BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

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OPPOSITION TO PETITIONS FOR RECONSIDERATION OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

Michael F. Altschul
Vice President, General Counsel

Randall S. Coleman
Vice President for
Regulatory Policy and Law

Andrea D. Williams
Assistant General Counsel

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
(202) 785-0081

Its Attorneys

Philip L. Verveer
Jennifer A. Donaldson
Gunnar D. Halley
WILLKIE FARR & GALLAGHER
1155 21st Street, N.W., Suite 600
Three Lafayette Centre
Washington, D.C., 20036-3384

Of Counsel

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OPPOSITION TO PETITIONS FOR RECONSIDERATION OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Cellular Telecommunications Industry Association ("CTIA")[1] hereby submits its Opposition to Petitions for Reconsideration in the above-captioned proceeding.[2]

I. INTRODUCTION AND SUMMARY

Several parties, covering a wide range of interests, seek Commission reconsideration of its First Report and Order.

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1 CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, including 48 of the 50 largest cellular, broadband personal communications service ("PCS"), enhanced specialized mobile radio, and mobile satellite service providers. CTIA represents more broadband PCS carriers, and more cellular carriers, than any other trade association.

2 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185 (released August 8, 1996) ("First Report and Order").

Specifically, CTIA addresses three issues in its opposition. Contrary to the claims of petitioners:

- The Commission was acting within its authority when it refrained from classifying CMRS providers as LECs;[3]
- The Commission was acting within its authority when it defined the local service areas for CMRS calls based on MTA boundaries;[4] and
- The Commission was acting within its authority when it interpreted Section 224[5] to apply not only to cable television systems and wireline carriers, but to all telecommunications carriers, including CMRS providers.[6]

II. THE COMMISSION CORRECTLY IMPLEMENTED CONGRESS' INTENT IN REFUSING TO CLASSIFY CMRS PROVIDERS AS LECs.

The COPUC has asked the Commission to reconsider its conclusion that CMRS providers should not be treated as LECs for purposes of implementing Sections 251 and 252.[7] The COPUC argues that if CMRS providers are holding themselves out as local

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3 The Public Utilities Commission of the State of Colorado ("COPUC") requests that the Commission reconsider its decision to refrain from classifying CMRS carriers as LECs. COPUC petition at 8.

4 The Local Exchange Carrier Coalition ("LECC") requests that the Commission reconsider its decision to utilize MTA boundaries. LECC petition at 17.

5 47 U.S.C. § 224.

6 Consolidated Edison Company of New York, Florida Power & Light and the "Infrastructure Owners," comprised of American Electric Power Service Corporation, Commonwealth Edison Co., Duke Power Co., Entergy Services, Inc., Northern States Power Co., The Southern Co., and Wisconsin Electric Power Co., request clarification by the Commission that Section 224 does not require utilities to provide access for pole attachments to be used in the provision of wireless services.

7 47 U.S.C. §§ 251, 252.

exchange providers, they should be treated as LECs, regardless of the technology utilized by the provider.[8]

COPUC's argument merely repeats other contentions already thoroughly considered and rejected by the Commission in the First Report and Order. In implementing Section 3(44) of the Telecommunications Act of 1996 ("1996 Act"), Congress expressly excluded CMRS carriers from the definition of a LEC and vested the Commission with complete discretion to determine when such treatment is warranted.[9] As the Commission noted, "Congress recognized that some CMRS providers offer telephone exchange and exchange access services, and concluded that their provision of such services, by itself, did not require CMRS providers to be classified as LECs."[10] For this reason, the Commission chose to preempt States from requiring a CMRS carrier to classify itself

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8 COPUC petition at 7-8. To the extent that COPUC claims that the Commission should classify CMRS carriers as LECs simply because they may provide fixed radio services, the Commission should reject it as premature and consider the matter in its ongoing Flexibility Proceeding. Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-283 (released August 1, 1996).

9 47 U.S.C. § 153(26) ("The term 'local exchange carrier' means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.").

