

by each, and, to a certain extent, the nature of the services offered over the attachments. In short, a pole-by-pole assessment of whether nondiscriminatory access is triggered because the pole, duct, conduit or right-of-way is being used for "wire communications" is fully consistent with the Congressional intent, as embodied in the legislative history of the statute.

67. The Commission's construction of the phrase "used, in whole or in part, for wire communications" leads it to an 'access to one, access to all' notion. The Infrastructure Owners request clarification, however, that the Commission has not found, in its First R&O, that the use of one pole for "wire communications" triggers access to ducts and conduits that are not now, and never have been, used for wire communications. To the extent the Commission has reached such a conclusion, the Infrastructure Owners seek reconsideration of that finding.

68. The Commission has acknowledged the unique properties and safety considerations associated with conduits and ducts,^{81/} in light of which, many electric utilities have declined to permit access to these facilities on a blanket, nondiscriminatory basis to any third party. Thus, the utility maintains strict control over the access and use of its infrastructure, all of which is intended to be used to carry high voltage, dangerous electric wires and related equipment. The Commission has acknowledged that "denial of access to all discriminates against

^{81/} First R&O, ¶ 1149 ("The installation and maintenance of underground facilities raise distinct safety and reliability concerns.").

none."^{82/} This principle must be applied on an infrastructure- and even route- or segment-specific basis.

69. Finally, the Commission's conclusion that the "wire communications" used solely for internal purposes in providing electric service triggers the access requirement is unsupported by any legal authority. "Wire communications," as used in this context, clearly contemplates common carrier communications by telecommunications carriers and cable service operators -- not communications by wholly private carriers and private networks. Thus, as noted above, the FCC's jurisdiction under the Pole Attachments Act is not even triggered unless the utility has designated communications space on a pole and a CATV system or telecommunications carrier uses the communications space, either alone or in conjunction with another communications entity.^{83/} A utility using a private network to support its electric operations is not a communications entity. It is not considered to make or have "pole attachments" under the statute.^{84/} It is not required by the statute to impute to itself the costs of "pole attachments" unless it engages in the provision of

^{82/} First R&O, ¶ 1173.

^{83/} S. Rep. No. 95-580, 95th Cong., 1st Sess. 16 (1977) (emphasis added); In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, 68 F.C.C.2d 1585, 1588 (1977).

^{84/} "Pole attachments" are defined as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4).

telecommunications or cable services.^{85/} Thus, the use of its own infrastructure, in part, for a private communications network designed to support a safe and reliable electric service cannot be deemed to trigger the nondiscriminatory access provision of the 1996 Act.

V. **Clarifications Are Warranted Because the Commission's Intent Is Ambiguous**

A. **The FCC Should Clarify that Only Reasonable Efforts to Provide Sixty Days Advance Notice of Non-Routine or Non-Emergency Modifications Are Required**

70. Section 224(h) of the 1996 Act's amendments requires owners to provide written notice of an intended modification or alteration of a pole, duct, conduit or right-of-way "so that such entity may have a reasonable opportunity to add to or modify its existing attachment." In the First R&O, the FCC has established a 60-day advance notice period for non-routine and non-emergency modifications/alterations. Specifically, Rule Section 1.1403(c), as added pursuant to the First R&O, provides, in relevant part:

A utility shall provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to... (3) any modification of facilities other than routine maintenance or modification in response to emergencies.

The Infrastructure Owners request that this rule be clarified/reconsidered to provide that reasonable efforts to provide 60 days advance notice of non-routine, non-emergency modifications constitute compliance.

^{85/} 47 U.S.C. § 224(g).

71. The Infrastructure Owners commend the FCC's effort to accommodate their operations by excepting emergency and routine modifications from the notice requirement. As drafted, however, the rule is unnecessarily inflexible with regard to notice of all other modifications and, if applied, would constitute an undue hardship on electric utilities in many instances.

