

nondiscrimination requirement of Section 224(f)(1) . . . prohibits a utility from favoring itself or its affiliates with respect to the provision of telecommunications and video services."^{14/} Thus, a utility's ability to expand capacity for its core utility services should have no bearing on, nor confer a similar right on, telecommunications carriers seeking access to such facilities.

B. The Commission Exceeded Its Statutory Authority by Requiring a Utility to Allow the Use of Its Reserve Space Until It Has an Actual Need for the Space

13. In the First R&Q, the Commission determined to allow "an electric utility to reserve space if such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service."^{15/} The Commission further decided that "[t]he electric utility must permit use of its reserved space by cable operators and telecommunications carriers until such time as the utility has an actual need for that space."^{16/}

14. As discussed above, Congress plainly and unambiguously gave electric utilities the right to make capacity determinations when considering requests for access. A denial need only be administered in a nondiscriminatory manner vis-a-vis cable operators and telecommunications carriers. Nothing in Section 224(f)(2) limits a utility's ability to plan for future expansion

^{14/} First R&Q, ¶ 1168 (emphasis added).

^{15/} First R&Q, ¶ 1169.

^{16/} Id.

by reserving capacity. Indeed, Congress was well aware of an electric utility's need to reserve capacity when it gave utilities the right to deny access based on insufficient capacity. If it had intended to change the status quo, Congress would have included language in the statute that could reasonably be interpreted to limit this utility practice. Thus, the Commission's determination to further qualify a utility's right to reserve capacity violates Congressional intent.

15. As noted above, the Commission limited a utility's right to use its reserve space to instances where such reservation is "consistent with a bona fide development plan that reasonably and specifically projects a need for that space." This standard is vague, ambiguous and unworkable, and ignores the realities of a utility's core business of providing electric service. Many utilities' development plans are under constant review and revision to account for regulatory and market uncertainties caused by federal efforts to deregulate the electric industry. By restricting a utility's right to reserve capacity, the Commission is forcing a utility to either expand its business based on sheer speculation of load growth, or to face repeated complaints by entities seeking access to reserve capacity. The provision of safe, reliable electric service cannot be conditioned on a utility's ability to satisfy this unworkable standard.

16. As a practical matter, the reservation of capacity must remain within the exclusive authority of the utility, and any

reservation of space by a utility should be considered presumptively reasonable. Just because a utility is not currently using "capacity" does not mean that such capacity should be available for use by others, such as telecommunications carriers and cable companies. Utilities routinely allocate certain space to be used in the event of an emergency. For example, if certain ducts collapse, the utility's contingency plan calls for the immediate substitution of other ducts. Surely, this space cannot be considered "reserve." At a minimum, the Commission must clarify that the obligation to provide access does not extend to space that is needed for emergency purposes.

17. The idea that a party can use space on an interim basis is simply impractical and unworkable. Once telecommunications carriers and cable companies are using a utility's infrastructure, and serving telecommunications interests, a utility simply will not be able to recapture such reserved space in the time necessary to effectively serve its core utility business. Indeed, according to the Commission, at the time the utility seeks to recapture its reserve space, the utility must provide the user an "opportunity to . . . maintain its attachment" by expanding capacity.^{12/} This requirement could be used by attaching entities to claim that the utility must allow the user to stay on or in the facility until the utility construct additional capacity. A utility's ability to provide dependable service would be severely threatened by such

^{12/} First R&O, ¶ 1169.

an obligation because of the significant engineering and construction time involved in expanding capacity.

18. Even if the Commission crafted a rule that allowed a utility to immediately recapture its reserve space, in the real world, once a telecommunications carrier or cable company is using a utility's infrastructure, it will be difficult to reclaim that capacity. Telecommunications carriers simply will not vacate a utility's facility short of litigation if the withdrawal will likely result in the interruption of service to telecommunications customers. For this reason, any requirement to allow telecommunications carriers and cable operators access to a utility's reserve space will effectively eliminate a utility's use of that space altogether. As such, and in light of the above reasons, the Commission's determination on access to reserve space is arbitrary and capricious and must be reversed.

C. The FCC Has No Authority to Require Electric Utilities to Exercise Their Powers of Eminent Domain to Expand Capacity^{18/}

19. In its discussion of access to poles, conduits, and rights-of-way in the First R&O, the FCC articulates its view of utilities' obligations with regard to private property rights. Specifically, the FCC states:

^{18/} Wisconsin Electric Power Company does not join in this section of the parties' Petition for Reconsideration and/or Clarification.