10 First Report and Order at ¶ 1004.

as a LEC to be permitted to avail itself of the negotiation and arbitration provisions of Sections 251 and 252.[11]

The Commission's determination in the First Report and Order is not only consistent with Congress' intent in passing Section 3(44) of the 1996 Act, but is also a continuation of the effort begun by Congress in 1993 with the amendment of Section 332.[12] In Section 332, Congress established "uniform rules" to govern all commercial mobile service offerings "to ensure that all carriers providing such services are treated as common carriers under the Communications Act of 1934."[13] It specifically required preservation, though, of the "key principles" of common carriage such as "nondiscrimination," and allowed "minimal state regulation." It permitted the Commission "authority to specify by rule which provisions of title II may not apply,"[14] and it preempted state rate and entry regulation of CMRS to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecom-munications infrastructure."[15] Section 332 was

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11 Id.

12 47 U.S.C. § 332.

13 See H. Rep. No. 111, 103rd Cong., 1st Sess. 259 (1993) ("House Report"). See also H.R. Conf. Rep. No. 213, 103rd Cong., 1st Sess. 490 (1993) (the intent of Section 332(c)(1)(A) "is to establish a Federal regulatory framework to govern the offering of all commercial mobile services"). ("Conference Report").

14 House Report at 260.

15 Id.

revised to permit federal forbearance and to require state preemption so that "the disparities in the current regulatory scheme [do not] impede the continued growth and development of commercial mobile services and deny consumers the protections they need."[16]

Congress specifically authorized and required disparate federal and state regulatory treatment of wireless vis-a-vis wireline local exchange service. This is why it permitted the Commission to forbear from all but Sections 201, 202 and 208 of Title II for CMRS, and why it preempted state rate and entry regulation, even in those cases where the CMRS carrier was providing functionally equivalent local exchange services in competition with the wireline incumbent.[17] The fact that

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16 Id.

17 Moreover, Congress required the Commission to regularly assess "competitive market conditions" of CMRS and to rely upon such assessment to determine whether to forbear from Title II obligations. In addition, Congress authorized the Commission to differentially regulate CMRS carriers, to the extent that certain classes of CMRS carriers were more competitive than others. See 47 U.S.C. § 332(c)(1)(C); Conference Report at 491 (the purpose of Section 332(c)(1)(C) "is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services"). Thus, there was an explicit recognition on the part of Congress that differential regulation, even of CMRS (in which Congress was expressly trying to remove regulatory disparity), was justified as a means to promote competition and safeguard consumers from the improper exercise of market power.

Of course, upon examination of the CMRS market, the Commission found it sufficiently competitive to extend forbearance from most Title II obligations to all CMRS carriers alike. See Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, Second Report and Order in GN Docket 93-252, 9 FCC Rcd 1411 (1994).

wireless carriers used a different technology, i.e. radio, to provide essentially the same basic telephone service as their wireline counterparts, did not necessitate the retention of state jurisdiction. As far as Congress was concerned, of crucial importance in determining the level of necessary regulation was the underlying market power of the respective parties, and not the underlying technologies they employed to provide such services in competition with each other.

The most cursory examination of the 1996 Act reveals Congress' intent to maintain the deregulatory policies reflected in Section 332.[18] As noted above, Congress entrusted to the FCC the decision to classify CMRS providers as LECs when circumstances warranted. Moreover, Congress, in enacting the interconnection and unbundling requirements of Section 251,[19] established three distinct levels of obligations or duties to be imposed upon various telecommunications providers, dependent upon their level of market power. While Congress recognized that some markets, and some carriers in those markets, would need closer regulatory supervision as they transition to a competitive marketplace, it nevertheless specifically exempted CMRS from most of these obligations. Congress' decision to exempt CMRS

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[18] Congress passed the 1996 Act as a means to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." S. Conf. Rep. No. 230, 104th Cong., 2d Sess, at 1 (1996)("1996 Conference Report").

