

discrimination and other anticompetitive conduct.^{85/} Imposing such requirements on new entrants is both unnecessary and unjustified, since they lack market power.^{86/}

V. THE "TRANSMISSION AT TARIFF" OBLIGATION SHOULD NOT BE EXTENDED TO CLECs PROVIDING INFORMATION SERVICES

In its Petition for Reconsideration, the Information Technology Association of America (ITAA) contends that "CLECs that provide local service using their own facilities, or that use network elements obtained from incumbent LECs, must acquire the transmission capacity that underlies their information service offerings at the same price, terms, and conditions as the carrier makes that capacity available to all other information service providers."^{87/}

As a threshold matter, it is unnecessary to impose the "transmission at tariff" requirement on carriers that lack market power, since those carriers lack the ability to engage in the kind of discriminatory practices ITAA fears. Indeed, the clarification sought by ITAA would actually deter competition. The Commission opted to permit CLECs to provide local service and information services via the same interconnection arrangements and unbundled

^{85/} See NCTA Comments at 19-21.

^{86/} Cf. In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Services, First Report and Order, CC Docket No. 94-54 (rel. July 12, 1996), at ¶ 24 (sunsetting resale rules imposed on CMRS providers five years after the award of initial licenses for currently-allocated PCS spectrum because "competitive development of broadband PCS service will obviate the need for a resale rule in the cellular and broadband PCS market sector").

^{87/} ITAA Petition at 6. ITAA refers to this requirement as "transmission at tariff," even though carriers without market power are not subject to tariff requirements. See "FCC Relieves Long Distance Companies From Tariff Filing Requirements," CC Docket No. 96-61, rel. Oct. 29, 1996.

elements obtained from ILECs in order to stimulate competition with ILECs, reduce transaction costs, and encourage multiple service offerings.^{88/} ITAA's proposal would recreate the very transaction costs and service burdens that the authorization of "same arrangement" offerings sought to eliminate.

If the Commission does choose to apply transmission-at-tariff rules to facilities-based CLECs providing information services, it should make clear that such requirements in no way obligate CLECs to unbundle their networks. The Act's bar against requiring CLECs to unbundle their networks would prohibit such a result.

Finally, even if "transmission at tariff" requirements are imposed on CLECs, they cannot be applied to the offering of cable services. Historically, such requirements have only been applicable to common carriers. Section 621(c) of the Communications Act expressly proscribes the imposition of common carrier rules on cable operators offering cable service.^{89/} That provision was left undisturbed by the 1996 Act.

VI. THE COMMISSION SHOULD REJECT UTILITY EFFORTS TO CURTAIL COMPETITORS' ACCESS TO POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY

Several electric utilities, railroads, and ILECs argue that they should be entitled to exercise broader discretion in denying cable operators and telecommunications carriers the

^{88/} First Report and Order at ¶ 995 (Precluding competitors "from offering information services in competition with the incumbent LEC under the same arrangement" would increase transaction costs and contravene the "pro-competitive spirit of the 1996 Act, while permitting same arrangement offerings provides "competitors the opportunity to compete effectively with the incumbent by offering a full range of services to end users without having to provide some services inefficiently through distinct facilities or arrangements").

^{89/} 47 U.S.C. § 541(c).

access to pole, ducts, conduits, and rights-of-way permitted by the Act and the First Report and Order.^{90/} The Commission correctly interpreted the 1996 Act to limit the power of utilities to exclude telecommunications carriers from attachment space on poles, ducts, conduits, and rights-of-way and to constrain the ability of state regulators to adopt pole attachment rules that fail to live up to the intent of the amended Pole Attachment Act. The Commission's rules properly reflect the detailed historical record demonstrating that the owners of attachment space have long engaged in discriminatory practices designed to frustrate competition. Accordingly, the Commission should reject the efforts by LECC and electric utilities to resurrect the status quo ante by expanding their authority to thwart access to poles by competitors.

