These proposals should be rejected and the Commission's rules clarified to forbid similar efforts to evade the Act's key requirement of cost-based rates.

Although costs for certain elements may not vary "significantly" among geographic areas in certain states (MFS at 20), that in no way justifies wholesale elimination of the deaveraging requirement. Proper application of the Commission's cost-based rules will ensure that rates among zones will differ significantly only if costs differ significantly, and thus rates for some elements (e.g., loop elements) may vary widely across zones while rates for other elements differ little if at all.[27] And there can be no serious claim that states are incapable of rationally implementing the deaveraging requirement or that implementation is overly burdensome in the context of either interim default or permanent rates (see Sprint at 7-9; WUTC at 3-4). All parties and states, for example, have access to existing density-related cost "scaling" tools like the Hatfield Model.[28] Sprint's complaint (at 8) that there is an element of arbitrariness to any such exercise likewise provides no basis for reconsideration of the deaveraging rules: the perfect should not be the enemy of the good - even reasonably accurate (albeit imperfect) deaveraging is competitively superior to no deaveraging at all.[29]

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27 AT&T agrees with MFS that the Commission should clarify that deaveraging applies on a statewide, not study area, basis. Compare First Report and Order at ¶ 794 (Appendix D lists "the proxy ceilings on a statewide basis") with ¶ 784 (states "shall set rates such that the average rate for the particular element in a study area does not exceed the applicable proxy ceiling").

28 As the First Report and Order demonstrates, a state commission need not endorse the absolute cost levels produced by the Hatfield Model to find it an effective tool for scaling averages and computing relative rates. See First Report and Order at ¶ 795.

29 WUTC's other claims misconstrue the Commission's rules. WUTC complains that the Commission's selection of three zones is "arbitrary," but the rules make clear that states

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D. Enhanced Services

In its First Report and Order (¶ 995), the Commission held that carriers which purchase unbundled network elements under Section 251(c) to provide telecommunications services may use those elements to also provide enhanced services. ITAA (at 2-3) asks the Commission to "clarify" that "facilities based CLECs must acquire the transmission capacity that underlies their information service offerings at the same price, terms and conditions that they make that capacity available to non-affiliated information service providers." ITAA (at 3) seeks a similar ruling with respect to services obtained by "reseller CLECs" under Section 251(c)(4). It claims (at 2) that absent the requested rulings, providers of enhanced services ("ESPs") will be placed "at a substantial and unfair competitive advantage."

As a preliminary matter, the nature of the "clarifications" requested by ITAA is unclear. ITAA could be asking the Commission to require that CLECs pay to ILECs additional charges beyond those specified in Sections 251(c) and 252(d) for network elements and services that CLECs use to provide enhanced in addition to basic telecommunications services. Alternatively, ITAA may be seeking a ruling that CLECs must make these elements and services available to unaffiliated ESPs at the same rates and terms they provide to their

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are free to use more zones if cost differences are significant (or to employ three zones with very similar rates if cost differences are insignificant). WUTC also worries that density-related rate zones may not be appropriate in all circumstances, but the rules provide only that "states may use . . . density-related zone pricing plans." 47 CFR § 51.507(f) (emphasis added).

own or affiliated ESPs. There is, however, no legal or policy basis to impose either requirement.

Most fundamentally, any requirement that CLECs pay more than the statutorily prescribed charges for unbundled network elements and wholesale services is foreclosed by the plain language of the Act, and would as a practical matter nullify the Commission's ruling that requesting carriers may use the elements and services they obtain pursuant to Section 251 to provide enhanced in addition to basic services. The result would be to deny to CLECs "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 agreements," contrary to the Commission's intent in the First Report and Order (¶ 995).

There is likewise no basis for a rule requiring CLECs to provide services utilizing an incumbent's network to affiliated and nonaffiliated ESPs under the same rates and terms. The Computer II language that ITAA cites applies, by its terms, solely to facilities-based carriers.[30] Requesting carriers that obtain network elements and services from ILECs pursuant to Section 251 do not, by definition, own those elements or underlying facilities. Extending the Computer II language to non-facilities based carriers is not merely unwarranted, but would not be appropriate without a separate rulemaking proceeding.

Finally, any "competitive disadvantages" to which ESPs may be subject is not a function of the First Report and Order, but of Congress' decision not to extend to ESPs the rights conferred on telecommunications carriers by Sections 251 and 252. Indeed, the First

[30] ITAA, at 4 quoting Computer II Final Order, 77 F.C.C.2d at 475.