We believe that a utility should be expected to exercise its eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments.^{19/}

In support of this position, the FCC further states:

Congress seems to have contemplated an exercise of eminent domain authority in such cases when it made provisions for an owner of a right-of-way that 'intends to modify or alter such...right-of-way...'.^{20/}

The FCC's position goes well beyond Congressional intent or any reasonable construction of Section 224 with regard to access to utility infrastructure. Requiring electric utility owners to not only provide access to established rights-of-way but also to condemn properties at the request of telecommunications carriers is without any support in the statute.^{21/} Accordingly, this position must be reconsidered.

20. As the FCC notes in the First R&O, the scope of a utility's ownership or control of an easement or right-of-way is

^{19/} First R&O, at ¶ 1181, (footnote omitted).

^{20/} Id. (footnote omitted).

^{21/} Although the Pole Attachments Act was enacted some 18 years ago, requiring utilities to exercise their eminent domain authority to expand rights-of-way has never been considered a part of that statute. Typical pole attachment agreements require the party seeking access to secure whatever additional rights are needed by that party before access can be granted consistent with the underlying easement or right-of-way. This practice correctly assigns the obligation of securing additional rights to the party requiring those rights. The 1978 Pole Attachments Act and the 1996 amendments to it permit 'piggybacking' on the utilities' existing poles, ducts, conduits and rights-of-way -- they do not require utilities' to secure additional poles, ducts, conduits and rights-of-way.

a matter of state law.^{22/} The authority granted by many state eminent domain statutes expressly limit the use of lands condemned by a utility to the utility's own operations. The Alabama Code, for example, provides that electric or power companies:

...may acquire by condemnation for a right-of-way for their...lines, tunnels,...excavations or works, lands for ways or rights-of-way...^{23/}

Many other states, including those identified to the FCC in the Comments,^{24/} limit the exercise of eminent domain authority.^{25/}

The Ohio Code, for example, provides:

Any company organized for manufacturing, generating, selling, supplying, or transmitting electricity, for public and private use. . . may appropriate so much of such land, or any right or interest therein, including any trees, edifices, or building thereon, as is deemed necessary for the erection, operation, or maintenance of an electric plant, including its generating stations, substations, switching stations, transmission and distribution lines, poles, towers, piers, conduits, cables, wires, and other necessary structures and appliances.^{26/}

^{22/} First R&O, ¶ 1179.

^{23/} Ala. Code § 10-5-4 (1996) (emphasis supplied).

^{24/} See, e.g., Comments of Duquesne Light Company at 15 n.26, identifying the States of Florida, Georgia, New Hampshire, New Mexico and Virginia; Comments of PECO Energy at 2, identifying the Commonwealth of Pennsylvania as having such restrictions in place.

^{25/} See, e.g., Arkansas, Ark. Stat. Ann. § 18-15-503 (1995), California, Cal. Pub. Util. Code § 612 (Deering 1996), Delaware, Del. Code Ann. § 901 (1995), Indiana, Ind. Code Ann. § 32-11-3-1 (Burns 1996) Minnesota, Minn. Stat. § 300.4 (1995), Texas, Tex. Rev. Civ. Stat. art. 1436 (1996), Wisconsin, Wis. Stat. § 32.02 (1994), all restrict the exercise of eminent domain authority to purposes that further the utility's own operations.

^{26/} Ohio Rev. Code Ann. § 4933.15 (1996).

As the above passage demonstrates, state statutes frequently provide for only a limited exercise of eminent domain power, or resultant use of condemned lands, restricted to the actual electric needs of the utility. Utilities, of course, cannot provide to telecommunications carriers authority that they do not have themselves. Accordingly, the FCC's position is untenable in a substantial number of jurisdictions across the country.

21. Section 224, furthermore, does not provide any statutory basis for application of the FCC's position in those jurisdictions where eminent domain authority has not been expressly limited. Section 224(c)(1) makes clear that it does not grant to the FCC jurisdiction over "rates, terms, conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) in any case where such matters are regulated by a State." In order to assume and retain jurisdiction over rates, terms and conditions for pole attachments under Section 224, a state must make certification to the FCC, implement rules and respond promptly to complaints.^{22/} No such conditions are placed in Section 224 on a state's jurisdiction over, or its regulation of, access to poles, ducts, conduits and rights-of-way; the fact of regulating this subject matter is alone sufficient to establish state jurisdiction over it.