72. The FCC notes, in the First R&O, that a number of the commenting parties, including pole owners, have advocated a 60-day advance notice period.^{86/} The Infrastructure Owners note that none of the parties identified as supporting a 60-day period is an electric utility.^{87/} This is so, the Infrastructure Owners submit, because the day-to-day operations of electric utilities are different in kind from those of communications providers; electric utilities often will not be in a position to delay service to a customer for 60 days, though based on reasons that may not fall readily within the term "emergency."

73. A utility frequently becomes aware of the need to provide or modify service very near to the time that a customer has an expectation, or a need, to receive it. While perhaps not "emergency" in nature, a strict application of the 60-day period, such as is provided for in the rule, to such situations would at best be inconvenient and unfair to a utility's customers in many

^{86/} First R&O, at ¶ 1207 and n.2973.

^{87/} In Comments to the FCC's NPRM, the Infrastructure Owners, consisting of the parties to this petition, as well as other electric utilities, urged a 14-day period. Comments of the Infrastructure Owners at ¶ 92.

cases. It is difficult to conceive that business or residential customers in need of electric service would accept any kind of a delay in the provision of that service. Indeed, a delay of longer than a day is considered extreme in many instances. In the aggregate, any type of a delay situation has the potential to cause real damage to a utility from a business standpoint, as customer goodwill wears thin over extensive delays or interruptions in service.

74. Section 224, of course, does not specify a time frame for notice to any attaching entity, providing only that notice is to result in "a reasonable opportunity" for such entity to modify its own attachment. In providing for the emergency exception to notice requirements, the FCC has already acknowledged that whether an "opportunity" to modify is "reasonable" depends upon the circumstances associated with both the utility's and the attaching entity's modifications. In an emergency, based upon the circumstance with which the utility and others are faced, no opportunity to modify is reasonable.

75. Similarly, in non-emergency, non-routine situations, less than 60 days' notice will frequently yield a reasonable opportunity to modify, given prevailing circumstances. Imposition of a fixed notice period to all such cases is a seemingly arbitrary and overly simplistic solution to diverse circumstances and situations. The Infrastructure Owners submit that a reasoned approach to this issue would establish a benchmark period for notice, with flexibility built into the

rules to allow for diversity of situations. In this regard, utilities should be deemed to be in compliance with notice requirements upon taking reasonable steps to comply with the stated notice period.

B. The FCC Should Clarify the Procedures for Resolution of Complaints

76. The Infrastructure Owners seek clarification from the Commission regarding Paragraph 1225 of the First R&O, which states in relevant part:

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."^{88/}

The process described by the Commission makes no provision for a response by the utility company. It is fundamental to a fair resolution of any adversarial proceeding that a party against whom a complaint has been lodged be afforded an opportunity to address the allegations. The Infrastructure Owners, therefore, request clarification that the Commission intends to consider the utility company's response to a complaint in resolving disputes through the Commission's expedited complaint process. Indeed, the Commission's current rules, which it has not amended in promulgating new provisions regarding the resolution of access disputes, provide a Respondent with "30 days from the date the complaint was filed within which to file a response." 47 C.F.R.

^{88/} First R&O, ¶ 1225.

§ 1.1407(a). The Infrastructure Owners seek clarification that, in order to ensure a complete and equitable complaint review process, the Commission intends to follow the procedure set forth in Section 1.1407(a).

77. The Infrastructure Owners also seek clarification from the Commission with regard to the specific time frame in which to file a complaint. In accordance with newly promulgated Rule Section 1.1404(k), a complaint is to be filed within 30 days of a denial.^{89/} In Paragraph 1225 of its First R&O, however, the Commission states that a requesting party shall have 60 days upon receipt of a denial notice to file a complaint.^{90/} The Infrastructure Owners request clarification as to the applicable time frame within which a party may file a complaint.

78. Additionally, the Infrastructure Owners seek clarification of the Commission's statement that if it "requests additional information from any party, such party will have 5 days to respond to the request."^{91/} The Commission's articulation of this time frame, which was not codified in the Commission's rules, should serve as a general guideline rather than an inflexible requirement. The Infrastructure Owners anticipate that the Commission will consider the facts and circumstances of each situation on a case-by-case basis and, in many instances, five days will be an unrealistic period within to

^{89/} 47 C.F.R. § 1.404(k).