[19] 47 U.S.C. § 251.

providers from LEC obligations reflects its realization that a CMRS provider, even one providing local exchange services, does not possess market power that warrants imposing the additional requirements LECs must satisfy under the 1996 Act.[20]

In sum, the Commission's policy to refrain from labeling CMRS carriers as LECs, even when they are providing telephone exchange and exchange access service, is consistent with achieving Congressional objectives. Accordingly, the COPUC's desire to subject CMRS providers with LEC obligations under Sections 251 and 252 should be rejected by the Commission.

III. THE COMMISSION CORRECTLY DEFINED THE LOCAL SERVICE CALLING AREA FOR CMRS CALLS ON THE BASIS OF MTA BOUNDARIES.

In the First Report and Order, the Commission determined that, under its "exclusive authority to define the authorized license areas of wireless carriers, . . . traffic to or from a CMRS network that originates or terminates within the same MTA is subject to transport and termination rates under Section 251(b)(5), rather than interstate and intrastate access

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20 The general duties to interconnect (either directly or indirectly) with other telecommunications carriers and to maintain a minimum level of network compatibility applies to almost all providers of telecommunications services, including LECs, incumbent LECs and CMRS providers. In turn, local exchange carriers, of which CMRS providers are excluded, have the additional obligations to provide resale, number portability, dialing parity, access to rights-of-way and reciprocal termination. Finally, incumbent local exchange carriers have additional obligations to provide, among other things, direct interconnection, unbundled access, resale at wholesale rates, and physical collocation. 47 U.S.C. § 251(a),(b),(c).

charges."[21] Petitioners seek reconsideration of the Commission's decision that LEC-CMRS compensation arrangements, for the purpose of transport, termination, and access charges, be based on the MTA delineations. LECC argues that the Commission's decision is discriminatory and that it could transform interstate calls into local calls.[22]

The Commission properly reasoned that the MTA based payment system is the most appropriate method for defining LEC-CMRS interconnection rates. The Commission's decision is based on the facts that: (1) different CMRS carriers have licenses to operate in different sized territories, often depending upon the type of service provided; and (2) that the largest territory, the MTA, "serves as the most appropriate definition for local service area for CMRS traffic."[23] While LECC believes that it may be discriminatory to create a specific definition for CMRS carriers, it fails to recognize that mobile telephony has not developed under the same parameters as landline carriers and its technology is vastly different than that of landline carriers.

The MTA based definition reflects the Commission's recognition that CMRS licenses and CMRS calling patterns do not operate with respect to state boundaries, and thus neither should payment schemes between LECs and CMRS carriers. The policy

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21 First Report and Order at ¶ 1036. This effectively treats intra-MTA calls as local calls.

22 LECC petition at 16-17.

23 First Report and Order at ¶ 1036.

supporting the Commission's pricing guidelines is the promotion of an efficient, competitive buildout of a nationwide wireless communications network. The continuing development of cellular service demonstrates that efficient buildout of wireless networks requires "clustering" of systems into regional areas. Indeed, recognizing the benefits of the larger, interstate service areas, the Commission adopted an MTA/BTA scheme for licensing PCS. These larger CMRS service areas (both cellular and PCS) effectively dictate the most efficient system architecture, including the optimal number and location of LEC to CMRS interconnections. They also reflect the local calling patterns of CMRS customers who are accustomed to the notion of mobility, and the advantages it provides.

If the petitioner's request were to be implemented, any efficiencies created by the Commission's licensing plan, based on geographic areas which follow patterns of trade rather than state lines, would most surely be lost. Where two states could mandate differing interconnection compensation arrangements for the same licensee, a single efficient system configuration is no longer a reality. Moreover, by allowing differing state traffic termination regulations, one ignores the fact that wireless services are unique in that their billing procedures are not, and never have been required to be, designed to monitor traffic between state borders.[24] Rather than permitting a situation

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[24] Wireless carriers would be required to make costly and impractical additions to their networks to determine the jurisdictional nature of each call.

where CMRS systems must be designed to accommodate varying requirements resulting from each state's differing approach to interconnection, the First Report and Order is the principal means of achieving Congress' and the Commission's goal of creating efficient interstate services.[25]

IV. THE COMMISSION CORRECTLY DETERMINED THAT CMRS PROVIDERS ARE ENTITLED TO NONDISCRIMINATORY ACCESS TO POLES UNDER SECTION 224.

