DOCKET FILE COPY ORIGINAL

FCC MAIL SECTION

OCT 28 3 16 PM '99

DISPATCHED BY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

ORDER ON RECONSIDERATION

Adopted: October 20, 1999 **Released: October 26, 1999**

By the Commission: Commissioners Furchtgott-Roth and Powell concurring in part, and dissenting in part and issuing separate statements.

I. INTRODUCTION

1. In this *Order on Reconsideration*, we address petitions for reconsideration or clarification of the *Local Competition Order*[1] regarding the rules implementing access provisions of the Communications Act of 1934[2] ("the Act"), as amended by the Telecommunications Act of 1996[3] ("1996 Act"). In the *Local Competition Order*, the Commission established a program for nondiscriminatory access to utilities' poles, ducts, conduits and rights-of-way, consistent with its obligation to institute a fair, efficient and expeditious regulatory regime for determining just and reasonable pole attachment rates with

[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd. 15499, 15505 ¶ 1 (1996) (*Local Competition First Report and Order*), *aff'd in part and vacated in part sub nom.* Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom.* Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part, and remanded sub nom.* AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721 (1999) (*Iowa Utilities Board*), *Order on Reconsideration*, 11 FCC Rcd. 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd. 19738 (1996), *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 12460 (1997), *appeals docketed*, *Second Further Notice of Proposed Rulemaking*, FCC 99-70 (rel. Apr.16, 1999) (*UNE Further NPRM*).

[2] Communications Act of 1934 ("Communications Act") 47 U.S.C. §§ 151, *et seq.*

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), codified at 47 U.S.C. §§ 151, *et seq.*

a minimum of administrative costs.[4] Herein we consider petitioners' requests for reconsideration or clarification of the access requirements of the *Local Competition Order*, including requirements pertaining to capacity expansion and reservation of space, utilities' access obligations, worker qualifications, the timing and manner of notification of modifications, allocation of modification costs, and state certification of access regulation.[5]

II. BACKGROUND

A. Local Competition Order

2. Section 224 of the Act, as amended by the 1996 Act, imposes upon all utilities,[6] including local exchange carriers ("LECs"), the duty to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[7] The 1996 Act also added Section 251(b) to the Act, regarding interconnection obligations of all local exchange carriers (LECs). Section 251(b)(4) expressly imposes upon all LECs the duty to provide "access to the poles, ducts, conduits, and rights-of-way of such carrier[s] to competing providers of telecommunications services on rates, terms and conditions that are consistent with section 224."

3. Section 224(b) grants the Commission its general authority to regulate the rates, terms, and conditions for, and access to, poles owned or controlled by a utility for purposes of "pole attachments."[8] Section 224(a)(4) defines "pole attachment" as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or

---

[4] *Local Competition Order*, 11 FCC Rcd at 16058-59. *See* 47 U.S.C. § 224(b)(1) and (2).

[5] In its petition for reconsideration or clarification in this proceeding, WinStar asked the Commission to determine that section 224 encompasses the right of access to building rooftops and riser conduit that a utility owns or controls. Oppositions and comments were filed by American Electric Power Service Corporation *et al.* (AEPSC *et al.*), Ameritech, Duquesne Light Company (Duquesne), Edison Electric Institute and UTC (EEI/UTC), Sprint Corporation (Sprint), and United States Telephone Association (USTA). Replies were filed by AEPSC *et al.*, Duquesne, and WinStar. The question of whether section 224 mandates such access raises potential implementation concerns not fully addressed in the record in this proceeding. The Commission requested further comment on these issues in a Notice of Proposed Rulemaking, Notice of Inquiry, and Third Further Notice of Proposed Rulemaking. *See Notice of Proposed Rulemaking, Notice of Inquiry and Third Further Notice of Proposed Rulemaking*, WT Docket No. 99-217, FCC 99-141. Accordingly, the aforementioned comments were referred to the NPRM proceeding and are not addressed herein.

[6] A "utility" is "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 rights-of-way used, in whole or in part, for wire communications," but does not include any railroad, any cooperative, or any federally or state-owned entities. 47 U.S.C. § 224(a)(1).

[7] 47 U.S.C. § 224(f)(1). *See* 47 U.S.C. § 153(44) (definition of "telecommunications carrier"). For purposes of section 224, the term "telecommunications carrier" excludes any incumbent LEC as that term is defined in section 251(h) (*see* 47 U.S.C. § 224(a)(5)).

[8] 47 U.S.C. § 224(b)(1) and (2).

controlled by a utility."[9] Section 224(a)(1) defines "utility" to include any entity that owns or controls "poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communication."[10] Notwithstanding this general grant of authority, section 224(c)(1) states that the Commission shall not regulate rates, terms, and conditions for, or access to, pole attachments where such matters are regulated by the state.[11]

4. As summarized below, the *Local Competition Order* adopted general rules and guidelines designed to give parties flexibility to reach agreements on access to utility-controlled poles, ducts, conduits, and rights-of-way, without the need for regulatory intervention. The *Local Competition Order* also provides for a dispute resolution mechanism when negotiations fail, and establishes requirements concerning modifications to pole attachments and the allocation of the cost of such modifications.[12] In addition, we have interpreted the revised requirements of section 224 governing rates, terms and conditions of telecommunications carriers' pole attachments to utility poles in the *Pole Attachment Telecommunications Rate Order*.[13]

5. In the *Local Competition Order*, the Commission determined that "the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis."[14] The Commission found that the large number of variables present with respect to poles and conduit nationwide prevented it from creating a comprehensive set of specific rules.[15] Instead, the Commission adopted several general rules, supplemented by guidelines and presumptions (summarized below) that are intended to facilitate the negotiation and mutual performance of fair, pro-competitive access arrangements.[16]

---

[9] 47 U.S.C. § 224(a)(4).

[10] 47 U.S.C. § 224(a)(1).

[11] Section 224 specifically provides that: "Nothing in [section 224] shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions or access to poles, ducts, conduits, and rights-of-way as provided in [section 224(f), for pole attachments in case where such matters are regulated by the State." 47 U.S.C. § 224(c)(1). As of 1992, nineteen states had certified to the Commission that they regulated the rates, terms, and conditions for pole attachments. *See* Public Notice, *States That Have Certified That They Regulate Pole Attachments*, 7 FCC Rcd 1498 (1992).

[12] *Local Competition Order* at para. 1122.

[13] *In the Matter of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, FCC 98-20 (rel. Feb. 6, 1998) (*Pole Attachment Telecommunications Rate Order*).

[14] *Local Competition Order* at para. 1143.

[15] *Id.*

[16] The Commission stated that it would "monitor the effect of this approach and propose more specific rules at a later date if reasonably necessary to facilitate access and the development of competition in telecommunications and cable services." *Local Competition Order* at para. 1143.

