

notification obligations.²⁹³⁸ Similarly, NEES points out that a group of New England utilities, local exchange carriers, and cable systems are developing a joint electronic information system for all construction-related notifications, and notes that specific notice requirements could reduce the effectiveness of such a system.²⁹³⁹ Bell Atlantic argues that any duty of notice should be deemed waived when an attachment contract grants the utility modification power as needed.²⁹⁴⁰

(2) Allocation of Costs

1199. Several commenters argue that the circumstances surrounding modifications will vary so greatly that uniform application of a single cost allocation formula is infeasible.²⁹⁴¹ Others propose a variety of cost allocation formulas, including dividing the total cost of the modification by the number of entities modifying their attachments,²⁹⁴² tying an entity's share of modification costs to the share of space reserved on the pole for that entity's use,²⁹⁴³ and applying a total service long-run incremental cost methodology based on proportionate space used by each carrier.²⁹⁴⁴ One commenter suggests that costs of modifications should be shared only when the user requests the modification, in which case the user would pay a *pro rata* share of the cost.²⁹⁴⁵

1200. AT&T contends that, while the attacher should pay the cost of the addition, if the addition involves more capacity than is needed by existing users, then the owner should pay the balance, subject to recovery later when other entities seek attachments.²⁹⁴⁶ According to AT&T, attachers should not pay the cost of modifications by owner, but should only pay

²⁹³⁸ *Id.*, at 18 n.39.

²⁹³⁹ NEES comments at 16.

²⁹⁴⁰ Bell Atlantic comments at 15.

²⁹⁴¹ Ameritech comments at 39-40; GTE comments at 28; USTA comments at 11; U S West comments at 20.

²⁹⁴² Bell Atlantic comments at 16; Delmarva comments at 24-25; Duquesne comments at 26. Duquesne also contends that section 224(e)(1) dictates that any such rule should apply to a party's "proportionate costs" only if the parties are unable to resolve a dispute over such charges. *Id.*

²⁹⁴³ AT&T comments at 21, reply at 22; MCI comments at 25; USTA comments at 11.

²⁹⁴⁴ MCI comments at 24.

²⁹⁴⁵ Teleport comments at 11.

²⁹⁴⁶ AT&T comments at 19.

their share of the costs to make the structure accessible.²⁹⁴⁷ AT&T adds that owners should not be allowed to charge new attachers for modifications paid for by existing attachers.²⁹⁴⁸ PECO argues that if the utility has decided to replace a 50-foot pole with a 55-foot pole, an attaching party should not be permitted to request a 60-foot pole unless the requesting party intended to make a modification necessitating the 60-foot pole within six months. According to PECO, the requesting party should be permitted to reserve space in this manner only if it was willing to cover maintenance, insurance, and other operational costs associated with the reserved space.²⁹⁴⁹

1201. Cole observes that an applicant must pay for the make-ready needed to accommodate its own attachments. This would include the cost to pre-existing users to transfer their lines to new locations on the pole, or to install a new pole if such a pole is necessary to accommodate the new attachment.²⁹⁵⁰ Cole argues that the new user should be protected from having to pay for preexisting NESC violations that are corrected at the same time the new attachment is made.²⁹⁵¹ In addition, reading sections 224(h) and (i) together,²⁹⁵² Cole concludes that, if a change out is required to correct a pre-existing utility violation on the pole, the utility must bear the cost of the change out, and should also be solely responsible for change out costs if the change out is attributable solely to the needs of the utility, such as an increase in the load carried by the utility. Under this approach, if a change out is necessitated by something other than the needs of an entity that already has, or seeks to have, an attachment, then entities with existing attachments must be given an opportunity to maintain or modify their attachments, with each party bearing their own costs. As an example, all attaching parties would share the cost of a new pole that was needed due to a road widening project.²⁹⁵³

1202. A few commenters suggest that cost arrangements currently in place in certain states should be considered as possible solutions to this problem. For example, ConEd recommends adoption of the rule which it says is currently applied in New York and is an accepted practice: "If a utility causes an attachment to be modified within two years of an

²⁹⁴⁷ *Id.*, at 21.

²⁹⁴⁸ AT&T reply at 22.

²⁹⁴⁹ *Id.*

²⁹⁵⁰ Cole comments at 18.

²⁹⁵¹ *Id.*; *accord*, Summit comments at 1.

²⁹⁵² Note that section 224 (i) was not the subject of the *Notice*.

²⁹⁵³ Cole comments at 19.

attachment, then the utility is responsible for the modification. (However, if it is the attaching entity, then the provider would be responsible for these costs.) Then, if a modification is made after two years, the provider is required to pay the costs of the modification."²⁹⁵⁴ PacTel currently bills the attacher when it modifies a conduit to facilitate space for that attacher; if the modification is to benefit PacTel, PacTel picks up the whole cost. PacTel requests that this approach, which is currently used in California and Nevada, be recognized as a safe harbor under the 1996 Act.²⁹⁵⁵ The NU System Companies contend that costs should be borne equally by all parties that have existing attachments on the facility, claiming that this method has generally been used among electric and telephone companies in its territories.²⁹⁵⁶

1203. Measuring modification costs poses a separate concern. Electric utilities, for example, contend that modification costs incurred to accommodate an attaching entity impose long-term costs beyond the initial cost of modification. Utilities have argued that the presence of attachments adds to the cost of maintaining and modifying the facility. One commenter suggests that modifications to increase pole height to accommodate attaching parties could impose on utilities additional costs of new trucks to service the pole.²⁹⁵⁷ According to this commenter, unless attaching parties cover these added costs, utility owners will be subsidizing attaching parties on a continuous basis.²⁹⁵⁸ At the same time, some commenters suggest that facility owners may engage in unnecessary or unduly burdensome modifications, imposing costs that could discourage new entrants from offering telecommunications services.²⁹⁵⁹ Other commenters contend that normal market forces will prevent facility owners from making such modifications.²⁹⁶⁰

1204. Delmarva contends that it will be difficult, if not impossible, for the Commission to establish a rule that fairly defines what modifications are "unnecessary or unduly burdensome." Similarly, the NU System Companies argue that limitations on an owner's right to modify a facility and on "unnecessary or unduly burdensome modifications" would potentially and directly interfere with crucial day-to-day utility operations. They further argues that applicable codes, state laws and company standards will generally dictate

²⁹⁵⁴ ConEd comments at 14.

²⁹⁵⁵ PacTel comments at 22.

²⁹⁵⁶ NU System Companies comments at 6-7.

²⁹⁵⁷ UTC comments at 18.

²⁹⁵⁸ *Id.*; see Puget Sound comments at 5-6.

²⁹⁵⁹ WinStar comments at 8; Teleport comments at 10; GST Telecom comments at 8; NCTA reply at 7-8.

