMSs to write or populate its own information in call-related databases. The Commission's determination that the statute mandates such access was correct, and should not be revisited.

C. Incumbent LECs Must Be Required To Provide Quarterly Installation and Maintenance Reports

In the Order, the Commission stated that incumbent LECs should be required to fulfill some type of reporting requirement to ensure that they provision unbundled elements in a nondiscriminatory manner,[13/] but found the record to be insufficient to adopt such a requirement at this time.[14/] MCI supports Teleport Communications Group's (TCG) request that the Commission reconsider its decision not to impose a reporting requirement now. The Commission should require incumbent LECs to file quarterly reports describing, at a minimum, installation intervals for unbundled elements, local service, additional lines, and custom calling options, as well as the frequency of trouble reports and the average repair interval. For each measure of installation or repair performance, an incumbent LEC should be required to break out the data in a manner that allows comparison of the service that it provides to its own operations, to its affiliates, and to unaffiliated entities.

13/ Order at ¶ 311

14/ Id.

The record before the Commission demonstrates the need to adopt a reporting requirement. The Commission has already determined, based on this record, that "incumbent LECs have the incentive and the ability to engage in many kinds of discrimination,"[15/] and for this reason found it necessary to adopt national rules defining "nondiscriminatory access" to unbundled network elements, and "just, reasonable, and nondiscriminatory" terms and conditions for the provision of such elements.[16/] The same concerns demonstrate the need to promulgate reporting requirements that will allow the Commission to effectively enforce these rules. As TCG notes, the quality of service that incumbent LECs provide to new entrants can be compared to the quality of service they provide to themselves only if the Commission imposes a reporting requirement.[17/]

A reporting requirement would both facilitate the detection of discriminatory activity and deter the incumbent LECs from engaging in such activity, without imposing any significant additional burdens on incumbent LECs. Much of the data that the incumbent LECs would be required to provide must already be collected for the ARMIS 43-05 service quality report. For example, the ARMIS 43-05 report already requires incumbent LECs to report installation and repair intervals for exchange access and local service, broken out by business and residential customers. It would be a simple matter for an incumbent LEC to

---

15/ Order ¶ 307.

16/ Order ¶ 308.

17/ TCG Petition at 6.

provide similar data for unbundled network elements and to report the data separately for its own operations, affiliates, and unaffiliated entities. Indeed, part of the BOCs' ONA reporting requirement, the Commission has long required various installation and maintenance parameters to be reported separately for the BOCs' own enhanced service operations and unaffiliated providers.

D. Incumbents Must Make Tandem-Switched Transport Available To New Entrants As An Unbundled Network Element

MCI supports WorldCom's request that the Commission clarify that § 251(c)(3) requires incumbent LECs to provide tandem-switched transport as a network element.[18] Section 51.319(d) of the Commission's rules makes clear that new entrants may purchase both dedicated and shared transport as a network element but, as WorldCom notes, it is not clear from the Order whether new entrants may purchase tandem-switched transport on an end-to-end basis between the end office and the Serving Wire Center (SWC).[19]

Requesting carriers should be permitted to purchase tandem-switched transport as a single network element at a usage-based rate, based on the mileage between the end office and the SWC. New entrants that require the use of tandem-switched transport should not be forced to purchase a separate shared transport network element between the SWC and the tandem, and a dedicated transport network element between the tandem and end office. As WorldCom notes, new entrants have no control over the placement of the incumbent LEC's

---

18/ WorldCom Petition at 2.

19/ Id.

tandems.[20] Consequently, the Commission should make clear that incumbent LECs are required to provide tandem-switched transport as a network element.

E. **The Commission Should Not Reconsider Its Rules on Local Provisioning Intervals**

In its comments, the LEC Coalition asks the Commission to modify its rules requiring that incumbent LECs switch local customers in the same interval as they switch end users for long distance customers. See Order ¶ 421. The LEC Coalition asserts that it is easier to change an end user's presubscribed interexchange carrier because it involves only one aspect of the interexchange carrier's service whereas switching a customer's local service may involve changing many aspects of the customer's service. LEC Coalition at 24. Moreover, the LEC Coalition asserts that a LEC's own service order for various types of local service may not be processed in the time that it takes for a PIC change. See id. This, according to the LEC Coalition, may lead to the "unreasonable result" of an incumbent LEC provisioning its competitors' local customers more quickly than it provisions its own.

