interpretation was at odds with the plain language of the statute. The Commission further stated that, "[a]lthough internal communications are used solely to promote the efficient distribution of electricity, the definition of 'wire communications' is broad and clearly encompasses an electric utility's internal communications."[168]

b. Positions of the Parties

74. AEP and FP&L seek clarification that the use of one pole for wire communications should not trigger access to other ducts and conduits that are not now and never have been used for wire communications.[169] They argue that the *Local Competition Order*'s interpretation of section 224(f) violates the plain language of the Act by concluding that the use of any utility pole, duct, conduit or right of way for wire communications triggers access to all utility poles, ducts, conduits or rights of way. They claim the Commission has misinterpreted the statutory phrase "used, in whole or in part, for wire communications." AEP asserts that Congress intended that Commission jurisdiction be invoked on a pole-by-pole basis, not a system-wide basis. In support, AEP and FP&L cite the legislative history of the 1978 Pole Attachments Act, and assert that Congress identified two conditions precedent to Commission jurisdiction over pole attachments: 1) that communications space be designated on the pole; and 2) that a CATV system use the communications space, either alone or in conjunction with another communications entity.[170] They further argue that this interpretation is consistent with the nature of access requests which are made on a specific route or segment basis, depending on the needs of the requesting party. These access requests may be granted consistent with existing capacity, safety, reliability and generally applicable engineering purposes on a pole-by-pole basis.[171]

75. AEP and FP&L also maintain that the use of part of a utility's infrastructure for a private communications network designed to support a safe and reliable electric service cannot be deemed to trigger the nondiscriminatory access provisions of the 1996 Act. They assert that the term, "wire communications," as used in this context, clearly refers to the provision of common carrier communications by telecommunications carriers and cable service operators, and not to communications by wholly private carriers and private networks. According to these utilities, a utility using a private network to support its electric operations is not a communications entity, and is not treated as such under the other provisions of section 224.[172]

76. Delmarva requests clarification "of the lengths to which a utility must go" in order to comply with the Commission's statutory interpretation. Delmarva questions whether a cable operator or telecommunications carrier could demand that a utility install poles, ducts, or conduits on a completely unimproved utility right-of-way in order to accommodate the needs of such providers solely on the basis

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[168] *Id.* at 1174.

[169] AEP comments at 40-45; FP&L comments at 36-42.

[170] AEP comments at 42, *citing* S. Rep. No. 95-580, 95th Cong., 1st Sess. 16 (1977); *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 1585, 1588 (1978).

[171] AEP comments at 40-45; FP&L comments at 36-42.

[172] AEP comments at 44; FP&L comments at 39-40.

that the utility may own poles with wire communications attachments somewhere in its electric utility system.[173]

77. In response, AT&T and MCI argue that section 224(a)(4) provides that if a company's poles, ducts, conduits, or rights of way are used in whole or in part for wire communications, then it is a utility for purposes of section 224.[174] According to AT&T, a utility's duties under section 224(f) are broad. Specifically, the utility must grant access to any pole, duct, conduit, or right-of-way owned or controlled by it. MCI agrees that the statute expressly states that the use of any part of a utility's facilities for the provision of any type of wire communications brings an entity within the definition of utility, and thus within the nondiscriminatory access requirement in section 224(f). AT&T states that AEP's statutory argument that section 224 applies to a given utility on a pole-by-pole basis is therefore without merit, as is AEP's further argument that an internal communications network would not qualify as wire communications under the statute. According to AT&T, the statutory definition of wire communications is not limited to communication sold to the public. Therefore, argues AT&T, a utility with a private communications network clearly has facilities that are being used to provide wire communications under the statute and thus the utility is subject to the duty to provide access.[175] MCI asserts that this is the only result compelled by the plain language of the statute and it is also the only equitable result. If it is technically feasible for the facilities at issue to support telecommunications attachments for internal purposes, argues MCI, it must be technically feasible to permit others to attach to provide telecommunications services as well.[176]

78. Airtouch also argues that the Commission's interpretation of the statutory language is consistent with the intent and purpose of the 1996 revisions to the Communications Act. According to Airtouch, section 224(f) provides all telecommunications carriers additional options for facility placement.[177] Increased facilities presence within the local marketplace serves to enhance competition in that market.[178] This is especially true since the number of CMRS providers seeking site locations has skyrocketed with the licensing of the broadband PCS and narrowband PCS spectrum.[179] Airtouch further states that there has been an increasing amount of opposition to new CMRS facilities. Therefore, Airtouch argues, the use of utility facilities may be necessary for the quick deployment of these services.[180]

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[173] Delmarva comments at 7.

[174] AT&T reply comments at 36-37; MCI reply at 39.

[175] AT&T reply comments at 36-37.

[176] MCI reply at 39.

[177] Airtouch reply at 21-23.

[178] *Id.*

[179] *Id.*

[180] *Id.*

c. Discussion

79. FP&L and AEP have presented no new facts or arguments on reconsideration to support their contention that the access provisions of section 224(f) should be invoked on a pole-by-pole rather than a system-wide basis. We continue to believe the better statutory reading does not support the argument made by some utilities 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)(1). Those obligations apply to any "utility," which section 224(a)(1) defines to include an entity that controls "poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." We reaffirm the *Local Competition Order*'s conclusion that the use of the phrase "in whole or in part" is best read to indicate that Congress did not intend for a utility to be able to restrict access to the exact path used by the utility for wire communications. Further, we reaffirm the 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.

80. We also decline to modify our conclusion in the *Local Competition Order* with respect to an electric utility's internal communications. We continue to reject the contention that, because an electric utility's internal communications do not pose a competitive threat to third-party cable operators or telecommunications carriers, such internal communications are not "wire communications" and do not trigger access obligations. Although internal communications may be used solely to promote the efficient distribution of electricity, the definition of "wire communication" is broad and clearly encompasses an electric utility's internal communications.[181]

D. Qualifications of Workers

1. Use of Non-Utility Employees.

a. Background

81. The *Local Competition Order* stated that utilities should be able to require that only properly trained persons perform work in the proximity of the utilities' lines, but did not require parties seeking to make attachments to use either the utility's own employees or the contractors or pre-designated by the utility.[182] A utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria. Permitting a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications carriers and cable operators and could lead to disputes over rates to be paid to the workers.[183]

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[181] *See Local Competition Order* at para. 1174.