A. The Statutory Language In Section 224 Expressly Mandates Access For CMRS Providers.

Several electric utilities assert that the definition of "pole attachment" is limited by the statutory language to wires and cables.[26] They request clarification by the Commission that Section 224(f) does not require utilities to provide access for the attachment of wireless equipment.[27] Consolidated Edison, while recognizing that the "the Telecommunications Act . . . [does not] discuss the equipment that can be attached [to poles],"[28] makes the contradictory assertion that the "Commission

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25 The interstate nature of CMRS services is also reflected in Congress' determination in Section 332 to essentially eliminate state jurisdiction over CMRS rates. 47 U.S.C. § 332(c)(3)(A). As explained in Part II above, in preempting state rate and entry regulation of CMRS, Congress specifically accounted for the fact that "mobile services . . . by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."

26 See Consolidated Edison petition at 11-12; see also Florida Power & Light petition at 24-26; see also Infrastructure Owners petition at 26-29.

27 Id.

28 Consolidated Edison petition at 11.

is again attempting to improperly expand the requirements of the Telecommunications Act"[29] by failing to limit to cables the equipment that may be attached to poles. Florida Power & Light urged "the FCC [to] clarify that radio antennas, satellite earth stations, microwave dishes and other wireless equipment . . . are not covered by Section 224(f)"[30] and claims that, historically, "[w]ireless equipment has not been considered a 'pole attachment.'"[31] The Infrastructure Owners echo the claims of the other utilities and assert that "Congress specifically did not include anything other than traditional wire equipment in the definition of 'pole attachments.'"[32]

The access requirement at issue is contained in Section 224(f)(1) of the 1996 Act. To illustrate the clarity of the statutory language, CTIA quotes the subsection herein. Specifically, section 224(f)(1) states that:

> A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.[33]

CTIA notes the absence of an exemption for wireless equipment and wireless carriers.

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29 Id. at 12.

30 Florida Power & Light petition at 24.

31 Id. at 25.

32 Infrastructure Owners petition at 28.

33 47 U.S.C. 224(f)(1).

A cursory review of the definition of "pole attachment" dispels the notion that Congress intended the term to exclude access on the basis of the form of communication (i.e., form of technology used) provided over the attachment. Section 224(a)(4) defines a 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." The use of the word "any" signifies inclusion rather than exclusion. Any attachment is permissible. The use of the attachment, be it to provide wireline services or wireless services, is irrelevant under the statute.

To the extent that Section 224 limits applicability to certain carriers, it is clear that CMRS providers are entitled to access. Cable television systems and telecommunications carriers are granted nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by utilities.[34] The 1996 Act's definition of "telecommunications carriers" includes CMRS providers.[35] Because CMRS providers are

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[34] 47 U.S.C. § 224(f)(1).

[35] 47 U.S.C. § 153(44)("The term 'telecommunications carrier' means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services"). "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46)(emphasis added). "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). CMRS falls squarely within these definitions. See also First Report and Order at ¶ 993

telecommunications carriers, and because Section 224 provides nondiscriminatory access to poles for telecommunications carriers, CMRS providers are entitled to nondiscriminatory access to poles mandated by Section 224.

Perhaps in recognition of the absence of legitimate supporting arguments, the Infrastructure Owners and Florida Power & Light attempt to support their position by relying on Section 224(a)(1) which states:

> The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

The utilities claim this provision provides evidence that Congress intended pole attachments to be used for the provision of wireline communications only.[36]

This provision is irrelevant to the issue of whether items other than wire cables may be attached to the poles of utilities. Rather, Section 224(a)(1) defines which utilities are subject to the terms of Section 224. More Important, it does not restrict

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(Commission holding that CMRS carriers "meet the definition of 'telecommunications carrier'"). Congress provided specific exceptions to those entities included within the definition of "telecommunications carriers," namely aggregators of telecommunications services. Notably, CMRS providers are <u>not</u> excluded from the definition of "telecommunications carriers."