²⁹⁶⁰ See, e.g., Bell Atlantic comments at 15, Public Service Company of New Mexico reply at 18-19.

when and where modifications are needed, and it would be impractical to suggest a "limitation" or standard that could be applied in all cases.²⁹⁶¹ A number of commenters note that if a utility seeks to modify a facility and the attaching carrier will not benefit from the modification, the attaching entity bears none of the costs associated with the modification. Given the large costs associated with such arrangements, this allocation of rearrangement costs will preclude utilities from making any "unnecessary or unduly burdensome" modifications, according to these commenters.²⁹⁶²

1205. Some commenters supported,²⁹⁶³ while many opposed,²⁹⁶⁴ our proposal to require facility owners to offset modification costs with additional revenues from new attachments made possible by those modifications. Several of those opposed to offsetting note that pole owners modify out of necessity, not to attract additional attachers, and any additional revenues generated by the new capacity added through modifications would be speculative.²⁹⁶⁵ One commenter notes that offsetting costs by potential additional revenues would be inconsistent with a scheme that allocates the cost of modifications only to those parties who benefit from such modifications.²⁹⁶⁶ ConEd adds that the facility belongs to the utility and it therefore should be permitted to receive any revenues it can from the use of those facilities.²⁹⁶⁷

1206. Cole suggests that regular attachment fees paid over the term of a pole attachment agreement constitute a return on the utility's investment in the pole. Cole contends such fees should be minimal if parties with attachments have contributed to the cost of a new pole. "Otherwise," Cole states, "the utility will be recovering a return and other compensation for an investment which was made in part by its tenants."²⁹⁶⁸ In such circumstances, Cole recommends that the ongoing rental fee should be limited to the

²⁹⁶¹ NU System Companies comments at 7.

²⁹⁶² Delmarva comments at 26-27; *accord* Duquesne comments at 28.

²⁹⁶³ AT&T comments at 21; GST Telecom comments at 9.

²⁹⁶⁴ ConEd comments at 14; Delmarva comments at 25-26; Duquesne comments at 27; NEES comments at 16.

²⁹⁶⁵ Bell Atlantic comments at 16; NU Systems comments at 7; NEES comments at 16; PECO comments at 10.

²⁹⁶⁶ Duquesne comments at 27.

²⁹⁶⁷ ConEd comments at 14.

²⁹⁶⁸ Cole comments at 20.

incremental cost to the utility of the attachment.²⁹⁶⁹

c. Discussion

1207. We recognize that, when a modification is planned, parties with preexisting attachments to a pole or conduit need time to evaluate how the proposed modification affects their interest and whether activity related to the modification presents an opportunity to adjust the attachment in a desirable manner.²⁹⁷⁰ At the same time, we also recognize that not all adjustments to utility facilities are alike. Some adjustments may be sufficiently routine or minor as to not create the type of opportunity that triggers the notice requirement.²⁹⁷¹ Indeed, it is possible that in some cases lengthy notice requirements could delay unnecessarily the kinds of modifications that would expedite the onset of meaningful competition in the provision of telecommunications services.²⁹⁷² Although the period of advance notice has varied widely among commenters, we note that 60 days has been advocated by several parties.²⁹⁷³

1208. Several commenters expressed a preference for negotiated notification terms.²⁹⁷⁴ They have explained that circumstances will vary among owners of facilities.²⁹⁷⁵ The time needed to commence a modification could vary according to pole conditions, technological improvements and demand growth.²⁹⁷⁶ Attaching parties in rural markets may need more time to study facilities than facility users in urban markets.²⁹⁷⁷ To demonstrate their ability to develop appropriate negotiated agreements, some commenters have described notice requirements in existing agreements. Such cases, they contend, illustrate that notification

²⁹⁶⁹ *Id.*

²⁹⁷⁰ Teleport comments at 10; AT&T reply at 20.

²⁹⁷¹ USTA comments at 10; Bell Atlantic comments at 15; MFS comments at 12; SBC reply at 33.

²⁹⁷² AT&T reply at 20; USTA reply at 9; U S West reply at 8; Massachusetts Electric, *et al.*, reply at 4-5.

²⁹⁷³ *See, e.g.*, U S West comments at 19; AT&T comments at 20; GST Telecom comments at 7; AT&T reply at 20; Cincinnati Bell reply at 6.

²⁹⁷⁴ GTE comments at 28; PacTel comments at 21-22; Rural Tel. Coalition comments at 16; American Electric Power reply at 40; Ohio Edison reply at 23.

²⁹⁷⁵ American Electric Power comments at 46.

²⁹⁷⁶ Ameritech comments at 39; Municipal Utilities reply at 6-7; Cincinnati Bell reply at 6.

²⁹⁷⁷ GVNW comments at 11.

rules are unnecessary.²⁹⁷⁸

1209. We conclude that, absent a private agreement establishing notification procedures, written notification of a modification must be provided to parties holding attachments on the facility to be modified at least 60 days prior to the commencement of the physical modification itself. Notice should be sufficiently specific to apprise the recipient of the nature and scope of the planned modification. These notice requirements should provide small entities with sufficient time to evaluate the impact of or opportunities made possible by the proposed modifications on their interests and plan accordingly.²⁹⁷⁹ If the contemplated modification involves an emergency situation for which advanced written notice would prove impractical, the notice requirement does not apply except that notice should be given as soon as reasonably practicable, which in some cases may be after the modification is completed. Further, we believe that the burden of requiring specific written notice of routine maintenance activities would not produce a commensurate benefit. Utilities and parties with attachments should exchange maintenance handbooks or other written descriptions of their standard maintenance practices.²⁹⁸⁰ Changes to these practices should be made only upon 60 days written notice. Recognizing that the parties themselves are best able to determine the circumstances where notice would be reasonable and sufficient, as well as the types of modifications that should trigger notice obligations, we encourage the owner of a facility and parties with attachments to negotiate acceptable notification terms.

1210. Even with the adoption of a specific notice period, however, we still encourage communication among owners and attaching parties. Indeed, in cases where owners and users routinely share information about upgrades and modifications, agreements regarding notice periods and procedures are ancillary matters.²⁹⁸¹

1211. With respect to the allocation of modification costs, we conclude that, to the extent the cost of a modification is incurred for the specific benefit of any particular party, the benefiting party will be obligated to assume the cost of the modification, or to bear its proportionate share of cost with all other attaching entities participating in the modification.²⁹⁸² If a user's modification affects the attachments of others who do not initiate or request the

²⁹⁷⁸ PacTel comments at 21-22; BellSouth comments at 17-18; American Electric Power reply at 40.

²⁹⁷⁹ See Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

²⁹⁸⁰ Although we do not offer a definition of "routine maintenance" in this proceeding, we anticipate that the parties to an attachment agreement will have established understandings in this regard. We do not believe that routine maintenance of a facility encompasses actions that would disrupt or impair the service of a facility user.

²⁹⁸¹ Frontier comments at 7.

²⁹⁸² NYNEX reply at 8; Carolina Power Reply comments at 3.

modification, such as the movement of other attachments as part of a primary modification, the modification cost will be covered by the initiating or requesting party.²⁹⁸³ Where multiple parties join in the modification, each party's proportionate share of the total cost shall be based on the ratio of the amount of new space occupied by that party to the total amount of new space occupied by all of the parties joining in the modification. For example, a CAP's access request might require the installation of a new pole that is five feet taller than the old pole, even though the CAP needs only two feet of space. At the same time, a cable operator may claim one foot of the newly-created capacity. If these were the only parties participating in the modification, the CAP would pay two-thirds of the modification costs and the cable operator one-third.