The LEC Coalition does not assert, however, that it would always be technically infeasible to change over local service within the same interval that it provisions long distance service. Nor does it address the Commission's express acknowledgment that certain changeovers do require additional time. Indeed, the Order explicitly states that the "same interval" requirement applies when the

---

[20] WorldCom Petition at 4-6.

incumbent LEC must make changes only to software. See Order ¶ 421. For those changes that require physical modification of the network, the Commission mandates that they be governed by the rules for all unbundled elements. See Order ¶ 421. It appears that the LEC Coalition's request for modification is based more on incumbent LECs' unwillingness to provide efficient service to their competitors than on their inability to provide local service changeovers in the same time interval as now occurs for long distance service. The LEC Coalition's request for modification of the Commission's requirements with respect to local service changeovers should be denied.

F. The Deadline for Implementation of Electronic Access to Operations Support Systems Should Not be Extended

In the Order, the Commission concluded that in order to comply fully with § 251(c)(3) of the Act, an incumbent LEC must provide, upon request, nondiscriminatory access to operations support systems (OSS) for pre-ordering, ordering, provisioning, maintenance and repair, and billing of unbundled network elements and resold services. See Order ¶ 525. The Order requires incumbent LECs to comply with this requirement of Section 251(c)(3) as expeditiously as possible, but in no event later than January 1, 1997. Id.

Sprint and the LEC Coalition request that the Commission move the January 1, 1997 deadline back in order to allow time for the development of industry-standard electronic interfaces.[21] The LEC Coalition requests that the Commission change the deadline to January 1, 1998, while Sprint argues that the

[21] Sprint Petition at 5-6; LEC Coalition Petition at 4.

Commission should allow 12 months for the industry to develop a consensus standard and an additional 12 months for the incumbent LECs to implement the standard.

The Commission should not allow incumbent LECs to use delays in the standards-setting process as an excuse to postpone new entrants' electronic access to OSS functions. If the deployment of electronic interfaces is linked to the progress of standards-setting groups, incumbent LECs will only have further incentive to delay the work of these groups. The Commission must maintain its January 1, 1997 deadline in order to give new entrants sufficient leverage to force progress in standards-setting activities and, if necessary, to negotiate interim electronic access to incumbent LECs' OSS functions.

MCI supports WorldCom's proposal that incumbent LECs be required to report on the status of their implementation of electronic access to OSS functions.[22] In its petition, WorldCom requests that the Commission require that, beginning on December 1, 1996, incumbent LECs submit quarterly reports showing on a qualitative and quantitative basis that requesting carriers are obtaining non-discriminatory access to the incumbent LECs' OSS functions. This reporting requirement is necessary to permit the Commission to monitor the extent of electronic access to OSS systems and to track progress toward the deployment of industry-standard interfaces.

[22] WorldCom Petition at 8-9.

V. Methods of Obtaining Interconnection and Access to Unbundled Network Elements

A. The Commission Is Correct to Require Incumbent LECs to Offer Both Virtual and Physical Collocation

The Commission correctly concluded that virtual collocation is a form of interconnection. The same equipment is used by the incumbent LEC to receive or deliver traffic, whether traffic is handed off from a "cage" inside the central office, or at a location outside the central office.

There is no question that §§ 251(c)(2) and (c)(3) give the Commission authority to order interconnection at any "technically feasible point" including incumbent LEC switches. There, the Commission properly ordered incumbent LECs to provide virtual collocation.[23]

B. The Commission Correctly Defined "Premises"

In the Order, the Commission correctly defined "premises" for collocation purposes as "all buildings or similar structures owned or leased by the incumbent LEC that house LEC network facilities."[24] The LEC Coalition requests that the Commission expressly remove vaults, huts, and other small structures from the definition of "premises," asserting that physical collocation is often impractical and

---

[23] Contrary to the LEC Coalition's assertion, LEC Coalition at 8, nothing in § 251(c)(6) alters this result. That provision requires ILECs to provide physical collocation upon request, unless it is not practical for technical reasons. In that case, virtual collocation may be substituted. That section simply does not speak to whether virtual collocation may be ordered by the Commission under §§ 251(c)(2) and (c)(3).