^{22/} 47 U.S.C. § 224(c)(2)-(4).

22. In the First R&O, the FCC has posited eminent domain authority as a vehicle for access to rights-of-way by telecommunications carriers. In light of the fact that powers of eminent domain are conferred by, and regulated under state law, however, Section 224 confers no jurisdiction to the FCC to dictate the scope or the terms of their application. Despite this jurisdictional deficiency, the FCC has articulated a position that suggest a de facto preemption, unauthorized by Congress, of the states' jurisdiction over the exercise of eminent domain authority. In accordance with the FCC's position, a requesting carrier could effectively assert eminent domain authority co-extensive with that of the utilities; by making a request of a utility, a carrier could, indirectly, cause the condemnation of property solely to benefit its own telecommunications operations.

23. This extraordinary result was not contemplated by Congress, as is evidenced by the specific provisions detailing the respective extent of federal and state jurisdiction over such matters.^{28/} Had Congress intended to dramatically rework local regulation of eminent domain authority, it would have done so

^{28/} Congress may delegate eminent domain authority to a person or corporation under federal statute. See, e.g., 47 U.S.C. § 717(f)(h) (granting certain natural gas companies eminent domain authority to expand a right-of-way). Congress had the authority to make a delegation of eminent domain authority to utilities to acquire additional rights-of-way under the Pole Attachments Act but chose not to. The FCC should not do indirectly what Congress did not do directly.

expressly in the Telecommunications Act of 1996 ("1996 Act").^{29/} Instead, Congress expressly and clearly preserved the states' jurisdiction to determine who will exercise eminent domain authority and the circumstances under which it will be exercised.^{30/}

24. Matters of a purely state or local nature should be handled in keeping with the deregulatory policies underlying the 1996 Act. The FCC should not establish a regulatory scheme that requires utilities to act on behalf of carriers vis-a-vis third parties. Where the right-of-way previously established by a utility is inadequate to serve the purposes of a requesting carrier, the issue of condemning new properties through eminent domain should be left between the carrier and the state, subject to the provisions of Section 253 of the 1996 Act. Indirectly bestowing upon telecommunications carriers powers that are not provided for in the Act and that are subject to local jurisdiction is an impermissible approach and one which should not be maintained.

25. The FCC cites Section 224(h) in support of its position that Congress contemplated requiring utilities to exercise their eminent domain authority on behalf of requesting telecommunications carriers.^{31/} Section 224(h) in fact

^{29/} Pub. L. No. 104-104, 110 Stat. 56 (1996).

^{30/} See, e.g., 47 U.S.C. § 253(b).

^{31/} First R&O, ¶ 1181.

indicates an opposite intention on the part of Congress. That provision requires notice to attaching entities "[w]henever the owner of a pole, duct, conduit or right-of-way intends to modify or alter such pole, duct, conduit or right-of-way..."^{32/} The use of the term "intends" makes clear that modification is to be made whenever the utility's needs require the modification or alteration, rather than compelled by a request for attachment. Had Congress intended otherwise, it would have used language in Section 224(h) to reflect the significant mandatory obligation to make modifications or alterations at the request of a telecommunications carrier or cable television operator that would result from applying the FCC's interpretation of that section.

26. Finally, the Commission must understand the implications of the exercise of powers of eminent domain. In the law governing property rights, the right of eminent domain represents a drastic remedy and one which is not casually exercised by utilities. Utilities do not take their exercise of these powers lightly as the condemnation of property may result in significant disruption to property owners including, in some cases, the displacement of people from their homes. Utilities have a strong interest in maintaining good relationships with the communities and customers that they serve and recognize that the responsible exercise of condemnation power is critical to those relationships. It is contrary to the public interest that such

^{32/} Id. (emphasis supplied).

powers be extended wholesale, though indirectly, to an entirely new class of entity, whether or not permissible as a matter of state law.

27. In summary, an obligation to take independent, affirmative steps to secure new rights-of-way solely for the benefit of a telecommunications carrier is an extraordinary obligation and was neither contemplated nor authorized by Congress. Even assuming, arguendo, that applicable state law permitted a utility to exercise its right of eminent domain on behalf of a third party telecommunications service provider or cable television operator, the Commission should not, as a matter of policy, require the exercise of such radical action on behalf of another entity. The Commission should rescind any requirement that an electric utility exercise its state law-granted powers of eminent domain to expand its infrastructure capacity on behalf of a third party where that capacity is insufficient to permit access.

