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VIA HAND DELIVERY

September 28, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

EX PARTE OR LATE FILED

EX PARTE

Re: Ex Parte Presentation in WT Docket No. 99-217, and CC Docket No. 96-98

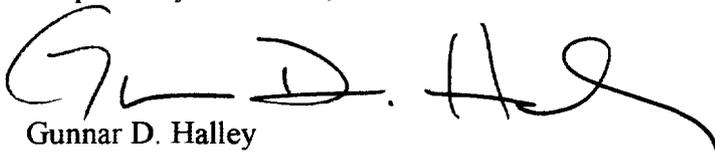
Dear Ms. Salas:

Please find attached the following documents that the undersigned, on behalf of the Smart Buildings Policy Project, provided today to Lauren Van Wazer in the Wireless Telecommunications Bureau:

- 1) California Public Utilities Commission Decision 98-10-058 (Oct. 22, 1998);
- 2) California Public Utilities Commission Order Modifying Decision 98-10-058 and Denying Rehearing (March 16, 2000); and
- 3) Summary of the California Public Utilities Commission's Order Modifying Decision 98-10-058 and Denying Rehearing.

In accordance with the Commission's rules, for each of the above-mentioned proceedings, I hereby submit to the Secretary of the Commission two copies of this notice of the Smart Buildings Policy Project's written ex parte presentation, with copies of the documents specified above.

Respectfully submitted,



Gunnar D. Halley

Counsel for the
SMART BUILDINGS POLICY PROJECT

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List A B C D E

cc: Lauren Van Wazer (WTB)(w/o enclosures)

Enclosures

Washington, DC
New York
Paris
London

Order Instituting Rulemaking on the
Commission's Own Motion into Competition
for Local Exchange Service.

R.95-04-043

Order Instituting Investigation on the
Commission's Own Motion into Competition
for Local Exchange Service.

I.95-04-044

Decision **98-10-058**

California Public Utilities Commission
October 22, 1998

***1 OPINION**

TABLE OF CONTENTS

	Title	Page
OPINION	2
I.	Procedural Background	3
II.	Statutory Authority For ROW Access Rulemaking	5
A.	The Need For Rules and Tariffs	9
B.	Discussion	12
III.	General Definitions and Applicability of Rules	14
A.	Utility Categories Covered Under ROW Rules	14
1.	Parties' Positions	14
2.	Discussion	15
B.	Definition of Rights of Way	16
1.	Parties' Positions	16
2.	Discussion	17
C.	Definition of Nondiscriminatory Access	18
1.	Parties' Positions	18
2.	Discussion	20
D.	Renegotiation of Existing Agreements to Conform to Commission Rules	21
1.	Parties' Positions	21
2.	Discussion	22
E.	Applicability of Rules to Cable Companies	22
1.	Discussion	23
F.	Applicability of Rules to Commercial Mobile Radio Service (CMRS)	25
1.	Parties' Positions	25
2.	Discussion	26
G.	Applicability of Rules to Municipalities and Governmental Agencies	28
1.	Parties' Positions	28
2.	Discussion	33
H.	Reciprocity of Rights-of-Way Access Between Incumbents and CLCs	40
1.	Parties' Positions	40
2.	Discussion	42
IV.	Pricing Issues	43
A.	Parties' Positions	43

B.	Discussion	48
V.	Obligations to Respond to Requests Concerning Facility Availability and Requests for Access	57
A.	Parties' Positions	57
B.	Discussion	61
VI.	Treatment of Confidential Information	65
A.	Parties' Positions	65
B.	Discussion	66
VII.	Restrictions on Access to Utility Capacity	66
A.	Safety and Reliability Issues	66
1.	Parties' Positions	66
2.	Discussion	72
B.	Reservations of Capacity	76
VIII.	Capacity Expansion, and Modification, and Reclamation	87
A.	Parties' Positions	87
B.	Discussion	89
IX.	Obtaining Third-Party Access to Customer Premises	92
A.	Parties' Positions	92
B.	Discussion	97
X.	Third Party Access to Jointly-Owned Facilities	102
A.	Parties' Positions	102
B.	Discussion	105
XI.	Expedited Dispute Resolution	105
A.	Parties' Positions	105
B.	Discussion	109
	Findings of Fact	112
	Conclusions of Law	119
	ORDER	132

Before Bilas, President and Conlon, Knight, Jr., Duque and Neeper, Commissioners.