[24] Order ¶ 573, 47 C.F.R. § 51.5.

virtual collocation is often technically infeasible. This request must be rejected.[25] There is no need for a wholesale elimination of all small structures from the definition of premises; the Commission has already acknowledged that "LECs are not required to physically collocate equipment in locations where not practical . . . because of space limitations" and that "virtual collocation is required only where technically feasible." Order ¶ 575. Therefore, under the Order as written, where a LEC incumbent is able to demonstrate that physical collocation is impractical or virtual collocation is not technically feasible with respect to a particular location, it will not be required to collocate equipment in that location.

C. Collocator-to-Collocator Interconnection Must Be Permitted.

The Order requires incumbent LECs to allow collocating carriers to connect their collocated equipment with that of other collocating carriers within the incumbent LEC's premises. The LEC Coalition contends that this requirement is unwarranted, arguing that "[h]ad the 1996 Act intended to require interconnection between two collocating carriers within an incumbent LEC's central office, such a requirement would have been specifically included in its provisions."[26] The Commission correctly concluded that the Act does not bar such a requirement and that § 251(c)(6)'s requirement that collocation be "just, reasonable, and nondiscriminatory" authorizes the Commission to implement such a rule. See Order ¶ 594. The Commission found, correctly, that allowing an interconnector to

[25] LEC Coalition at 6.

[26] LEC Coalition at 7.

cross-connect between its facility and any other interconnector's facility at the collocated space serves the public interest and the policy goals of the Act. See id. It would be inefficient to require new entrants, collocated several feet from each other to backhaul traffic to facilities outside the incumbent LEC premises. There is no technical reason why an incumbent LEC should not permit interconnectors from connecting directly to each other at a collocated space, and the Act does not give incumbent LEC's the authority to impose such a restriction.

VI. Pricing of Interconnection and Unbundled Elements

A. The Ultimate Deadline For The Termination Of The Transitional Access Charge Mechanism Should Not Be Extended

The Commission should not, under any circumstances, permit the temporary access charge mechanism to continue past the ultimate termination date of June 30, 1997.[27] The LEC Coalition's argument that the Commission must continue the transitional mechanism until access reform is implemented in order to protect incumbent LECs from the revenue losses must be rejected. It is highly unlikely that the transitional mechanism will expire before access reform is completed. The Commission is required by the Act to complete the universal service proceeding by May 1997, and it has stated that it will complete access reform before or

---

[27] Indeed, even a temporary access charge regime that is not cost-based is unwarranted. As the Commission recognized, where a telecommunications carrier provides local and long distance service to a customer though unbundled network elements, the Act permits that carrier to use those elements for the origination and termination of interstate calls without having to pay access charges to the incumbent LECs. See Order ¶ 717. The Commission also recognized that the access charges that purchasers of unbundled elements must pay under the transitional regime are not cost-based, as required by the Act. See Order ¶ 718.

concurrently with universal service reform. See Order ¶ 8. Even if access reform is not completed by June 30, 1997, however, by that time incumbent LECs will have had sufficient time to plan for the potential revenue shifts and other changes likely to result from the expiration of the Commission's temporary access charge mechanism. See Order ¶ 725.

To the extent that the LEC Coalition is asking the Commission to continue the transitional access charge mechanism even beyond the conclusion of the Commission's access charge reform proceedings until the incumbent LECs implement access reform, their request must be absolutely denied. This claim is transparently self-serving. If the transitional mechanism is set to continue in force even after the Commission institutes access reform, incumbent LECs will have an indefinite term of access windfall and will have absolutely no incentive to implement the Commission's reforms.

B. The Commission Should Not Reconsider Its Geographic Rate Deaveraging Rule

The Commission concluded that requiring rates to be geographically deaveraged will more closely reflect the statutory requirement that access to unbundled elements be based on the cost of providing such access. See Order ¶ 764. To effectuate this requirement, the Commission required states to establish a minimum of three zones. Order ¶ 765. The Public Service Commission of Wisconsin (PSCW) now requests that the Commission permit states to seek a waiver of the deaveraging requirement which would allow a state to adopt fewer than three zones. The Commission should reject this request because permitting a state to use any fewer than three zones would effectively nullify the requirement that rates be deaveraged. One zone would, of course, mean that rates would not be deaveraged at all; two zones would not sufficiently ensure that rates reflected the actual costs incurred by carriers. In addition, requiring the states to select three different zones only makes the states consider how costs may differ in different regions, nowhere do the rules require that the actual prices be different in the different zones.