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

A. The FCC's Requirement that Utilities Provide Access to Infrastructure Within Forty-Five Days Is Arbitrary and Capricious Because the Agency Failed to Provide Notice of Agency Action

28. Newly promulgated Section 1.1403 of the Commission's rules incorporates the duty to provide access to a utility's infrastructure:

Requests for access to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted

within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. . .^{33/}

29. Reconsideration of this section is mandated because the agency failed to address this issue in its NPRM and failed to provide any reasoned basis for the requirement in its First R&O. Thus, the requirement was adopted in violation of the Administrative Procedure Act ("APA").^{34/}

30. Pursuant to Section 10 of the APA, a court will set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."^{35/} In determining whether agency action is arbitrary and capricious, a reviewing court will first consider whether the agency has considered the relevant factors involved and whether there has been a clear error of judgment.^{36/} The agency must articulate a "rational connection between the facts found and the choice made."^{37/} A reviewing court "will not supply the basis for the agency's action, but instead rely on the reasons advanced by the

^{33/} 47 C.F.R. § 1.1403. It is unclear from the rule whether the 45-day deadline represents the amount of time in which a utility has to respond to a request for access, or whether it represents the time allowed a utility to grant physical access to its infrastructure. The latter interpretation, as discussed below, imposes significant, unreasonable burdens upon utilities, apart from the procedural irregularities raised by the requirement.

^{34/} 5 U.S.C. § 551 et seq.

^{35/} 5 U.S.C. § 706(2)(A).

^{36/} Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

^{37/} City of Brookings Mu. 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)).

agency in support of the action."^{38/} The United States Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner."^{39/} "[A]n agency action accompanied by an inadequate explanation constitutes arbitrary and capricious conduct."^{40/}

31. The Commission's adoption of the 45-day access requirement constitutes arbitrary and capricious conduct inasmuch as the Commission failed to provide any basis -- reasoned or otherwise -- for this requirement.^{41/} Nowhere in the Commission's First R&O does the Commission explain how it devised the 45-day access requirement. The Commission's failure in this regard runs contrary to the APA which requires the agency to supply a reasoned basis for why it adopts a certain rule or rules.^{42/} The lack of a reasoned basis for the Commission's decision constitutes arbitrary and capricious decision making.^{43/}

^{38/} Cincinnati Bell Tel. Co. v. Federal Communications Comm'n, 69 F.3d 752, 758 (6th Cir. 1995) (citation omitted).

^{39/} Motor Vehicle Ass'n v. State Farm Mutual 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)).

^{40/} FEC v. Rose, 806 F.2d 1081, 1088 (D.C. Cir. 1986).

^{41/} See 806 F.2d at 1088.

^{42/} Schurz Communications, Inc. v. Federal Communications Comm'n, 982 F.2d 1043, 1049 (7th Cir. 1994).

^{43/} Cincinnati Bell Tel. Co. v. Federal Communications Comm'n, 69 F.3d 752 (6th Cir. 1995).

32. Moreover, the Commission's 45-day access requirement is not a "logical outgrowth" out of its original NPRM.^{44/} The focus of the "logical outgrowth" test is "whether . . . [the party] . . . should have anticipated that such a requirement might be imposed."^{45/} In this instance, parties could not have anticipated that a 45-day access requirement would be imposed, as the Commission did not even address this issue in its NPRM. While the Infrastructure Owners recognize that an agency's notice need not identify every precise proposal that the agency may finally adopt, the notice must specify the terms or substance of the contemplated regulation.^{46/} The Commission adopted the 45-day access rule without having discussed this contemplated rule anywhere. Had the Commission addressed the 45-day access requirement in its NPRM, parties would have had an opportunity to respond to the proposal.^{47/}

^{44/} See United Steelworkers of America v. Marshall, 647 F.2d 1189, 1221 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981).

^{45/} Small Refiner Lead Phase-Down Task Force v. United States EPA, 705 F.2d 506, 549 (D.C. Cir. 1983).

^{46/} American Medical Ass'n v. United States, 887 F.2d 760, 767 (7th Cir. 1989).