^{90/} First R&O, ¶ 1225.

^{91/} First R&O, ¶ 1225, n.3019.

produce requested information. For example, if the Commission requests additional information from a utility regarding its poles, complying with such a request within five days could be impossible, in light of the millions of poles owned by large utilities. A more practical approach would be the establishment of a time frame for response, at the time that the request is made based on the nature and extent of the information requested.

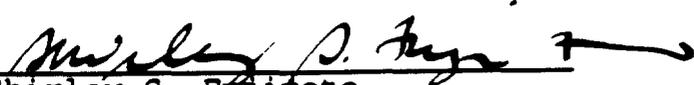
CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company, The Southern Company, and Wisconsin Electric Power Company, urge the Commission to consider this Petition for Reconsideration and/or Clarification of the First R&Q and to proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company, The Southern Company, and Wisconsin Electric Power Company

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Dated: September 30, 1996

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)
)
Implementation of the Local) CC Docket No. 96-98
Competition Provisions in the)
Telecommunications Act of 1996)

To: The Commission

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REPLY TO OPPOSITIONS TO
PETITIONS FOR RECONSIDERATION

FILED ON BEHALF OF

AMERICAN ELECTRIC POWER SERVICE CORPORATION,
COMMONWEALTH EDISON COMPANY, DUKE POWER
COMPANY, ENTERGY SERVICES, INC., NORTHERN
STATES POWER COMPANY AND THE SOUTHERN COMPANY

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Executive Summary

The Infrastructure Owners, a group of electric utilities with infrastructure networks constructed and maintained for the purpose of providing electric service, reply to positions adopted by a number of parties in opposition to their Petition for Reconsideration and/or Clarification of the Commission's First Report and Order. The Commission's findings with respect to Sections 224(f) and 224(h) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, are contrary to law in a number of respects. Nothing raised by opposing parties compels a different conclusion.

The Commission's decision on the expansion of capacity, the reservation of electric utility space, and the use of eminent domain powers granted under state law is in excess of its statutory authority. Parties interpreting Section 224(f) to the contrary ignore fundamental principles of statutory construction.

Similarly, parties opposing the Infrastructure Owners's contention that the Commission's decision is arbitrary and capricious fail to present cogent arguments for a different conclusion. Quite simply, the FCC violated the Administrative Procedure Act when it adopted a 45-day response requirement without noticing the issue or discussing the basis for the requirement in the First Report and Order. The rule permitting non-electric personnel to work in proximity to electric lines is unreasonable and lacks sufficient record support.

Several parties opposed the Infrastructure Owners's arguments that aspects of the Commission's decision embrace a construction of Section 224 that impermissibly violates Congressional intent. Again, evidence compelling a different conclusion is lacking. The agency's findings including transmission facilities in the scope of Section 224, allowing for the placement of equipment other than coaxial or fiber cable on or in utilities' infrastructure and concluding that use of any single piece of infrastructure for wire communications triggers access to all other infrastructure contradict the express language of the statute and, therefore, Congressional intent.

In response to oppositions to their request for clarification of the 60-day written notice period under Section 224(h), the Infrastructure Owners submit that clarification is appropriate. It will clarify compliance with the requirement and thereby avoid time-consuming and costly litigation.

Finally, the Infrastructure Owners support the Commission's decision on the issue of state certification on access matters and the exclusion of roofs and risers from the scope of the Pole Attachments Act. The FCC properly found that States need not certify that they regulate access as a condition to preempting the FCC's jurisdiction. Similarly, the Commission properly adhered to the language of the statute in declining to broaden the statute to encompass infrastructure conspicuously omitted from its scope.

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)
)
Implementation of the Local) CC Docket No. 96-98
Competition Provisions in the)
Telecommunications Act of 1996)

To: The Commission

REPLY TO OPPOSITIONS TO
PETITIONS FOR RECONSIDERATION

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company and The Southern Company (collectively referred to as the "Infrastructure Owners"), through their undersigned counsel and pursuant to Section 1.429(g) of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission") submit this Reply to Oppositions to Petitions for Reconsideration of the First Report and Order.^{1/} The Infrastructure Owners oppose positions adopted by various parties regarding Sections 224(f) and (h) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996.^{2/}

^{1/} First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (released Aug. 8, 1996), 61 Fed. Reg. 45,476 (Aug. 29, 1996) ("First R&O").