Report and Order can only help, not harm, ESPs. Preliminarily, no CLEC enjoys today the rates and terms promised by the new Act, and it will be some time before CLECs complete the arbitration process and implement the resulting interconnection and service arrangements. Ultimately, if the rules adopted in the First Report and Order work as intended, then the competition they create will ensure that ESPs receive services at competitive rates. Until then, ESPs will be able to pursue whatever remedies are conferred upon them by the 1934 Act, and existing Commission decisions, including Computer II, that will continue to apply to ILECs as facilities-based carriers.

E. Non-Cost-Based Access Charges.

As the First Report and Order recognizes, "[p]rices for unbundled elements under section 251 must be based on cost under the law" (¶ 620) and "may not include non-cost-based amounts or subsidies" (¶ 726). The carrier common line charge ("CCLC") and transport interconnection charge ("TIC") that the First Report and Order authorizes incumbents to collect for a limited period from purchasers of unbundled elements are indisputably "non-cost-based components and elements" (¶ 718) of the access charge system that have nothing to do with the costs of providing unbundled elements.[31] Two petitioners nonetheless ask the Commission to extend indefinitely incumbents' opportunities to collect these tributes from potential competitors. See LEC Coalition at 12-13 (requesting opportunity to charge "transitional" access charges until access reform is "implemented"); WUTC at 7-11 (requesting

[31] AT&T has therefore intervened in support of the appeal of this aspect of the First Report and Order filed by the Competitive Telecommunications Association.

opportunity to impose non-cost-based intrastate access charges indefinitely). Granting those requests would conflict not only with the plain terms of the Act but with the Commission's own finding that allowing incumbents to "charge the CCLC and the TIC, which are not based on forward-looking economic costs, to competitors that use unbundled elements" would have an "adverse impact on competition" (¶ 724) when incumbents provide interLATA services – as many, including the nation's largest local carrier, GTE, already do.[32]

F. Reciprocal Compensation.

Incumbents also seek improper and discriminatory competitive advantages over their potential rivals in the area of reciprocal compensation for transport and termination. Specifically, incumbents seek to pay interconnectors only end office switching rates for transport and termination even when a new entrant's switch supports an extended loop plant that serves a geographic area comparable to that served by the incumbent's tandem. See LEC Coalition at 14-15; Sprint at 11-14. The rule proposed by these petitioners would plainly be discriminatory, rewarding incumbents, and only incumbents, for their inefficient structures. If incumbents are to receive the higher tandem compensation rate regardless whether an efficient competitor would have deployed a tandem in the area in question, new entrants must receive

[32] WUTC complains that intrastate tariffs do not necessarily include the same access rate elements as interstate tariffs and thus that the Commission's rules may be difficult to apply to intrastate charges. In practice, there should be few real difficulties: however labeled, intrastate access charges generally are structured in a manner comparable to interstate access charges and thus intrastate charges generally can be reduced (and eventually eliminated) in the same manner as interstate charges. To the extent a state is concerned that its access charge structure is such that a transition period cannot be devised, it may seek guidance from the Commission as to how to achieve comparable reductions.

reciprocal compensation (either through bill-and-keep or payment of the same tandem rate) for its own efficient switch configurations that serve comparable geographic areas. No other approach is consistent with competition on the merits. The incumbents' proposal, moreover, would, give new entrants' perverse incentives to deploy unnecessary tandems in order to qualify for the higher tandem compensation rate. For these reasons, competitive neutrality requires "that a non-incumbent LEC is entitled to symmetric compensation if *either* its switch serves a geographic area comparable to that of the LEC tandem, *or* its network performs functions similar to those performed by a tandem." MFS at 26.

IV. THE COMMISSION SHOULD REJECT ILEC ATTEMPTS TO FORECLOSE VIABLE RESALE COMPETITION, BUT CLARIFY THE PRINCIPLES USED IN DETERMINING AVOIDED COST DISCOUNTS.

The ILECs, competitive access providers ("CAPs"), and cable television companies repeat their arguments aimed at preventing resale from becoming a viable entry strategy. They therefore revive their requests that the Commission restrict the services that are available for resale, and limit improperly the scope of avoided costs to ensure that the resulting resale rates are as high as possible. But these petitioners have presented no arguments that were not thoroughly considered and properly rejected by the Commission in its First Report and Order. The Commission's existing standards for reconsideration require that the petitions be denied without revisiting the merits.[33]

In contrast, MCI raises certain matters with respect to the calculation of avoided cost discounts that may not be explicitly addressed in the First Report and Order, and asks the

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[33] See, e.g., Creation of an Additional Private Radio Service, n.2 supra.

Commission for clarification. With the exceptions noted below, AT&T supports the requested clarifications.