6. Specific Rules. In the *Local Competition Order*, we established five rules of general applicability concerning access to a utility's poles, ducts, and rights-of-way. The aim of these procedures is to require utilities to justify any conditions they may place on access.[17] First, in evaluating a request for access, a utility may continue to rely on widely-accepted codes, such as the National Electric Safety Code (NESC), to prescribe standards with respect to capacity, safety, reliability, and general engineering principles.[18] Second, federal requirements, such as those imposed by the Federal Energy Regulatory Commission (FERC) and the Occupational Safety and Health Administration (OSHA), will continue to apply to utilities to the extent such requirements affect requests for attachments to utility facilities under section 224(f)(1).[19] Third, the Commission will presume state and local requirements affecting pole attachments to be reasonable, and are entitled deference even if the state has not sought to preempt federal regulations under section 224(c).[20] Fourth, the rates, terms, and conditions of mandated access must be applied to all attaching telecommunications carriers and cable operators on a non-discriminatory basis. The utility must charge all parties an attachment rate that does not exceed the maximum amount permitted by the formula the Commission has devised for such use.[21] Fifth, a utility may not favor itself over other parties with respect to the provision of telecommunications or video programming services.[22]

7. Guidelines In addition to the five rules of general applicability, the *Local Competition Order* established certain guidelines and presumptions addressing specific access issues that were raised in the record of the *Local Competition* proceeding. These guidelines may be summarized as follows:

8. *Capacity Expansions*: In the *Local Competition Order*, we recognized that section 224(f)(2) provides that an electric utility may deny access on a non-discriminatory basis "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." We also determined that non-electric utilities may take these factors into consideration when evaluating an access request.[23] However, the lack of capacity on a particular facility does not automatically entitle a utility to deny a request for access, since the modification costs to increase capacity will be borne only by the parties directly benefitting from this modification. If a telecommunications carrier or cable

[17] *Local Competition Order* at para. 1150.

[18] *Id.* at para. 1151. The Commission further determined that utilities may incorporate such standards into their pole attachment agreements in accordance with section 224(f)(2).

[19] *Local Competition Order* at para. 1152.

[20] *Id.* at para. 1153. In reaching this conclusion, the Commission determined that "state and local requirements affecting attachments are entitled to deference even if the state has not sought to preempt federal regulations under section 224(c)." *Id.* Nonetheless, the Commission concluded that its rules would prevail where a local requirement directly conflicts with a rule or guideline adopted by the Commission. *Id.* The Commission further noted that, although state and local governments have general authority to regulate in the area of pole attachments, section 253 invalidates all state or local legal requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate of intrastate telecommunications service." 47 U.S.C. § 253.

[21] *Local Competition Order* at para. 1156.

[22] *Local Competition Order* at para. 1157.

[23] *See* para. 11, below.

operator's request for access cannot be accommodated due to a lack of available capacity, a utility must modify the facility to increase its capacity under the principle of nondiscrimination.[24] Before denying access based upon a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access. [25] Sections 224(f)(1) and 224(f)(2) require a utility to take all reasonable steps to accommodate access in these situations.[26] Telecommunications carriers or cable operators seeking access are not required to exhaust any possibility of leasing capacity from other providers before requesting a modification to expand capacity.[27]

9. *Reservation of Space by Utility*: In the *Local Competition Order*, we recognized that a balance needed to be struck between the non-discrimination principal of section 224(f), which prohibits a utility from favoring itself with respect to the provision of telecommunications and video services, and the need for a utility to be able to respond quickly to new circumstances affecting the provision of core utility service.[28] Accordingly, we found that a utility may not reserve space for the provision of telecommunications or video service to the detriment of a would-be entrant to the telecommunications or video market.[29] For example, an electric utility may not reserve space to provide telecommunications service, and then force an attaching telecommunications provider to bear the cost of modifying the facility to increase capacity.[30] An electric utility may, however, designate space as reserved for its core utility service. Such reservation must be consistent with a bona fide development plan that reasonably and specifically projects a need for that space for the provision of core electric service.[31] A utility must also permit cable operators and telecommunications carriers to use the reserve space until the utility has an actual need for the space. At that time, the utility shall give the displaced cable operator or telecommunications carrier the opportunity to pay for the cost of any modifications needed to expand capacity and maintain the attachment.[32]

10. *Access 'Triggers'*: The access obligations of section 224(f) apply to a utility that uses its poles, ducts conduits or other rights-of way "in whole or in part, for wire communications."[33] For example, an electric utility would not be required to grant access under section 224(f) if its facilities are not used for wire communications. However, if a portion of the electric utility's poles, ducts, conduits

---

[24] *Local Competition Order* at para. 1161-62.

[25] *Id.* at para. 1163.

[26] *Id.*

[27] *Id.* at para. 1164.

[28] *Id.* at para. 1168.

[29] *Id.* at para. 1170.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *See* 47 U.S.C. § 224(a)(1); 47 U.S.C. § 224(f).

or rights-of-way are used for wire communication, access is triggered for all such facilities owned or controlled by the utility, including those not used for wire communication. In this context, 'wire communication' includes an electrical utility's own internal communications.

11. *Application of Section 224(f) to Non-Electric Utilities*: The Commission concluded that the statutory exception to access to electric utilities' poles, ducts, conduits and rights-of-way enunciated in section 224(f)(2) regarding denials based on capacity, safety, reliability, and generally applicable engineering purposes, should also be available to other utilities, provided the assessment of such factors is done in a nondiscriminatory manner.[34] The Commission cautioned that, with respect to non-electrical utilities' denials of access, the issues will be very carefully scrutinized, particularly when the parties concerned have a competitive relationship.[35] Thus, non-electrical utilities generally must accommodate requests for access, except for reasons of capacity, safety, reliability and generally applicable engineering purposes that cannot reasonably be ameliorated by modification.[36]

12. *Third-Party Property Owners*: In the *Local Competition Order*, we stated that the access obligations of section 224(f) apply when, as a matter of state law, the utility owns or controls its right-of-way to the extent that it is able to permit access. A utility should exercise its eminent domain authority to expand an existing right-of-way over private property to accommodate a request for access.[37]

13. *Qualified Workers*: A utility may require that individuals who 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 must be able to use any individual workers who meet these criteria.[38]

14. *Modification Notification*. Section 224(h) requires any utility that intends to modify or alter a pole, duct, conduit, or right-of-way to "provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment."[39] Absent a private agreement establishing notification procedures, written notification of a modification must be provided to parties holding

[34] *Id.* at paras. 1123, 1175-77. Section 224(f)(2) permits "a utility providing electric service [to] deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes." 47 U.S.C. § 224(f)(2).

[35] *Local Competition Order* at 1177.

[36] *Id.*

[37] *Id.* at para. 1179-1181.

[38] *Id.* at para 1182.

[39] 47 U.S.C. § 224(h).

attachments on the facility to be modified at least 60 days prior to the commencement of the physical modification itself.[40]

15. *Allocation of Modification Costs.* To the extent the cost of a modification is incurred for the specific benefit of any particular party, the benefitting party will be obligated to assume the cost of the modification, or to bear its proportionate share of cost with all other attaching entities participating in the modification. If a user's modification affects the attachments of others who do not initiate or request the modification, such as the movement of other attachments as part of a primary modification, the modification cost will be covered by the initiating or requesting party. Where multiple parties join in the modification, each party's proportionate share of the total cost shall be based on the ratio of the amount of new space occupied by that party to the total amount of new space occupied by all of the parties joining in the modification.[41]

16. In addition, the *Local Competition Order* found that if a party uses a proposed modification as an opportunity to adjust its existing attachment, the party should share in the overall cost of the modification to reflect its contribution to the resulting structural change. A utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost.[42] To protect the initiators of modifications from absorbing costs that should be shared by others, the *Local Competition Order* permitted the modifying party or parties to recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification.