[182] *Id.* at para. 1182.

[183] *Id.*

b. Positions of the Parties

82. Several utilities seek reconsideration of the decision to permit non-utility workers to perform work in proximity to the utility's electric lines.[184] AEP argues that the Commission's determination in this regard is not supported by the statute, is arbitrary and capricious and reflects the Commission's failure to comprehend fully the danger associated with such work. AEP and CP&L argue that access by persons not employed by the utilities creates hazards and exposes the utilities to uncontrollable risk for damage caused by those acting on behalf of the attaching entities. This is an issue both with respect to the workers themselves, and with respect to the high costs associated with an electrical outage when accidents occur as a result of work being performed by inadequately skilled or trained workers.[185] Duquesne also argues that permitting non-utility workers in proximity of electric lines not only compromises worker safety, but also has the potential to affect reliability of utilities' transmission and distribution systems. If system reliability is degraded, Duquesne states, it is the utility that will be blamed.[186]

83. If the Commission declines to reconsider the third-party worker requirements, Duquesne seeks clarification that a utility has reasonable discretion to establish training requirements so long as they are applied without discrimination. According to Duquesne, that training also means actual experience performing required work; a utility should be able to ask for demonstration of qualifications; and a utility must be able to insist on indemnity from carrier, or post a bond, against damage to system and personal injury suits by workers.[187] Similarly, CP&L maintains that the Commission must adopt rules to control risk, including minimum skills and performance requirements for the technicians to perform work and requirement that parties provide minimum insurance for risks. CP&L also seeks authority to bar workers who do not meet the same safety standards, training and safety culture that their own employees must meet.[188]

84. Delmarva also seeks clarification that utilities can establish and enforce reasonable worker qualifications. Delmarva suggests that the most efficient means for a utility to ensure that only qualified workers gain access to underground ducts and conduits is for the utility to designate contractors sufficiently skilled and knowledgeable about the utility's system.[189] An attaching entity may use the designated workers, with supervision from the utility, for equipment installation.

85. In response, MCI defends the Commission's rules on "qualified workers" as sound. MCI characterizes AEP as arguing that anything less than complete control over electrical contractors and installers would eliminate the electric utility's ability to take certain measures to minimize the risk and liability this mandatory access may cause. According to MCI, the argument that the Commission has

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[184] AEP Petition at 29-32; Duquesne Petition at 15-17; CP&L Petition at 18-19; Delmarva Petition at 3-4.

[185] AEP Petition at 29-32; CP&L Petition at 18-19.

[186] Duquesne comments at 16.

[187] *Id.* at 15-17.

[188] CP&L comments at 18-19.

[189] Delmarva comments at 3-4.

completely eliminated a utility's ability to minimize installation risk is specious. MCI states that the Commission expressly allowed the imposition of safety requirements, such as the ability of the utility to require that the attaching party's workers have the same training as do the utility's workers.[190]

c. Discussion

86. We have been presented with no facts or arguments that necessitate modification of the Commission's decision that otherwise qualified, third-party workers may perform pole attachment and related activities, such as make-ready work, in the proximity of electric lines.[191] In the alternative, several of the utilities have sought clarification that a utility has reasonable discretion to establish training requirements. We also find that clarification on this point is unnecessary. The *Local Competition Order* expressly gives a utility the ability to require the same qualifications and training of individuals working in proximity to utility facilities as a utility would impose on its own employees. We reiterate that a utility may require that individuals who will work attaching or making ready attachments of telecommunications or cable system facilities to utility poles, in the proximity of electric lines, have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria.[192] Thus, utilities may ensure that individuals who work in proximity to electric lines to perform pole attachments and related activities meet utility standards for the performance of such work, but the utilities may not dictate the identity of the workers who will perform the work itself. As we stated in the *Local Competition Order*, allowing a utility to dictate that only specific employees or contractors be used would impede access and lead to disputes over rates to be paid to the workers.[193]

87. We recognize that utilities' requirements with respect to qualifications and training of individuals working in proximity to utility facilities flow from such codes and requirements as the NESC and OSHA. Some utilities have training programs and qualifications that are more strict than the NESC or OSHA would require. We therefore disagree with CP&L that the Commission should adopt rules with respect to minimum skills and performance requirements for technicians or that parties provide minimum insurance for risks.

E. Modifications

a. Background

88. Section 224(h) provides:

> Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of

[190] MCI reply comments at 41.

[191] "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.

[192] *Local Competition Order* at para. 1182.

[193] *Id.*

> 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. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.[194]

89. The *Local Competition Order* established requirements regarding the manner and timing of the notice that must be provided to third-party attachers to ensure a reasonable opportunity to add to or modify an attachment. In general we concluded that, absent a private agreement establishing notification procedures, written notification of a modification must be provided to parties holding attachments on the facility to be modified at least 60 days prior to the commencement of the physical modification.[195] In emergency situations in which a 60 day notice would be impractical, we require that notice be given as soon as reasonably practicable.[196] The 60 day notice is not required for routine maintenance activities.[197]

90. In addition, the *Local Competition Order* established requirements apportioning the cost of a modification among the various users of the modified facility. Generally, we concluded that, to the extent the cost of a modification is incurred for the specific benefit of any particular party, the benefiting 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.[198]

b. Positions of the Parties

(1) Manner and timing of notice

91. EEI and UTC seek clarification that a utility's ability to promptly serve new customers is not constrained by the requirement that written notification of a modification be given to parties holding attachments on a facility 60 days prior to the commencement of the modification.[199] For example, according to EEI and UTC, some states require utility service to new customers within three days.[200] EEI and UTC contend that the utility would therefore be unable to comply with the state law if it were forced

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[194] 47 U.S.C. § 224(h).

[195] *Local Competition Order* at para. 1209.

[196] *Id.*

[197] *Id.*

[198] *Id.* at 1211.

[199] EEI/UTC comments at 10-11.