A. Services Available For Resale At Wholesale Rates.

In its First Report and Order, the Commission determined that Section 251(c)(4) means what it says -- incumbent LECs must offer for resale at wholesale rates any service that they provide at retail to non-telecommunications carriers. Some petitioners, however, ignore the plain language of the Act and attempt to establish broad exceptions to their resale obligations that would foreclose competition. The LEC Coalition (at 2-3), for example, seeks to exclude contract and customer-specific offerings from the Act's resale obligation. These ILECs also seek (at 2) carte blanche to offer "trials" outside the obligations of Section 251(c)(4). Time Warner (at 18-22), on the other hand, would prohibit resellers from providing their own operator or directory assistance services (and from not paying the costs ILECs would avoid when resellers provide such functions themselves). The Commission should reject -- again -- each of these attempts to subvert the plain language of the Act.

The Commission properly concluded that contracts and customized service offerings are included within the plain language of Section 251(c)(4).[34] The Act simply does not contemplate that ILECs can make retail services available to their largest customers through contracts or customized service offerings and not make such services available for resale at wholesale rates. The LEC Coalition offers no justification for excluding such services from their wholesale obligation other than their untenable reasoning that large

[34] First Report and Order, ¶ 948.

customers are not part of the "public" and that services provided to large customers are subject to competition. Each of these positions was rejected in the First Report and Order (¶ 943). Indeed, the ILECs' claim that discounted and customized offerings provided to large customers are subject to "competition" is contradicted by their threat that they will cease providing such offerings if their petitions are not granted. The simple fact is that new entrants will not be able to bring competition to all customers, including large customers, unless ILECs comply with Section 251(c)(4) and offer such services for resale at wholesale rates.[35]

The Commission should also reject Time Warner's request (at 19-22) to prohibit resellers from providing their own operator or directory assistance services. Direct routing of operator and directory assistance traffic to resellers' service platforms is technically feasible[36] and permits a reseller to differentiate its service offerings from those of the incumbent.[37] The First Report and Order properly holds (¶ 536) that resellers can assume responsibility for

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35 The LEC Coalition also contends that trials should be excluded from an ILEC's resale obligations under Section 251(c)(4). LEC Coalition at 2. Such an exemption would present a grave threat to incipient local services competition. It would permit ILECs to provide "trial" offerings to their most attractive customers that could not be matched by competitors who, by necessity, must rely on ILEC networks and services. The Commission should deny this request.

36 See p. 5, supra.

37 Moreover, operator and directory assistance services are typically viewed by customers as separate from basic local dialtone. ILECs separately promote and market these services as well. In these circumstances, and given the competitive benefits of the Commission's rules requiring direct routing, conditioning the availability for resale of local dialtone on the requesting carrier's agreement to resell the incumbent's operator and directory assistance services would be an unjust and unreasonable condition, and thus unlawful under Section 251(c)(4).

operator services and directory assistance functions -- just as they assume responsibility for customer service and billing and collection. By doing so, resellers will be able to differentiate their service offerings and have an opportunity to provide these functions more efficiently, thus lowering both the wholesale rates for services they continue to obtain from incumbents, and the retail rates that customers pay to their service providers.

B. Avoided Costs.

Congress plainly intended that costs not associated with an ILEC's provision of wholesale services be excluded from the wholesale price for such services. Section 252(d)(3) thus cites marketing, billing and collection costs as costs that will be avoided by ILECs in their provision of wholesale service. In their petitions, ILECs, cable television providers and CAPs repeat their demand that the Commission only permit exclusion of those costs that an ILEC actually sheds in its provision of wholesale services.[38] The First Report and Order rejected these arguments, holding that all costs that are reasonably avoidable by an ILEC in its provision of wholesale services must be excluded from the wholesale rate:

> We do not believe that Congress intended to allow incumbent LECs to sustain artificially high wholesale prices by declining to reduce their expenditures to the degree that certain costs are readily avoidable. We therefore interpret the 1996 Act as requiring states to make an objective assessment of what costs are reasonably avoidable when a LEC sells its services wholesale.[39]

This ruling is both consistent with the language of the statute and required to achieve its objectives. If petitioners' argument were accepted, ILECs could compel new

38 LEC Coalition at 25-26; Time Warner at 3-18; NCTA at 14-20.

39 First Report and Order, ¶ 911.

entrants to underwrite the ILECs' retail marketing efforts. NYNEX, for example, argued that no advertising expenses would be avoided in its provision of wholesale services because it would have to increase its advertising to compete with new entrants.[40] Thus, under NYNEX's argument -- and those of petitioners -- resellers would be compelled to subsidize the ILECs' retail efforts.[41] The Act cannot be read to require such a perverse result.