First, the utilities' contention that the 1996 Act does not compel them to expand capacity to accommodate access requests by telecommunications carriers^{91/} is wholly without merit. As the Commission recognized, the owner of attachment space is in a position to expand capacity as its needs grow, and attaching parties should be given the same

^{90/} See, e.g., American Electric Power Service Corp., Commonwealth Edison, Duke Power, Energy Services, Northern States Power, The Southern Co., and Wisconsin Electric Power ("American Electric Power Service Corp., et al.") Petition; Florida Power & Light Petition at 10-13 (asserting Commission exceeded authority by requiring owner of reserved attachment space to grant access to telecommunications carriers until actually needed by owner); Petition of Carolina Power & Light Petition at 14-22 (arguing, inter alia, that utilities should be allowed greater latitude in allocating reserve space, exclude employees of telecommunications carriers and cable operators from utility-owned facilities, and decline to exercise condemnation powers).

^{91/} See, e.g., American Electric Power Service Corp., et al. Petition at 8-9; Carolina Power & Light Petition at 16 (contending that Commission's decision would force utilities to underwrite expansion of capacity for attaching party's benefit).

opportunity based on the principle of non-discrimination embodied in Section 224(f)(1).^{92/}

Section 224(f) creates a right of access to rights-of-way as well as physical facilities such as poles, and the absence of spare capacity on a physical facility does not necessarily mean the right-of-way is full.^{93/}

The utilities' effort to block expansion of capacity on their poles and rights-of-way would impede the Act's competitive purposes by erecting right-of-way bottlenecks that would limit entry by new competitors. The amount of right-of-way space that was available in a monopoly telecommunications environment should not be expected to set the outer limit of space under a pro-competitive regulatory scheme. Right-of-way space must be sufficient to accommodate the access needs generated by the proliferation of new competitors envisioned by the 1996 Act. Absent the ability to compel entities who control attachment space to expand capacity, the access rights created by the 1996 Act for new telecommunications carriers would be meaningless.^{94/}

Second, the Commission should reject efforts to broaden the circumstances under which owners of poles or other attachment areas will be allowed to exclude attaching parties

^{92/} First Report and Order at ¶ 1162.

^{93/} See id.

^{94/} Many utilities contend that the Commission should not have required them to exercise eminent domain powers on behalf of attaching parties when necessary to provide additional capacity. See, e.g., American Electric Power Service Corp., et al. Petition at 14-21; Florida Power & Light Petition at 14-21; LECC Petition at 23-24; UTC Petition at 3-6. This argument ignores the right of access created by Section 224(f)(1), which would be meaningless if utilities were permitted to deny attachment requests based on space limitations while selectively using their power to condemn additional space for their own purposes. The Commission should uphold its decision to compel utilities to use their eminent domain powers on behalf of telecommunications providers to the extent permitted under state law.

from using so-called "reserve" space. Under the Commission's decision, electric utilities can reserve space for future needs if the reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for the space in the provision of its core utility service.^{95/} The utility must permit carriers and cable operators to use the reserved space until the utility has an actual need for it, and then the attaching party must be given an opportunity to pay for modifications necessary to expand the available space.^{96/}

This arrangement strikes a fair balance between the needs of utilities to expand to serve additional customers and the rights of cable operators and telecommunications carriers to obtain space in the face of warehousing by pole owners. The new compensation formula established under the 1996 Act -- and the interim formula developed under the previous version of the PAA -- ensures that attaching parties will pay an equitable share of the costs associated with their attachments, including the costs of relocating the attachments as the needs of both the owner and attaching party change.^{97/}

LECC contends that ILECs should be permitted to reserve attachment space on their poles, ducts, conduits, and rights-of-way on the same basis as electric utilities.^{98/} If they are not allowed to set aside space for their own future needs, the ILECs warn, "the end result will be uneconomically high provisioning costs and repeated re-excavation and other

^{95/} First Report and Order at ¶¶ 1175-1177.

^{96/} Id. at ¶¶ 1169-1170.

^{97/} See 47 U.S.C. § 224(d)(1) (establishing compensation formula).

^{98/} LECC Petition at 22-23.

construction activities that will greatly inconvenience customers."^{99/} LECC's argument proves too much. A rule that allows ILECs to reserve attachment space would force CLECs, wireless carriers, and other new entrants to undertake construction and excavation activities before the available space on existing poles, ducts, conduits, and rights-of-way under the control of ILECs has been exhausted. The ILECs fail to explain how allowing them to warehouse space would spare customers or the general public the consequences of new construction; indeed, it would make matters worse. Moreover, the incentive for ILECs to use the right to reserve space for future use in order to erect roadblocks to competition would be overwhelming.