17. *Dispute Resolution.* Under the procedures adopted in the order, a utility must grant or deny a request for access within 45 days of a written request. If the utility denies the request, it must do so in writing, and the reasons given for the denial must relate to the permissible grounds for denying access (*e.g.*, lack of capacity, safety, reliability, or engineering concerns).[43]

18. *Just and Reasonable Rates.* Section 224(b)(1) states that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable."[44] Section 224 was adopted by Congress in 1978 to ensure that cable operators are charged just and reasonable rates for attachments to utility poles, ducts, conduits, or rights-of-way. In the 1996 Act, Congress added telecommunications carriers as beneficiaries of the Commission's oversight of

---

[40] *Local Competition Order* at para. 1209. The notice should be sufficiently specific to apprise the recipient of the nature and scope of the planned modification. If the contemplated modification involves an emergency situation for which advanced written notice would prove impracticable, the 60 day notice requirement does not apply. Rather, notice should be given as soon as practicable. *Id.*

[41] *Local Competition Order* at para. 1211.

[42] *Id.* at para. 1212. On the other hand, the Commission stated that an attaching party, incidentally benefitting from a modification, but not initiating or affirmatively participating in one, should not be responsible for the resulting cost. *Id.* at para. 1213.

[43] *Local Competition Order* at para. 1224.

[44] 47 U.S.C. § 224(b)(1).

pole attachments. Section 224(e)(1) governs the rates for pole attachments used in the provision of telecommunications services, including single attachments used jointly to provide both cable and telecommunications service. Under this section, the Commission must prescribe regulations to "ensure that a utility charges just, reasonable, and nondiscriminatory rates for...pole attachments" used by telecommunication carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges.[45]

19. Pursuant to the directive in section 224(e)(1), the Commission adopted, in the *Pole Attachment Telecommunications Rate Order*, regulations establishing the formula for rates governed by section 224(e). Until these requirements become effective on February 8, 2001 (five years after the enactment of the 1996 Act),[46] Congress has directed that the cable operator rate methodology set forth in section 224(d)(1) shall also govern pole attachments used by a telecommunications carrier, to the extent such carrier is not a party to a pole attachment agreement, to provide any telecommunications service.[47]

20. Section 224(d)(1) specifically provides that a rate is "just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way."[48]

21. Currently, application of the section 224(d)(1) formula results in a rate that ranges from the statutory minimum ("additional" costs) to the statutory maximum (fully allocated costs).[49] Additional costs include pre-construction survey, engineering, make-ready and change-out costs incurred in preparing for pole attachments.[50] Fully allocated costs refer to the portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles that is equal to the portion of usable pole space that is occupied by an attacher. In the *Local Competition Order*, the Commission stated that, "except as specifically provided herein, the utility must charge all parties an attachment rate that does not exceed the

---

[45] The section also sets forth a transition schedule for implementation of the new rate formula for telecommunications carriers. Until the effective date of the new formula governing telecommunications attachments, the existing pole attachment rate methodology of cable services is applicable to both cable television systems and to telecommunications carriers.

[46] Section 224(e)(4) states that "[t]he regulations under [section 224(e)(1)] shall become effective 5 years after the date of enactment of the [1996 Act]." 47 U.S.C. § 224(e)(4). Because the 1996 Act was enacted on February 8, 1996, section 224(e)(4) requires the Commission to implement the telecommunications carrier rate methodology beginning February 8, 2001.

[47] 47 U.S.C. § 224(d)(3).

[48] 47 U.S.C. § 224(d)(1).

[49] *See Pole Attachment Fee Order*, 2 FCC Rcd 4387 (1987) at para. 6.

[50] "Make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. *See Pole Attachment Fee Order* at n.22. A pole "change-out" is the replacement of a pole to accommodate additional users. *Id.*

maximum amount permitted by the formula we have devised for such use, and that we will revise from time to time as necessary."[51]

B. Petitions

22. Twelve petitions for reconsideration or clarification of the *Local Competition Order* raising issues with respect to the "Access to Rights-of-Way" portion of the Order are addressed in this *Order on Reconsideration*.[52] The issues raised fall into seven major areas: (1) the scope of the right of access to utilities' poles, ducts, conduits and rights-of-way; (2) the scope of the utilities' obligations with respect to expansion and reservation of space; (3) the question of when a utility may be deemed to be providing "communications" over its facilities so as to trigger the access obligation; (4) worker qualifications; (5) timing and manner of notification of modifications; (6) allocation of modification costs; and (7) the need for States to certify their regulation of access in order to assert jurisdiction pursuant to section 224(c). We address these issues below sequentially.

III. DISCUSSION

A. Access to Rights of Way

1. Access to Transmission Facilities

a. Background

23. Section 224(f)(1) provides that a utility "shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." Several electric utilities had asserted that high voltage transmission facilities should not be accessible by telecommunications carriers or cable operators under section 224(f)(1), arguing that permitting attachments to transmission facilities involves heightened safety and reliability concerns.[53] In the *Local Competition Order*, we rejected these claims, stating that the breadth of the language contained in section 224(f)(1) precludes a blanket determination that Congress did not intend to include transmission facilities.[54] To the extent safety and reliability concerns are greater at a transmission facility, the statute permits a utility to impose stricter conditions on any grant of access or, in appropriate circumstances, to deny access if legitimate safety or reliability concerns cannot be reasonably accommodated.[55]

---

[51] *Local Competition Order* at para. 1156. *See* 47 C.F.R. § 1.1404.

[52] Appendix A contains a list of the parties filing petitions for reconsideration considered herein, as well as a list of those parties filing responsive pleadings. As noted above, the issues raised in WinStar's petition are being addressed in a seperate proceeding (*see* note 5, *supra*).

[53] *See Local Competition Order* at para. 1183.

[54] *Id.* at 1184.

[55] *Id.*

b. Positions of the Parties

24. On reconsideration, several utilities contend that the Commission's decision with respect to electric transmission facilities is contrary to the intent of Congress and the plain language of the Act.[56] These utilities argue that if Congress had intended to include transmission facilities in the scope of the infrastructure covered by section 224(f), it would have specifically included "transmissions facilities" in the precise language it used.[57] Several utilities contend that the use of the term "poles" refers only to distribution poles.[58] They argue the legislative history of the 1978 Pole Attachment Act triggers Commission jurisdiction over pole attachments only where space on a utility pole is actually being used for communications services by wire or cable. Thus, transmission poles, which are not used for stringing communications wires, are not within the scope of the Act.[59]

25. In its response, ALTS maintains that the utilities ignore the purpose of section 224, which is to permit cable operators and telecommunications carriers to piggyback along distribution networks owned or controlled by the utilities.[60] ALTS states that the Commission was aware of the technical issues involved in access to transmission facilities and simply declined to exempt them from the access requirements.[61]

26. The Joint Cable Parties assert that there is no engineering, safety or any other reason that would justify a blanket prohibition on transmission structure access. According to the Joint Cable Parties, it is not uncommon for utilities to place both transmission circuits and distribution circuits on the same pole, "underbuilding" the transmission lines with electric secondary distribution service lines.[62] In addition, several parties argued, in *ex parte* presentations, that it is technically feasible to attach to electric transmission tower facilities and conduit.[63] MCI argues that it presently has agreements with a number of electric utility companies to attach either fiber optic ground wire (FOGWIRE) or all-dielectric self-supporting (ADSS) cable to their high kilovolt transmission facilities.[64]

---

[56] FP&L Comments at 33-36; AEP Comments at 37-40; ConEd Comments at 11; EEI Reply Comments at 4-6; GTE Comments at 39-40.