Time Warner (at 14) and NCTA (at 18-19) likewise argue that joint and common costs should not be considered avoided because they will not be shed in a wholesale environment. But the Commission found that the Act requires that all costs that are not associated with the provision of wholesale services should be considered avoided, including at least a portion of joint and common (or indirect) expenses. Petitioners offer no facts or analysis that were not previously considered by the Commission.[42]

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40 NYNEX Comments at 81 and n.149. Bell Atlantic has made the same claim in arbitration after release of the First Report and Order. Rebuttal Testimony of Edwin Hall, Docket Nos. R-00963578 and R-00963578C0001, at 2 (Pa. PUC, September 27, 1996).

41 See Time Warner at 7-13. Time Warner and NCTA argue that new entrants will enjoy the benefit of an ILEC's advertising and therefore such costs are not avoided in a wholesale environment. This argument, which in all events is foreclosed by the plain language of Sections 251(c)(4) and 252(d)(3), is based on a fundamental misunderstanding of the nature of a reseller's relationship with an ILEC. Unlike the relationship between chip manufacturers, such as Intel, and computer companies, ILECs and resellers will directly compete to provide local services to end users. New entrants will not be "distributors" of a manufacturer's retail product. Indeed, resellers do not want end users to identify the local service they are receiving with that of the incumbent. Moreover, ILECs routinely prohibit new entrants from using the ILEC's name or logo without the ILEC's express written permission.

42 NCTA mistakenly asserts that the Commission has established a presumption that "90 percent of an ILEC's product management and product advertising expenses are avoided when selling at wholesale . . . ." NCTA at 16. In fact, the Commission's Rules

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MCI has asked the Commission to clarify its rules governing the determination of avoided costs in a number of respects. In particular, MCI (at 13) requests that the Commission clarify that avoided cost calculations should be based on revenues and costs for services that are available for resale, and should exclude costs and revenues associated with other services. AT&T supports this request. As MCI explains (and as the First Report and Order contemplates), the only costs that are relevant to determine the costs that will be avoided by a wholesale, as opposed to retail, operation are those that are incurred in connection with the service or group of services being resold.[43] Including costs and revenues associated with other services that are not available for resale is inconsistent with the statute and will not yield an accurate determination of costs that are avoided with respect to the services at issue.[44]

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presume that such expenses are wholly avoided, but permit ILECs to demonstrate otherwise. Rules 51.609(c)(1) and 51.609(d). By the same token, resellers can rebut the presumption that specific costs are not avoided. See Rules 51.609(c)(3) and 51.609(d).

43 See First Report and Order, ¶ 917 (costs that are not associated with the service being resold should not be considered in the determination of avoided costs), ¶ 916 (avoided cost discounts may be calculated for individual services so long as avoided costs are allocated among services).

44 The methodology proposed by MCI in its petition excludes interstate revenues and expenses from the avoided cost discount calculation because the one interstate service provided by ILECs -- interstate access -- is not subject to resale. However, MCI's methodology includes cost and revenues for intrastate access, even though that service also is not available for resale. AT&T believes that a better way of dealing with the issue of non-resale services is the approach taken in AT&T's avoided cost model. In order to exclude non-resale services from the avoided cost calculation, and to avoid the distortions in cost allocation created by the separations process, AT&T's model excludes all access revenues and all access expenses in otherwise avoidable categories from the wholesale discount calculation. The resulting discount is understated because, in

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AT&T believes that the First Report and Order as written requires avoided costs to be determined with reference only to costs of services available for resale, but supports MCI's request for confirmation.

MCI also seeks clarification of the proper method for allocating indirect expenses (at 14). The First Report and Order requires that indirect expenses be avoided in proportion to direct expenses. AT&T agrees that the only proper way to calculate avoided indirect expenses is using the ratio of avoided direct expenses to total direct expenses, and that this is consistent with the First Report and Order. Yet, many ILECs have taken the position that the First Report and Order requires indirect expenses to be considered avoided based on the ratio of avoided direct expenses to total expenses (including indirect expenses).[45] From an economic standpoint, it does not make sense to include the item being allocated (indirect expenses) in the allocation formula.[46] For this reason, AT&T supports MCI's request for clarification.

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determining the indirect expense allocator, access costs are excluded from the avoided direct expenses in the numerator, but over 95% of access costs -- *i.e.*, those associated with the network -- are included in the total direct cost denominator.

45 See, e.g., Rebuttal Testimony of Edwin Hall, Bell Atlantic, Docket Nos. R-00963578, R-00963578C0001, at 6 (Pa. PUC, September 27, 1996); Recommended Decision, AT&T/GTE Arbitration, Docket No. A-310125F0002, at 11 (Pa. PUC, October 10, 1996).