The original version of the Pole Attachment Act was enacted because Congress recognized that telephone companies and electric utilities had incentives not to deal fairly with cable operators. At a time when ILECs are competing directly in both the local exchange and cable businesses, the concerns that led Congress to pass the Pole Attachment Act are heightened, not diminished. ILECs should not be given additional excuses to exclude their competitors from urgently needed attachment space.

Third, the Commission should stand by the 45-day access rule adopted in the First Report and Order. Some utilities contend that the Notice of Proposed Rulemaking in this proceeding provided no indication that an access rule would be adopted and that the First Report and Order fails to explain the basis for the rule.^{100/} These arguments are wholly

^{99/} Id. at 23.

^{100/} See e.g. American Electric Power Corp., et al. Petition at 23-24; Florida Power and Light Petition at 18-23.

meritless. The Notice clearly stated that the access rights added to Section 224 by the Act would be part of the rulemaking in the instant proceeding;^{101/} commenting parties underscored the importance of adopting procedures designed to expedite the resolution of pole attachment disputes;^{102/} and the First Report and Order made clear that the requirement that a utility act within 45 days to either grant or deny in writing an access request derived from the Commission's view that "time is of the essence" with respect to pole attachment requests.^{103/}

The utilities' arguments against the merits of the 45-day rule are similarly unavailing. Indeed, these arguments presage the type of delaying tactics that competitors can expect to encounter absent the strict timetable delineated in the First Report and Order.^{104/} To the extent that a utility cannot respond to a particular access request within the requisite 45 days, it is free to seek a waiver of the requirement. The Commission should not, however, modify or eliminate the 45-day rule.

Fourth, the Commission also should reject efforts to curtail the requirement that attaching entities be provided with 60 days notice of non-routine, non-emergency facility

^{101/} See Notice at ¶ 221.

^{102/} See First Report and Order at ¶ 1225.

^{103/} See id.

^{104/} See, e.g., American Electric Power Service Corp., et al. Petition at 25-26 (arguing that 45-day rule provides insufficient time for "internal coordination" for processing, conducting "requisite studies," obtaining necessary "permits or franchises" by parties seeking access, establishing "potential routes," evaluating route feasibility, and creating "a final route map").

modifications or alterations.^{105/} For example, American Electric Power Service Corp. et al. suggest that utilities need only make a "reasonable effort" to provide 60 days notice of non-routine, non-emergency modification and alterations of poles and conduits.^{106/} There is no justification for providing less than 60 days notice of alterations or modifications in non-emergency situations, and the absence of such a requirement would deny attaching entities a meaningful opportunity to assess the impact of such modification on their businesses and respond accordingly.^{107/}

Fifth, the Commission should reject EEI's suggestion that States should be permitted, pursuant to the "reverse preemptive" authority granted to them by Section 224, to regulate access to poles without certifying that they have in place rules that regulate such access.^{108/} As demonstrated in NCTA's Petition for Reconsideration, State certification regarding access regulation is critical in order to carry out the Act's goal of expediting the transition to competition and to ensure that States meet the Act's presumption in favor of access.^{109/}

^{105/} See 47 C.F.R. § 1.1403(c).

^{106/} American Electric Power Service Corp., et al. Petition at 45-48.

^{107/} See First Report and Order at ¶ 1207. EEI's requests that the 60-day notice requirement should not be construed to limit a utility's "ability to promptly serve new customers" can be addressed via a case-by-case waiver process. EEI Petition at 10-11. Since the provisioning of service to new customers should not normally necessitate modification or alteration of poles, it would be more appropriate to address EEI's concern via a waiver process than by establishing a specific exception to the notice requirement.

^{108/} EEI Petition at 17-18.

^{109/} See generally NCTA Petition at 20-23; see also First Report and Order at ¶ 1222 (noting that a denial of access . . . is an exception to the general mandate of section 224(f) and that "the utility [should] bear the burden of justifying why its denial of access to a cable television or telecommunications carrier fits within that exception").

As the Commission has already recognized, States cannot merely assert jurisdiction over access, but must be able to "cite to state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum."^{110/} The Commission should further clarify that States seeking to certify their regulation of access must demonstrate that their rules conform to section 224(f) and the Commission's access guidelines in the First Report and Order.^{111/} To ensure conformance, interested parties should have an opportunity to review and comment on a State's access rules before the Commission acts on the State's request for certification.^{112/}

The Commission also should reject EEI's suggestion that rate regulation of cable and telecommunications services should be taken to conclusively demonstrate, for certification purposes, that a State's rules regulating pole attachment rates, terms and conditions "consider the interests of the subscriber of the services offered via such attachments."^{113/} Such a presumption is wholly inappropriate. Regulation of cable rates in no way demonstrates that a

^{110/} First Report and Order at ¶ 1240.