The Washington Utilities and Transportation Commission ("Washington UTC") argument that the three-zone requirement should not be applicable where the FCC's proxies are used should also be rejected. The Commission's proxies are generally ranges, and when a state commission opts to use such a proxy it must select a rate within that range and give its reasons for doing so. Geographic rate deaveraging merely requires the state commission to consider whether a different rate within the range should apply in each of three different zones. The Washington UTC's argument that states that do not have the cost information necessary to conduct cost studies and set prices will also have inadequate information to determine a basis for the creation of zones is without merit. Most state commissions currently have this information in the Hatfield study. Even if a commission does not have specific data sufficient to price specific elements, it should be able to separate areas into three zones reflecting general cost differences.[28/]

Washington UTC's contention that the Commission's deaveraging rules conflict with requirements in § 254 of the Act that consumers in all regions should be charged rates that are reasonably comparable are meritless. Nothing in the Commission's rules interfere with the authority of state commissions under section 254(f) to establish competitively neutral rules requiring all providers of intrastate services to contribute to a universal service fund that keeps rates affordable to subscribers in high-cost areas. Universal service is not included as a cost for purposes of calculating the rates for unbundled elements and interconnection.

Sprint contends that by mandating that state commissions using loop proxies ensure that the weighted average of deaveraged loop rates must not exceed the statewide proxy rate, the Commission is forcing states to make a statewide determination of deaveraged proxy loop rates in the course of arbitrating a dispute between only one incumbent LEC and a requesting carrier. Sprint comments at pp. 8-9. This argument is without merit. A state commission will not be required to set all loop rates in a single arbitration. Rather, it will be required to establish at least three cost zones, to determine which zone the proceeding before it falls

---

[28/] Washington UTC's assertion that the Commission's choice of a three zone minimum is arbitrary must also be rejected. The Commission previously permitted LECs to implement a three zone structure in the Expanded Interconnection proceeding, and at least two states have implemented a structure using at least three zones.

into, and to ensure that the loop price chosen remains below the Commission's proxy ceiling unless the proceeding involves one of the higher cost areas.

VII. Resale

A. The Commission Correctly Identified The Costs That incumbent LECs Will Avoid By Selling Their Service Wholesale

The Commission correctly defined avoided costs as those that an incumbent LEC would no longer incur if it were to cease providing retail service and instead provided its service only through resellers. See Order ¶ 911. The argument made by some petitioners that the Act requires that incumbent LECs actually experience a reduction in cost before a cost will be considered avoided is wrong and must be rejected.[29/] As the Commission recognized, this interpretation would permit incumbent LECs to frustrate the Act's requirements and charge inflated wholesale prices by declining to avoid those costs that are avoidable. See Order ¶ 911.

Some petitioners argue that Accounts 6611 (Product Management), and 6612 (Sales) will not be avoided because these functions will need to be performed to provide wholesale services.[30/] The Commission, however, recognized that some costs of this nature will be incurred by incumbent LECs providing wholesale service, and ruled that, based on its assessment of the record, 90 percent of these costs will be avoided. The parties seeking reconsideration have presented no new

---

29/ See Time Warner at 4-6; NCTA at 15.

30/ See Time Warner at 7-17; NCTA at 16-18.

data indicating that this conclusion is incorrect, and their arguments should therefore be rejected.

The Commission should also decline to reconsider its conclusion that overhead and profit are partially avoided costs. The parties urging reconsideration merely assert that these costs will not be avoided, without presenting any evidence to support their claim.[31]

B. Contract and Customer-Specific Offerings Must Be Offered At Wholesale Rates

The LEC Coalition's request that the Commission reconsider its decision to require incumbent LECs to resell contract and other customer-specific offerings at wholesale rates must be denied.[32] As the Commission notes in the Order,[33] § 251(c)(4) requires incumbent LECs to offer for resale at wholesale rates "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." (emphasis added). Because contract and customer-specific offerings are provided "at retail" to end users, the Commission's determination that they are subject to the § 251(c)(4) resale requirement and the § 252(d)(3) wholesale pricing standard was correct.

---

[31] LEC Coalition at 25-26; Time Warner at 14-17.

[32] LEC Coalition at 2.

[33] Order at ¶ 948.