[57] *Id.*.

[58] AEP at 39-40; FP&L at 35-36; EEI/UTC reply at 5-6.

[59] *Id.*

[60] ALTS reply at 26-27.

[61] *Id.*

[62] Joint Cable Parties reply at 10-11.

[63] *Ex Parte* Written Presentation of WinStar, May 13, 1997 to Mr. William F. Caton, Secretary, Federal Communications Commission, CC Docket No. 96-98, Interconnection; *Ex Parte* Letter of MCI, May 16, 1998 to Mr. William F. Caton, CC Docket No. 96-98, Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 ("MCI May 16, 1997 *Ex Parte*").

[64] MCI May 16, 1997 *Ex Parte*, Attachment at 1.

c. Discussion

27. We reaffirm our decision in the *Local Competition Order* that electric transmission facilities are not exempted from the pole attachment provisions of section 224. We reject the argument that, because a transmission pole is not used by the utility for stringing communications wires, it would not fall within the access obligations of section 224(f)(1). As discussed in paragraphs 79-80, *infra*, we reaffirm our conclusion that 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 not currently used for wire communications. We do not believe that commenters have demonstrated why electric transmission facilities should be entitled to an automatic exemption from a utility's obligation under section 224. To the extent an electric transmission facility is a 'pole, duct, conduit or right-of-way,' the facility would be subject to the access provisions of section 224. The utilities' arguments regarding safety were made and adequately considered in the *Local Competition Order*.[65] Moreover, the record on reconsideration indicates a finding that electric transmission facilities are currently used for communications attachments.

28. We are mindful of the potential technical issues, including heightened safety and reliability concerns, involved in access to electric transmission facilities.[66] We reiterate that, as with any facility to which access is sought, section 224(f)(2) permits a utility to impose conditions on access to transmission facilities, if necessary, for reasons of safety and reliability. To the extent safety and reliability concerns are greater at a transmission facility, the statute permits a utility to impose conditions on access due to safety and reliability concerns, or to deny access if those concerns cannot reasonably be accommodated.[67]

2. Exercise of Eminent Domain to Accommodate a Request for Access

a. Background

29. The *Local Competition Order* stated 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. The order noted that 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 . . . ."[68] In addition, the *Local Competition Order*, recognizing that the scope of a utility's ownership or control of an easement or right-of-way is a matter of state law, determined that the access obligations of section 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access.[69]

---

[65] *Local Competition Order* at paras. 1183-1184.

[66] *Id.* at para. 1184.

[67] *Id.*

[68] *Id.* at para. 1181.

[69] *Id.* at para. 1179.

b. Positions of the Parties

30. Several utilities urge the Commission to reconsider its decision requiring utilities to exercise their authority of eminent domain on behalf of third parties. They argue it is not within the jurisdiction of the Commission to regulate or mandate the exercise of eminent domain.[70] Rather, they argue that the right to exercise eminent domain is a matter of state law, and in many instances under state law eminent domain can only be exercised by a utility for very limited purposes.[71] ConEd asserts the Commission is overstepping its jurisdiction as there is no mention of eminent domain in either the law or the corresponding conference report.[72] FP&L states that 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.[73] GTE asserts the Commission has no authority under the Act, and has not articulated a statutory policy justifying preemption of state law in requiring utility to use eminent domain for an attaching entity.[74] Duquesne contends the portion of section 224(h) that the Commission relies upon establishes only notice requirements pertaining to an intended modification, and thus the Commission's interpretation fails for not being a permissible construction of the statute to which Congress would not object. Duquesne argues that the Commission's action is based on an interpretation of statutory silence rather than on an explicit grant of authority.[75]

31. In addition, several utilities assert that state law precludes them from using eminent domain powers for other than their core electric utility business operations. The utilities argue that they would therefore be precluded from using eminent domain authority on behalf of third parties.[76] According to EEI/UTC, in some states, condemnation must be preceded by a corporate resolution based on the utilities' "planning power." Thus, condemnation for a third party would require access to that party's planning process.[77] Delmarva states that in Delaware a utility can condemn property for transmitting electricity only in limited circumstances, such as along a public highway. Therefore, Delmarva argues, the Commission's assumption that all electric utilities are authorized to exercise general eminent domain creates expectations that utilities may not be able to satisfy.[78] EEI/UTC contends that the exercise of

---

[70] LECC; EEI/UTC; PP&L; Duquesne; AEP (Wisconsin P&L does not join in this part of AEP's petition); FP&L; CP&L; Delmarva; ConEd; Bellsouth; Nynex; US West; GTE.

[71] EEI/UTC comments at 3-4. Con Ed at 6; GTE at 42; FP&L at 15; AEP at 16. Delmarva comments at 4-5.

[72] ConEd reply at 5-6.

[73] FP&L comments at 17-18.

[74] GTE reply at 41-42.

[75] Duquesne comments at 5-6.

[76] Con Ed at 6; GTE at 42; FP&L at 15; AEP at 16; Duquesne at 3.

[77] EEI/UTC comments at 3-4.

[78] Delmarva comments at 4-5.

eminent domain under most state laws is premised on an exclusive franchise. Where there is no longer such a franchise, exercise is expensive and lengthy.[79]

32. EEI/UTC argue it would not be discriminatory to withhold the exercise of the right of eminent domain for the benefit of third party telecommunications carriers or cable TV operators where an electric utility has the right of eminent domain but uses it sparingly or not at all in connection with its electric operations.[80] According to Duquesne, if the nondiscrimination principle is applied, the result would be that the use of eminent domain for third parties should not be required if the utility does not exercise it for its own business purposes.[81] Duquesne states that, at a minimum, the Commission should create a "safe haven" for utilities that have an established corporate practice not to exercise eminent domain.[82]

33. Duquesne argues that the forced exercise of eminent domain creates a taking of Duquesne's intangible property, such as the direct costs of maintaining the takings action and the loss of goodwill.[83] Duquesne states that the loss of goodwill could result in a loss of market share in the emerging competitive market for electric services. Margaretville asks the Commission to adopt a just compensation process that will allow ILECs to recover the economic value of the competitive advantages that will be lost.[84] Duquesne also requests that the Commission tailor its ruling to apply only where existing state law gives a utility taking power on behalf of a third party non-utility. Duquesne further states that a utility should not be required to exercise eminent domain for a third party attacher who has taking power in its own right under state law.[85] Similarly, LECC opposes the rule on the grounds that in many states, new entrants will enjoy the same rights as the incumbent LEC, once they are certified, and can therefore exercise their own rights of condemnation.[86]

34. AEP asserts that 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 Act. AEP and FP&L emphasize that eminent domain is a drastic remedy which is not casually exercised by utilities, and that they exercise the right, if at all, as a last resort because of the company time and resources that could be expended on the complex regulatory approval processes and litigation over property valuation.[87]

---

[79] EEI/UTC comments at 5.

[80] EEI/UTC at 5; *See* Duquesne at 3.

[81] Duquesne comments at 3.

[82] *Id.*

[83] *Id.* at 4.