[200] *Id.*

to delay work for 60 days in order to comply with the notice requirement.[201] Additionally, according to EEI and UTC, the 60 day notification should only apply to major rebuilds.[202]

92. Similarly, Duquesne states that, in the case of modifications of facilities required by governments and governmental agencies, the Commission should only require utilities to give as much notice as practical under circumstances. While some suggest simply shortening the 60 day notice period to one or two weeks,[203] others contend that the 60 day notice period is reasonable and reflects current industry practices.[204]

(2) Allocation of costs

93. MCI requests that attaching entities be able to seek compensation for modification costs that create excess capacity which is later sold to other entrants by the incumbent utility. MCI contends that the Commission's statement that the 1996 Act ". . . does not give that party any interest in the pole or conduit other than access," is inconsistent with other statements contained within the same *Local Competition Order*.[205] According to MCI, examples of this inconsistency are found in the portion of the *Local Competition Order* that states that the Commission "will allow 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" and in the portion of the *Local Competition Order* that states that parties joining in a modification will be "responsible for the resulting costs to maintain the facility on an ongoing basis."[206]

94. MCI asserts that the Commission's contention that it would be a "disincentive to add new competitors" to not permit utilities to earn future revenues from excess capacity, is tantamount to asserting that competition is promoted by dis-incenting actual entrants in order to incent potential entrants.[207] MCI proposes that a utility be required to establish an escrow account for revenues earned from this excess capacity or, alternatively, to require new entrants requesting additional capacity to compensate the utility for the average incremental cost of the addition, rather than the total incremental cost.[208] New entrants would therefore be responsible for paying the annual depreciated value of their share of the additional

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[201] *Id.*

[202] *Id.*

[203] *See* Con Edison comments at 9; AEP reply comments at 14-15; FP&L comments; GTE comments at 42-43; CP&L comments.

[204] *See* NCTA comments at 30-31; MCI comments at 41-42; Joint Cable Parties comments at 14.

[205] MCI comments at 33.

[206] *See Local Competition Order* at para. 1216; MCI comments at 33-34.

[207] MCI comments at 34.

[208] *Id.*

facilities.[209] Finally, MCI avers that, given the potential the utilities have for double recovering additional rights of way cost, the Commission should require utilities to meet the same burdens of proof concerning claims of space exhaustion for rights of way as it had adopted for collocation.[210]

95. Bellsouth responds that compelling utilities to compensate modifiers for future revenues the utility may earn as a result of the modification would necessarily result in complicated formulas and "rebate mechanisms."[211] Likewise, EEI and UTC object to the creation of escrow accounts for future revenues resulting from modifications.[212] EEI and UTC contend that the future revenues a utility may earn from added capacity as a result of modifications for making facility accessible are irrelevant under statute.[213] Duquesne states that because of burden of record keeping on hundreds of thousands of poles and other facilities, Commission should clarify that it is the entity seeking reimbursements from future attaching entities, and not the utility, that is required to maintain pertinent records for this purpose.[214]

96. EEI and UTC state that modifications arising from compliance with the NESC should not obligate the utility to share in the cost of a proposed facility change-out where the only modifications are those necessitated by changes in the NESC since the existing facilities were installed. According to EEI and UTC, the "grandfathering" provisions of the NESC allow utilities to delay modifications to meet code changes until "more than a minimal amount of other work is done."[215] EEI and UTC contend that it would be unfair for utilities to bear the cost of a safety compliance upgrade if the upgrade is triggered solely because of modifications arising from utilities' obligations to allow attachments.[216]

97. Similarly, Duquesne states that a "grandfathered" facility is required to bring its facilities into compliance with changes in the NESC only if it rebuilds its facilities, and therefore the facilities would not be in violation of the NESC absent a change out.[217] According to Duquesne, a utility should not have to share in the modification costs unless an actual violation exists, such as noncompliance with NESC at the time the utility built its facility.[218] If such a violation exists, Duquesne asserts that a utility

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[209] *Id.*

[210] *Id.* at 35.

[211] Bellsouth Reply at 11-12.

[212] EEI and UTC Reply at 6-7.

[213] *Id.*

[214] *Id.*

[215] EEI/UTC comments at 11-13.

[216] *Id.*

[217] Duquesne comments at 14-15.

[218] *Id.*

should likewise not be required to share in costs of the modification if the violation could have been corrected on the old facility without expanding the capacity used by the utility.[219]

98. EEI and UTC seek clarification that agreements between utilities and attaching entities regarding rearrangement of facilities and notifications of proposed facility modifications supersede FCC rules. Specifically, EEI and UTC seek clarification that parties may enter private agreements regarding allocation of costs that may vary from the policies adopted in this proceeding.[220] In addition, EEI and UTC seek clarification that a utility be able to recoup labor and administrative expenses incident to providing maps, plats, and other data from entities making legitimate inquiries regarding access.[221] According to EEI and UTC, these costs are expenses which traditionally are borne directly by beneficiaries of costs. EEI and UTC also ask that requesting party be required to sign a confidentiality agreement as a precondition of a utility providing such information.[222]

99. Duquesne states that, with respect to modifications of facilities required by governments and governmental agencies (such as due to a road widening), attaching entities will claim they do not have to share costs here because these modifications are not for their special benefit or initiated by them.[223] Duquesne seeks clarification that attaching entities should share in cost of governmentally mandated pole movement because the attachers should assume the same business risk as utilities that the government may require poles to be moved.[224] GTE also requests clarification of cost sharing rules with respect to modifications to facilities caused by government agencies.[225]

c. Discussion

100. We decline to modify our decision in the *Local Competition Order* that requires, absent a private agreement establishing notification procedures, written notification of a modification to be provided to parties holding attachments on the facility to be modified at least 60 days prior to the commencement of the physical modification itself.[226] We continue to believe that under most circumstances, a utility should be able to comply with the 60 day notice requirement, even in instances where a government or a government agency requires service to new customers in less that 60 days.[227]

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[219] *Id.*

[220] EEI/UTC comments at 12-13.

[221] *Id.* at 15.

[222] *Id.* at 13-14.

[223] Duquesne comments at 11-12.

[224] *Id.*

[225] GTE comments at 40-41.

[226] *Local Competition Order* at para. 1209.

[227] *See* NCTA opposition at 14 ("[i]ndustry practice makes 60 days a common period for joint coordination of projects requiring facilities modification").