1212. As a general approach, requiring that modification costs be paid only by entities for whose benefit the modification is made simplifies the modification process. For these purposes, however, if an entity uses a proposed modification as an opportunity to adjust its preexisting attachment, the "piggybacking" entity should share in the overall cost of the modification to reflect its contribution to the resulting structural change. A utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost. This will discourage parties from postponing necessary repairs in an effort to avoid the associated costs.

1213. We recognize that limiting cost burdens to entities that initiate a modification, or piggyback on another's modification, may confer incidental benefits on other parties with preexisting attachments on the newly modified facility. Nevertheless, if a modification would not have occurred absent the action of the initiating party, the cost should not be borne by those that did not take advantage of the opportunity by modifying their own facilities. Indeed, the Conference Report accompanying the passage of the 1996 Act imposes cost sharing obligations on an entity "that takes advantage of such opportunity to modify its own attachments." This suggests that an attaching party, incidentally benefiting from a modification, but not initiating or affirmatively participating in one, should not be responsible for the resulting cost.²⁹⁸⁴ As for pole owners themselves, the imposition of cost burdens for modifications they do not initiate could be particularly cumbersome if excess space created by modifications remained unused for extended periods.²⁹⁸⁵

1214. Apart from entities that initiate modifications and preexisting attachers that use the opportunity to modify their own attachments, some entities may seek to add new

²⁹⁸³ Cole comments at 18; MFS reply at 24.

²⁹⁸⁴ GST Telecom comments at 8; MFS comments at 12; NCTA reply at 8.

²⁹⁸⁵ Cincinnati Bell reply at 8.

attachments to the modified facility after the modification is completed to avoid any obligation to share in the cost. If this occurs, the entity initiating and paying for the modification might pay the entire cost of expanding a facility's capacity only to see a new competitor take advantage of the additional capacity without sharing in the cost.²⁹⁸⁶ Moreover, entities with preexisting attachments may, due to cost considerations, forgo the opportunity to adjust their attachment only to see a new entrant attach to a pole without sharing the modification cost. To protect the initiators of modifications from absorbing costs that should be shared by others, we will allow the modifying party or parties to recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification. The proportionate share of the subsequent attacher should be reduced to take account of depreciation to the pole or other facility that has occurred since the modification. These provisions are intended to ensure that new entrants, especially small entities with limited resources, bear only their proportionate costs and are not forced to subsidize their later-entering competitors. To the extent small entities avail themselves of this cost-saving mechanism, however, they will incur certain record keeping obligations.²⁹⁸⁷

1215. Parties requesting or joining in a modification also will be responsible for resulting costs to maintain the facility on an ongoing basis. We believe determining the method by which to allocate such costs can best be resolved in the context of a proceeding addressing the determination of appropriate rates for pole attachments or other facility uses.²⁹⁸⁸ We will postpone consideration of these issues until such time.

1216. We recognize that in some cases a facility modification will create excess capacity that eventually becomes a source of revenue for the facility owner, even though the owner did not share in the costs of the modification.²⁹⁸⁹ We do not believe that this requires the owner to use those revenues to compensate the parties that did pay for the modification. Section 224(h) limits responsibility for modification costs to any party that "adds to or modifies its existing attachment after receiving notice" of a proposed modification.²⁹⁹⁰ The statute does not give that party any interest in the pole or conduit other than access. Creating a right for that party to share in future revenues from the modification would be tantamount to bestowing an interest that the statute withholds.²⁹⁹¹ Requiring an owner to offset

²⁹⁸⁶ See AT&T comments at 19.

²⁹⁸⁷ See Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

²⁹⁸⁸ BellSouth comments at 18; NYNEX comments at 14; SBC comments at 18.

²⁹⁸⁹ AT&T comments at 21; GST Telecom comments at 9; WinStar reply at 8-9.

²⁹⁹⁰ 47 U.S.C. § 224(h).

²⁹⁹¹ American Electric Power reply at 46.

modification costs by the amount of future revenues emanating from the modification expands the category of responsible parties based on factors that Congress did not identify as relevant. Since Congress did not provide for an offset, we will not impose it ourselves. Indeed, a requirement that utilities pass additional attachment fees back to parties with preexisting attachments may be a disincentive to add new competitors to modified facilities, in direct contravention of the general intent of Congress.

5. Dispute Resolution

a. Background

1217. Implementation of the access requirements of sections 224 and 251(b)(4) require the adoption of enforcement procedures. In the NPRM, we sought comment on, among other things, whether to impose upon a utility the burden of justifying its denial of access to its poles, ducts, conduits, and rights-of-way due to lack of capacity, safety, reliability, and engineering issues.²⁹⁹²

b. Comments

1218. With respect to dispute resolution procedures generally, a few commenters note that existing complaint procedure mechanisms have worked well in the cable television pole context and should be adequate in this broader context as well.²⁹⁹³ Other commenters argue that dispute resolution should be left to the states, with federal intervention only where the states failed to regulate.²⁹⁹⁴ Some commenters request that any complaint mechanism established should provide for the expeditious resolution of disputes, with short time frames for responses and final resolution.²⁹⁹⁵

1219. Several commenters argue that, where access has been denied, the party denying access should have the burden of proving that such denial was justified.²⁹⁹⁶ Others contend that, historically, cable operators have had the burden of proof in pole attachment

²⁹⁹² NPRM at para. 223; *see* 47 U.S.C. § 224(f)(2).

²⁹⁹³ *See, e.g.*, BellSouth reply at 16-17; GTE reply at 29-30; U S West reply at 8.

²⁹⁹⁴ ICC comments at 72-73; Bell Atlantic reply at 10-11; GTE reply at 29-30; PacTel reply at 27.

²⁹⁹⁵ *See, e.g.*, Joint Cable commenters at 20-22; NEXTLINK comments at 6-7.

²⁹⁹⁶ Delmarva comments at 19; Duquesne comments at 22; Joint Cable commenters at 20-22; NEXTLINK comments at 6-7; OCC reply at 6; PUCO Staff comments at 11-12; Sprint reply at 20.

cases, and that no principled basis exists for altering historic procedures.²⁹⁹⁷ In addition, commenters expressed concern that placing the burden of proof on a utility unfairly presumes bad faith.²⁹⁹⁸

1220. PECO agrees with some cable commenters that the reasonableness of a denial of access should be based on industry safety and operational standards. A restriction on access imposed in accordance with such standards should be irrebuttably presumed reasonable, according to PECO. If the utility seeks to impose stricter standards, the burden would be on the utility to establish the reasonableness of the stricter standard. Predicting the likelihood of fact-intense disputes on such issues, PECO recommends the adoption of adequate dispute-resolution procedures.²⁹⁹⁹ Similarly, Cole contends that a utility cannot deny a request for access based upon safety or reliability concerns as long as the applicant is willing to undertake the obligations necessary to comply with NESC standards.³⁰⁰⁰ Safety and reliability standards that exceed NESC standards should be presumed unreasonable if they are used to deny access to a pole. The utility would then have the burden of showing the reasonableness of such standards.³⁰⁰¹

1221. Duquesne argues that it is appropriate for the utility to bear the burden of establishing a threat to reliability if that rationale is used to deny access. Once a utility makes a showing, based on an engineering analysis, that the attachments "quantifiably threaten reliability," the burden would shift to the party seeking the attachment to show that the utility's analysis is incomplete or invalid, with the utility holding the ultimate burden of proof.³⁰⁰²

c. Discussion

(1) General Complaint Procedures Under Section 224

1222. Section 224(f)(2) provides that an electric utility may deny non-discriminatory access "where there is insufficient capacity and for reasons of safety, reliability and generally

²⁹⁹⁷ ConEd comments at 12; American Electric Power reply at 32-36; BellSouth reply at 16-17; SBC reply at 26-27.