^{47/} In short, the Commission failed to provide parties with adequate notice "to afford interested parties a reasonable opportunity to participate in the rule making process." Florida Power & Light Co. v. United States, 846 F.2d 765, 777 (D.C. Cir. 1988). "This requirement serves both (1) 'to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies'; and (2) to assure that the 'agency will have before it the facts and information relevant to a particular administrative problem.'" MCI Telecommunications Corp. v. Federal Communications Comm'n, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (citing National Ass'n of Home
(continued...)

33. Notwithstanding and without prejudice to their assertion that the adoption of the 45-day requirement is procedurally defective, the Infrastructure Owners submit that to the extent the FCC intended to require utilities to grant physical access to infrastructure within 45 days, the requirement is overly burdensome and unreasonable. Forty-five days in which to grant physical access to a utility's infrastructure fails to acknowledge or recognize the amount of internal coordination involved in processing requests for access. Further, it provides a utility with insufficient time to conduct the requisite studies to consider requests to access, for example, studies related to issues of capacity, safety, reliability and generally applicable engineering purposes. Moreover, it is questionable whether a party seeking access can obtain the necessary permits or franchises required before access may be granted within 45 days. Finally, this requirement is at odds with the notice of modifications requirement, that obligates utilities to provide existing attaching entities with 60 days advance notice prior to performing any modifications or alterations to the utility's infrastructure.

34. In the case of one company, simply addressing a request for access to its infrastructure can take six to eight weeks. The process of establishing potential routes, evaluating whether

⁴⁷ (...continued)

Health Agencies v. Schweiker, 690 F.2d 932, 949 (D.C. Cir. 1982)).

the requested route is feasible, creating a final route map, and performing the necessary safety and engineering studies on a case-by-case basis especially when a large number of poles is involved is one that cannot reasonably be accomplished within the 45-day time frame arbitrarily established by the FCC without imposing significant burdens on the utility and its resources. Thus, the 45-day access requirement should be rescinded not only because it was promulgated in violation of the APA but also because of the operational and administrative burdens it would impose on utilities.

B. The Conclusion that Any Type of Equipment Can Be Placed on a Utility's Infrastructure Is Arbitrary and Capricious

35. The FCC erroneously failed to limit the type of telecommunications equipment that may be attached under an interpretation of Section 224 that would afford mandatory access to poles, ducts, conduits or rights-of-way. Specifically, the FCC must clarify that only wire facilities -- coaxial cable and fiber optic facilities -- are covered by Section 224(f). Other types of facilities, including radio antennas, satellite earth stations, microwave dishes and other wireless equipment, are not covered by Section 224(f).^{48/}

36. The Pole Attachments Act, as enacted in 1978, was intended to encompass "pole attachments" by cable operators to poles, ducts, conduits and rights-of-way of utilities used, in whole or in part, for wire communications. While the 1996 Act

^{48/} See Reply Comments of Infrastructure Owners at ¶ 14.

expanded the scope of the statute to allow pole attachments by "telecommunications carriers" as well as cable operators, Congress did not make any further changes to the definition of "pole attachment." The placement of any type of equipment other than coaxial and fiber cable, including wireless equipment, on poles, ducts, conduits or rights-of-way raises a number of unique issues that were not intended to be covered by the Pole Attachments Act.

37. The term "pole attachments" in the Pole Attachments Act has referred to the stringing of coaxial cable along a utility's distribution pole system.^{49/} Any other type of equipment has not been considered a "pole attachment." Indeed, where any other type of equipment, such as wireless, has been placed on a utility's infrastructure at all, it generally has been sited on communications towers or transmission facilities, which are not covered under Section 224(f) as discussed below. Antennas, for example, require siting on a place higher than the typical distribution pole. Thus, in practical terms, utility poles, ducts, conduits or rights-of-way are unsuited for the placement of anything other than traditional coaxial or fiber cable facilities. Moreover, although wire service facilities typically

^{49/} See, e.g., In the matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report, 9 F.C.C.R. 7442, 7555 (1994). "Many cable operators lease space on utility poles in order to string wires and deliver programming. The contract between the cable operator and the owner of the pole is known as a 'pole attachment agreement.'"

require distribution pole access to reach customer homes, other types of facilities have a wide range of options in terms of siting, such as buildings, rooftops, communications towers, or water towers.^{10/}

38. In spite of the definition of "pole attachment" under the Pole Attachment Act of 1978, Congress did not see fit to alter the definition of a "pole attachment" for purposes of the 1996 amendments to the Pole Attachment Act; neither should the FCC of its own initiative expand that definition. Congress specifically did not include anything other than traditional wire equipment in the definition of "pole attachments."