[84] Margaretville comments at 2-5.

[85] Duquesne comments at 9-10.

[86] LECC comments at 23-24; CP&L comments at 18; Bellsouth reply at 14.

[87] AEP comments at 15; FP&L comments at 16.

35. Joint Cable Parties respond that utilities' discomfort with exercise of eminent domain has more to do with a misunderstanding of cable's easement rights than with agency overreaching.[88] Joint Cable Parties state that historically, common law permitted cable operators to make use of compatible utility easements. According to Joint Cable Parties, some utilities nonetheless attempted to insert clauses in pole agreements purporting to require cable to obtain their own easements.[89] After Congress codified the common law doctrine in 1984, many utilities continued to ignore the law.[90] According to the Joint Cable Parties, if the utilities would obey existing law, there would almost never be cause to exercise eminent domain for an attaching party because parties can only attach to facilities which the utilities themselves have placed in compatible easements.[91] If there is ever an occasion which departs from this common sense analysis, it is better addressed on a case-by-case basis, rather than by blanket reconsideration.[92]

36. NCTA argues that the Commission should uphold its decision to compel utilities to use their eminent domain powers on behalf of telecommunications providers to the extent permitted under state law pursuant to the right of access created by section 224(f)(1), which would be meaningless if utilities were permitted to deny attachment requests based on space limitations while selectively using their power to condemn additional space for their own purposes.[93]

37. Similarly, AT&T and MCI argue that where a utility can use eminent domain authority to gain capacity for itself, the nondiscrimination principle of section 224(f)(1) requires that the utility use that authority to gain capacity for others.[94] MCI argues that if utilities were not required to use their authority on behalf of third parties in the same manner they use it for themselves, they could fill their existing facilities with their own competing telecommunications or cable wires. This would allow the utilities to claim lack of capacity for competitors seeking access, while also allowing them to obtain additional rights-of-way to serve electric customers using their eminent domain power.[95] MCI states that the Commission recognized that state law governs some of these issues, and that if state law precludes the use of eminent domain power, a utility clearly cannot exercise it on its own behalf or on other parties' behalf.[96] AT&T asserts that the Commission can decide whether a state law restricts eminent domain on

[88] Joint Cable Parties reply at 10.

[89] *Id.*

[90] *Id.*

[91] *Id.* at 17-19.

[92] *Id.*

[93] NCTA reply at 27.

[94] AT&T reply at 35. MCI reply at 38.

[95] MCI reply at 38.

[96] *Id.*

a case-by-case basis in response to complaints filed under 47 C.F.R. Section 1.1414, or in the context of petitions for a declaratory ruling or Section 253 pre-emption proceedings.[97]

c. Discussion

38. Based upon the record before us, we agree with those commenters that argue that the right to exercise eminent domain is generally a matter of state law, exercised according to the varying limitations imposed by particular states. We are persuaded that neither the statute nor its legislative history offers convincing evidence that Congress intended for section 224 to compel a utility to exercise eminent domain. Accordingly, on reconsideration, we find that section 224 does not create a federal requirement that a utility be forced to exercise eminent domain on behalf of third party attachers.

3. Access for Wireless Equipment to "Poles, Ducts, Conduits, and Rights-of-Way."

a. Background

39. Section 224(a)(4) states that the term "'pole attachment' means 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." The *Local Competition Order* observed that the statute does not describe the specific types of telecommunications or cable equipment that may be attached when access to utility facilities is mandated, and that establishing an exhaustive list of such equipment would be neither advisable, nor possible.[98] Instead, the *Local Competition Order* stated that the question of access should be decided, in accordance with the statute, on the basis of capacity, safety, reliability, and engineering principles. [99]

b. Positions of the Parties

40. Utilities generally seek to limit the nature of equipment that can be attached to utility facilities.[100] Several argue that the only type of telecommunications equipment that may be attached under section 224(f) is coaxial and fiber optic wire facilities.[101] They assert that the 1978 Pole Attachment Act was intended to encompass pole attachments for wire communications, and that if Congress had intended to expand the type of attachment covered under the 1996 Act, it would have done so explicitly.[102]

---

[97] AT&T reply at 35.

[98] *Local Competition Order* at 1183.

[99] *Id.*

[100] ConEd comments at 11-12; Duquesne comments at 17-18; AEP comments at 26-29; FP&L comments at 24-26.

[101] AEP comments at 26-29; FP&L comments at 24-26; ConEd comments at 11-12.

[102] *Id.*

41. For example, ConEd argues that wire cables are the only type of equipment that should be attached to utility facilities because the intent of the law was to allow entities to attach wires along distribution networks, and neither the 1996 Act nor the *Local Competition Order* discuss other equipment that can be attached.[103] Duquesne maintains that wireless antenna and microwave dish attachments are more burdensome than coaxial cable attachments, and could preclude the facility owner from permitting later attachments.[104]

42. AT&T responds that the utilities' argument ignores Congress' change to the definition of "pole attachment" to include any attachment of a "provider of telecommunications service."[105] Comcast states that by expanding the pole attachment provisions to all telecommunications carriers, Congress refused to favor one type of technology over another.[106] According to Comcast, there is no basis for the Commission to narrow the application of pole access rules when these rules require only "reasonable" efforts to accommodate attachment requests. Comcast notes that currently, coaxial cable is not the only equipment found on utility poles.[107]

43. Paging Network contends that CMRS carriers face siting obstacles due to local ordinances that limit the ability of wireless carriers to site antennas. Allowing access to existing utility sites could help alleviate this problem.[108] Joint Cable Parties contend that a utility that bars wireless access to its facilities may be attempting to reduce competition for its own commercial communications ventures.[109]

c. Discussion

44. At the outset, we note that we have, since the record closed in this reconsideration proceeding, addressed this issue in our recent *Pole Attachments Telecommunications Rate Order*, where we stated that "wireless carriers are entitled to the benefits and protection of section 224.[110] We found that statutory definitions and amendments by the 1996 Act demonstrate Congress' intent to expand the pole attachment provisions beyond their 1978 origins. In particular, we found that use of the word "any" in several portions of section 224(d) and (e) "precludes a position that Congress intended to distinguish between wire and wireless attachments."[111] The *Pole Attachments Telecommunications Rate Order* noted that wireless attachments may include "an antenna or antenna clusters, a communications cabinet at the

[103] ConEd comments at 11-12.

[104] Duquesne comments at 17-18.

[105] AT&T reply at 32.

[106] Comcast reply comments at 9.

[107] Comcast reply comments at 10 (see Duquesne comments at 17-18).

[108] Paging Network reply comments at 23-24.

[109] Joint Cable Parties reply comments at 11-13.

[110] *Pole Attachments Telecommunications Rate Order* at para. 39.