^{2/} Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § § 151 et seq. ("the 1996 Act").

I. Reconsideration Is Mandated Because the Commission Exceeded Its Statutory Authority

A. The FCC's Conclusion on the Expansion of Capacity Ignores the Express Language of the Statute

1. Various telecommunications and cable interests oppose the Infrastructure Owners's position on the expansion of capacity^{3/} on a variety of grounds.^{4/} Significantly, only two of the parties address the issue raised by the Infrastructure Owners.

2. In their Petition, the Infrastructure Owners argued that the Commission's requirement that utilities expand capacity to accommodate requests for access from cable operators or telecommunications carriers failed to give effect to the limitations set forth in Section 224(f)(2), thus ignoring a fundamental tenet of statutory construction: a statute should be construed so as to give effect to all of its language.^{5/} Although the Commission did not set forth a specific interpretation of Section 224(f)(2) in the First R&O, AT&T argued

^{3/} Infrastructure Owners's Petition For Reconsideration and/or Clarification ("Infrastructure Owners's Petition") at 8-10.

^{4/} Reply of The Association For Local Telecommunications Services to Petitions For Clarification and Reconsideration ("ALTS Reply") at 27-28; AT&T Opposition to and Comments on Petitions For Reconsideration and Clarification of First Report and Order ("AT&T Opposition") at 33; Continental Cablevision, Inc. et al.'s Opposition to Petitions For Reconsideration Regarding Access To Poles, Conduits and Rights-Of-Ways (Continental Cablevision et al. Opposition") at 9; MCI Communications Corp.'s Response to Petitions For Reconsideration ("MCI Response") at 34-35; The National Cable Television Associations's Opposition to Petitions For Reconsideration ("NCTA Opposition") at 26-27.

^{5/} See Infrastructure Owners's Petition at 8-10; FP&L Petition at 6-9; see also United States v. Nordic Village, Inc., 503 U.S. 30, 36-37 (1992).

that the Commission reasonably interpreted the phrase "where there is insufficient capacity" to require expansion of facilities.^{5/} Without resort to any tools of statutory construction, AT&T, like the Commission, reads the following language (bolded and underlined) into the statute:

Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity, and the utility cannot reasonably modify its facility to increase such capacity....

47 U.S.C. § 224(f)(2) (emphasized language added). Because this interpretation of Section 224(f)(2) clearly reads into the statute words that are not present, it violates the plain language of the 1996 Act and must be rejected.

3. In addition, NCTA argues that the absence of spare capacity on a physical facility does not necessarily mean the right-of-ways are full, and, therefore, a utility is in a position to expand its physical facility.^{2/} Once again, the cable and telecommunications interests have entirely ignored the language of the statute. Section 224(f)(2) provides electric utilities with an explicit exemption from the requirements of Section 224(f)(1). Section 224(f)(2) allows an electric utility to deny access based on insufficient capacity to any of its "poles, ducts, conduits, or rights-of-way."^{8/} Thus, NCTA's effort to measure the capacity of physical facilities by the

^{5/} AT&T Opposition at 33.

^{2/} NCTA Opposition at 26-27.

^{8/} 47 U.S.C. § 224(f)(2) (emphasis added).

potential capacity of the right-of-way -- rather than actual, present capacity of the physical facilities -- is simply contrary to the language of the 1996 Act. The Commission erred in concluding that utilities should be required to expand capacity for third party cable operators or telecommunications carriers. That error must be corrected.

B. The FCC's Reserve Capacity Determination Is Inconsistent with the Record Evidence

4. Several telecommunications and cable interests oppose the Infrastructure Owners on the issue of reserve capacity,^{9/} arguing that access to a utility's reserve space is reasonable.^{10/} The arguments are unavailing because the FCC's decision goes beyond its statutory authority. Moreover, the oppositions, like the FCC's decision, fail to take into account the practical realities that render the decision wholly impractical and unworkable.

