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

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[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

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[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.

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[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

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[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.

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[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

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[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&O 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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