A utility would in most cases be aware well in advance of, for example, a new building or road development planned in its service area. In the unusual case of a utility that did not know of, and could not reasonably be expected to have known of a governmentally required facility modification 60 days before the governmentally mandated modification deadline, the utility must give notice to attachers at the time it becomes aware of its obligation to modify the facility.

101. We continue to believe that a 60 day notification period strikes an appropriate balance between avoiding unnecessary delays of modifications that would expedite competition in telecommunications services, and providing parties with preexisting attachments to a pole or conduit sufficient time to evaluate the effects of the proposed modification, including whether the modification presents an opportunity to adjust the attachment.[228] As stated in the *Local Competition Order*, if the contemplated modification involves an emergency situation for which advanced written notice would prove impractical, notice should be given as soon as reasonably practicable.[229] We also continue to believe that the burden of requiring specific written notice of routine maintenance activities would not produce a commensurate benefit.[230] Rather, as we stated in the *Local Competition Order*, utilities and parties with attachments are expected to exchange maintenance handbooks or other written descriptions of their standard maintenance practices, and this information exchange should be sufficient to apprise all parties of the status of their facilities.

102. We also decline to specifically limit the 60 day notice requirement to "major rebuilds," as EEI and UTC suggest.[231] We believe that the parties themselves are best able to determine when and under what circumstances notice would be reasonable and sufficient. As we stated in the *Local Competition Order*, the owner of a facility and parties with attachments are encouraged to negotiate acceptable notification terms.[232] For example, smaller entities that are attaching parties and attaching parties in rural markets may need more time to study facilities than larger facility users and those in urban markets.[233]

103. We decline to reconsider the *Local Competition Order*'s decision that, in the case of facility modifications initiated by third-party attachers that create excess capacity, the facility owner is not obligated to use any later-earned revenues from that capacity to compensate the parties who paid for the modification, even in cases in which the owner did not share in the costs of the modification. Petitioners have presented no new evidence or arguments that would cause us to change this conclusion on reconsideration. As the *Local Competition Order* notes, section 224(h) limits responsibility for modification costs to any party that "adds to or modifies its existing attachment after receiving notice" of

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[228] *Id.* at 1207.

[229] *Id.* at 1209.

[230] *Id.*

[231] EEI/UTC comments at 10-11; *see also* CP&L comments at 15.

[232] *Id.*

[233] *Id.*

a proposed modification.[234] The statute does not confer any interest to that party in the pole or conduit other than access. We reiterate that creating a right for that party to share in future revenues from the modification would be tantamount to bestowing an interest that the statute withholds.[235] We continue to believe that a requirement that utilities pass additional attachment fees back to parties with preexisting attachments may be a disincentive to add new competitors to modified facilities, in direct contravention of the general intent of Congress.[236]

104. We also disagree with MCI that our finding runs contrary to the decision to allow 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. We likewise do not agree that the Commission's decision to require parties requesting or joining in a modification to be responsible for resulting costs to maintain the facility on an ongoing basis contradicts this policy. The *Local Competition Order* merely declined, in the absence of a congressional directive, to add facility owners to the category of responsible parties. Because we have declined to hold facility owners responsible for passing these additional attachment fees back to parties with preexisting attachments, we strongly encourage those parties seeking compensation from future attaching parties to maintain the records necessary to facilitate the collection of such compensation.[237] These records should utilize generally accepted accounting procedures and, as stated in the *Local Competition Order*, should take into account depreciation to the pole or facility that has occurred since the modification.[238] We will not, however, require the facility owner to maintain records regarding modification costs for the benefit of attaching entities.

105. Pursuant to the *Local Competition Order*, 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.[239] In this context, our rule would require a utility that alters its facilities in accordance with the NESC at the time of a modification to share in the costs of the modification. EEI, UTC, and Duquesne seek clarification of this requirement in the context of changes to the NESC since the facilities were built. A utility must alter its facilities in response to changes to the NESC at the time the NESC so requires. This is a matter that we expect to be well-established under current practices, and is in any case beyond the scope of this proceeding.

106. We also clarify that attaching entities will not be responsible for sharing in the cost of governmentally mandated pole or other facility modification. In the case of a road widening, for example, a utility would be required to move the pole or other facility even in the absence of attaching entities; such

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[234] 47 U.S.C. § 224(h).

[235] *Local Competition Order* at para. 1216.

[236] *Id.*

[237] A modifying party or parties may recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification. *Local Competition Order* at para. 1214.

[238] *Id.* at para. 1214.

[239] *Id.* at para. 1212.

expenses are not caused by the attaching party and would occur in any event. The reasonably projected incremental costs associated with movement of attaching entities' facilities should be factored into the standard rent that attaching entities pay a utility, rather than be treated as a separate cost to be recovered.

107. We further clarify that a utility may require an inquiring entity to reimburse the utility, on an actual cost basis, for the actual labor and administrative costs incident to providing maps, plats, and other data to entities making inquiries regarding access, because such one-time expenses would not typically be provided for in an attaching entities' rent. However, we would expect that utilities would have a standard quote for ascertaining the availability of pole or conduit capacity. Only in the case where a particular request for access involves highly unusual expenses associated with evaluating a proposal, would cost recovery over-and-above the standard rate be permissible. With respect to the confidentiality of such information, we reiterate that we expect a utility to make its maps, plats and other relevant data available for inspection and copying by the requesting party, subject to reasonable conditions to protect proprietary information.[240]

F. State Certification

a. Background

108. Prior to enactment of the 1996 Act, section 224(b)(1) gave the Commission jurisdiction to "regulate the rates, terms, and conditions for pole attachments . . . ."[241] Under former section 224(c)(1), that jurisdiction was preempted where a state regulated such matters. Such "reverse preemption" was conditioned upon the state following a certification procedure and meeting certain compliance requirements set forth in sections 224(c)(2) and (3).[242] The 1996 Act expanded the Commission's jurisdiction to include not just rates, terms, and conditions, but also the authority to regulate non-discriminatory access to poles, ducts, conduits and rights-of-way under section 224(f).[243] At the same time, the 1996 Act expanded the preemptive authority of states to match the expanded scope of the Commission's jurisdiction. Section 224(c)(1) now provides:

> Nothing in this section 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 subsection (f), for pole attachments in any case where such matters are regulated by the State.[244]

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[240] *Id.* at para. 1223.