C. The Commission Should Not Reconsider Its Rules With Respect To Rebranding And Customized Routing Obligations

The LEC Coalition asserts that technical infeasibility requires abandonment of the branding and customized routing obligations. Although the LEC Coalition argues that the Commission failed to "consider the technical implications of the branding or rebranding obligations it imposes on incumbent LECs," (LEC Coalition at 21) that is simply wrong. The Commission recognized that in certain limited circumstances, an incumbent LEC may be able to demonstrate that rebranding is infeasible. Thus, the Commission established a rebuttable presumption that failure to rebrand violates the Act. The Commission's rules thus protect incumbent LECs by allowing them to demonstrate to a state commission that they cannot comply with an unbranding or rebranding request. The Commission should leave undisturbed its finding that failure to comply with rebranding requests is an unreasonable restriction on resale. As the Commission's Order recognizes, brand identification is critical to resellers' attempts to compete with incumbent LECs, and without the ability to rebrand resold services new entrants would be placed at a severe competitive disadvantage. Order ¶ 971.[34]

---

[34] The LEC Coalition's passing argument that rebranding requirements may violate its members' First Amendment rights is without merit. Once a service is purchased by a CLEC from an incumbent LEC and sold to that CLEC's customers, it is no longer an ILEC service, and thus, the ILEC has no rights with respect to the information the CLEC chooses to place on billing, advertising or other commercial information.

VIII. Obligations Imposed on LECs by Section 251(b).

A. Interim Transport and Termination Must be Provided Immediately Without Regard to "Non-Rate" Terms

In its petition, the LEC Coalition requests clarification of § 51.715 of the Commission's rules. Specifically, the LEC Coalition asked the Commission to announce that that rule requires incumbent LECs to make only interim transport and termination rates available to entrants that do not have an existing interconnection agreement with the incumbent LEC, and not non-rate terms.[35] MCI urges the Commission to reject this proposed clarification.

There is no dispute that the Order requires incumbent LECs to establish immediate interim transport and termination agreements with requesting carriers that do not have an existing interconnection agreement with the incumbent LEC. The LEC Coalition's requested "clarification" is merely an attempt to find some way to avoid that requirement using potential disputes over "non-rate" terms and conditions.

The LEC Coalition's focus on "non-rate" terms and conditions is merely a red herring. Interim transport and termination agreements simply do not involve the numerous terms and conditions contained in final agreements covering issues such as access to unbundled elements or resale. For example, interim agreements do not require any agreement on the term of the agreement -- the agreement lasts only until a final agreement is negotiated or arbitrated. Similarly, the

[35] LEC Coalition at 35.

Commission's Order makes clear that incumbent LECs must accept traffic at any technically feasible point, removing that issue from contention in these interim arrangements. Because this portion of the Order is clear, and because the LEC Coalition is merely attempting to find a loophole through which interim interconnection requirements can be avoided, the Commission should decline the LEC Coalition's invitation to reconsider its interim interconnection rules.

B. When A New Entrant's Switch Serves A Geographic Area Comparable to the Area Served By The Incumbent's Tandem, The Incumbent Should Pay The New Entrant Tandem-Switched Transport and Termination Rates

The Commission concluded that if a state establishes transport and termination rates that vary according to whether traffic is routed through a tandem switch, the state must consider whether new technologies used by a new entrant (such as fiber rings) "perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch." Order ¶ 1090. Sprint and the LEC Coalition request that the Commission reconsider this conclusion, arguing that the incumbent LEC should be required to pay tandem-switched transport and termination rates only if the new entrant actually employs both a tandem and end office switch.[36]

---

[36] See, e.g., LEC Coalition at 14-15.

Otherwise, they argue, the Commission's rule will overcompensate the new entrant.[37]

This assertion is unfounded. The Order recognizes that new entrants and incumbent LECs may employ different network architectures to serve comparable geographic areas, and seeks to make transport and termination rates reflect the function performed by the carrier rather than the underlying technology used. The incumbent LEC most likely will reach its customers using a network of access tandems, end office switches, interoffice trunks, and relatively short loops, while it is likely that the new entrant, with its smaller customer base, will serve the same geographic area with a smaller number of switches and a greater investment in loops and fiber rings. The Commission's rule recognizes that there is a trade-off between deploying more switches and more extensive fiber rings to perform the same functions. Accordingly, the incumbent LEC's costs for transport and termination via a tandem switch are an appropriate proxy for the costs incurred by new entrants serving a comparable geographic area with new network architectures that do not require tandem switching. It would be inefficient to require new entrants to use the same network architectures as incumbent LECs in order to obtain symmetrical transport and termination rates.