BY THE COMMISSION:

HENRY M. DUQUE Commissioner

By this decision, we take a further significant step in our program to open the local exchange market within California to competition. We adopt rules herein governing the nondiscriminatory access to the poles, ducts, conduits, and rights-of-way (ROW) applicable to all competitive local carriers (CLCs) competing in the local exchange market within the service territories of the large and mid-sized incumbent local exchange carriers (ILECs): Pacific Bell (Pacific) and GTE California Incorporated (GTEC), Roseville Telephone Company (RTC) and Citizens Telecommunications Company of California (CTC). In order for broadly available facilities-based competition to succeed, CLCs need

access to the poles, ducts, conduits, and ROW, owned not only by the ILECs, but those owned by other entities controlling essential ROW including electric utilities and by local governments. The rules adopted herein shall apply to the major investor-owned electric utilities [FN1] as well as to the above-referenced ILECs. The obligations of the ILECs and electric utilities to provide nondiscriminatory access to CLCs shall also extend to cable companies. Thus, our rules shall apply uniformly, without the need to distinguish whether a given attachment is used to provide cable television, as opposed to telecommunications services. We also address herein ROW access issues relating to municipal utilities and local governments. At this time, we shall not apply these rules to other categories of investor-owned public utilities such as gas, water, or steam utilities. We will consider expanding the scope of the rules at a later time to cover additional classes of utilities.

FN1. The major electric utilities are Pacific Gas and Electric Company (PG&E); Southern California Edison Company (Edison); and San Diego Gas & Electric Company (SDG&E).

I. Procedural Background

*2 We establish rules herein regarding ROW access as a crucial part of our continuing program to facilitate the emergence of robust competition for local exchange service within California. We solicited initial comments on proposed rules for access to ROW among telecommunications carriers in conjunction with the initiation of local exchange competition in the incumbent territories of Pacific and GTEC in Phase II of this proceeding. In Decision (D.) 96-02-072, in response to Phase II comments, we concluded that parties had raised a number of complex issues relating to ROW access which were important but which could not readily be resolved at that time. We directed carriers to negotiate any necessary ROW access requirements through contract on a case-by-case basis as an interim measure and stated our intention to further consider the need to define carriers' ROW access rights through a combination of workshops and written pleadings. In the event parties could not reach agreement, we directed them to file complaints for prompt resolution. By Rule 12 in Appendix E of D.96-02-072, we directed that "LECs and CLCs may mutually negotiate access to and charge for right-of-way, conduits, pole attachments, and building entrance facilities on a nondiscriminatory basis."

By ruling dated March 28, 1996, the need for further rules governing access to ROW was designated among the matters to be addressed in Phase III of this proceeding. The record on this issue was developed through written comments and technical workshops. No evidentiary hearings have been held. An initial workshop was held on April 8, 1996, addressing provisions for ROW access among telecommunications carriers. Workshop participants agreed that telecommunications ROW issues also impact municipal and investor-owned electric utilities, and that notice of subsequent proceedings on this issue

should be provided to such utilities. A ruling subsequently was prepared on May 30, 1996, setting forth the issues identified by the workshop participants, and was served on the major investor-owned and municipal electric utilities in California with an invitation to participate in a further workshop.

