

attachment rate that does not exceed the maximum amount permitted by formula we have devised for such use^{50/}

52. Interpreted as a separate section, this Commission rule cuts across Congress's intent, in promulgating Section 224(e)(1) of the 1996 Act, that there be voluntarily negotiated agreements. If rates, terms and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access, there is no reason to enter into voluntary negotiations with other carriers.

53. In interpreting a statute, agencies and courts must look to a construction that gives effect to the statute as a whole.^{51/} A construction that renders meaningless one or more provisions of the statute must be avoided, as " . . . it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law . . ." ^{52/}

54. In the present context, the Commission's decision that the statute requires uniform application of rates, terms and conditions for access ignores the 1996 Act's statutory provision allowing parties to negotiate their own terms. For this reason, the agency must correct this clear error by adopting regulations

^{50/} First R&O, ¶ 1156 (emphasis added).

^{51/} United States v. PUC of District of Columbia et al., 151 F.2d 609, 613 (1945).

^{52/} Stafford v. Briggs, 444 U.S. 527, 535 (1980) (quoting Brown v. Duchesne, 60 U.S. (19 How.) 183, 194 (1857)) (emphasis added).

that will enable parties to negotiate the rates, terms and conditions of their agreements.

B. The FCC's Finding that the Pole Attachments Act Applies to Transmission Facilities Is Contrary to the Plain Meaning of the Statute and the Congressional Intent

55. In the First R&O, the Commission suggested that transmission facilities might be covered by the Pole Attachments Act and declined to make a blanket determination that Congress did not intend to include such facilities under Section 224(f)(1).^{53/} That suggestion contradicts the plain meaning of the statute and the legislative history of the Pole Attachments Act, as amended, both of which clearly establish that Congress did not intend for transmission facilities to be included under Section 224(f).

56. The Pole Attachments Act was enacted to provide the then nascent cable television industry with access to the distribution poles of utilities, in an effort to foster the development of the CATV industry. Cable providers asserted that they required access to distribution poles in order to wire customer homes. Congress intended access to be limited to distribution poles; its intentions did not change under the 1996 Act. To the contrary, had Congress intended to mandate nondiscriminatory access of transmission facilities, it would have specifically included "transmission facilities" in the precise language it used.

^{53/} First R&O, ¶ 1184.

57. The meaning of a statute must first be sought in the language in which the act is framed.^{54/} If that language is plain, then there is no room for alternative construction.^{55/} Moreover, the expression of a discrete group of items creates an inference that all omissions are meant to be excluded.^{56/}

58. Based on its plain language, the Pole Attachments Act encompasses only "poles, ducts, conduits, and rights-of-way."^{57/} Congress did not name, and thus did not intend to include, transmission facilities in the scope of the infrastructure covered by Section 224(f).

59. As noted above, the 1996 Act's amendments did not change the type of utility infrastructure covered by the original 1978 Act. For this reason, it is appropriate to look not only to the 1996 Act's legislative history to glean Congressional intent, but also to that of the earlier statute.^{58/} For example, the legislative history of the 1978 Pole Attachments Act notes that the FCC's jurisdiction over pole attachments is triggered only

^{54/} Wolverine Power Co. v. FERC, 963 F.2d 446, 449-450 (D.C. Cir. 1992).

^{55/} Id.

^{56/} See Nat'l Resources Defense Council v. Reilly, Adm'r. EPA and EPA, 976 F.2d 36, 41 (D.C. Cir. 1992).

^{57/} Additionally, words not defined in a statute should be given their ordinary or common meaning. United States v. PUC of District of Columbia et al., 151 F.2d 609, 613 (D.C. Cir. 1945). The Infrastructure Owners are unaware of any instance in which Congress has included transmission facilities in the definition of poles, ducts, conduits and rights-of-way.

^{58/} See generally, Blum v. Stenson, 465 U.S. 886, 896 (1984).

where space on a utility pole has been designated and is actually being used for communications services by wire or cable.^{59/}

Thus, transmission poles, which are not used for stringing communications wires, would not be subject to FCC jurisdiction and logically are not within the scope of the Act.^{70/}

60. Moreover, in its Reconsideration Memorandum Opinion and Order revising the 1978 rate formula, the Commission stated that "[t]he cable television industry leases space on existing distribution poles owned by electric utilities and telephone companies to attach its coaxial cable and related equipment."^{71/} Additionally, in at least two other decisions addressing FCC rate calculations, the Commission states that "towers and extremely tall poles" are pole plants not normally used for attachments.^{72/} These references are clear examples of the Commission's interpretation that, as the plain language of the statute suggests, the Pole Attachments Act does not apply to transmission towers and other transmission facilities. This interpretation is consistent with the prevailing understanding

^{59/} S. Rep. No. 95-580 at 15, reprinted in 1978 U.S.C.C.A.N. 109, 123.