MCI supports MFS's petition, which requests that the Commission clarify when new entrants are entitled to charge tandem-switched transport and termination rates. U S West asserts that a new entrant must demonstrate both that

---

[37] LEC Coalition at 14; Sprint Petition at 13.

its switch performs tandem-like switching functions and that it serves a geographic area comparable to that served by the incumbent LEC's tandem.[38] The Commission should reject U S West's interpretation and clarify that a new entrant may charge the tandem-switched transport and termination rate either if the new entrant's switch is providing tandem functions or if the new entrant's switch is serving a geographic area comparable to the area served by the incumbent LEC's tandem. In the first case, the new entrant incurs the cost of both tandem and end office switching and may thus charge a rate equal to the incumbent LEC's tandem interconnection rate. In the second case, as was shown above, the new entrant incurs the additional costs of an extensive fiber ring.

C. The Commission's Rules on Access to Rights of Way Should Not be Altered

In their oppositions, a number of electric utility companies argue that the Commission should reconsider its rules governing access by telecommunications carriers to the poles, ducts, conduits and rights of way owned or controlled by the utilities.[39] Although it is not surprising that these utilities seek to limit access to their facilities -- utilities are, after all, potential telecommunications competitors -- their substantive arguments are meritless. The Commission should reject their requests to alter or rescind § 1.403 of its regulations.

---

[38] See MFS Petition at 26.

[39] See, e.g., Reconsideration Petitions of: Carolina Power & Light Company (CPL), at 5; American Electric Power (AEP), at 13; Con Edison at 4.

As the Commission noted, section 224(f)(1) "seeks to ensure that no party can use its control of the enumerated facilities and property to impede . . . the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields." Order ¶ 1123. The Commissions' rules do just that. Its rules are particularly critical now that, pursuant to the Act, utility companies are poised to begin providing telecommunications service.[40] These new service opportunities increase the risk that customers of the utilities will subsidize their entry into the telecommunications business. Of particular concern are electric utility company requests to upgrade their internal communications systems with fiber optic cable that would provide a tremendous amount of excess capacity. Indeed, because utility company rights of way facilities may now be used jointly by telecommunications and electric services, actions taken, or plans made, by utilities ostensibly on behalf of electric service customers cannot be separated from their potential entry in the telecommunications business.

The Commission acknowledged the "legitimate interests of utilities in protecting and promoting the safety and reliability of their core services," id., and its rules amply protect those interests. Far from interfering with utility company obligations to serve their electric customers -- as the utilities claim -- the

---

[40] A February 1996 study by Chartwell, Inc. found that 33 utilities are pursuing various broadband communications projects. Utility Telecommunications Projects Have Doubled in Last Year, Study Says, Energy Services & Telecom Report, February 29, 1996. See also Iowa Cooperative Plans Ambitious, 400-mile Fiber Optic Installation, Energy Services & Telecom Report, September 26, 1996; Proposed PGE/Enron Merger Likely to Accelerate Telecom Efforts, Energy Services & Telecom Report, August 29, 1996.

Commission's rules serve to promote the interests of telecommunications competition and affordable electric utility service by minimizing the incentive utilities have to shift the cost of their telecommunications business to their captive electric customers.

1. Utilities are not Entitled to Preferential Access to Reserve Capacity.

The utilities object to the Commission's effort to monitor the amount of excess capacity they have on their systems to which competitors may potentially gain access. In an attempt to fend off competition, they object to the Commission's determinations that they may reserve space for future electric service use only pursuant to a bona fide electric service development plan, Order ¶ 563, and that until they have an actual need for excess pole attachment capacity, they must make that capacity available to requesting telecommunications companies. Id. The Commission's rules, however, follow both the letter and the pro-competitive spirit of the Act, and should not be altered.

Utility companies first argue that the Commission should have made no rule regarding pole capacity because it is not possible for any one other than the utility itself to determine whether excess pole attachment capacity exists. They claim an exclusive right to determine whether or not excess pole attachment capacity exists, and they claim priority access to any such capacity.[41]

---

[41] See e.g., AEP at 9; CPL at 15; Con Edison at 9; Edison Electric Institute (EEI) at 8; PG&E at 7.