46 A real life example of indirect cost allocation demonstrates the flaw in including indirect expenses in the denominator for determining an indirect expense allocator:

Two roommates -- Joe Retail and Sam Wholesale -- share a two-bedroom apartment with rent of $800 per month and utilities of $400 per month. Joe Retail's share of the

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V. THE COMMISSION SHOULD NOT RECONSIDER ITS RULES RELATING TO POLE ATTACHMENTS.

In the 1996 Act, Congress radically changed the pre-existing provisions that related to pole attachments for cable operators. For the first time, Congress imposed an affirmative duty upon utilities to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way.[47] Congress also expanded the scope of these provisions so that utilities owe duties to telecommunications carriers as well as to cable companies.[48] Congress' expansion of these provisions was an important component of its plan to create competition in the local exchange market. The Commission's implementing rules in this area are consistent with both the language and purpose of the new Act.

Several electric utilities, however, have sought reconsideration of the Commission's pro-competitive rules. They seek almost unlimited ability to deny access to telecommunications carriers on a number of bases, including reserved capacity, an unwillingness to exercise eminent domain authority, and unreasonable limitations on the kinds of equipment that can be attached. The utilities justify many of these arguments by referring to the assumptions and purposes underlying the pre-existing law, which did not contain the

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utilities expenses should be determined based on the relationship his share of the rent has to total rent ($400/$800 = 50% x $400 = $200), rather than on the relationship his share of the rent has to total expenses ($400/$1200 = 33% x $400 = $133).

47 See 47 U.S.C. §§ 224(f) & 251(b)(4).

48 47 U.S.C. § 224(f)(1).

affirmative duty to provide access and which did not extend to telecommunications carriers.[49] For example, some utilities argue that the pre-existing law's focus on cable operators forecloses the Commission's decision to require utilities to permit access for wireless equipment under the new Act; these utilities ignore, however, that Congress changed the definition of "pole attachment" to include any attachment of a "provider of telecommunications service," which clearly includes wireless providers.[50]

Because the utilities' arguments effectively read the pole attachment provisions out of the statute, they should be rejected.

A. The Commission Should Reject The Electric Companies' Attempts To Eviscerate The Rules Relating To Capacity Issues.

In the First Report and Order, the Commission recognized that "allowing space to go unused when a cable operator or a telecommunications carrier could make use of it is directly contrary to the goals of Congress."[51] Moreover, the Commission correctly concluded that permitting a utility to deny access based on claims of "reserved" capacity "would nullify, to a great extent, the nondiscrimination that Congress required."[52] Thus, the Commission promulgated a set of reasonable, even-handed rules to prevent utilities from unduly favoring

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49 See, e.g., American Electric at 15 n.21, 26-29, 37-40; Florida Power at 24-26, 33-37.

50 See American Electric at 26-28; cf. 1996 Act, § 703 (amending § 224(a)(4) to include providers of "telecommunications service").

51 See First Report and Order, ¶ 1168.

52 See id., ¶ 1170.

themselves with respect to capacity constraints at the expense of other telecommunications carriers.[53]

Nonetheless, several power companies ask the Commission to eviscerate these rules on reconsideration, and to restore to them the unfettered discretion to deny access that they enjoyed prior to the Act. These petitions should be rejected. Indeed, the extreme nature of these requests is exemplified by the petition of American Electric Power Service Corporation et al. ("American Electric"), who ask the Commission to reconsider its rule that utilities should explore reasonable accommodations with CLECs in good faith in situations where an expansion of capacity is necessary.[54]

There is no legal or practical basis for American Electric's objection. Although Section 224(f)(2) permits electric utilities to deny access based on "insufficient capacity," the Act does not define that term. The Commission's rule properly adopts the interpretation that is most consistent with the purposes of the statute: where a utility can make reasonable modifications to its facilities to permit access to a CLEC -- at the CLEC's expense -- then the utility obviously has sufficient capacity within its system to accommodate that CLEC, and it must allow the CLEC to make use of that capacity. The Commission's reading of Section 224(f)(2) is reinforced by the fact that any denial must be "on a nondiscriminatory

53 See id., ¶¶ 1161-77.

54 See American Electric at 8-10 (objecting to what it concedes are "reasonabl[e]" modifications to increase capacity); see also Florida Power at 6-9 (same).

basis" -- i.e., the utility cannot use capacity constraints as an excuse to favor itself over other telecommunications carriers.

Other objections by electric utilities to the Commission's rule on reserved capacity are also baseless.[55] The Commission permitted electric utilities (as distinguished from LECs) to reserve space "if such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in its core utility business."[56] Although cable companies and telecommunications carriers are permitted to use that reserved space, the utility can reclaim the space whenever it needs it.[57] Thus, the Commission's rule does not deprive electric utilities of reserved capacity in any meaningful sense at all: the rule ensures that electric utilities will always have reserved space when they need it, and the CLECs bear any risks related to the utility's reclamation of that space and bear the costs for modifications necessary to maintain their attachments. Because the rule actually protects the utility's ability to use reserved capacity, the rule could not conceivably violate Section 224(f).