^{70/} Id. at 123-124.

^{71/} See In the Matter of Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 4 F.C.C.R. 468 (1989) (emphasis added).

^{72/} In the Matter of Capital Cities Cable, Inc. v. Mountain States Tel. and Tel. Co., 56 Rad. Reg. 2d (P&F) 393, 399 n.10 (1984); In the Matter of Logan Cablevision, Inc. v. Chesapeake and Potomac Tel. Co. of West Virginia, 1984 FCC Lexis 2400 (1984).

within the electric utility industry that the term "poles" means distribution poles only. Accordingly, the Commission should correct its finding on the issue and specifically interpret the Pole Attachments Act to exclude transmission facilities.

C. **The FCC Violated the Plain Language of the Pole Attachments Act to the Extent It Concluded that the Use of any Single Piece of Infrastructure for Wire Communications Triggers Access to All Other Infrastructure**

61. In its First R&O, the FCC discusses the issue of when the mandatory access provision of Section 224(f) is triggered. According to the Commission, the definition of "utility" addresses that issue.^{23/} A "utility" -- a local exchange carrier or an electric, gas, water, steam or other public utility who owns or controls poles, ducts, conduits or rights-of-way -- must grant access if those poles, ducts, conduits or rights-of-way, are "used, in whole or in part, for wire communications."^{24/} The question then becomes the proper interpretation of the phrase "used, in whole or in part, for wire communications." The Commission made three critical findings in this regard.

62. First, the Commission determined that the plain language of the statute establishes that a "utility" may deny access to its facilities if the utility has refused to permit any wire communications use of its facilities and rights-of-way.^{25/}

^{23/} First R&O, ¶s 1171-1174.

^{24/} Id., ¶ 1172.

^{25/} First R&O, ¶ 1173.

Second, the Commission found that "the use of any utility pole, duct, conduit or right-of-way for wire communications triggers access to all poles, ducts, conduits and rights-of-way owned or controlled by the utility, including those that are not currently used for wire communications."^{26/} Third, the Commission found that the use of poles, ducts, conduit and rights-of-way for a utility's private internal communications constitute "wire communications," thereby triggering the access requirement.^{27/} These findings violate the Congressional intent of the Pole Attachments Act and, for this reason, are impermissible constructions of the statute.

63. The Commission relies on the use of the phrase "in whole or in part" to support its conclusions. According to the Commission, that phrase demonstrates that Congress did not intend for a utility to be able to restrict access to the exact path used by the utility for wire communication.^{28/} The Infrastructure Owners disagree.

64. Congress has addressed the precise question of whether the phrase "in whole or in part" refers to (1) the use of an individual pole, in whole or in part, or (2) to the use of a utility's entire electric distribution network, in whole or in part, for wire communications. Although not addressed in the legislative history of the 1996 Act's amendments, Congress spoke

^{26/} Id.

^{27/} Id., ¶ 1174.

^{28/} Id., ¶ 1173.

to the question in 1977, in enacting the original Pole Attachments Act.^{79/} There, Congress indicated two conditions precedent to Commission jurisdiction over pole attachments:

- (1) That communications space be designated on the pole;
and,
- (2) That a CATV system use the communications space, either alone or in conjunction with another communications entity.^{80/}

65. This language establishes that Congress intended the Commission's jurisdiction to be invoked on a pole-by-pole basis, not a systemwide basis. Plainly then, the phrase "used, in whole or in part" refers to the use of a single pole.

66. This interpretation of the statutory language is consistent with the underlying nature of access requests. Those requests are made on a specific route or segment basis, depending on the needs of the requesting party. Similarly, the decision as to whether access may be granted consistent with existing capacity, safety, reliability and generally applicable engineering purposes is made on a pole-by-pole basis. Even the statutory rate methodology recognizes variations among poles -- in terms of the number of attaching parties, the space occupied

^{79/} Because the language in question was not amended by the 1996 Act's amendments, the earlier legislative history is relevant in determining the intent of Congress.

^{80/} 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).

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,^{21/} 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

^{21/} 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.^{83/} 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&Q, 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&Q, 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.

^{83/} 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.

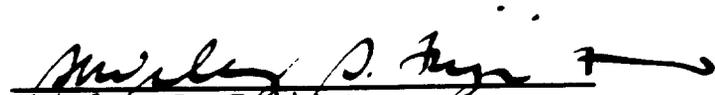
CONCLUSION

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
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BEFORE THE
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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.