4. Utilities May Not Restrict Access to Wire or Cable Attachments.

Petitioning utilities also ask the Commission to restrict telecommunications carriers' access to their poles by allowing only wire facilities to be attached.[46] This is required, according to AEP, because under § 224 "a 'utility' is a person utilizing poles, ducts, conduits or rights-of-way 'for any wire communication,' [and thus] the access provision necessarily should be construed to apply only to such uses.[47] AEP's argument is flatly illogical.

Section 224 defines the relevant term -- "pole attachment" -- as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, [or] right-of-way owned or controlled by a utility." Section 224(a)(4) (emphasis added). By its express terms, it does not limit attachments in any way, much less to wire facilities.

There is, therefore, simply no basis for importing into § 224(f), which requires utilities to provide "nondiscriminatory access to any pole, duct, conduit, or right-of-way," the limitation on telecommunications carriers that petitioners request. Petitioners' request that the Commission impose additional limitations on requesting telecommunications carriers should be rejected.

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[46] See, e.g., AEP at 29; Con Edison at 11.

[47] AEP at 28-29.

5. The Commission's Rules on "Qualified Workers" are Sound.

The utilities also object to the Commission's refusal to require parties seeking attachments to use only employees or contractors designated by the utility.[48] In essence, AEP argues that anything short of monopoly control over electrical contractors and installers "eliminate[s] the electric utility's ability to take certain measures to minimize the risk and liability this mandatory access may cause."[49] The argument that the Commission has completely eliminated utilities' ability to minimize installation risk is specious, however. The Commission expressly allowed the imposition of safety requirements -- such as the ability of the utility to require that the attaching party's workers have the same training as do the utility's workers. Order ¶ 658. There can be no serious argument that this is insufficient. Instead, the utilities arguments are merely an attempt to maintain to the extent possible, exclusive control over their monopoly facilities.

6. Notification of Modifications

Finally, the utilities complain that the Commission's requirement that they provide at least 60 days notice prior to non-routine or non-emergency modification of their pole attachment facilities is unduly burdensome, inflexible, and unreasonable.[50] There is nothing in the record, however, to substantiate this claim. Although the utilities assert that they often make modifications in the field

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[48] See e.g., AEP et al. at 29; Duquesne Light Company at 15; Carolina Power & Light Company at 18.

[49] AEP at 31.

[50] See e.g., AEP at 45; CPL at 8; EEI at 10.

on a case-by-case basis, close to the time of service provision to a customer, they fail to discuss how these modifications are anything other than "routine." At the same time, the utilities argue that it can take "six to eight weeks" to perform the necessary safety and engineering studies on a case-by-case basis to evaluate a request for pole attachments by a requesting carrier.[51] Thus, although utilities themselves want 60 days notice from requesting carriers, they argue that they should not be required to provide the same advance notice to their potential competitors. As with the rest of the utilities' arguments, this should be rejected as a blatant attempt to cling to monopoly powers in the competitive universe of the Act.

D. State Commissions May Not Impose § 251(c) Obligations on Non-Incumbent LECs

The Commission correctly concluded that the states may not impose on non-incumbent LECs the § 251(c) obligations placed by Congress solely on incumbent LECs. See Order ¶ 1247. In § 251, Congress deliberately divided into separate subsections the "general duty of telecommunications carriers," § 251(a); the "obligations of all local exchange carriers," § 251(b); and the "additional obligations of incumbent local exchange carriers." § 251(c). This clear delineation demonstrates that Congress did not intend that the obligations imposed on incumbent LECs under subsection (c) be extended to other categories of telecommunications carriers.

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[51] AEP at 25.

The Act contemplates that, in some circumstances, non-incumbent LECs may be treated as incumbents and subjected to § 251(c) obligations, but only by the FCC -- not the state commissions -- and only if certain conditions are met. In § 251(h)(2) Congress specifically provided a mechanism by which "[t]he Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of [§ 251]." (emphasis added). Under § 251(h)(2), the Commission must find (1) that the LEC occupies a position in the relevant market comparable to the position occupied by the incumbent LEC; (2) that the LEC has substantially replaced the incumbent LEC; and (3) that treatment of the LEC as an incumbent is consistent with the public interest and the purposes of § 251. To permit state commissions unilaterally to impose § 251(c) obligations on non-incumbent LECs without regard to these statutory conditions would directly contradict the express terms of the Act. See Order ¶ 1248.

The Commission should reject the arguments made by the Ohio PUC[52] and the Texas PUC[53] that, despite this clearly expressed Congressional intent, state commissions may nonetheless impose § 251(c) obligations on non-incumbent LECs. Contrary to these assertions, §§ 251(d)(3), 252(e)(3) and 253(b) do not

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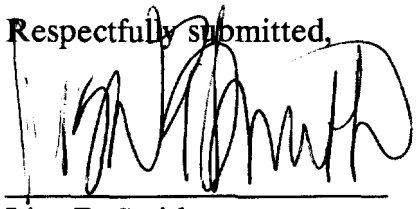
[52] See Public Utilities Commission of Ohio's Petition for Reconsideration and Clarification at 3-5.

[53] See Petition for Reconsideration of the Public Utility Commission of Texas at 13-17.

authorize states to impose additional obligations that are inconsistent with the express language and the purpose of the Act.

Respectfully submitted,



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