39. Beyond the definition of "pole attachments," the definition of "utility" establishes that the statute is limited to wire facilities and equipment. Under Section 224(f), both as originally enacted and today, Congress defined a utility as:

any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or other rights-of-way used, in whole or in part, for any wire communications....^{11/}

The use of "wire communications" was in fact retained from the previous definition of utility; Congress considered such language and deliberately decided not to change it. Since, for purposes of the Act, a "utility" is a person utilizing poles, ducts,

^{10/} Unlike the "push" Congress gave the cable television industry, Congress did not see a need to grant access by cellular telephone companies to poles, ducts, conduits or rights-of-way because wireless facilities can be place in many different locations.

^{11/} 47 U.S.C. § 224(a)(1) (emphasis added).

conduits or rights-of-way "for any wire communication," the access provision necessarily should be construed to apply only to such uses. Had Congress intended otherwise, knowing of the historical interpretation of the Act as applicable only to wire communications, it would have amended the statute to reflect an intent that the Act also apply to wireless uses.^{12/}

40. The Pole Attachments Act covers only the attachment of wire equipment -- coaxial and fiber cable -- to utilities' poles, ducts, conduits or rights-of-way. There is nothing in the express language of the statute, its legislative history or the case law to support a contrary view. Thus, the Commission must rescind its finding on this issue.

C. The Commission's Determination that a Utility May Not Restrict Who Will Work in Proximity to Its Electric Lines Is Arbitrary and Capricious and Reflects a Failure to Comprehend Fully the Danger Associated With Such Work

41. In addressing the question of whether a utility can impose limitations on the class of workers that work in proximity to a utility's facility, the Commission determined that:

[a] utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria. Allowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress

^{12/} The Commission has an obligation to construe the language of Section 224(f) as narrowly as possible given the constitutional taking implications of Section 224(f). See, e.g., Delaware Lackawanna & W. R.R. Co. v. Morristown, 276 U.S. 182, 192. "[T]he taking of private property for public use is deemed to be against the common right and authority so to do must be clearly expressed."

sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes over rates to be paid to the workers.

In its effort to apply a uniform rule to all utilities and all types of infrastructure, the Commission has adopted a rule which ignores fundamental and significant differences between working in proximity to electric facilities and working in proximity to other telecommunication facilities.

42. Electric facilities are used for high voltage transmission and, thus, pose a real and significant danger to anyone working in close proximity to such facilities. To minimize the risk of harm to persons and property, utilities tap a pool of highly trained and experienced employees to perform any required work on such facilities. The level of experience required of an employee called upon to perform work on electric facilities is strictly related to the grade of danger associated with the work. For example, any employee who works in proximity to electric facilities in conduits may be required to have a minimum of ten years of experience. Qualified personnel require a unique understanding of the dangers associated with the performance of construction, maintenance or repair work in proximity to electrical wire. Personnel possessing the requisite skill and experience for certain situations are in short supply. Because of the hazards involved, a utility is understandably reluctant to allow a person with unknown skills to perform highly dangerous work. Only a person with a thorough knowledge of the

utility's specific operations and facilities can safely perform some types of construction, maintenance and repair work.

43. In complete disregard of the serious danger and concomitant liability associated with working in proximity to electric facilities, the Commission has fashioned a rule that simply is unworkable on a practical level. Most importantly, regardless of any broad form indemnity provision, electric utilities simply cannot sufficiently protect themselves from personal injury litigation and the high costs associated with an electrical outage when accidents occur as a result of work being performed by inadequately skilled or trained workers. Because of this enormous financial exposure to utilities and their ratepayers, it is incongruous that the Commission can first mandate access to this dangerous facility, and then eliminate the electric utility's ability to take certain measures to minimize the risk and liability this mandatory access may cause. The Commission's rule on worker access to utility infrastructure is unsupported by the statutory provisions relating to nondiscriminatory access and, thus, is capricious. For this reason, the rule must be rescinded to allow the utility, in the exercise of its best judgment, to adopt procedures that it deems are necessary to protect itself, persons requesting access to its infrastructure and the public in general from the dangers associated with exposure to high voltage electric lines. The utility must be allowed to dictate that, in some instances, only

its specifically trained and experienced personnel may access its infrastructure.