A second ROW workshop on June 17, 1996, which included representatives of municipal and investor-owned electric utilities, provided participants an opportunity to discuss and to further define the relevant ROW issues to be addressed through subsequent written comments. Based on the input from the workshops, a list of issues was prepared by the assigned Administrative Law Judge (ALJ) and submitted for comments by ruling dated September 10, 1996. Opening comments were received on October 22, 1996, with reply comments on November 13, 1996. Comments were filed by the large and mid-sized ILECs, a group of small ILECs, [FN2] by the major California electric utilities, [FN3] by a group of CLCs known as the California Rights-of-Way Coalition (Coalition), [FN4] by the California Cable Television Association (CCTA) and by AT&T Wireless Services, Inc. (AWS).

FN2. The small LECs represent: Calaverac Telephone Company; California-Oregon Telephone Co.; Ducor Telephone Company; Foresthill Telephone Co.; Happy Valley Telephone Company; Hornitos Telephone Company; The Ponderosa Telephone Co.; Sierra Telephone Company, Inc.; and Winterhaven Telephone Company.

FN3. Pacific Gas and Electric Company (PG&E); Southern California Edison Company (Edison); and San Diego Gas & Electric Company (SDG&E).

FN4. The California Rights-of-Ways Coalition consists of: AT&T Communications of California Inc. (AT&T); MCI Telecommunications Corporation; ICG Telecom Group, Inc.; and MFS Intelenet of California, Inc. The view expressed in the Coalition's comments represent a consensus of the Coalition's members and may not

represent all of the views of each member of the Coalition.

*3 Although various municipal electric utility and certain local government entities were provided notice of the workshops held in this proceeding and were provided the opportunity to file comments, none chose to comment.

An initial draft decision of the assigned Administrative Law Judge was mailed to parties of record on March 30, 1998 for comment. Although evidentiary hearings were not held in this matter requiring that a proposed decision be served on parties for comment, the assigned Commissioner determined that an opportunity for comments was appropriate. Opening comments were filed on May 7 and reply comments were filed on May 18, 1998. In addition to the parties previously filing comments, certain new parties filed comments. A revised version of the draft decision was served on parties of record on July 7, 1998, soliciting additional comments from parties. The revised draft decision was also served on The League of California Cities and various other local governments throughout California, providing them with the opportunity to comment on the Commission's jurisdiction with respect to telecommunications carriers' access to the ROW of local governments. Opening comments on the revised draft decision were filed on July 24, 1998, with replies filed on July 31, 1998. We have reviewed parties' comments and taken them into account, as appropriate, in finalizing this order.

II. Statutory Authority For ROW Access Rulemaking

The current rights and obligations of public utilities with respect to ROW access are addressed in various federal, state, and local statutes. The rules we adopt expand, elaborate, or clarify previously existing access rights and obligations with a view toward promoting a more competitive market for telecommunications services. The rules we adopt shall apply to the major ILECs as well as to the major investor-owned electric utilities under our jurisdiction. We establish

rules for ROW access in this decision pursuant to our jurisdictional authority, as discussed below.

Legal disputes relating to accessing the ROW and support structures of public utilities became significant nationally in the late 1970s as the newly-emerging cable television industry sought to gain access to the utility poles and underground conduit owned by incumbent public utilities. In 1978, Congress enacted the Pole Attachments Act (47 U.S.C. § 224) which gave the Federal Communications Commission (FCC) jurisdiction to regulate the rates, terms, and conditions of attachments by cable television operators to the poles, conduit or ROW owned or controlled by utilities in the absence of parallel state regulation. More recently, with the accelerated implementation of competition for telecommunications services, Congress has further addressed and modified federal law pertaining to ROW access rights and obligations. In the Telecommunications Act of 1996 (the "Act") Congress expanded the scope of § 224 to include pole attachments by telecommunications carriers. It also gave the FCC the authority to regulate nondiscriminatory access to poles, ducts, conduits and ROW. [FN5] As amended by the Act, § 224 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." [FN6] Section 251(b)(4) of the Act further provides that "all local exchange carriers have the duty to afford access to the poles, ducts, conduits, and rights-of-way of such carriers to competing providers of telecommunications services on rates, terms, and conditions that are consistent with § 224." Similarly, § 271(c)(2)(B), checklist item (iii), requires "[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by a Bell operating company at just and reasonable rates in accordance with the requirements of § 224 "prior to that Bell operating company being able to provide certain in-region inter-Local Access and Transport Area services.