5. The Infrastructure Owners assert that the Commission lacks the statutory authority to require electric utilities to provide access to their reserve space.^{11/} Further, the Commission's rules failed to consider factors which illustrate the impracticability -- and thus the unreasonableness -- of such rules. None of the parties who opposed the Infrastructure Owners's Petition for Reconsideration addressed the electric

^{9/} Infrastructure Owners's Petition at 12-14.

^{10/} ALTS Reply at 27-28; AT&T Opposition at 34; Continental Cablevision et al. Opposition at 9; MCI's Response at 37; NCTA's Opposition at 27.

^{11/} Infrastructure Owners's Petition For Reconsideration and/or Clarification at 12-13.

utilities' concerns that these rules ignore the practical realities of an electrical utility's core business.

6. Reserving capacity pursuant to a "bona fide development plan" ignores the ongoing changes in the electric utility business brought on by deregulation. Equally important, the Commission failed to address the problems that a utility will face when it seeks to recapture its reserve space in the time necessary -- oftentimes an emergency situation -- to serve its core utility business. Because the Commission did not adequately consider the problems associated with allowing access to a utility's reserve space, the Commission's decision is impermissible, arbitrary and capricious and should be reversed.

C. **The Commission Has No Authority to Require Utilities to Exercise Eminent Domain Powers**

7. Several parties oppose the Infrastructure Owners's position^{12/} on the requirement that utilities exercise their eminent domain authority granted under state law to expand rights-of-way for the benefit of non-electric third parties.^{13/} These arguments ignore the fundamental flaw in the Commission's conclusion: the FCC has no statutory authority to require utilities to use any state-granted eminent domain powers, assuming such authority exists, on behalf of a non-electric third party.

8. Sections 224(f)(1) and (f)(2), when properly read as a whole, unequivocally permit an electric utility to deny a request

^{12/} See Infrastructure Owners's Petition at 14-21.

^{13/} MCI Response at 38; AT&T Opposition at 35; Continental Cablevision et al. Opposition at 18-19.

for access to its rights-of-way where capacity is insufficient to accommodate the request. Historically, the exercise of rights of eminent domain has been beyond the scope of the FCC's jurisdiction.^{14/} The historical treatment was not changed by the 1996 Act. Congress must be presumed knowledgeable about existing law relevant to the legislation it enacts.^{15/} Moreover, unlike Section 541(a)(2) of the 1984 Cable Act, to which *Continental Cablevision et al.* refer, the Pole Attachments Act of 1978, as amended by the 1996 Act, does not address the scope of rights-of-way or require that such rights-of-way be construed to accommodate compatible uses. Congress can be presumed to have been aware of Section 541(a)(2) of the 1984 Cable Act and yet did not adopt a similar provision in amending the Pole Attachments Act. The FCC cannot do indirectly what Congress expressly declined to do directly. Based on the plain language of the statute, the FCC's conclusion that the statute requires utilities to expand capacity through the exercise of their eminent domain authority violates the intent of Congress and should be reversed.

9. Moreover, the FCC's interpretation with respect to the eminent domain issue is unreasonable and, therefore, impermissible. The FCC's conclusion is based solely on a strained interpretation of Section 224(h). That provision requires notice of intended modifications or alterations to

^{14/} S. Rep. No. 580, 95th Cong., 1st Sess. 16.

^{15/} Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988); Washington Legal Found. v. United States Sentencing Comm'n, 17 F.3d 1446 (D.C. Cir. 1994).

facilities, not notice of intended expansions of capacity. Any expansion under Section 224(h) stems from the utility's own electric needs, not from any mandatory obligation to make modifications or alterations at the request of a telecommunications carrier or cable television system.

