

infrastructure for internal communications purposes subjects it generally to the nondiscriminatory access provisions of the 1996 Act.<sup>35/</sup> This position goes well beyond Congressional intent in enacting the 1996 Act. A utility that is not itself engaged in wire communications, other than for internal communications, is not subject to the access requirements. This is so despite the likelihood that such access would be useful to cable or telecommunications carriers in competing in their respective markets. The FCC's position to the contrary is not supported by the 1996 Act and should be rescinded.

IV. Clarification of the Sixty-Day Advance Notice Requirement Will Avoid Litigation of the Issue

24. Several parties oppose the Infrastructure Owners's request for clarification of the Commission's 60-day notice requirement.<sup>37/</sup> AT&T asserts that the FCC's 60-day notice requirement properly balances the interests of incumbent utilities and competitive LECs.<sup>38/</sup> NCTA asserts that there is no justification for providing less than 60 days' notice of alterations or modification.<sup>39/</sup> Continental Cablevision et al. assert that the 60-day notice period is a common period for joint coordination of projects requiring facilities modification and represents a reasonable compromise.<sup>40/</sup>

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<sup>36/</sup> See, e.g., AirTouch Comments at 23.

<sup>37/</sup> Infrastructure Owners' Petition at 45-48.

<sup>38/</sup> AT&T Opposition at 40.

<sup>39/</sup> NCTA Opposition at 31.

<sup>40/</sup> Continental Cablevision et al. Opposition at 14-15.

25. The Infrastructure Owners do not necessarily disagree. They simply request that the rule be clarified to provide that reasonable efforts to provide 60 days advance notice of non-routine, non-emergency modifications constitute compliance. The Infrastructure Owners's position is an attempt to provide some flexibility to meet a myriad of diverse circumstances, thereby avoiding needless, costly litigation. This position is consistent with the FCC's approach in other areas.<sup>41/</sup>

V. Reconsideration Is Not Warranted Because the FCC's Decision Is Correct

A. The Commission Properly Found that States Need Not Certify that They Regulate Matters of Access

26. NCTA and the California Cable Television Association ("CCTA") urge the FCC to require States to certify that they regulate matters of access. They further assert that the states must regulate access in a manner consistent with the Pole Attachments Act and the FCC's First R&O.<sup>42/</sup> These arguments are wholly without textual basis in the 1996 Act and, as a matter of law, are incorrect: Section 224 does not provide for, nor does the Commission have authority to require, State certification of access matters. Similarly, the FCC has no authority to establish a federal policy on access which the states must follow.

27. Congress has spoken to this precise issue. States need not certify on access matters; to the contrary, such a requirement is conspicuously absent from Section 224, in contrast to the express requirement that States certify that they regulate

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<sup>41/</sup> See, e.g., First R&O, ¶ 1159.

<sup>42/</sup> NCTA Opposition at 31-32; CCTA Opposition to Petitions for Reconsideration and Clarification ("CCTA Opposition") at 5-6.

the rates, terms and conditions of pole attachments.<sup>43/</sup> The Commission properly followed the plain language of the statute, finding that the amendments to the reverse preemption scheme enacted as part of the 1996 Act do not require the States to certify as to matters of access. The Commission's proper determination should not be disturbed.

28. NCTA and CCTA also assert that the States must regulate access in a manner consistent with the federal law.<sup>44/</sup> However, the FCC has no jurisdiction "in any case where such matters are regulated by a State."<sup>45/</sup> Thus, once a State has preempted the FCC's jurisdiction, the FCC has no further statutory authority to review the State's access rules or regulations to ensure conformity with the federal rules and regulations. The FCC properly found that it has no authority to establish a nationwide policy on access decisions, or to require States that have preempted its jurisdiction on access matters to conform their rules and regulations to the federal law.<sup>46/</sup> NCTA's and CCTA's Oppositions are meritless.

**B. Neither the FCC Nor A Party Can Expand the Scope of the Pole Attachments Act to Encompass a Right of Access to Roofs and Risers**

29. WinStar reasserts in its Opposition, as it did in its Reconsideration Petition, that "access to roofs and related riser is, by definition, access to the critical right of way for local

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<sup>43/</sup> 47 U.S.C. § 224(c)(2).