^{111/} While the reverse preemption authority granted to States over rates, terms and conditions is not tethered to the Federal requirements, Federal authority over access to poles, ducts, conduits, and rights-of-way is preempted only where a State regulates such matters "as provided in subsection (f)." 47 U.S.C. § 224(c)(1).

^{112/} Regardless of the Commission's resolution of the certification issue, it must reject EEI's assertion that State regulation of access has preemptive effect irrespective of whether a State has an established procedure for resolving access complaints. See EEI Petition at 17. The Commission appropriately recognized that competitors' access rights would be wholly vitiated if the "reverse preemption" provision could be interpreted to require them to vindicate those rights in States that have not even established a procedure for resolving access disputes. See First Report and Order at ¶ 1240.

^{113/} EEI Petition at 17-18, quoting 47 U.S.C. § 224(c)(2)(B).

State's rules regarding pole attachment, rates, terms and conditions take account of subscriber interests in obtaining a competitive choice of local telephone and other telecommunications services.

Sixth, the Commission should reject the arguments advanced by some utilities to the effect that the owners of attachment space should be entitled to exclude the workers employed by attaching parties from the owner's facilities.^{114/} The utilities offer no evidence that attaching parties will use unqualified technicians to install or modify attachments or that the presence of these workers will create a safety hazard, even though they have had ample experience dealing with attaching parties under the pre-1996 version of the Pole Attachment Act. The speculative nature of the risks posited by the utilities militate against adopting a rule that would allow them to exercise discretion over installation and maintenance by attaching entities, opening the door to dilatory tactics. The Commission's decision not to issue specific rules concerning conditions on the right of access to facilities was sound and should be maintained.^{115/}

Finally, the Commission should spurn proposals to interpret the amended version of the Pole Attachment Act as providing access to facilities on a pole-by-pole basis.^{116/} Section 224(f)(1) plainly requires utilities to grant telecommunications carriers and cable operators access to all poles, ducts, conduits, and rights-of-way controlled by the utility.

^{114/} See, e.g., Duquesne Light Co. Petition at 15-17.

^{115/} First Report and Order at ¶¶ 1143, 1158.

^{116/} See, e.g., Florida Power & Light Petition at 36-42; Delmarva Power & Light Petition at 6-7; American Electric Power Corp., et al. Petition at 40-45.

The Commission has limited the right of access to include only those facilities that are part of the utility's "distribution network," as opposed to every facility,^{117/} so the scope of the attachment right is already reasonably limited. On the other hand, a more restrictive approach would deny telecommunications carriers and cable operators access to attachment space that would enable them to provide service more efficiently for no compelling reason. In light of the statute's clear meaning, utilities must accept the fact that if they use any part of their distribution network for wire communications, they are obligated to provide access to the whole network.^{118/}

^{117/} First Report and Order at ¶ 1185.

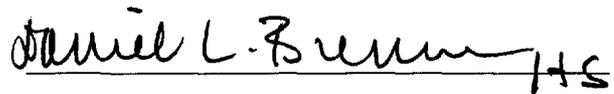
^{118/} As the Commission recognized, "[t]he use of the phrase 'in whole or in part' demonstrates that Congress did not intend for a utility to be able to restrict access to the exact path used by the utility for wire communications." First Report and Order at ¶ 1173.

CONCLUSION

For the foregoing reasons, the Commission should reject the proposals for reconsideration opposed herein and reconsider and revise the First Report and Order in accordance with the arguments set forth in NCTA's initial Petition.

Respectfully submitted,

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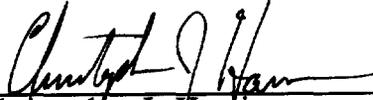
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CERTIFICATE OF SERVICE

I, Christopher J. Harvie, do hereby certify that a copy of the foregoing Opposition to Petitions for Reconsideration of The National Cable Television Association was sent to the following by either first class mail, postage pre-paid, or by hand delivery, this 31st day of October, 1996.


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