[241] 47 U.S.C. § 224(b)(1).

[242] *See States That Have Certified That They Regulate Pole Attachments, DA 92-201, Public Notice*, 7 FCC Rcd 1498 (1992).

[243] 47 U.S.C. § 224(f).

[244] 47 U.S.C. § 224(c)(1).

109. The *Local Competition Order* noted that Congress did not amend section 224(c)(2) to prescribe a certification procedure with respect to access (as distinct from the rates, terms, and conditions of access).[245] The *Local Competition Order* stated that, upon the filing of a section 224(f) access complaint with the Commission, the defending party or the state itself should come forward to apprise the Commission whether the state is regulating such matters.[246] If so, the Commission shall dismiss the complaint without prejudice to it being brought in the appropriate state forum.[247] Pursuant to the *Local Competition Order*, a party seeking to show that a state regulates access issues should cite to state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum.[248]

b. Positions of the Parties

110. NCTA requests that the Commission reconsider its decision and require states to utilize the same procedural mechanism for assuming jurisdiction over access that they must use to assume jurisdiction over pole attachment rates, terms and conditions. NCTA claims that not requiring a state to certify that it regulates access in advance of a complaint will create uncertainty and will waste time determining the proper forum to file a complaint.[249] NCTA also claims that the lack of state certification could undermine the choice of a potential attaching party to vindicate rights as part of an overall Section 252 arbitration or as an independent complaint under Section 224.[250]

111. NCTA notes that the *Local Competition Order* recognizes that "time is of the essence" in resolving access disputes, and that the Act and the Commission's rules make clear that "denial of access . . . is an exception to the general mandate of section 224(f)."[251] According to NCTA, since the Commission has already determined a state's pole attachment access rules ultimately could be subject to preemption under section 253(a), it should reduce uncertainty, transaction costs and potential litigation by requiring states to certify they have actually adopted access rules in conformity with the strong Federal presumption favoring access and the access guidelines adopted in the *Local Competition Order*.[252]

112. CompTel, along with EEI, UTC and PG&E request clarification that where a state has certified that it regulates rates, terms and conditions for pole attachments, its regulations in this area are not only entitled to deference but have preemptive effect to the extent they do not directly violate section

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[245] *Id.*

[246] Our rules require service of a pole attachment complaint on both the defending utility and the state. 47 C.F.R. § 1.1404(b).

[247] *Local Competition Order* at para. 1240.

[248] *Id.*

[249] NCTA comments at 21-22.

[250] *Id.* at 22.

[251] *Id.* at 21.

[252] *Id.* at 21-22.

253, which invalidates all state or local requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[253] CCTA disagrees, arguing that such a clarification would run contrary to the 1996 Act.[254] EEI, UTC and PG&E ask the Commission to revise section 1.1414(a)(2) to conform with revised section 224(c)(2)(B) which requires states wishing to exercise preemption authority to certify that they "consider the interest of the subscribers of the services offered via such attachments."[255]

113. EEI, UTC, and AEP urge rejection of NCTA's request to require states to certify, as a precondition to regulating access, that they preempt FCC authority over rates, terms and conditions for attachments.[256] According to AEP, the Commission properly held that the states are not required to certify as to access matters because the Commission has no statutory authority to require states to certify as to access. AEP also opposes NCTA's request that if a state does preempt federal jurisdiction it should follow the federal lead with respect to access to poles, ducts, conduits, and rights-of-way.[257]

c. Discussion

114. In the *Local Competition Order*, we noted that the authority of a state is clear under section 224(c)(1) to preempt federal regulation for access requests arising solely under section 224(f)(1).[258] When a telecommunications carrier seeks access to LEC facilities or property under section 251(b)(4), the reference in section 251(b)(4) to section 224 incorporates all aspects of the latter section, including the state reverse preemption authority of section 224(c)(1).[259] Thus, when a state has exercised its preemptive authority under section 224(c)(1), a LEC satisfies its duty under section 251(b)(4) to afford access by complying with the state's regulations.[260] If a state has not exercised such preemptive authority, the LEC must comply with the federal rules.[261] The *Local Competition Order* noted that Congress did not amend section 224(c)(2) to prescribe a certification procedure with respect to access (as distinct from the rates, terms, and conditions of access).[262] Parties seeking reconsideration have provided no new facts or arguments to justify their requested rule changes. We note that, in a separate proceeding, we seek comment on whether additional certification is needed to ascertain whether a State is regulating the rates,

[253] EEI/UTC comments at 16.

[254] CCTA opposition at 1-6.

[255] *Id.*

[256] *Id.* at 8. *See also* AEP comments at 11-12.

[257] AEP comments at 11-12.

[258] *Local Competition Order* at para. 1236.

[259] *Id.* at para. 1237.

[260] *Id.* at para. 1239.

[261] *Id.*

[262] *Id.* at para. 1240.

terms and conditions of access to facilities and rights-of-way on multiple unit premises.[263] The issue of State certification of such jurisdiction was not raised in this proceeding and is not decided herein.

115. Rather than requiring states to undertake formal certification procedures that are not supported by the text of section 224(c)(2), we determined that the burden of informing this Commission when a state has exercised its reverse preemption authority should rest with the party seeking to rely upon such authority in defending an access complaint filed before us. Although we decline to reconsider this decision, we clarify that this applies to those states that have previously certified their regulation of rates, terms and conditions of pole attachments. Our rule does not require such states to formally re-certify in order to assert their jurisdiction over access. However, if a state that has not previously certified its authority over rates, terms and conditions wishes to begin to assert such jurisdiction, including jurisdiction over access pursuant to section 224(f), the state must certify its jurisdiction, as required under section 224(c)(2). We are mindful of the potential confusion and lack of certainty that could result in the absence of any certification, and do not believe that Congress intended such a result.