<sup>44/</sup> NCTA Opposition at 32; CCTA Opposition at 6.

<sup>45/</sup> 47 U.S.C. § 224(c)(1).

<sup>46/</sup> First R&O, ¶ 1238.

exchange carriers such as WinStar..."<sup>47/</sup> Specifically, WinStar contends that the 1996 Act provides it with a right of access to "utility roofs."<sup>48/</sup> WinStar explains that "it is not seeking access to every piece of equipment or real property owned or controlled by the utility," but instead "is seeking access to legitimate rights of way that will be effective in enabling wireless local exchange carriers to expand their local exchange distribution networks."<sup>49/</sup>

30. The apparent basis for WinStar's contention that "utility roofs" are rights-of-way under the 1996 Act is that (1) LECs and utilities maintain microwave and wireline networks used for telecommunications purposes, (2) such LECs and utilities are free to site microwave facilities upon their roofs, whether they choose to do so or not,<sup>50/</sup> and (3) denying WinStar access to utility roofs would unreasonably restrict its ability to compete with LECs and utilities that have the option of siting wireless facilities on their roofs.<sup>51/</sup> In essence, WinStar's reasoning appears to be that, because rooftops might be useful or "effective"<sup>52/</sup> to a telecommunications carrier in expanding its

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<sup>47/</sup> WinStar Opposition at 6.

<sup>48/</sup> Id. at 7.

<sup>49/</sup> Id. at 9.

<sup>50/</sup> Id.

<sup>51/</sup> WinStar at 7-8.

<sup>52/</sup> Id. at 9.

distribution network, rooftops are rights-of-way under Section 224. The FCC properly rejected this position.<sup>33/</sup>

31. Both the plain language and the legislative history of the statute undermine WinStar's position.<sup>34/</sup> The rights conferred by Section 224 extend only to "poles, ducts, conduits and rights of way." The term "rights of way" has historically referred to a right of passage over land owned by another.<sup>35/</sup> Where Congress intended to reach "property," as distinguished from "rights-of-way," it expressly indicated its intention to do so.<sup>36/</sup>

32. Section 224 does not provide for access to a utility's actual or potential "distribution network," as WinStar appears to be contending,<sup>37/</sup> except insofar as the network consists of the listed items. Under WinStar's reasoning, if a utility's property could be used by the utility to site wireless equipment, and if such siting would be "effective in enabling wireless local exchange carriers to expand their local exchange networks,"<sup>38/</sup> that property is a "right of way" for purposes of Section 224.

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<sup>33/</sup> First R&O, ¶ 1185.

<sup>34/</sup> See Infrastructure Owners' Opposition to Petition for Clarification or Reconsideration of WinStar Communications, Inc. at 4-9.

<sup>35/</sup> See, e.g., Black's Law Dictionary (Abridged Fifth Edition 1983) at 689: "The term [right of way] sometimes is used to describe a right belonging to a party to pass over land of another . . . ."

<sup>36/</sup> See, e.g., Section 704 of the 1996 Act, codified at 47 U.S.C. § 332(c).

<sup>37/</sup> WinStar Opposition at 7.

<sup>38/</sup> Winstar Opposition at 9.

Carried to its logical conclusion, WinStar's argument would permit a telecommunications carrier to site its facilities in the lobby of a utility's headquarters, a location potentially available to the utility, if it would be "effective" to the carrier in expanding its network. Section 224 does not go that far in according access to telecommunications carriers, but instead clearly circumscribes the extent of access. Because WinStar's contrary interpretation of Section 224 constitutes an unwarranted expansion of the rights of access conferred by Congress, it must be rejected.

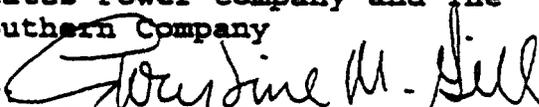
Conclusion

WHEREFORE, THE PREMISES CONSIDERED, American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company, and The Southern Company urge the Commission to deny those Oppositions to Petitions for Reconsideration inconsistent with the views expressed herein.

Respectfully submitted,

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I hereby Certify that on this 12th day of November 1996, I caused true and correct copies of the Reply to Oppositions to Petitions for Reconsideration of the First Report and Order of American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company, and The Southern Company to be served via First-Class Mail postage prepaid on:

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