10. The exercise of eminent domain power is a drastic measure which electric utilities use only with abundant caution. Although AT&T asserts that the utilities' concerns may be premature and can be handled on a case-by-case basis, the electric utilities nonetheless object to a requirement that is contrary to law and beyond the scope of the FCC's authority. While the FCC states that it has promulgated this and other requirements in an effort to facilitate arms-length negotiations, rather than having to rely on multiple adjudications in response to complaints,^{16/} the Infrastructure Owners submit that if allowed to stand, this requirement will have the opposite effect, as AT&T's Opposition also seems to suggest. The FCC should correct its previous conclusion and rescind any requirement that utilities exercise their state-granted powers of eminent domain on behalf of any non-electric third party.

II. **Reconsideration Is Mandated Because the Commission's Decision Is Arbitrary and Capricious**

A. **The FCC Did Not Follow APA Procedures in Promulgating the Forty-Five Day Access Rule**

11. Contrary to the Infrastructure Owners's contention,^{17/} AT&T and NCTA assert that the FCC followed the Administrative

^{16/} First R&O, ¶ 1159.

^{17/} Infrastructure Owners's Petition at 21-26.

Procedure Act ("APA") in promulgating the 45-day access rule.^{18/} Continental Cablevision et al. simply asserts that the utilities' request for more than 45 days to respond to access requests is inconsistent with modern industry practice and, therefore, is unreasonable.^{19/} Continental Cablevision's argument is unpersuasive; clearly, a large number of utilities disagree with its notion of the "modern industry practice." AT&T's and NCTA's arguments are equally without merit.

12. In promulgating new rules, an agency must articulate a "rational connection between the facts found and the choice made"^{20/} and "must cogently explain why it has exercised its discretion in a given manner."^{21/} The Commission failed to articulate any basis -- reasoned or otherwise -- for the 45 day requirement. Nowhere in the Commission's First R&O does the Commission explain how it devised the 45-day access rule, contrary to the assertions of AT&T and NCTA.^{22/} In its sole reference to the requirement, the Commission merely states that

^{18/} AT&T Opposition at 40; NCTA Opposition at 30.

^{19/} Continental Cablevision et al. Opposition at 13.

^{20/} City of Brookings Mun. Tel. Co. v. Federal Communications Comm'n, 822 F.2d 1153, 1165 (D.C. Cir. 1987) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

^{21/} Motor Vehicle Ass'n v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 48-49 (1983) (citing Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade, 412 U.S. 397, 416 (1967)).

^{22/} AT&T contends that the FCC discussed the 45 day access requirement in ¶s 1224-1225 of the First R&O. NCTA cites to ¶ 1225 as containing the FCC's discussion of the 45 day access rule.

"[i]f access is not granted within 45 days of the request, the utility must confirm the denial in writing by the 45th day."^{23/} Clearly, this passing reference does not provide an explanation of the Commission's decision to impose a 45 day access requirement, as opposed to a 60, 90, or 120 day requirement. The APA requires the agency to supply a reasoned basis for why it adopts a certain rule.^{24/} The FCC failed to do so. Hence, the requirement must be rescinded.^{25/}

B. The Rule Permitting Non-Electric Personnel to Work in Proximity to Electric Lines Is Unreasonable

13. MCI, AT&T and NCTA oppose the Infrastructure Owners' position^{25/} that the rule allowing non-electric utility personnel to work in proximity to electric lines is not supported by a reasoned basis in the record. They generally argue that the Commission has adequately protected electric utilities in allowing access to their facilities because the Commission specified that any worker seeking access must have sufficient qualifications and training.^{27/}

^{23/} First R&O, ¶ 1224.

^{24/} Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1994).

^{25/} The Infrastructure Owners also assert that the Commission's 45-day access requirement is not a "logical outgrowth" out of its original NPRM. See Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983). While an agency's notice need not identify every precise proposal that the agency may finally adopt, here the FCC impermissibly adopted the 45-day access rule without having discussed this contemplated rule anywhere.

^{26/} Infrastructure Owners's Petition at 29-31.

^{27/} AT&T Opposition at 39; MCI Opposition at 37; NCTA Opposition at 33.