[36] <u>See</u> Florida Power & Light petition at 25-26; <u>see also</u> Infrastructure Owners petition at 28-29.

the types of carriers who are entitled to access, nor does it limit the types of services these eligible carriers can provide.

Congress expressly listed in the statute several exceptions to the utilities' overriding duty to provide nondiscriminatory access. Namely, a utility may deny access to its poles, ducts, conduits, or rights-of-way only for reasons of (1) insufficient capacity, (2) safety, (3) reliability, and (4) generally applicable engineering purposes.[37] Notably, these exceptions do not relate to the claims that the utilities articulate in their petitions.

The Commission was correct in placing the burden of proof for access denial upon the utilities.[38] The resistance of utilities to pole attachment requirements, as evidenced by the Petitions filed for reconsideration, underscores the need for a narrow interpretation of the statute's exceptions and strict enforcement of the Act's mandate that utilities provide nondiscriminatory access to their poles.[39]

The utilities' interpretation of the Act not only contradicts the language itself, but also ignores the Act's pro-

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[37] 47 U.S.C. § 224(f)(2).

[38] See First Report and Order at ¶ 1222 (placing the ultimate burden of proof for denial of access upon utilities in light of the information and expertise possessed by utilities).

[39] The Commission recognized the potential for utility anticompetitive behavior in the provision of access to poles. See First Report and Order at ¶ 1150 ("[w]e note in particular that a utility that itself is engaged in video programming or telecommunications services has the ability and the incentive to use its control over distribution facilities to its own competitive advantage").

competitive goals.[40] CMRS providers offer an alternative to traditional wireline local exchange service. An exclusion of CMRS providers from the scope of Section 224's grant of non-discriminatory access would competitively disadvantage CMRS providers vis-a-vis wireline carriers by unnecessarily and significantly raising the costs of providing commercial mobile radio service. The result would be the diminution of viable, competitive and affordable alternatives for consumers to the services of incumbent LECs. Such a result would contradict the entire purpose of the 1996 Act.

B. Pole Attachment Case Law Fully Supports Rejection Of Petitioners' Position To Deny Access To CMRS Providers.

The utility Petitioners suggest that the provision of access to pole attachments should be limited on the basis of the services provided over the pole attachments. Consolidated Edison claims that "[t]he only equipment permitted to be attached to utility facilities are cables . . . the only facilities that could possibly be contemplated to attach along these distribution networks would be cables."[41] Similarly, the Infrastructure Owners argue that "[t]he placement of any type of equipment other than coaxial and fiber cable, including wireless equipment, on poles, ducts, conduits or rights-of-way raises a number of unique

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40 Congress enacted the Telecommunications Act of 1996 "to provide for a pro-competitive, de-regulatory national policy framework" for telecommunications in the United States. 1996 Conference Report at 1.

41 See Consolidated Edison petition at 12.

issues that were not intended to be covered by the Pole Attachments Act."[42]

Notwithstanding utility Petitioners' assertions, it is wholly consistent with case law governing pole attachments to emphasize the statutory classification of the carrier instead of the service for which the attachment is used. In Texas Utilities Elec. Co. v. FCC, the court held that the determinative inquiry under the Pole Attachment Act was not the particular service offered by the attaching entity, but rather the classification of the entity itself.[43] One issue in Texas Utilities centered around the applicability of Section 224 (then applicable only to cable television systems) to the fees for pole attachments used by a cable operator to transmit non-video broadband services. The Texas Utilities Electric Company attempted to charge a premium for the non-video pole attachments claiming that they were not cable services and, as such, the rates otherwise required by Section 224 were inapplicable.[44] The Commission interpreted the statute as "not distinguishing between the types of service transmitted over the cable, but only requiring that the attachment be made by a cable operator as part of a franchised cable television system."[45]

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42 See Infrastructure Owners petition at 27.