[111] *Id.* at para. 40.

base of the pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service," but that there was no reason why the Commission's rules could not accommodate wireless attachers' use of poles when negotiations fail.[112] We committed to examine issues on a case-by-case basis where parties are unable to modify or adjust the rate formula to deal with the unique nature of these attachments, and are unable to reach agreement through good faith negotiations.[113]

45. We are presented with no new facts or arguments on the record before us in this proceeding that warrant reconsideration of the decision in the *Local Competition Order* not to categorically restrict the types of "pole attachments" that may be attached to utility poles and conduits pursuant to section 224(a)(4).[114] Rather, as we stated in the *Local Competition Order*, when evaluating any attachment request, including a wireless attachment, access determinations are to be based on the statutory factors of capacity, safety, reliability, and engineering principles, which would presumably take into account such factors as the size and weight of attaching equipment.[115]

4. Clarification of the Definition of "Attachment"

46. Duquesne seeks clarification of the definition of "attachment" and proposes that the number of attachments a given attaching entity makes is not necessarily determined by the number of physical attachments made to the pole, but by determining the equivalent burden.[116] We sought comment on the issue Duquesne raises in the *Pole Attachments Telecommunications Rate* proceeding, but determined that we would instead address whether any of our existing pole attachment rate formulas should reflect factors such as weight and wind load burdens in our *Pole Attachment Fee* rulemaking.[117] We again defer consideration of this issue to that proceeding.

---

[112] *Id.* at paras. 41-42.

[113] *Id.* at para. 42.

[114] *Local Competition Order* at para. 1184.

[115] *Id.*

[116] Duquesne petition at 17-18.

[117] *Pole Attachments Telecommunications Rate Order* at para. 25, *citing Notice of Proposed Rulemaking*, CS Docket No. 97-151, 12 FCC Rcd 11725, 11733. *See also Amendment of Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking*, CS Docket No. 97-98, 12 FCC Rcd 7449 (1997) ("*Pole Attachment Fee Notice*").

B. Capacity Expansions and Reservation of Space

1. Expansion of Capacity for the Benefit of Attaching parties.

a. Background

47. In the *Local Competition Order*, we recognized that a utility is able to take the steps necessary to expand capacity if its own needs required such expansion, and that the principle of nondiscrimination established by section 224(f)(1) would require it to do likewise for telecommunications carriers and cable operators.[118] However, we also recognized that the complexity of an expansion can vary given the particular circumstances of an attachment request. Accordingly, we declined to adopt a specific rule that would prescribe when a utility could reasonably deny access based on difficulties posed by the expansion. In the *Local Competition Order*, we interpreted sections 224(f)(1) and (f)(2) to require utilities to take all reasonable steps to accommodate requests for access and to explore potential accommodations in good faith with the party seeking access. In reaching these conclusions, the Commission rejected utilities' arguments that the failure of section 224 to explicitly impose this requirement indicates that utilities need not expand or alter their facilities to accommodate entities seeking to lease space.[119]

b. Positions of the Parties

48. FP&L and AEP contend the Commission exceeded its statutory authority in its decision requiring a utility to take all reasonable steps to expand capacity to accommodate requests for access just as it would expand capacity to meet its own needs. They assert the Commission's decision is contrary to the plain language of the statute.[120] They argue further that the Commission failed to recognize that section 224(f)(2) gives utilities the right to deny access based on insufficient capacity. While Congress specified that such denials must be made on a nondiscriminatory basis, it did not further qualify that section.[121] According to ConEd, that a particular expansion may be technically possible should not compel a utility to jeopardize its operations by actually performing the work.[122]

49. In response, AT&T states that there is no legal or practical basis for utilities' arguments on reconsideration. AT&T notes that although section 224(f)(2) permits electric utilities to deny access based on insufficient capacity, the Act does not define that term, and the Commission properly adopted the interpretation that is most consistent with the nondiscriminatory provisions of the statute.[123]

---

[118] *Local Competition Order* at para. 1162.

[119] *Id.* at para. 1161.

[120] FP&L comments at 6-9; AEP comments at 8-11.

[121] FP&L comments at 6-9; AEP comments at 8-11.

[122] ConEd comments at 4.

[123] AT&T reply comments at 33. *See also* NCTA opposition at 26-27.

50. NCTA argues that section 224(f) creates a right of access to rights-of-way, and the absence of spare capacity on a physical facility does not necessarily mean the right-of-way is full. According to NCTA, the amount of available space in a monopoly telecommunications environment should not constrain access in a competitive environment.[124]

c. Discussion

51. We are presented with no new facts or legal arguments to support the utilities' request for reconsideration of the *Local Competition Order*'s interpretation of the utilities' obligation to expand capacity to accommodate telecommunications carriers and cable operator's requests to attach to the utilities' poles, ducts, conduits and rights-of-way. We reiterate that the principle of nondiscrimination established by section 224(f)(1) requires a utility to take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs. Furthermore, before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access. Again, because modification costs will be borne only by the parties directly benefitting from the modification, neither the utility nor its ratepayers will be harmed by the requirement that capacity expansions be undertaken on a nondiscriminatory basis.[125]

52. In the *Local Competition Order*, we recognized that a utility may deny access on a non-discriminatory basis "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." That a utility could ultimately find that it cannot grant an access request based on capacity and safety concerns does not exempt it from the overall access requirement of section 224(f). When a utility denies access, as an exception to the access requirement of section 224, it must be able to establish a prima facie case for the denial in the context of an access complaint. As we stated in the *Local Competition Order*, a utility that denies access to, for example, a 40 foot pole due to lack of capacity should be able to demonstrate why there is no capacity and enumerate the specific reasons for declining to replace the pole with a 45 foot pole.

53. It is worth noting in this regard, that utilities subject to pole attachment regulation have been expected, since the beginning of pole attachment regulation to take steps to rearrange or change out existing facilities at the expense of attaching parties in order to facilitate access. The legislative history of the 1978 law that first included direct pole attachment regulation within the Communications Act makes specific reference to the fact that "it may be necessary for the utility to replace an existing pole with a larger facility in order to accommodate the CATV user" and discusses the rate treatment to be given these "change-out" replacement costs.[126] This capacity expansion process then became a critical part of the Commission's regulatory practice and there is no indication the legislative changes adopted in 1996, designed to expand the scope of pole attachment access, reflected any intention to withdraw this existing process.

---

[124] NCTA reply comments at 26-27.

[125] *See Local Competition Order* at paras. 1162-1163.

[126] S. Rep. No. 580, 95th Cong., 1st Sess. 1977.

2. Use of Utility's Reserve Space by Attaching Parties Until Utility has an Actual Need for the Space.

a. Background

54. The *Local Competition Order* carved out a limited exception to the principle of nondiscriminatory access, allowing a utility to reserve for itself some capacity, 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."[127] However, a utility may not reserve or recover reserved capacity to provide competing telecommunications or video programming service, and then force an attaching party to incur the cost of modifying the facility to increase capacity, even if the reservation of capacity were pursuant to a reasonable development plan. A utility that reserves capacity must permit use of its reserved capacity by cable operators and telecommunication carriers until such time as the utility has an actual need for the capacity. At that time, the utility may "recapture" the reserved capacity for its own use. The utility shall give the displaced cable operator or telecommunications carrier the opportunity to pay for the cost of any modifications needed to expand capacity and to continue to maintain its attachment.[128]

b. Positions of the Parties

55. Many of the parties' arguments regarding capacity expansions are also applied to the issue of reserve space. AEP and FP&L argue that requiring a utility to allow the use of its reserve space until it has an actual need for the space is contrary to the intent of Congress.[129] They argue that Congress was aware of a utility's need to reserve capacity when it gave them the right to deny access based on insufficient capacity, and would have included specific language limiting this utility practice if such limitation was intended. They contend that Congress plainly and unambiguously gave electric utilities the right to make capacity determinations when considering requests for access.[130]

56. AEP and FP&L further argue that the Commission's decision to limit a utility's right to use its reserve capacity where such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that capacity is vague, ambiguous and unworkable, and ignores the realities of a utility's core business of providing electric service.[131] AEP maintains that utilities routinely allocate certain space to be used in the event of an emergency, and that this space cannot be considered "reserve." For example, AEP states, if certain ducts collapse, the utility's contingency plan will call for the immediate substitution of other ducts. AEP urges that, at a minimum, the Commission

---

[127] *Id.*

[128] *Id.*

[129] FP&L comments at 10-13; AEP comments at 11-14.