A number of electric utilities seek reconsideration of the Commission's rule that utilities should use their eminent domain rights to expand existing capacity where necessary to

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55 See American Electric at 11-14; Florida Power at 10-13; Consolidated Edison, at 5. Notably, many electric utility petitioners, including the Edison Electric Institute, UTC, Delmarva, and Carolina Light & Power, have not objected to this rule.

56 First Report and Order, ¶ 1169. Electric utilities could properly set aside space for emergency purposes pursuant to the "safety, reliability and generally applicable engineering" exception to the access requirement. See § 224(f)(2); American Electric at 13.

57 Id.

accommodate CLECs.[58] As the Commission properly recognized, however, such a rule follows from Section 224(f)(1): where a utility has eminent domain authority as a tool to gain capacity for itself, the nondiscrimination principle requires that the utility use that tool to gain capacity for others.[59]

To be sure, state law may, in some instances, restrict the ability of a utility to use its eminent domain authority, and several utilities attempt to demonstrate in their petitions that the law of particular states would in fact preclude exercising eminent domain authority on behalf of CLECs.[60] Such attempts are entirely premature, however, and therefore the Commission need not consider those issues in the context of this proceeding. If state law legitimately restricts eminent domain, the Commission can decide that on a case-by-case basis in response to complaints filed under 47 C.F.R. § 1.1404, or in the context of petitions for a declaratory ruling or Section 253 pre-emption proceedings.[61]

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58 American Electric at 14-21; Florida Power at 14-21; LEC Coalition at 23-24; UTC at 3-6.

59 See First Report and Order, ¶ 1181 (drawing analogy to requirement to modify facilities to expand capacity). A number of utilities argue strenuously that Section 224(h) provides no basis for the Commission's rule. See, e.g., American Electric at 19-20; Duquesne at 5-8. While these arguments are misguided, the Commission could choose simply to clarify that the rule is fully supported by the nondiscrimination principle in Section 224(f).

60 Delmarva at 5; American Electric at 16-17; Florida Power at 14-17; Duquesne at 9-10; Consolidated Edison at 6.

61 Similarly, if a utility feels that exercising eminent domain rights entails additional costs, as Duquesne argues (at 4-5), the utility can prove those extra costs on a case-by-case basis in complaint proceedings brought pursuant to 47 C.F.R. § 1.1404.

B. The Electric Utilities' Various Other Objections To The First Report And Order Are Meritless.

The utilities seek reconsideration of a wide variety of other matters, but their arguments generally are meritless. AT&T addresses below the most conspicuous of their requests.

1. Certain utilities argue that the Commission erred in providing that the Act requires utilities to grant access for attaching wireless equipment.[62] The Commission's rule, however, is compelled by the plain language of the Act. Section 224(f) requires a utility to provide "any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way" (emphasis added). Moreover, Section 224(a)(4) defines a "pole attachment" as "any attachment by a . . . provider of telecommunications service" (emphasis added). Because CMRS providers are clearly "telecommunications carriers" (see 47 U.S.C. § 153(44)), and their equipment is clearly used to provide a "telecommunications service" (see 47 U.S.C. § 153(48) & (51)), the statute permits no other interpretation. Moreover, the rule is fully consistent with the purposes of the Act, which is to foster local exchange competition.

2. The Commission was also correct in finding that a utility becomes subject to Section 224 if only a portion of its lines are used for wire communications or if they are used only for an internal communications network. In this regard, American Electric's statutory argument that Section 224 applies to a given utility on a pole-by-pole basis is absurd.[63] Section 224(a)(4) provides only that if a company's poles, ducts, conduits, or rights-

[62] American Electric at 26-29; Florida Power at 24-26.

[63] See American Electric at 40-44; Florida Power at 36-40.

of-way are "used, in whole or in part, for wire communications," then it is a "utility" for purposes of Section 224. The duties of a "utility" are spelled out in Section 224(f), and they are broad: the utility must grant access to "any pole, duct, conduit, or right of way owned or controlled by it" (emphasis added). Therefore, the Commission was clearly justified in concluding that the use of any facility for wire communications "triggers access to all poles, ducts, conduits, and rights-of-way, including those that are not currently used for wire communications."[64]

American Electric's further argument that an internal communications network would not qualify as "wire communications" under Section 224(a)(4) is equally meritless.[65] Indeed, American Electric ignores the statutory definition of "wire communications," which is not limited to communications sold to the public.[66] Therefore, a utility with a private communications network clearly has facilities that are being "used" to provide "wire communications" under Section 224(a)(4), and thus the utility is subject to Section 224's duty to provide access.