²⁹⁹⁸ GTE reply at 26-27; NEES comments at 14.

²⁹⁹⁹ PECO comments at 6.

³⁰⁰⁰ Cole comments at 16.

³⁰⁰¹ *Id.*, at 17-18.

³⁰⁰² Duquesne comments at 22; *accord* Delmarva Comments at 19.

applicable engineering purposes.³⁰⁰³ We have determined that other utilities also may consider these concerns when faced with an access request.³⁰⁰⁴ A denial of access, while proper in some cases, is an exception to the general mandate of section 224(f). We note that utilities contend that they are in the best position to determine when access should be denied, because they possess the information and expertise to make such decisions and because of the varied circumstances impacting these decisions.³⁰⁰⁵ We think it appropriate that the utility bear the burden of justifying why its denial of access to a cable television or telecommunications carrier fits within that exception.³⁰⁰⁶ We therefore agree that utilities have the ultimate burden of proof in denial-of-access cases.³⁰⁰⁷ We believe this will minimize uncertainty and reduce litigation and transaction costs, because new entrants generally, and small entities in particular, are unlikely to have access to the relevant information without cooperation from the utilities.³⁰⁰⁸

1223. We also agree with Virginia Power that a telecommunications carrier or cable television provider filing a complaint with the Commission must establish a prima facie case.³⁰⁰⁹ A petitioner's complaint, in addition to showing that it is timely filed, must state the grounds given for the denial of access, the reasons those grounds are unjust or unreasonable, and the remedy sought. The complaint must be supported by the written request for access, the utility's response, and information supporting its position.³⁰¹⁰ The Commission will deny the petitioner's claim if a prima facie case is not established.³⁰¹¹ A complaint will not be dismissed if a petitioner is unable to obtain a utility's written response, or if a petitioner is denied any other relevant information by the utility needed to establish a prima facie case.

³⁰⁰³ See 47 U.S.C. § 224(f)(2).

³⁰⁰⁴ See *supra*, Section B(1)(c)(2).

³⁰⁰⁵ See generally Comments of American Electric Power; Delmarva Power and Light; NEES; Puget Sound; Public Service Company of New Mexico; UTC; Virginia Power.

³⁰⁰⁶ Public Service Company of New Mexico at 20-23; Delmarva Power and Light at 19; Joint Cable commenters at 18; WinStar reply at 7; Sprint reply at 20.

³⁰⁰⁷ Comments of Public Service Company of New Mexico at 20-23; Ohio Consumers' Counsel reply at 6; PUCO Staff comments at 12.

³⁰⁰⁸ See Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

³⁰⁰⁹ Virginia Power comments at 14; American Electric Power comments at 40-42; Carolina Power and Light comments at 5 (citing 47 C.F.R. § 1.1409(b)); see also SBC comments at 15-17.

³⁰¹⁰ Virginia Power comments at 15 (citing 47 C.F.R. § 1.1404(f) and (g)).

³⁰¹¹ 47 C.F.R. § 1.1409(d).

Thus, we expect a utility that receives a legitimate inquiry regarding access to its facilities or property to make its maps, plats, and other relevant data available for inspection and copying by the requesting party, subject to reasonable conditions to protect proprietary information.³⁰¹² This provision eliminates the need for costly discovery in pursuing a claim of improper denial of access, allowing attaching parties, including small entities with limited resources, to seek redress of such denials.³⁰¹³

1224. We agree with the Joint Cable Commenters that "time is of the essence."³⁰¹⁴ The Joint Cable Commenters contend that the Commission should implement an expedited review process for denial of access cases.³⁰¹⁵ By implementing specific complaint procedures for denial of access cases, we seek to establish swift and specific enforcement procedures that will allow for competition where access can be provided.³⁰¹⁶ In order to provide a complete record, written requests for access must be provided to the utility. If access is not granted within 45 days of the request, the utility must confirm the denial in writing by the 45th day. Although these written requirements involve some recordkeeping obligations, which could impose a burden on small incumbent LECs and small entities, we believe that burden is outweighed by the benefits of certainty and expedient resolution of disputes which this procedure encourages.³⁰¹⁷ The denial must be specific, and include all relevant evidence or information supporting its denial. It must enumerate how the evidence relates to one of the reasons that access can be denied under section 224(f)(2), *i.e.*, lack of capacity, safety, reliability or engineering standards.

1225. For example, a utility may attempt to deny access because of lack of capacity on a 40-foot pole. We would expect a utility to provide the information demonstrating why there is no capacity. In addition, the utility should show why it declined to replace the pole with a 45-foot pole. Upon the receipt of a denial notice from the utility, the requesting party shall have 60 days to file its complaint with the Commission. We anticipate that by following this procedure the Commission will, upon receipt of a complaint, have all relevant information upon which to make its decision. The petition must be served pursuant to section 1.1404(b)

³⁰¹² AT&T comments at 19; GST comments at 6.

³⁰¹³ See Regulatory Flexibility Act, 5 U.S.C. §§ 601, et seq.

³⁰¹⁴ Joint Cable Commenters reply at 24.

³⁰¹⁵ Joint Cable Commenters reply at 25.

³⁰¹⁶ Joint Cable Commenters reply at 24.

³⁰¹⁷ See Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

of the Commission's rules.³⁰¹⁸ Final decisions relating to access will be resolved by the Commission expeditiously.³⁰¹⁹ Because we are using the expedited process described herein, we do not believe stays or other equitable relief will be granted in the absence of a specific showing, beyond the prima facie case, that such relief is warranted.

(2) Procedures Under Section 251

1226. A telecommunications carrier seeking access to the facilities or property of a LEC may invoke section 251(b)(4) in lieu of, or in addition to, section 244(f)(1). Because section 251(b)(4) mandates access "on rates terms, and conditions that are consistent with section 224," we believe that the section 224 complaint procedures established above should be available regardless of whether a telecommunications provider invokes section 224(f)(1) or section 251(b)(4), or both.