[130] *Id.*

[131] *Id.*

must clarify that the obligation to provide access does not extend to space that is needed for emergency purposes.[132]

57. EEI/UTC and CP&L argue that being allowed to reserve space only as part of a "bona fide development plan" is too restrictive, and that it is beyond the Commission's ability to establish the reasonableness of such forecasts.[133] They contend that utilities have not generally been required to create and submit for public scrutiny development plans respecting facility expansion. EEI/UTC and CP&L argue it is difficult to specify the amount of space that a utility could reserve, and that utilities would be required to spend millions of dollars they might not recover to develop speculative pole-by-pole development plans, or face repeated complaints from attaching entities disputing requests to vacate.[134] PG&E requests that utilities be given the right to reserve capacity not specifically incorporated in a utility's bona fide development plans.[135] FP&L argues that by restricting its right to reserve capacity, the Commission is forcing FP&L to either expand its business based on sheer speculation of load growth, or to face repeated complaints by entities seeking access to reserve capacity.[136]

58. FP&L and AEP contend that the use of space by a party on an interim basis is impractical and unworkable.[137] According to FP&L and AEP, once entities are using a utility's infrastructure, a utility would not be able to recapture such reserved space in the time necessary to effectively serve its core business. FP&L and AEP assert that telecommunications carriers will not vacate a utility's facility short of litigation if the withdrawal will likely result in interruption of service to telecommunications customers.[138] FP&L and AEP state that the Commission's requirement that a utility provide the attaching entity an "opportunity to . . . maintain its attachment" by expanding capacity when the utility seeks to recapture its reserve space would obligate the utility to allow the user to stay on or in the facility until the utility constructed additional capacity for itself.[139] FP&L and AEP assert that a utility's ability to provide dependable service would be severely threatened by such an obligation because of the significant engineering and construction time involved in expanding capacity.[140] PG&E states that the Commission

---

[132] AEP comments at 13.

[133] EEI/UTC comments at 8-9; CP&L comments at 15

[134] *Id. Accord* FP&L comments at 10-13 (FP&L's expansion plans for transmission lines have radically changed in the recent past, and are likely to change radically again due to deregulation); AEP comments at 11-14.

[135] PG&E at 5-6.

[136] FP&L comments at 10-13; AEP comments at 12.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] FP&L comments at 10-13; AEP comments at 11-14.

should recognize the realities of electric distribution utility facility planning, and allow electric utilities greater reserve capacity call-back authority for future core electric service.[141]

59. CP&L states the Commission must define procedures by which utility companies define reserved capacity and notify entities with attachments on their poles that they are occupying reserve space.[142] CP&L urges the Commission to grant a presumption that any available capacity be deemed reserve capacity so utilities could avoid constructing new space a second or third time for future capacity because pole attachers have taken all of the capacity. According to CP&L, entities wanting to continue attachment to a particular pole would pay the costs of capacity expansion to accommodate their pole attachments after accommodation of the utility's core needs. Any other result, CP&L argues, would force the utility to pay for new capacity when existing capacity is taken by attaching entities.[143]

60. EEI/UTC also seeks clarification of the policy of permitting a utility to recapture 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," when the utility has an actual need for the space.[144] According to EEI/UTC, this policy must also be read in conjunction with section 224(i) regarding the reimbursement of expenses when an attaching party requires a modification that causes other attaching entities or the pole owner to rearrange their facilities.[145] EEI/UTC requests clarification that reimbursement policy of section 224(i), as embodied in section 1.1416(b), applies to an attaching entity in the reserve space who exercises the option of modifying the facility when the utility recovers the reserve space for its own use.[146]

61. CP&L argues that the Commission should provide the same manner of preference for lines which carry core business communications as is provided for electric lines. CP&L claims the communications capacity used by utilities is, in many ways, essential to the proper operations of the utility system.[147] CP&L avers that much of the traffic carried over these lines is essential to the monitoring of load and demand conditions, line breaks, and the integration of both utility and third party generators.[148] EEI/UTC asks the Commission to clarify that a utility's installation of its own internal communications cables within the "electric" space on the pole is consistent with the reservation of this space for utility use, and that denial of access to unused space in order to accommodate a utility's near-term expected use of

[141] PG&E comments at 5-6.

[142] CP&L comments at 16.

[143] *Id.*

[144] EEI/UTC comments at 7-8.

[145] *Id.*

[146] *Id.*

[147] CP&L comments at 14-17.

[148] *Id.*

that space for its internal communications needs would not be unreasonable.[149] EEI/UTC argues the Commission should establish a presumption that it would be reasonable for an electric utility to reserve any space above what has been traditionally referred to as "communications space."[150]

62. Teleport responds that the rules merely implement the plain language of statute, and the Commission cannot change the statutory language.[151] Teleport argues the Commission has crafted a fair approach that complies with the Act by permitting utilities to reserve space that they can reclaim from cable operators and telecommunications carriers once they have a need for the space for core utility purposes. The attaching party will pay for the cost of expanded capacity and continued attachment.[152]

63. Similarly, NCTA maintains that the *Local Competition Order* strikes a fair balance between the needs of utilities to expand to serve additional customers and the rights of cable operators and telecommunications carriers to obtain space in the face of warehousing by pole owners. NCTA argues that the amount of right-of-way space that was available in a monopoly telecommunications environment should not be expected to set the outer limit of space under a pro-competitive regulatory scheme.[153] Rather, right-of-way space must be sufficient to accommodate the access needs generated by the proliferation of new competitors envisioned by the 1996 Act.[154] NCTA urges the Commission to reject efforts to broaden circumstances allowing utilities to exclude attaching parties from reserve space. NCTA notes that the arrangement mandated in the *Local Competition Order* ensures that attaching parties will pay an equitable share of the costs associated with their attachments, including the costs of relocating the attachments as the needs of both the owner and attaching party change.[155] Joint Cable Parties note that when a utility needs pole space under a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service, it then can request that attaching third parties pay the costs associated with the expansion of that capacity to remain on the poles. Joint Cable Parties state the Commission's decision on this point is generous, because it allows "recapture" of reserved space when the statute, on its face, does not.[156] They contend it will require concerted vigilance by the Commission to make certain that a utility does not recapture space for competitive purpose under the guise that such recapture is for the utility's "core" business.[157]

---

[149] EEI/UTC comments at 9.

[150] EEI/UTC comments at 8-9.

[151] Teleport reply comments at 12-14.

[152] *Id.*

[153] NCTA reply comments at 27-28.

[154] *Id.*

[155] *Id.*

[156] *Id.* at 4.