3. The Commission's adoption of expedited complaint procedures, including the requirement that utilities respond to requests for access within 45 days, does not violate the Administrative Procedure Act.[67] The Commission has already provided a more

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64 First Report and Order, ¶ 1173.

65 See American Electric at 44-45; Florida Power at 41-42.

66 See 47 U.S.C. § 153(1) (cited by the Commission in First Report and Order, ¶ 1174 n.2869). By contrast, the definition of "telecommunications service" is limited to that which is sold to the public for a fee. See 47 U.S.C. § 153(51).

67 See American Electric at 21-23.

than adequate explanation of the rule in the First Report and Order, at ¶¶ 1224-25. Moreover, these rules logically grow out of ¶ 223 of the NPRM, which sought comment on whether the utilities should bear the burden of proof on denials of access and whether the Commission should establish regulations concerning the conditions under which utilities could deny access.[68]

4. Pacific Gas & Electric erroneously suggests that, once a state has asserted its right to regulate pole attachments pursuant to Section 224(c), the Commission then loses its independent authority to preempt state regulation of pole attachments as barriers to entry under Section 253.[69] Section 224(c)(1) clearly states only that "[n]othing in this section" -- i.e., Section 224 -- shall apply or give the Commission jurisdiction if the state has "reverse preempted" the Commission. Nothing in Section 224 purports to deprive the Commission of authority granted elsewhere in the Act. Thus, the Commission retains its independent authority under Section 253 to prevent states from permitting utilities to impose rates, terms, or conditions that operate as a barrier to entry, and the Commission's statement to that effect in the First Report and Order was clearly correct.[70]

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68 Indeed, that these rules are a "logical outgrowth" of the NPRM is confirmed by many of the cases American Electric cites. See, e.g., United Steelworkers of America v. Marshall, 647 F.2d 1189, 1221-26 (D.C. Cir. 1980); American Medical Ass'n v. United States, 887 F.2d 760, 767-69 (7th Cir. 1989).

69 Pacific Gas at 5.

70 See First Report and Order, ¶ 1239 ("Finally, we note that state regulation in this area is subject to the provisions of section 253.").

5. Several utilities object to the Commission's rule that CLECs may use their own workers in proximity to utility facilities, so long as those workers have the same qualifications and training as the utility's own workers.[71] None of these utilities, however, has pointed to any legal or practical reason why the Commission's rule is unreasonable. All of the qualifications and training cited by the utilities as necessary pre-requisites to working in proximity to electric facilities are already required of the CLEC workers under the Commission's rule.[72]

6. The Commission was clearly correct in finding that Section 224(f)(1) requires access to all poles and rights-of-way, even transmission facilities.[73] Several utilities challenge this finding,[74] but again they ignore the plain language of the statute: Section 224(f)(1) mandates access to "any" pole, duct, conduit or right-of-way owned or controlled by the utility. Indeed, American Electric's statutory argument is based entirely on a misguided reliance on the legislative history of the 1978 Act, and on its assertion that cable operators, prior to the passage of the 1996 Act, had no need for access to transmission facilities. As the Commission found, all of the utilities' concerns are dealt with in Section 224(f)(2), which permits denials of access based on legitimate safety and reliability considerations.[75]

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71 See First Report and Order, ¶ 1182. See American Electric at 29-32; Consolidated Edison at 7-9.

72 See, e.g., American Electric at 30 (employees who work in proximity to electric facilities in conduits may be required to have ten years of experience).

73 First Report and Order, ¶¶ 1183-84.

74 See American Electric at 37-40.

75 First Report and Order, ¶ 1184.

7. Many utilities ask the Commission to "clarify" that they need not share in the cost of requested modifications if they take that opportunity to bring their facilities into compliance with applicable safety codes.[76] The Commission should reject this argument. The contrary rule, as the Commission recognized, would give utilities an incentive to game the system, by postponing other modifications that would trigger the requirement to bring facilities into compliance.[77]

8. Several utilities ask the Commission to exempt electric utilities from the rule requiring 60 days notice before a modification.[78] As these petitioners acknowledge, however, the rule applies only to non-emergency, non-routine modifications. The Commission's rule properly balances the interests of incumbent utilities and CLECs; a fixed time period for non-emergency and non-routine modifications is necessary to ensure that the utility's competitors have an adequate opportunity to make their own modifications.

9. Finally, American Electric suggests that the Commission has improperly foreclosed negotiated agreements by forcing all utilities to charge the same rates to all parties, in violation of Section 224(e)(1).[79] Apart from the fact that these provisions will not apply until five years following enactment of the 1996 Act, the Commission's pricing rules do not foreclose negotiation. The electric utilities are undeniably subject to Section 224(f)'s

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[76] See, e.g., EEI/UTC at 11-12; Duquesne at 13-15.