1227. If a telecommunications carrier seeks access to the facilities or property of an incumbent LEC, however, it shall have the option of invoking the procedures established by section 252 in lieu of filing a complaint under section 224. Section 252 governs procedures for the negotiation, arbitration, and approval of certain agreements between incumbent LECs and telecommunications carriers.³⁰²⁰ In pertinent part, section 252(a)(1) provides:

Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) or (c) of section 251.³⁰²¹

1228. Where parties are unable to reach an agreement under this section, any party may petition the relevant state commission to arbitrate the open issues.³⁰²² In resolving the

³⁰¹⁸ 47 C.F.R. § 1.1404(b).

³⁰¹⁹ We note, however, that if the Commission requests additional information from any party, such party will have 5 days to respond to the request. Failure to provide the requested information within the 5 days, will result in a review of the record provided thus far.

³⁰²⁰ 47 U.S.C. § 252. The requirements of section 252, and the conditions set forth in this section 3(a) of this Order, do not apply if the party seeking access is not a telecommunications carrier, or if the party receiving the request for access is not an incumbent LEC.

³⁰²¹ 47 U.S.C. § 251(a).

³⁰²² 47 U.S.C. § 252(b)(1).

dispute, the state commission must ensure, among other things, that the ultimate resolution "meet[s] the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251" ³⁰²³ The Commission may assume the state's authority under section 252 if the state "fails to carry out its responsibility" under that section. ³⁰²⁴

1229. Section 251(c)(1) creates an obligation on the part of an incumbent LEC "to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements . . ." to fulfill its section 251(b)(4) obligation. ³⁰²⁵ Therefore, a telecommunications carrier may seek access to the facilities or property of an incumbent LEC pursuant to section 251(b)(4) and trigger the negotiation and arbitration procedures of section 252. If a telecommunications carrier intends to invoke the section 252 procedures, it should affirmatively state such intent in its formal request for access to the incumbent LEC. We impose this requirement because the two procedures have separate deadlines by which the parties may or must take certain steps, and therefore the incumbent LEC receiving the request has a need to know which procedure has been invoked. Section 224 shall be the default procedure that will apply if the telecommunications carrier fails to make an affirmative election.

1230. We note that section 252 does not impose any obligations on utilities other than incumbent LECs, and does not grant rights to entities that are not telecommunications providers. Therefore, section 252 may be invoked in lieu of section 224 only by a telecommunications carrier and only if it is seeking access to the facilities or property of an incumbent LEC.

1231. In addition, incumbent LECs cannot use section 251(b)(4) as a means of gaining access to the facilities or property of a LEC. A LEC's obligation under section 251(b)(4) is to afford access "on rates, terms, and conditions that are consistent with section 224." Section 224 does not prescribe rates, terms, or conditions governing access by an incumbent LEC to the facilities or rights-of-way of a competing LEC. Indeed, section 224 does not provide access rights to incumbent LECs. We cannot infer that section 251(b)(4) restores to an incumbent LEC access rights expressly withheld by section 224. We give deference to the specific denial of access under section 224 over the more general access provisions of section 251(b)(4). Accordingly, no incumbent LEC may seek access to the facilities or rights-of-way of a LEC or any utility under either section 224 or section 251(b)(4).

³⁰²³ 47 U.S.C. § 252(c)(1).

³⁰²⁴ 47 U.S.C. § 252(e)(5).

³⁰²⁵ 47 U.S.C. § 251(c)(1).

6. Reverse preemption

a. Background

1232. Even prior to enactment of the 1996 Act, section 224(b)(1) gave the Commission jurisdiction to "regulate the rates, terms, and conditions for pole attachments" ³⁰²⁶ Under former section 224(c)(1), that jurisdiction was preempted where a state regulated such matters. Such reverse preemption was conditioned upon the state following a certification procedure and meeting certain compliance requirements set forth in sections 224(c)(2) and (3). The 1996 Act expanded the Commission's jurisdiction to include not just rates, terms, and conditions, but also the authority to regulate non-discriminatory access to poles, ducts, conduits and rights-of-way under section 224(f). ³⁰²⁷ At the same time, the 1996 Act expanded the preemptive authority of states to match the expanded scope of the Commission's jurisdiction. section 224(c)(1) now provides:

Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by the State. ³⁰²⁸

b. Comments

1233. Cole contends that the nondiscriminatory access provisions of section 224 and our jurisdiction thereunder survive when a telecommunications provider seeks access to the facilities or property of a LEC under section 251(b)(4), even where such matters are regulated by a state. ³⁰²⁹ Cole notes that section 251(b)(4) requires LECs to afford access to its facilities and rights-of-way to competing telecommunications carriers "on rates, terms, and conditions that are consistent with section 224," with no reference to the possibility of state regulation. ³⁰³⁰ Cole further cites the competitive checklist of section 271 which requires an RBOC to provide such access "in accordance with the requirements of section 224," but which does not provide

³⁰²⁶ 47 U.S.C. § 224(b)(1).

³⁰²⁷ 47 U.S.C. § 224(f).

³⁰²⁸ 47 U.S.C. § 224(c)(1).

³⁰²⁹ Cole reply at 26-27.

³⁰³⁰ 47 U.S.C. § 251(b)(4); *see* Cole comments at 26-27.

for state regulation of access.³⁰³¹ Cole argues that neither section 251 nor section 271 exempts a LEC or BOC from the access requirements of section 224 where the state has undertaken regulation of such matters. Cole argues that allowing states to preempt federal authority "would defeat the purpose of the Act to promote access" to local facilities.³⁰³²

1234. Similarly, Nextlink contends that the Commission's access requirements should apply to any LEC that receives an access request under section 251(b)(4), regardless of whether a state has attempted to assert jurisdiction under section 224(c).³⁰³³ Nextlink describes section 251 as "an entirely separate section providing entirely different bases for Commission jurisdiction."³⁰³⁴

1235. Other commenters argue that a request for access under section 251(b)(4) always implicates section 224, including the provisions of section 224(c)(1) that allow the states to preempt federal regulation.³⁰³⁵ The District of Columbia Commission argues that section 251(b)(4) only requires that access be given "on rates, terms and conditions that are consistent with section 224."³⁰³⁶ Thus, this commenter asserts that any federal regulation of access under section 251(b)(4) is subject to the state's authority under section 224(c)(1).³⁰³⁷ Bell Atlantic agrees, arguing that the only obligation of section 251(b)(4) is to provide access consistent with section 224 and that providing access in accordance with a valid scheme of state access regulations meets this requirement, regardless of any federal access requirements that otherwise would apply.³⁰³⁸ UTC states that "the statute clearly gives the states authority to establish access requirements if they elect to assert jurisdiction."³⁰³⁹

c. Discussion

1236. To resolve this issue, we will begin with access requests that can arise solely

³⁰³¹ 47 U.S.C. § 271(c)(2)(b)(iii); see Cole comments at 27.

³⁰³² Cole reply at 27.

³⁰³³ Nextlink reply at 5.

³⁰³⁴ *Id.*

³⁰³⁵ Ameritech comments at 33; NYNEX comments at 11-12; USTA reply at 7.

³⁰³⁶ District of Columbia Commission comments at 9, quoting 47 U.S.C. § 251(b)(4).

³⁰³⁷ *Id.*

³⁰³⁸ Bell Atlantic comments at 12.