116. We reiterate that, upon the filing of an access complaint with this Commission, the defending party or the state itself should come forward to apprise us whether the state is regulating such matters.[264] If so, pursuant to the *Local Competition Order*, we shall dismiss the complaint without prejudice to it being brought in the appropriate state forum.[265] We require any party seeking to demonstrate that a state regulates access issues to cite the state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum.[266] We continue to believe that these procedures are consistent with the language and intent of the statute, and unduly burden neither the parties to an access complaint, nor the state entities responsible for pole attachment regulation.

G. Other Issues

a. 45 DayTime Limit on Utility Evaluation of Attachment Request

117. The *Local Competition Order* stated that, because time is of the essence in access requests, a utility must respond to a written request for access within 45 days.[267] If access is not granted within 45 days of the request, the utility must confirm the denial in writing by the 45th day. EEI and UTC request that we clarify that an entity requesting access to utility facilities must provide clear and sufficient information in order for the utility to evaluate the request, and the Commission should specify that 45-day time period to respond to request does not start until all the necessary information is provided.[268] The

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[263] *See Notice of Proposed Rulemaking, Notice of Inquiry, and Third Further Notice of Proposed Rulemaking*, FCC 99-141, WT Docket No. 99-217.

[264] *Local Competition Order* at para. 240.

[265] *Id.*

[266] *Id.*

[267] *Id.* at para. 1224.

[268] EEI/UTC comments at 14.

Joint Cable Parties and NCTA respond that giving more than 45 days would be unreasonable and contrary to industry practice.[269] According to the Joint Cable Parties and NCTA, in the event a utility were to find that a particular request for access would take longer than 45 days to evaluate, the utility should apply for a waiver of the 45 day limit.

118. Based upon the record before us, we decline to reconsider the procedural rules under discussion. We expect that access requests would contain all pertinent and reasonably necessary information for the utility's consideration of the request, and would follow established industry practices. If the information in the request is incomplete, a utility may require a second access request. In such a case, we would also expect the utility to notify the applicant of all pertinent defects in its application promptly. It would not be acceptable to object, in a piecemeal fashion, to an access request containing multiple defects.

119. As we stated in the *Local Competition Order*, a telecommunications carrier or cable operator filing a complaint with the Commission must establish a prima facie case.[270] A petitioner's complaint, in addition to showing that it is timely filed, must state the grounds given for the denial of access, the reasons those grounds are unjust or unreasonable, and the remedy sought.[271] The complaint must be supported by the written request for access, the utility's response, and information supporting its position.[272] We believe that an entity requesting access would provide the utility with sufficient information in its request, and this request will be part of the record in the Commission's evaluation of a complaint regarding a denial of access. We reiterate that, "time is of the essence," and that by implementing specific complaint procedures for denial of access cases, we have established swift and specific enforcement procedures that will allow for competition where access can be provided.[273]

b. Identification of Attachments

120. Several commenters ask that the Commission require attaching entities to "tag" their attachments, in order to facilitate easy identification of attachers lines.[274] We believe that, on a prospective basis, reasonable tagging requirements may be included in agreements between utilities and attachers. This would help prevent confusion during modifications, would aid safety measures, and would help insure that notice of modifications are sent to the correct parties. Thus, we will permit utilities to require tagging in their attachment agreements, as easy identification of attachers lines is in the best interests of the facility owner, the attaching entity, and the consumers of all of these services.

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[269] Joint Cable Parties comments at 13; NCTA comments at 30.

[270] *Local Competition Order*, at para 1223.

[271] *Id.*

[272] *Id.*

[273] *Id.* at para. 1224.

[274] *See* EEG/UTC comments at 13; Duquesne comments at 19; Carolina Power and Light comments at 21.

IV. ORDERING CLAUSES

121. Accordingly, IT IS ORDERED that, pursuant to sections 224, 251 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 224, 251 and 303(r), the Order on Reconsideration is ADOPTED.

122. IT IS FURTHER ORDERED, pursuant to section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106 (1995), that the petitions for reconsideration or clarification are DENIED IN PART and GRANTED IN PART to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX A

Parties Filing Petitions and/or Oppositions and Comments on Petitions
CC Docket No. 96-98
CC Docket No. 95-185

Petitions for Reconsideration and/or Clarification Regarding Access to Rights-of Way

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Energy Services, Inc., Northern States Power Company, The Southern Company and Wisconsin Electric Power Company (AEP)
Carolina Power & Light (CP&L)
Consolidated Edison Company of New York, Inc. (Con Edison)
Delmarva Power & Light Company (Delmarva)
Duquesne Light Company (Duquesne)
Edison Electric Institute and UTC, The Telecommunications Association (EEI/UTC) (joined and supported by letter by Pennsylvania Power & Light Company (PP&L))
Florida Power & Light Company (FP&L)
The Local Exchange Carrier Coalition (LECC)
MCI Communications Corporation (MCI)
Margaretville Telephone Company, Inc. (Margaretville)
National Cable Television Association, Inc. (NCTA)
Pacific Gas and Electric Company (PG&E)

Oppositions and Comments in Response to Petitions for Reconsideration and/or Clarification

AirTouch Communications, Inc. (AirTouch) (Comments)
American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Energy Services, Inc., Northern States Power Company, The Southern Company and Wisconsin Electric Power Company (AEP) (Opposition)
Ameritech (Opposition)
Association for Local Telecommunications Services (ALTS) (Reply)
AT&T Corporation (AT&T) (Opposition and Comments)
BellSouth Corporation, BellSouth Enterprises, Inc., and BellSouth Telecommunications, Inc. (BellSouth) (Opposition and Comments)
California Cable Television Association (CCTA) (Opposition)
Cellular Telecommunications Industry Association (CTIA) (Opposition)
Comcast Cellular Communications, Inc., and Vanguard Cellular Systems, Inc. (Comcast) (Comments)
Competitive Telecommunications Association (CompTel) (Comments)

Continental Cablevision, Inc., Jones Intercable, Inc., Century Communications Corp., Charter Communications Group, Prime Cable, InterMedia Partners, TCA Cable TV, Inc., Greater Media, Inc., Cable TV Association of Maryland, Delaware & the District of Columbia, Inc., Montana Cable TV Association, South Carolina Cable Television Association, Texas Cable & Telecommunications Association (Joint Cable Parties) (Opposition)
Cox Communications, Inc. (Cox) (Opposition and Response)
Duquesne Light Company (Duquesne) (Opposition)
Edison Electric Institute and UTC, The Telecommunications Association (EEI/UTC) (Comments)
GTE Service Corporation (GTE) (Opposition and Comments)
MCI Communications Corporation (MCI) (Response)
Margaretville Telephone Company, Inc. (Margaretville)(Reply)
National Cable Television Association, Inc. (NCTA) (Opposition)
NYNEX Telephone Companies (NYNEX) (Comments)
Paging Network, Inc. (Paging Network) (Comments)
Sprint Corporation (Sprint) (Opposition)
Teleport Communications Group, Inc. (Teleport) (Comments and Opposition)
United States Telephone Association (USTA) (Opposition)
US WEST, Inc. (US WEST) (Comments)

Statement of Commissioner Harold W. Furchtgott-Roth, Concurring in Part and Dissenting in Part

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98.