D. The Commission Improperly Incorporated Section 224(i) into Its Section 224(h) Analysis on Cost-Sharing Issues

44. In the First R&O, the Commission extensively discussed modification costs in its analysis of cost-sharing under Section 224(h), the newly enacted written notification provision. While that provision mentions modifications, the only costs addressed in Section 224(h) are accessibility costs. Modification costs are not involved. Confusingly then, the Commission adopted a rule addressing modification costs under the rulemaking notice to implement Section 224(h).^{31/}

45. Clearly, the Commission has misread Section 224(h).

That section reads:

Any entity that adds to or modifies its existing attachment after such notification shall bear a proportionate share of

^{31/} That rule paraphrases or adopts verbatim the language of Section 224(i). Section 224(i) states:

An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity

The Commission's rule, in turn, reads:

... a party with a preexisting attachment to a pole, conduct, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment of the modification of an existing attachment sought by another party.

47 C.F.R. § 1.1416.

the costs incurred by the owner in making such pole, duct, conduit, or right of way accessible.^{24/}

As the quoted passage established, Section 224(h) says nothing about modification, rearrangement, replacement, or make-ready costs. A discussion of modification or alteration costs is appropriate in the context of a rulemaking to implement Section 224(i) of the Pole Attachments Act. However, Section 224(i) is not a subject of this proceeding.^{25/}

46. Congress did not intend for modification costs to be governed by Section 224(h). Yet, the Commission's new rule, 47 C.F.R. § 1.1416, does just that. Because the Commission has improperly adopted rules implementing Section 224(i) under the guise of Section 224(h), it must strike 47 C.F.R. § 1.1416 as beyond the scope of this rule making. Any rule implementing Section 224(h) must address only the costs of accessibility, as specifically set forth by Congress in express language of that statutory provision.

^{24/} 47 U.S.C. § 224(h) (emphasis added).

^{25/} First R&O, ¶ 1201, n.2952 "Note that section 224(i) was not the subject of the Notice."

IV. The FCC's Interpretation Is Impermissible Because It Violates Congressional Intent

A. The Requirement for Uniform Application of the Rates, Terms and Conditions of Access Is Contrary to Law Because It Fails to Give Effect to the Statutory Requirement of Voluntary Negotiations

47. Section 224(e)(1) of the 1996 Act provides for voluntary negotiations whereby a utility and a telecommunications carrier may negotiate and enter into a binding agreement for access to the utility's infrastructure on terms that best suit the particular circumstances of both parties. Specifically, Section 224(e)(1) states that the Commission will prescribe regulations:

to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges.^{26/}

48. Clearly, Congress intended for utilities and requesting telecommunications carriers to voluntarily enter into binding, contractual arrangements. Congressional intent encouraging negotiated agreements, including negotiated rates, is clearly evidenced by the House/Senate Conference Committee's report explaining the 1996 Act and the amendments to the Pole Attachments Act enacted thereunder. That report states:

The conference agreement amends section 224 of the Communications Act by adding new subsection (e)(1) to allow parties to negotiate the rates, terms, and conditions for attaching to poles, ducts, conduits, and rights-of-way owned or controlled by utilities.^{27/}

^{26/} 47 U.S.C. § 224(e)(1) (emphasis added).

^{27/} H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 207 (1996) (emphasis added).

49. The concept behind negotiated agreements also comports with the public policies underlying the 1996 Act. The 1996 Act is intended "to provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition."^{58/} Even where Congress recognized that some regulation might be warranted during the transition period from a regulated to a deregulated market place, it put in place procedures to reduce or eliminate that regulation where possible.^{59/}

50. In its First R&O, the Commission recognized the deregulatory, pro-competition approach of the 1996 Act. For example, the Commission declared that it would enact rules and guidelines that are intended to "facilitate the negotiation and mutual performance of fair, pro-competitive access agreements." First R&O, at 1143.

51. Conflicting with Congress's notion of voluntary negotiated agreements, however, the Commission enacted a specific "rule" in its First R&O that states:

. . . where access is mandated, the rates, terms and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access. Except as specifically provided herein, the utility must charge all parties an

^{58/} H.R. Conf. Rep. No. 458, 104 Cong., 2d Sess. 113 (1996).

^{59/} See, e.g., 47 U.S.C. § 252(a)(1) (providing that an incumbent local exchange carrier and a party requesting interconnection may enter into a binding agreement without regard to the interconnection standards set forth in Sections 251(b) and (c)).