But the Commission's rules allow the utilities to make an initial calculation and representation as to both the amount of space available and that which is necessary to hold in reserve. Order ¶ 563. This allows a meaningful determination of the amount of space available and prevents utilities from simply foreclosing competitive access by reserving more space than is actually needed.[42] This rule is eminently reasonable.

The Commission's determination that utilities allow competitors access to reserve space until it is actually needed is similarly reasonable. This rule provides a check on potential anti-competitive behavior while imposing no harm on the utility; when the utility needs access to that space, it is entitled to reclaim it. Order ¶ 564.[43]

---

[42] As the Commission noted in its Order, the arguments of the utilities are especially unconvincing in light of the record presented to the Commission. Despite every opportunity to do so, utilities did not put into the record "sufficient data for [the Commission] to establish a presumptively reasonable amount of pole or conduit space subject that an electric utility may reserve . . ." Order ¶ 563.

[43] The Commission should adhere to its rejection of electric companies' representations that their poles do not contain excess capacity. See, e.g., Petition of Carolina Power & Light, at 16 (requesting that the Commission "grant a presumption that any available capacity on a utility companies' poles is reserved capacity . . ."). Excess "pole" capacity exists on many utility systems, including systems belonging to some of the petitioners. See "IOUs Invest Heavily in Telecommunications Technology," Electric Light and Power, January 1996 ("Electric utilities collectively own one of the largest communications systems in the nation. Much of the backbone of those systems consists of fiber-optic cable, which can carry a huge amount of voice, video and data. In many instances, these companies' excess capacity can be marketed in a number of ways.").

2. The Commission Properly Required Utilities to Use Eminent Domain Power in Certain Circumstances.

As the Commission noted, in order to meet the non-discriminatory requirement of the Act, "a utility may not favor itself over other parties with respect to the provision of telecommunications or video programming service." Order ¶ 1161. Thus, as discussed above, a utility must expand its facilities upon request for access in the same manner it expands space for itself. Id. at 1161-1162. One way utilities have traditionally expanded is through the use of eminent domain authority granted them by the states. Nothing in the Act indicates that this method of expansion should be exempt from the general requirement that capacity be provided in a non-discriminatory fashion. Id. at 1181.

Indeed, this requirement is necessary to ensure that utilities do not attempt an end-run around providing competitive access. If utilities were not required to use their eminent domain authority on behalf of third parties in the same manner they use it for themselves, they could fill their existing facilities with their own competing telecommunications or cable wires, allowing them to claim space restrictions when competitors seek access, and then obtain additional rights of way to serve electric customers using their eminent domain power. The Commission's rule ensures that such anti-competitive behavior does not occur.[44]

[44] The Commission recognized that state law governs some of these issues. Order ¶ 1179. If state law precludes the use of eminent domain power, a utility clearly cannot exercise it on its own behalf or on other parties' behalf. What utilities should not be allowed to do, however, is use state-granted eminent domain authority to discriminate against their competitors. Nothing in the Act suggests such a result; indeed, the Act requires just the opposite. 47 U.S.C. § 224(f)(1).

3. Utilities Must Make Excess Capacity Available Throughout Their Systems, Even If They Only Use Their Facilities to Provide Internal Wire Communications for Their Core Business.

The utilities also complain that the Commission violated the language of the Act when it concluded that electric company use of its facilities for wire communications triggers access to its network for telecommunications purposes.[45] The utilities are wrong.

The plain language of the Act defines a utility as "any person who is a local exchange carrier or an electric, gas, water, stream, or other public utility, and who owns or controls poles, ducts, conduits, or other rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1) (emphasis added). By its express terms, the use of any part of the utility's poles, ducts, conduits, or other rights of way for the provision of any type of wire communications brings an entity within the definition of "utility," and thus within the non-discriminatory access requirement in § 224(f).

Not only is this result compelled by the plain language of the statute, it is the only equitable result. If it is technically feasible for the facilities at issue to support telecommunications attachments for internal purposes, it must be technically feasible to permit others to attach to provide telecommunications services as well. Utilities should not be able to hide from this through a cramped and unwarranted reading of the statute.

[45] See, e.g., AEP at 40; Delmarva Power & Light Company at 7.