14. None of these parties addressed the Infrastructure Owners' argument that the Commission failed to consider the dangers associated with working in close proximity to electric lines versus working in close proximity to telecommunications facilities. In addition, none of these parties addressed the Commission's failure to consider how its uniform rule would apply to the different types of electric utility infrastructure. For example, it is much more dangerous to work in close proximity to electric lines in a conduit system than on a pole because in a conduit system workers are forced to work in extremely close physical proximity to high voltage electrical wire, usually less than two feet away from an energized conductor. In contrast, because the communications space is below the electric space on a pole, telecommunications personnel usually do not come closer than ten feet away from an energized conductor when working on a pole. Because it has not sufficiently considered the application of its rule, the Commission must reverse or modify this rule.

III. The FCC's Interpretation Is Impermissible Because it Violates Congressional Intent

A. Wireless Facilities Are Not Covered by the Pole Attachments Act

15. Many parties contend that Section 224(f)(1) mandates access to utility infrastructure to permit siting of wireless facilities.^{28/} The Infrastructure Owners disagree.

^{28/} See, e.g., Comments of AirTouch Communications on Petitions for Reconsideration ("AirTouch Comments") at 24; AT&T Opposition at 36; Opposition to Petitions for Reconsideration of the Cellular Telecommunications Industry Association ("CTIA Opposition") at 12; Comments on and Opposition to Petitions for Reconsideration and Clarification of Comcast Cellular Communications, Inc. and Vanguard Cellular Systems, Inc.

(continued...)

16. Section 224(f)(1) cannot be read standing alone. Section 224(a)(1) defines a "utility," for purposes of the nondiscriminatory access provisions of Section 224(f)(1), as "any person who is a local exchange carrier or. . . public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." (emphasis added). Congress maintained the "wire communications" language without change from the original version of the Pole Attachments Act.

17. CTIA contends that Section 224(a)(1) serves only to define the entities subject to the nondiscriminatory access requirements under Section 224(f)(1), and is "irrelevant to the issue of whether items other than wire or cables may be attached to the poles of utilities."^{29/} CTIA does not address the issue of why Congress sought to extend the nondiscriminatory access requirements only to entities engaged in wire communications. Other parties have failed to address Section 224(a)(1) at all.

18. It is illogical for Congress to have so specifically delimited the scope of entities subject to the pole attachment provisions, as it did in Section 224(a)(1), unless "wire communications" were the object of those provisions. Had Congress intended that Section 224, as amended, would mandate

^{28/} (...continued)

("Comcast Opposition:") at 9; *Continental Cablevision et al.* Opposition at 12; Opposition and Response of Cox Communications, Inc. to Petitions for Reconsideration ("Cox Opposition") at 9; MCI Response at 40; Comments in Response to Petitions for Reconsideration of Paging Network, Inc. ("Paging Network Comments") at 23; WinStar Communications, Inc. Opposition to Petitions for Reconsideration ("WinStar Opposition") at 12.

^{29/} CTIA Opposition at 13.

wireless access, it surely would have expanded "utilities" to encompass public utilities using their poles, ducts, conduits or rights-of-way for wireless communications. Instead, Section 224 establishes a logical symmetry, requiring that utilities whose facilities are used for wire communications provide nondiscriminatory access to telecommunications carriers seeking to attach for that purpose.

B. Section 224(f) Does Not Apply to Transmission Facilities

19. AT&T and Continental Cablevision et al. oppose the Infrastructure Owners's request that the FCC reconsider its decision with respect to transmission facilities.^{30/} Their arguments are unconvincing.

20. AT&T asserts that Section 224 mandates access to "any" pole, duct, conduit or right-of-way owned or controlled by the utility.^{31/} That is precisely the point. A "transmission tower" is not a "pole, duct, conduit or right-of-way." Based on its plain language, Congress did not name, and thus did not intend to include, transmission facilities in the scope of the infrastructure covered by Section 224(f).

21. Continental Cablevision makes a half-hearted argument in opposition to the exclusion of transmission facilities from the Pole Attachments Act, asserting that access to transmission facilities has never been categorically forbidden under the Pole Attachments Act.^{32/} The Infrastructure Owners disagree. For

^{30/} Infrastructure Owners's Petition at 37-40.

^{31/} AT&T Opposition at 39.

^{32/} Continental Cablevision et al. Opposition at 10.