Today we reconsider various aspects of the 1997 *Local Competition Order*, which implemented section 224 of the Telecommunications Act of 1996. I respectfully dissent from the affirmation of these rules to the extent that they require utilities to expand capacity for the benefit of attaching parties; limit utilities' ability to reserve space for themselves; and regulate labor and employment practices with respect to attachments. In these regards, I think the rules go far beyond the dictates of the statute. I concur in the rest of the Order, however -- especially in the decision not to require the exercise of eminent domain on behalf of would-be attachers.

Capacity Expansions

I would not require any capacity expansions, as does today's decision. *See supra* Part III.B. To be sure, section 224(f)(1) clearly requires non-discriminatory access, but to what? -- to "any pole, duct, conduit, or right-of-way *owned* or *controlled* by" a utility, not to some future pole that the utility could install, a duct that it theoretically could build, or a right-of-way different from the one that exists at the time the request is made. The latter type of facilities are not owned or controlled by the utility; they are wholly imaginary facilities that simply do not exist. Moreover, nothing in this section speaks of a duty to build out, construct, or expand infrastructure. It requires non-discriminatory access, at regulated rates, but imposes no construction or expansion duties upon utilities. If Congress had meant to impose such a drastic requirement on utilities (forced access being serious enough), I would think Congress would have done so expressly. Given the lack of such language in section 224(f)(1), I would not read a capacity expansion requirement into the statute for utilities, electric or otherwise.

If there were any reasonable doubt whether the plain language of 224(f)(1) requires capacity expansions (and I do not think there is), the very next provision of the Act conclusively resolves it, as far as electric utilities are concerned. Mandating capacity expansions across the board seems flatly contrary to section 224(f)(2), which provides that: "*Notwithstanding* [the access provision], a utility providing electric service *may deny* a cable television system or any other telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis *where there is insufficient capacity*. . .". 47 U.S.C. section 224(f)(2)(emphasis added). Where there is not enough room for the access requester, this language makes clear that an electric utility is fully within its rights to simply deny access, so long as it denies access to all other similarly-situated requesters.

The Commission never deals with the express language of 224(f)(1). Instead, it points to the non-discrimination "principle" of 224(f)(1) (this is all it can point to, since nothing in the text of 224(f)(1) mentions expansions), arguing that this section prohibits all utilities (electric or otherwise) from refusing to build out for others if it would build out for itself.

I believe that the Commission misapprehends the group that is protected from discrimination, and as against whom. To my mind, "non-discrimination" is not about discrimination as between the utility itself and the requesters, but discrimination by the utility as among requesters. That is, non-discrimination does not mean that the utility must treat all cable television systems and telecommunications carriers just as it treats itself, but that the utility must treat all cable televisions systems and telecommunications carriers just as it treats other cable television systems and telecommunications carriers. Simply put, cable television systems and telecommunications carriers all have a federal right of access to the enumerated facilities, and the utility must grant that access on a fair and equal basis, without favoring one requester over another. But it does not require the utility to give requesters the same treatment it gives itself.

Significantly, where Congress meant to require that companies treat others as they treat themselves -- as opposed to treating other parties similarly -- it said so directly, in addition to, and independently of language mandating non-discrimination. For example, in Title II, Congress required that ILECS provide interconnection on "nondiscriminatory" rates, terms, and conditions, 47 U.S.C. section 251(c)(2)(C), and then went on to say in the next provision that they must *also* provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself," *id.* section 251(c)(2)(D). If "non-discrimination" already included the principle of equal treatment as between the regulated entity and others, however, the additional language in subsection (D) would be mere surplusage, adding nothing to subsection (C). Here, there is no language requiring equal treatment with respect to a utility's treatment of itself, and we should not read it into the "non-discrimination" duty.

The Commission also attempts to justify its creation of the capacity expansion duty by noting that it had a "regulatory practice" of requiring expansion and arguing that nothing in the 1996 Telecommunications Act reflects an intent to eliminate that practice. *See supra* at para. 52.5. The question here is not whether the Act reflects an intent to change administrative practices in effect at the time of passage. Any number of practices -- statutorily authorized or not -- could be in effect when Congress legislates in an area; Congress is not required to make clear that those practices should be stopped before one can conclude that the practice is statutorily unauthorized. The question is whether the Act reflects an intent to create a duty to expand capacity, above and beyond the existing duty of nondiscriminatory access to existing facilities. The text of section 224 yields no such conclusion, past regulatory practice notwithstanding.

Reservation of Space

I also would not compel utilities to present to the Commission "bona fide" development plans in order to reserve capacity for themselves. *Supra* Part III.B. Again, I do not think the "non-discrimination principle" mandates this scheme, since the issue is not whether the utility does things for itself that it does not do for others, but whether it does things for some requesters that it does not do for other requesters. So, if a utility wants to reserve space for itself, that does not constitute discrimination among would-be attachers. Moreover, these "reservation" regulations places the Commission in the position of reviewing state utilities' business plans for legitimacy. This is federal micro-management, conducted by an agency wholly outside its area of expertise

(we know little to nothing about planning for the provision of utility services), and it is simply not required by the statute.