³⁰³⁹ UTC reply at 29.

under section 224(f)(1). These circumstances include when a cable system or telecommunications carrier seeks access to the facilities or rights-of-way of a non-LEC utility. In such cases, the expansion of the Commission's authority to require utilities to provide nondiscriminatory access under section 224(f) is countered by a corresponding expansion in the scope of a state's authority under section 224(c)(1) to preempt federal requirements. The authority of a state under section 224(c)(1) to preempt federal regulation in these cases is clear.³⁰⁴⁰

1237. The issue becomes more complicated when a telecommunications carrier seeks access to LEC facilities or property under section 251(b)(4). By its express terms, section 251(b)(4) imposes upon LECs, "[t]he duty to afford access to the poles, ducts, conduits, and rights-of-way of such a carrier to competing providers of telecommunications services on rates, terms and conditions that are consistent with section 224."³⁰⁴¹ We believe the reference in section 251(b)(4) to section 224 incorporates all aspects of the latter section, including the state preemption authority of section 224(c)(1). This interpretation is consistent not only with the plain meaning of the statute but with the overall application of sections 251 and 252.

1238. In the 1996 Act, Congress expanded section 224(c)(1) to reach access issues. Congress' clear grant of authority to the states to preempt federal regulation in these cases undercuts the suggestion that Congress sought to establish federal access regulations of universal applicability. Moreover, we do not find it significant that the access provisions of sections 251 and 271 contain no specific reference to the preemptive authority of states under section 224(c)(1), since both provisions expressly refer to section 224 generally.

1239. Thus, when a state has exercised its preemptive authority under section 224(c)(1), a LEC satisfies its duty under section 251(b)(4) to afford access by complying with the state's regulations. If a state has not exercised such preemptive authority, the LEC must comply with the federal rules. Similarly, when a telecommunications carrier seeks access rights from an incumbent LEC by choosing to avail itself of the negotiation and arbitration procedures established in section 252, a state that has exercised its preemption rights will apply its own set of regulations in the arbitration process pursuant to section 252 (c)(1). Finally, we note that state regulation in this area is subject to the provisions of section 253.

1240. We note that Congress did not amend sections 224(c)(2) to prescribe a certification procedure with respect to access (as distinct from the rates, terms, and conditions

³⁰⁴⁰ As in other circumstances, and subject to certain limitations, the Commission may preempt an otherwise valid state or local access requirement that "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service." 47 U.S.C. § 253(a).

³⁰⁴¹ 47 U.S.C. § 254(b)(1)(4).

of access). Therefore, upon the filing of an access complaint with the Commission, the defending party or the state itself should come forward to apprise us whether the state is regulating such matters.³⁰⁴² If so, we shall dismiss the complaint without prejudice to it being brought in the appropriate state forum. A party seeking to show that a state regulates access issues should cite to state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum. Especially probative will be a requirement that the relevant state authority resolve an access complaint within a set period of time following the filing of the complaint.³⁰⁴³

C. IMPOSING ADDITIONAL OBLIGATIONS ON LECs

1. Background

1241. Section 251(c) imposes obligations on incumbent LECs in addition to the obligations set forth in sections 251(a) and (b). It establishes obligations of incumbent LECs regarding: (1) good faith negotiation; (2) interconnection; (3) unbundling network elements; (4) resale; (5) providing notice of network changes; and (6) collocation.

1242. Section 251(h)(1) defines an incumbent LEC as a LEC within a particular service area that: (1) as of the enactment of the 1996 Act, provided telephone exchange service in such area; and (2) as of the enactment of the 1996 Act, was deemed to be a member of the exchange carrier association pursuant to 47 C.F.R. § 69.601(b) or, on or after the enactment of the 1996 Act, became a successor or assign of such carrier. Section 252(h)(2) provides that, "[t]he Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1); (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section."³⁰⁴⁴

1243. In the NPRM, we sought comment on whether we should establish at this time standards and procedures by which interested parties could prove that a particular LEC should be treated as an incumbent LEC. We also sought comment on whether carriers that are not

³⁰⁴² Our rules require service of a pole attachment complaint on both the defending utility and the state. 47 C.F.R. § 1.1404(b).

³⁰⁴³ See 47 U.S.C. § 224(c)(3) (establishing deadlines for states to take final action on complaints concerning the rates, terms, or conditions of access).

³⁰⁴⁴ 47 U.S.C. § 252(h)(2).

deemed to be incumbent LECs under section 251(h) may be required to comply with any or all of the obligations that apply to incumbent LECs, and whether states may impose on non-incumbent LECs the obligations that are imposed on incumbent LECs under section 251(c).³⁰⁴⁵

2. Comments

1244. Most parties that commented on the issue contend that the Commission should not establish in this proceeding standards and procedures for determining whether a LEC should be treated as an incumbent LEC.³⁰⁴⁶

1245. Many incumbent LECs and state commissions contend that it is not inconsistent with the Act for states to impose the requirements in section 251(c) on carriers that do not fall within the 1996 Act's definition of incumbent. These parties note that sections 251(d)(3), 252(e)(3), and 253(b) permit states to impose additional requirements on carriers.³⁰⁴⁷ State commissions allege that they are in the best position to determine when it is appropriate to impose particular obligations on new entrants.³⁰⁴⁸ These parties contend that state imposition of reciprocal obligations would be equitable,³⁰⁴⁹ and would help promote fair negotiation and realistic demands by the new entrants.³⁰⁵⁰

1246. Potential local competitors argue that states may not impose any of the requirements of section 251(c) on non-incumbent LECs.³⁰⁵¹ These parties contend that the

³⁰⁴⁵ NPRM at paras. 44-45.

³⁰⁴⁶ BellSouth comments at 10; NCTA comments at 15 n.46; Sprint comments at 10; Time Warner comments at 14; *contra* PacTel comments at 16.

³⁰⁴⁷ *See, e.g.*, BellSouth comments at 10; California Commission comments at 12; Illinois Commission comments at 19-20 (it is not inconsistent with the Act for states to impose additional obligations on non-incumbents, although it would not be permissible for FCC to do so); Ohio Commission comments at 21-22; PacTel comments at 16; Pennsylvania Commission comments at 19.

³⁰⁴⁸ *See, e.g.*, District of Columbia Commission comments at 14.

³⁰⁴⁹ *See, e.g.*, Colorado Commission comments at 14-15; MECA comments at 18; Municipal Utilities comments at 10-12 (reciprocal obligations should be permitted as long as they are allowed under state law and city charter); Ohio Consumers' Counsel comments at 5-6 (the loop is a bottleneck regardless of whether the provider is an incumbent or a new entrant); Ohio Commission reply at 8.

³⁰⁵⁰ *See, e.g.*, MCI comments at 16, 20; New Jersey Commission at 1.

³⁰⁵¹ *See, e.g.*, MCI comments at 5 n.7; MFS comments at 10; TCI comments at 14.