[77] See First Report and Order, ¶ 1212.

[78] American Electric at 45-48 (should be required only to undertake reasonable efforts to provide 60 days notice); Consolidated Edison at 9.

[79] American Electric at 34-37.

nondiscrimination requirement, however, which mandates that utilities cannot charge materially different rates to similarly situated carriers.

VI. THE COMMISSION SHOULD NOT RECONSIDER ITS PROCOMPETITIVE DECISIONS WITH REGARD TO CMRS PROVIDERS.

A. The Commission Correctly Defined A CMRS Local Calling Area As The Major Trading Area In Which The Wireless Provider Operates.

The Commission should reject the LEC Coalition's request (at 16) that it reconsider its determination (First Report and Order, ¶ 1036) that "traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under Section 251(b)(5), rather than interstate and intrastate access charges." In determining what geographic area constitutes a local calling area for CMRS providers, the Commission appropriately attempted to adapt preexisting practice to the new regulatory framework. Because of differences in technology and the fact that CMRS providers operate pursuant to federally-issued licenses that encompass wide geographic areas, CMRS service areas have rarely tracked wireline local exchange boundaries. CMRS providers have historically not paid access charges for calls initiated by their subscribers within their own service areas and terminated on the facilities of the incumbent LEC located in that same area.[80]

[80] For this reason, the LEC Coalition's contention (at 17) that the Commission's decision will cause a shift in revenues and costs from the interstate to the intrastate jurisdiction is misguided. Wireless service areas have often crossed state boundaries, yet CMRS providers have never been subject to interstate access charges for wireless-originated calls that terminate on LEC facilities within the same wireless service area even if the LEC is located in another state. In light of these historical circumstances, it is the LEC Coalition's proposal that would result in a dramatic shift of costs and revenues from one jurisdiction to another.

The fact that the Commission has established a different local calling area definition for competitive landline LECs does not provide a basis for requiring CMRS providers to engage in wholesale revision of their existing service plans.

B. The Commission Should Reject The LEC Coalition's Attempt To Deny Compensation To Paging Providers.

The LEC Coalition's claims (at 17-18) that paging providers are not entitled to compensation for termination of traffic originated by LECs, and that such compensation amounts to a "subsidy," ignore the plain language and underlying purpose of the transport and termination provision of the Act. Contrary to the LEC Coalition's argument, the fact that traffic generally only flows in one direction -- to the paging provider -- fully supports, indeed requires, the Commission's decision to require that paging providers receive but not pay compensation. As the Commission explained in the First Report and Order (¶ 1042), Section 251(b)(5) requires compensation to the terminating carrier for calls that are completed over another carrier's network, and does not require compensation to the originating carrier. Paging providers terminate calls that are originated on LEC networks, and are therefore entitled to compensation under the plain language of the Act. The petitioning LECs, in contrast, generally do not terminate calls originated over the networks of paging providers. Further, in no way can the compensation that the Act requires be paid to paging providers be deemed a "subsidy." The Commission's decision merely requires that paging providers receive reimbursement of the costs they incur in terminating calls originated by other carriers.

C. The Commission Should Reject The Colorado PUC's Request For Reconsideration Of The Commission's Refusal To Classify CMRS Operators As LECs.

In the First Report and Order (¶ 1004), the Commission noted that the Act leaves to its discretion whether and when to classify CMRS providers as LECs, and "declin[ed]" to treat CMRS providers as LECs "at this time." The Commission also stated (¶ 1005) that it is currently seeking comment in a separate proceeding on the regulatory treatment to be afforded wireless carriers when they provide fixed services.[81] Colorado's petition for reconsideraiton merely refers to the same arguments that were considered and rejected in the First Report and Order. AT&T believes that the Colorado PUC has not made a sufficient showing to warrant classification of CMRS providers as LECs, as the Commission has found. But in all events, the classification issues should be decided in the separate proceeding created for this purpose. Unless and until the Commission allows, the states are prohibited by statute from regulating CMRS providers as LECs.

VII. THE COMMISSION SHOULD DENY THE REQUESTS FOR RECONSIDERATION OF ITS RULINGS UNDER 251(h)(2).

Section 251(h)(2) sets forth a process through which non-ILECs may be subject to the obligations that the Act limits, at least initially, to ILECs. In the First Report and Order (¶ 1248), the Commission expressly held that absent a decision by the Commission, a state "may not unilaterally impose on non-incumbent LECs obligations the 1996 Act expressly

[81] See 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 Aug. 1, 1996).