[157] *Id.*

64. MCI asserts that the utilities' objections are merely an attempt to fend off competition.[158] MCI argues that the utilities are actually seeking an exclusive right to determine whether or not excess pole attachment capacity exists, and priority access to any such capacity. But, according to MCI, the Commission's determination that utilities may reserve space for future electric service pursuant to a bona fide development plan allows the utilities to make an initial calculation and representation as to both the amount of space available and that which is necessary to hold in reserve. MCI states that this allows a meaningful determination of the amount of space available and prevents utilities from simply foreclosing competitive access by reserving more space than is actually needed. MCI further states that the Commission's determination that utilities allow competitors access to reserve space until it is actually needed is similarly reasonable because it provides a check on potential anti-competitive behavior while imposing no harm on the utility.[159]

c. Discussion

65. The *Local Competition Order* struck a balance between the utilities' right to reserve capacity to meet anticipated future demand for their "core utility services," necessary if those utilities are to meet public demand for their services, and the nondiscrimination requirement of section 224(f)(1), which prohibits a utility from favoring itself or its affiliates with respect to the provision of telecommunications and video programming services.[160] The *Local Competition Order* qualifies the utilities' ability to reserve capacity for their own uses pursuant to a bona fide development plan that "reasonably and specifically projects a need for that space in the provision of its core utility service."[161] The Commission specifically found these arrangements to be consistent with the intent of the statute, stating that "allowing space to go unused when a cable operator or telecommunications carrier could make use of it is directly contrary to the goals of Congress."[162]

66. The utilities' challenges and requests for clarification fall into several categories. First, they argue that requiring a utility to allow attaching parties the use of its unused, reserved space until it has an actual need for the space is contrary to Congressional intent. Second, they argue that the requirement that space reservations must be made pursuant to a "bona fide development plan" that reasonably and specifically projects a need for the space in the provision of the utility's core utility service is unworkable, unduly restrictive, and beyond the Commission's jurisdiction to administer. Third, the utilities request further definition of the procedures by which utilities are to define "reserved capacity" and notify entities with pole attachments that they are occupying reserve space. Fourth, clarification is requested regarding the treatment of a utility's own internal communications attachments.

67. *Use of Unused, Reserved Space.* We do not find sufficient basis in the record on reconsideration to alter the balance struck in the *Local Competition Order* between the needs of the

---

[158] MCI reply comments at 36.

[159] *Id.* at 36-37.

[160] *See Local Competition Order* at para. 1169.

[161] *Id.*

[162] *Id.*

utilities to reserve unused space for future core utility service needs, and the statutory mandate that attaching entities be afforded nondiscriminatory access to a utility's poles, ducts, conduits and rights-of-way. The rules permit attaching entities to use the utility's unused, reserved space only until such time as the utility has an actual need for that space. At that point, the utility may seek to recover the reserved space for its own use, based upon its actual need for the reserved space. The reasonableness of such recapture of reserved space currently in use by a telecommunications carriers or cable operator will depend upon the factual circumstances at the time of the request. We therefore decline to grant CP&L's request that we grant a general presumption that any available capacity on a utility company's pole attachment infrastructure is reserved capacity. In the usual case, we believe that the question of what space is "reserved" and what space "available" will only arise if a request for access is denied. Any unresolved disputes over recapture of reserved space will need to be resolved on a case-by-case basis. We believe these rules represent a fair allocation of use of a valuable resource, that unduly favors neither party, and is consistent with the express terms of section 224(f)(1).

68. We will clarify several aspects of the *Local Competition Order*. First, section 224(i) states that 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 (including the owner of such pole, conduit, or right-of-way)." In the *Local Competition Order* we stated that those parties who do not initiate or request the modification are not required to share in the cost of the modification.[163] We clarify that in the instance of a utility's recapture of reserve space occupied by an attaching entity, the utility is not required to share in the modification costs the attaching entity may incur as a result of the need to modify the facilities incident to the utilities' recapture of that space. In such cases, an attacher should not be relieved of its obligation to pay for modification costs merely because, for a time, the attacher was able to use a utilities' reserve space, as opposed to initiating and bearing the cost of modifications that would otherwise have been needed in the absence of the reserve space.

69. In addition, we are persuaded that utilities are entitled to reserve capacity for the provision of emergency service. We therefore clarify that space that is allocated or planned for emergency purposes in a utility's contingency plan should not be subject to the access obligations of reserved space in general. This allocation of space for emergency service purposes is distinct from, and does not include, any reservation for projected growth pursuant to a bona fide development plan that reasonably and specifically projects a need for space in the provision of its core utility service.[164]

70. *Bona Fide Development Plans*. Consistent with the foregoing, a utility may 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, as opposed to telecommunications or video, service. We clarify that if a need arose for a utility to retrieve reserve capacity in order to provide its core utility services, but the exact circumstance was not laid out in the utility's bona fide development plan, such recapture of reserve space is permitted so long as it is consistent with the company's reasonable projections for growth as reported in the utility's bona fide development plan. The purpose of these

[163] *See Local Competition Order* at para. 1211.

[164] We address the designation, in terms of rates, of reserve capacity in conduit in our *Pole Attachment* proceeding.

safeguards is to ensure that utilities are not permitted to recapture space for their own provision of competitive telecommunications and video programming distribution purposes under the guise that such recapture is for the utility's "core" business.

71. *Definitions of Reserve Capacity.* The record does not contain sufficient data for us to establish a presumptively reasonable amount of pole, duct, conduit or right-of-way space that an utility may reserve, as requested by several utilities. As we stated in the *Local Competition Order*, if parties cannot agree, disputes will be resolved on a case-by-case approach based on the reasonableness of the utility's forecast of its future needs and any additional information that is relevant under the circumstances.[165]

72. *Treatment of Utility Communications Attachments.* As requested by CP&L and EEI/UTC, we clarify that a utility may reserve capacity to carry core utility communications capacity that is essential to the proper operations of the utility system. A utility's installation of its own internal communications cables within the "electric" space on a pole is consistent with the reservation of this space for utility use. A utility's denial of access to reserved capacity in order to accommodate the utility's near-term expected need for that space for its own internal communications needs would not be unreasonable. We caution that, as with all reservations of space for a utility's core functions, denials of access may not be made to accommodate a utility's provision of competitive telecommunications or video programming distribution services. We decline, however, to grant EEI/UTC's request that we establish a presumption that it would be reasonable for an electric utility to reserve any space above what has traditionally been referred to as "communications space" on a pole. In light of our clarification of the ability of utilities to reserve space for internal communications functions needed to support the utility's "core" service functions, we do not perceive the need for such a presumption.

C. When Utility is Subject to Access Obligations

1. Use of a Utilities' Facilities for Wire Communications

a. Background

73. The access obligations of section 224(f) apply to any "utility," defined as: "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns of controls poles, ducts, conduits, or other rights-of-way used, in whole or part, for any wire communications."[166] The *Local Competition Order* concluded that use of any pole, duct, conduit, or right-of-way for wire communications triggers access obligations for all poles, ducts, conduits, and rights-of-way owned or controlled by the utility, including those not currently used for wire communications.[167] The *Local Competition Order* specifically rejected utility arguments that they should be permitted to devote a portion of their poles, ducts, conduits, and rights-of-way to wire communications without subjecting all such property to the access obligations of section 224(f) on the ground that this

[165] *Local Competition Order* at para. 1169.

[166] 47 U.S.C. § 224(a)(1). The term utility "does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State." *Id.*

[167] *Local Competition Order* at paras. 1172-1174.