43 Texas Utilities Elec. Co. v. FCC, 997 F.2d 925 (D.C. Cir. 1993).

44 Id. at 928.

45 Id. at 930.

Focusing on the provider rather than the service provided, the D.C. Circuit rejected Texas Utilities' argument and upheld the Commission's interpretation stating "[w]e . . . cannot agree . . . that Congress, if it meant to incorporate the FCC's definition of 'cable television system,' specifically intended to restrict rate regulation to attachments distributing television programming."[46] The court further noted that the statutory language intended "not to circumscribe the scope of communications to be regulated but to limit the type of entity or industry to be protected."[47]

In light of the Texas Utilities case and Congress' decision not to include service-specific restrictions in Section 224, the type of communications offered over pole attachments by attaching entities is irrelevant to the applicability of Section 224. Rather, the emphasis must be the classification of the attaching entity itself. Regardless of whether an attaching entity provides commercial mobile radio services, cable television service, or competitive wireline local exchange service, that entity is permitted nondiscriminatory access to the poles of utilities insofar as the attaching entity falls within the statutory definition of "telecommunications carrier" or "cable television system."[48]

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46 Texas Utilities Elec. Co. v. FCC, 997 F.2d at 931.

47 Id.

48 The Infrastructure Owners' reference to unconstitutional takings in the context of pole attachments is specious in light of FCC v. Florida Power Corp., 480 U.S. 245 (1987). In that decision, the Court determined that the Commission's

In addition to the legal bases discussed above, for purposes of administrative ease, the Commission should continue to base the applicability of Section 224 on the regulatory classification of the carrier rather than the particular services offered over the pole attachment. Attempts to distinguish the types of services being offered over each pole attachment of every attaching entity would prove administratively burdensome, if not impossible. The Commission would expend unnecessarily substantial resources resolving complaints about the types of services being offered over particular pole attachments as would utilities and attaching entities in proving or disproving their claims.

Order under the Pole Attachments Act was not a taking within the meaning of the Fifth Amendment. Id. at 254. In so holding, the Court relied upon a line of regulatory takings cases standing for the premise that "regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible" insofar as "the rates set are not confiscatory." Id. at 253 (citations omitted). Because Section 224 and the Commission's implementing rules provide Infrastructure Owners with the basis for recovery for the use of their property, confiscatory rates are simply not implicated.

V. CONCLUSION

For these reasons, CTIA respectfully requests that the Commission deny the petitions detailed herein.

Respectfully submitted,

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

Andrea D. Williams
Assistant General Counsel

Michael F. Altschul
Vice President, General Counsel

Randall S. Coleman
Vice President for
Regulatory Policy and Law

1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
(202) 785-0081

Its Attorneys

Philip L. Verveer
Jennifer A. Donaldson
Gunnar D. Halley
WILLKIE FARR & GALLAGHER
1155 21st Street, N.W., Suite 600
Three Lafayette Centre
Washington, D.C., 20036-3384

Of Counsel

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CERTIFICATE OF SERVICE

I, David M. Don, hereby certify that a copy of each of the foregoing *Opposition to Petitions for Reconsideration of the Cellular Telecommunications Industry Association* has been served via U.S. first class mail this day upon the following parties:

Anthony Marquez
First Assistant Attorney General
State of Colorado
1580 Logan Street, OL2
Denver, CO 80203

William F. Mather, Jr.
Halprin, Temple, Goodman & Sugrue
1100 New York Avenue, NW
Suite 650 East
Washington, DC 20005

Shirley S. Fujimoto
Christine M. Gill
Thomas J. Navin
McDermott, Will & Emery
1850 K Street, NW
Suite 500
Washington, DC 20006

Shirley S. Fujimoto
Christine M. Gill
Kris Anne Monteith
McDermott, Will & Emery
1850 K Street, NW
Suite 500
Washington, DC 20006

John D. McMahon
Mary F. Krayeske
Consolidated Edison Company of New York, Inc.
4 Irving Place, Room 1815-S
New York, NY 10003

David M. Don

Dated: October 31, 1996