1996 Act specifically imposes different, and additional obligations on incumbent carriers.³⁰⁵² In addition, these parties contend that imposing the same regulatory obligations on non-incumbents is unnecessary because they lack market power,³⁰⁵³ and is contrary to Congress's desire to facilitate new entry into the local telephone market.³⁰⁵⁴ In addition, they assert that section 251(h)(2), which gives the FCC authority to determine when to treat additional carriers as incumbent LECs, would be meaningless if states could decide on their own to subject any LEC to obligations imposed by section 251(c) on incumbent LECs.³⁰⁵⁵ Some parties assert that states already impose reciprocal obligations on new entrants, or require them to comply with requirements the 1996 Act only imposes on incumbent LECs.³⁰⁵⁶

3. Discussion

1247. We conclude that allowing states to impose on non-incumbent LECs obligations that the 1996 Act designates as "Additional Obligations on Incumbent Local Exchange Carriers," distinct from obligations on all LECs,³⁰⁵⁷ would be inconsistent with the statute.³⁰⁵⁸ Some parties assert that certain provisions of the 1996 Act, such as sections 252(e)(3) and

³⁰⁵² See, e.g., ACTA comments at 5; Comcast comments at 17; Sprint comments at 10; Cox reply at 41; ICTA reply at 5.

³⁰⁵³ See, e.g., Comcast comments at 15-16; DoJ comments at 7 (absent a showing of market power, there is no basis for imposing additional obligations on new entrants); MCI comments at 5 n.7; Cox reply at 40; Time Warner reply at 11.

³⁰⁵⁴ See, e.g., Continental comments at 18; Metricom comments at 2 (imposing such requirements on non-dominant carriers would hinder competition); NEXTLINK comments at 15-16 (for states to impose additional obligations on non-incumbent LECs could constitute a barrier to entry in violation of section 253); Cox reply at 41; ICTA reply at 6 (imposing 251(c) requirements on new entrants would raise costs and thereby discourage potential competitors from entering the local market).

³⁰⁵⁵ See, e.g., GST comments at 3-4; MFS comments at 10; Time Warner comments at 15 (fact that Congress authorizes the FCC (but not state commissions) to impose incumbent obligations on the FCC suggests that Congress did not intend to give states that authority); TCI reply at 12; Teleport reply at 36.

³⁰⁵⁶ TCI comments at 14 n.23; see also Colorado Commission comments at 11-12 (stating that it exempts new entrants from certain rules for a period of three years, after which the new entrant must demonstrate the continued need for such exemption); Illinois Commission comments at 19 (stating that it imposes intraLATA presubscription and line-side interconnection obligations on new entrants for policy reasons).

³⁰⁵⁷ Compare 47 U.S.C. §§ 251(b) and 251(c).

³⁰⁵⁸ We understand that some states may be imposing on non-incumbent LECs obligations set forth in section 251(c). See, e.g., Colorado Commission comments at 11-12; Draft Decision, State of Connecticut Department of Public Utility Control, Docket No. 94-10-04 at 60, 65 (Connecticut Commission July 11, 1996); Illinois Commission comments at 19. We believe that these actions may be inconsistent with the 1996 Act.

253(b), explicitly permit states to impose additional obligations. Such additional obligations, however, must be consistent with the language and purposes of the 1996 Act.

1248. Section 251(h)(2) sets forth a process by which the FCC may decide to treat LECs as incumbent LECs. Thus, when the conditions set forth in section 251(h)(2) are met, the 1996 Act contemplates that new entrants will be subject to the same obligations imposed on incumbents. While we find that states may not unilaterally impose on non-incumbent LECs obligations the 1996 Act expressly imposes only on incumbent LECs, we find that state commissions or other interested parties could ask the FCC to classify a carrier as an incumbent LEC pursuant to section 251(h)(2). At this time, we decline to adopt specific procedures or standards for determining whether a LEC should be treated as an incumbent LEC. Instead, we will permit interested parties to ask the FCC to issue an order declaring a particular LEC or a class or category of LECs to be treated as incumbent LECs. We expect to give particular consideration to filings from state commissions. We further anticipate that we will not impose incumbent LEC obligations on non-incumbent LECs absent a clear and convincing showing that the LEC occupies a position in the telephone exchange market comparable to the position held by an incumbent LEC, has substantially replaced an incumbent LEC, and that such treatment would serve the public interest, convenience, and necessity and the purposes of section 251.³⁰⁵⁹

³⁰⁵⁹ 47 U.S.C. § 251(h)(2).

XII. EXEMPTIONS, SUSPENSIONS, AND MODIFICATIONS OF SECTION 251 REQUIREMENTS

A. BACKGROUND

1249. Section 251(f)(1) grants rural telephone companies an exemption from section 251(c), until the rural telephone company has received a bona fide request for interconnection, services, or network elements, and the state commission determines that the exemption should be terminated.³⁰⁶⁰ Section 251(f)(2) allows LECs with fewer than two percent of the nation's subscriber lines to petition a state commission for a suspension or modification of any requirements of sections 251(b) and (c). Section 251(f) imposes a duty on state commissions to make determinations under this section, and establishes the criteria and procedures for the state commissions to follow. In the NPRM, we tentatively concluded that state commissions have the sole authority to make determinations under section 251(f). In addition, we sought comment on whether we should issue guidelines to assist state commissions when they make determinations regarding exemptions, suspensions, or modifications under section 251(f).

1250. Although subsections (f)(1) and (f)(2) both address the circumstances under which an incumbent LEC could be relieved of duties otherwise imposed by section 251, subsection 251(f)(2) also applies to non-incumbent LECs. The standard for determining whether to exempt a carrier under subsection 251(f)(1) is different from the standard for determining whether to grant a suspension or modification under subsection (f)(2). Subsection 251(f)(1)(B) requires state commissions to determine that terminating a rural exemption is consistent with the universal service provisions of the 1996 Act.³⁰⁶¹ Subsection 251(f)(2)(A)(i) requires state commissions to grant a suspension or modification if it is necessary to "avoid a significant adverse economic impact on users of telecommunications services generally," and subsection 251(f)(2)(B) requires a suspension or modification to be

³⁰⁶⁰ A rural telephone company is defined as a local exchange carrier operating entity to the extent that such entity "(A) provides common carrier service to any local exchange carrier study area that does not include either-- (i) any incorporated place of 10,000 inhabitants or more, or any part thereof . . . ; or (ii) any territory, incorporated or unincorporated, included in an urbanized area . . . ; (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines; (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or (D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996." 47 U.S.C. § 153(37).

³⁰⁶¹ The provision states, "the State commission shall terminate the exemption if the request . . . is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof)." 47 U.S.C. § 251(f)(1)(B).

"consistent with the public interest, convenience, and necessity."³⁰⁶² Although we address these two subsections together, we highlight instances in which we believe that differences in statutory language require different treatment by state commissions.

1251. We discuss below issues raised by the commenters, and establish some rules regarding the requirements of section 251(f) that we believe will assist state commissions as they carry out their duties under section 251(f). For the most part, however, we expect that states will interpret the requirements of section 251(f) through rulemaking and adjudicative proceedings. We may in the future initiate a Notice of Proposed Rulemaking on certain additional issues raised by section 251(f) if it appears that further action by the Commission is warranted.