Exercise of Eminent Domain to Accommodate a Request for Access

The above-discussed capacity expansion requirement is not only outside the terms of the statute, but its implementation creates wrinkles in state law, making it all the more clear that Congress probably never intended such an obligation. Specifically, because the Commission requires expansions of existing rights-of-way, it must face the consequent issue whether utilities can be required to exercise state-created, state-granted, and state-governed rights of eminent domain in order to effectuate the perceived purposes of section 224.

Fortunately, the Commission reverses on reconsideration its original decision to mandate such action, *supra* at Part III.A.2, for that decision represented an extraordinary assertion of federal authority over the most traditional of state powers in order to advance a federal program. As such, I believe that the eminent domain requirement caused Tenth Amendment problems. *See* U.S. Const. Amdt. X "(The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

Under the old rules, the Commission would have pressed into service the core state power of eminent domain, as delegated to its utilities. *Cf. Alden v. Maine*, 119 S. Ct. 2240, 2264 (1999) ("A power to press a State's own courts into federal service to coerce the other branches of the State . . is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. Such plenary federal control of state governmental processes denigrates the separate sovereignty of the States.") (citation omitted); *see also Printz v. United States* 521 U.S. 898 (1997) (Brady Act violated the Tenth Amendment because it imposed unconstitutional obligation on state officers to execute federal laws). The mandatory exercise of this power was considered necessary in order to achieve the goals of purely federal regulatory program, not in order to effectuate any possible state interest.

Eminent domain is a core and traditional power of sovereign States, one that was never delegated by the Constitution to the federal government. As such, it rests exclusively within the province of the States, and I do not see how the Commission could have compelled the exercise of such power. As the Supreme Court has explained, "federal action [that] would 'commandeer' state governments into the service of federal regulatory purposes" is "inconsistent with the Constitution's division of authority between federal and state governments." *New York v. United States*, 505 U.S. 144, 175 (1992). The Commission thus does well to reconsider this aspect of pole attachment regulations.

(Of course, the statute evinces no more proof "that Congress intended for section 224 to compel a utility to exercise eminent domain," *supra* at para. 38, than it does that Congress meant for the statute to force a utility to build out its plant in the first place. If the Commission stuck

to this approach to statutory construction, it would not find a capacity expansion requirement in the statute either.)

Qualifications of Workers

The Commission on reconsideration keeps intact its regulations regarding the types of workers that can be used for the installation of requested attachments. *See supra* at paras. 86-87. The Commission thus bars utilities from designating the workers that should be used to attach equipment to their own facilities. Put directly, I see nothing in section 224 that gives this Commission authority to regulate the labor and employment practices of electric utilities. This is simply not a case of statutory ambiguity.

* * *

For the reasons discussed above, it seems to me that these pole attachment regulations, by requiring capacity expansions, limiting reservations of space by utilities, and regulating the qualifications of workers who install pole attachments, go much further than the statute requires. I expressly support, however, the decision to repeal the regulations requiring utilities to exercise eminent domain rights on behalf of third parties.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL POWELL, CONCURRING IN PART, DISSENTING IN PART

Re: *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98)*

As I have articulated on many occasions, I fully support taking the steps necessary to promote and insure local competition. To this end, our *Local Competition Order*, among other things, implemented the pole attachment provisions of the Telecommunications Act of 1996[1] so that cable television systems and telecommunications carriers have non-discriminatory access to poles, ducts, conduits, and rights-of-way owned by utilities or local exchange carriers.[2] Many of the decisions in the *Order* we adopt today reaffirm and recognize the importance of non-discriminatory access to the development of competition, and, in turn, the provision of choice to consumers. That said, I must respectfully dissent to the extent that the *Order* requires a utility providing electric service to expand the capacity of its poles, ducts, conduits, and rights-of-way in order to accommodate a request for attachment. I believe that such a requirement is contrary to the plain language of the statutory mandate.

This *Order* addresses petitions for reconsideration or clarification of the access requirements of the *Local Competition Order*. Specifically, my concern lies in the portion of the item that relates to capacity expansion. Section 224(f)(1) of the Act, one of the provisions implemented in the *Local Competition Order*, mandates that a utility[3] provide either a telecommunications carrier or cable television system "with non-discriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[4] This *Order* reaffirms the finding of the *Local Competition Order* that requires a utility to expand capacity at the request of a telecommunications carrier or cable television system, just as it would to meet its own needs.[5] Generally I agree that the non-discrimination principle requires a utility to expand capacity at the request of a telecommunications carrier or cable television system. My specific disagreement is

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1 *See* 47 U.S.C. § 224(f).

2 *See 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, 16058-107 (1996) (*Local Competition Order*).

3 Section 224 (a)(1) defines a "utility" as "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State." 47 U.S.C. § 224 (a)(1).

4 47 U.S.C. § 224(f)(1).

5 *See Order* ¶ 52 ("We reiterate that the principle of non-discrimination 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").

that this *Order* ignores that Congress explicitly excepted electric utilities from this general obligation.

Although I concur in that the non-discrimination provision discussed in section 224(f)(1) can be read to require that certain utilities expand capacity for a request of attachment, I believe that the *Order* fails to sufficiently recognize the exemption discussed in section 224(f)(2), and incorrectly requires that electric utilities provide for this capacity expansion against their will. Section 224(f)(2) states that:

> "[n]otwithstanding paragraph [(f)] (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[6]

The language unambiguously reserves to electric utilities the right to deny access if there is not sufficient capacity on its poles, or in its ducts or conduits, or in its rights-of-way. There is nothing in the statute from which to draw the conclusion that Congress meant the words "insufficient capacity" to mean "insufficient expanded capacity," nor does this *Order* cite to any legislative history to support such a position.

Indeed, it is hard to see how you can give section 224(f)(2) any meaning at all if an electric utility is required to expand its poles, ducts or conduits, or even expand its rights-of-way, to accommodate requests for attachment. There is no apparent point at which an electric utility could actually deny a request. Thus, the better reading is that upon a request for attachment, the electric utility is not mandated to expand capacity of its poles under the non-discrimination principle drawn from section 224(f)(1). Instead, the electric utility must only ensure that any denials of such requests are done so on a non-discriminatory basis.

For the aforementioned reasons, I concur in part and dissent in part from this *Order*.

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6 47 U.S.C. § 224(f)(2).