B. NEED FOR NATIONAL RULES

1. Comments

1252. Most state commissions³⁰⁶³ and some other parties³⁰⁶⁴ assert that states should have exclusive responsibility for the guidelines and determinations made under this section. Several commenters contend that any guidelines the Commission might issue would be useless, because generalized national guidelines could not take into account the variations among states and among individual LECs.³⁰⁶⁵ For example, the Minnesota Independent Coalition argues that the additional grant of authority to states under section 214(e) confirms that state commissions have the sole authority to make determinations under section 251(f).³⁰⁶⁶ A number of small telephone companies and associations of LECs advocate mandatory national rules regarding implementation of section 251(f). They assert that such rules would ensure that states carry out this provision in accordance with congressional

³⁰⁶² 47 U.S.C. § 251(f)(2).

³⁰⁶³ See, e.g., Alaska Commission comments at 6; Alabama Commission comments at 33-34; California Commission comments at 46; Idaho Commission comments at 14; Illinois Commission comments at 84; Louisiana Commission comments at 22-23; Ohio Commission comments at 80; Oregon Commission comments at 31; Pennsylvania Commission comments at 42; Texas Commission comments at 34; Wyoming Commission comments at 38-39.

³⁰⁶⁴ Ad Hoc Telecommunications Users Committee comments at 11; ALLTEL comments at 16; Citizens Utilities comments at 34; Colorado Ind. Tel. Ass'n comments at 5-6; GVNW comments at 42; GTE comments at 80; Home Tel. comments at 1; Illinois Ind. Tel. Ass'n comments at 7; Minnesota Ind. Coalition comments at 14; Ohio Consumers' Counsel reply at 25-26; PacTel comments at 99; Puerto Rico Tel. reply at 16-17; Rural Tel. Coalition comments at 11-15.

³⁰⁶⁵ Minnesota Ind. Coalition comments at 14; Western Alliance comments at 7.

³⁰⁶⁶ Minnesota Ind. Coalition comments at 14.

intent.³⁰⁶⁷ Some commenters favor a middle ground, claiming that non-mandatory guidelines from the Commission would be helpful, but that mandatory requirements would conflict with the Act's delegation to the states to make determinations under section 251(f).³⁰⁶⁸

2. Discussion

1253. We agree with parties, including small incumbent LECs, who argue that determining whether a telephone company is entitled, pursuant to section 251(f), to exemption, suspension, or modification of the requirements of section 251 generally should be left to state commissions.³⁰⁶⁹ Requests made pursuant to section 251(f) seek to carve out exceptions to application of the section 251 rules that we are establishing in this proceeding. We find that Congress intended the section 251 requirements, and the Commission's implementing rules thereunder, to apply to all carriers throughout the country, except in the circumstances delineated in the statute. We find convincing assertions that it would be an overwhelming task at this time for the Commission to try to anticipate and establish national rules for determining when our generally-applicable rules should *not* be imposed upon carriers. Therefore, we establish in this Order a very limited set of rules that will assist states in their application of the provisions in section 251(f).

1254. Many parties have proposed varying interpretations of the provisions in section 251(f), and have asked for Commission determination or a statement of agreement. Because it appears that many parties welcome some guidance from the Commission, we briefly set forth our interpretation of certain provisions of section 251(f). Such statements will assist parties and, in particular, state commissions that must make determinations regarding requests for exemption, suspension, and modification.

C. APPLICATION OF SECTION 251(f)

1. Comments

1255. Some commenters urge the Commission to require states to grant exemptions, suspensions, or modifications only on a case-by-case basis, and only to the extent warranted by the particular circumstances. They ask the Commission to prohibit states from granting

³⁰⁶⁷ Anchorage Tel. Utility comments at 2-4; Bay Springs, *et al.* comments at 10; Centennial Cellular Corp. comments at 12; Alaska Tel. Ass'n comments at 6; Matanuska Tel. Ass'n comments at 5; USTA comments at 87-93.

³⁰⁶⁸ Kentucky Commission comments at 7; Anchorage Tel. Utility comments at 4. Several parties argue that any federal action should not be mandatory. Ohio Commission comments at 80; Citizens Utilities comments at 33; Colorado Ind. Tel. Ass'n comments at 6; Rural Tel. Coalition reply at 18-19.

³⁰⁶⁹ *See, e.g.*, Minnesota Ind. Coalition comments at 14; Rural Tel. Coalition comments at 11.

broad-scale or generalized exemptions, suspensions or modifications.³⁰⁷⁰ AT&T argues that, to ensure that states do not allow LECs to avoid the regulatory and policy framework that Congress has mandated, the Commission should clarify that states must narrowly tailor suspensions and modifications to protect against specific, identifiable harm.³⁰⁷¹

Telecommunications Carriers for Competition and GCI argue that section 251(f) allows states to delay imposing the requirements under section 251(b) and (c), but it does not allow states to protect LECs from those requirements indefinitely.³⁰⁷² In response, Rural Tel. Coalition and SNET state that, while the term "suspensions" could be interpreted as allowing a time delay in implementation, the addition of the term "modifications" allows states to act more broadly.³⁰⁷³ SNET favors allowing the states "broad discretion to change the nature of any requirement imposed by subsections (b) and (c)."³⁰⁷⁴ USTA argues that states should not be permitted to eliminate all exemptions for all carriers.³⁰⁷⁵

1256. A number of parties allege that the Commission should encourage or require states to establish a legal presumption that the LEC seeking an exemption, suspension, or modification must prove to the state commission that such request is merited under the criteria set forth in section 251(f). AT&T argues that a carrier petitioning for suspension or modification under section 251(f)(2) should be obliged to demonstrate that "the application to it of the [s]ection 251(b) or (c) obligations that are the subject of its petition would inflict substantial harm on the LEC and customers in its territories that would not be inflicted on larger LECs and customers in their territories."³⁰⁷⁶ SCBA asserts that the burden should be upon the incumbent LEC, which has strong disincentives to promote competitive entry.³⁰⁷⁷ Local exchange carriers contend, on the other hand, that the party making a request under section 251(b) or (c) should have to prove that an exemption, suspension, or modification is not justified. For example, TCA, Inc. argues that, because of the high cost of providing telephone service in rural areas, competing carriers should be required to prove that

³⁰⁷⁰ See, e.g., Centennial Cellular Corp. comments at 16; NCTA comments at 64; Vanguard reply at 21-22.

³⁰⁷¹ AT&T comments at 90-93; accord Ohio Consumers' Counsel reply at 26.

³⁰⁷² GCI comments at 16-19; TCC comments at 51-53, reply at 28.

³⁰⁷³ Rural Tel. Coalition reply at 19-20; SNET comments at 36-37.

³⁰⁷⁴ SNET comments at 36-37.

³⁰⁷⁵ USTA comments at 87; Continental comments at 17 (citing actions of New Hampshire and Connecticut Commissions); Rural Tel. Coalition reply at 25.

³⁰⁷⁶ AT&T comments at 92-93; contra Cincinnati Bell reply at 14; PacTel reply at 41; SNET reply at 8; USTA reply at 35-36.

³⁰⁷⁷ SCBA comments at 17.