FN5. 47 U.S.C. §§ 224(a)(4) and (f).

FN6. 47 U.S.C. § 224 (f)(1).

*4 The FCC adopted rules governing access to ROW in its Interconnection Order, FCC 96-325, adopted August 1, 1996, in conformance with the Act. As set forth in § 224(c)(1), however, the FCC does not have "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 a State." This Commission, therefore, has jurisdiction to exercise reverse preemption, setting our own rules governing access to ROW, and we are not obligated to conform to the FCC rules. The discretion of state and local authorities to regulate in the area of pole attachments is circumscribed by § 253 which invalidates all state or local legal requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." This restriction does not prohibit a state from imposing "on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." In addition, § 253 specifically recognizes the authority of state and local governments to manage public ROW and to require fair and reasonable compensation for the use of such ROW.

In order to establish our jurisdiction, the Commission must satisfy the conditions of §§ 224(c)(2) and (3), which provide:

"(2) Each State which regulates the rates, terms, and conditions for pole attachment shall certify to the Commission that --

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates terms, and conditions, the State has the authority to consider and does consider the interests of the

subscribers of the services offered via such attachment, as well as the interests of the consumers of the utility service.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments --

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) With respect to any individual matter, unless the State takes final action on a complaint regarding such matter --

i. within 180 days after the complaint is filed with the State or

ii. within the application period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint."

The Commission must prescribe rules governing access to public utility ROW consistent with state statutory law as set forth in Public Utilities (PU) Code § 767 which provides in pertinent part:

"Whenever the commission, after a hearing had upon its own motion or upon complaint of public utility affected, finds that public convenience and necessity require the use by one public utility of all or any part of the conduits, subways, tracks, wires, poles, pipes, or other equipment, on, over, or under any street or highway, and belonging to another public utility, and that such will not result in irreparable injury to the owner or other users of such property or equipment or in any substantial detriment to the service, and that such public utilities have failed to agree upon such use or the terms or conditions or compensation therefore, the commission may by order direct that such use be permitted, and prescribe a reasonable compensation and reasonable terms and conditions for the joint use..."

*5 By virtue of the rules we issue pursuant to the instant decision, we hereby certify to the FCC that we regulate the rate, terms, and conditions of access to poles, ducts, conduits, and ROW in conformance with §§ 224(c)(2) and (3).

A. The Need For Rules and Tariffs

As a threshold issue, we must address the extent to which the Commission should prescribe detailed rules or require tariffs governing the pricing and other terms and conditions for access to the ROW and support structures of the incumbent utilities.

The Coalition and CCTA propose a detailed set of rules for adoption by the Commission governing various terms and conditions for ROW access. The Coalition and CCTA argue that detailed rules and minimum performance standards are needed to prevent the ILECs and electric utilities from extracting unreasonable terms of access and excessive rents from CLCs through the negotiation process, impeding the growth of local exchange competition. By contrast, the ILECs and electric utilities oppose the adoption of structured rules and favor negotiations of access agreements with recourse to a dispute resolution process in case of impasse.

The Coalition also argues that incumbents should be required to file tariffs covering the pricing and terms for ROW access, in order to mitigate CLCs' lack of equal bargaining power with the incumbent utilities. The Coalition argues that tariffs avoid the danger of CLCs being forced to accept an anticompetitive contract to gain access to an ILEC's facilities.

The Coalition argues that the incumbent utilities, through their control of essential facilities, have little or no real incentive to reach agreement through negotiations, especially where permitting attachments would simply subject them to greater competition and potential loss of market share. In the absence of fixed rules or performance requirements, and in the absence of a prescribed formula governing the

calculation of pole attachment rates, the Coalition argues, negotiations alone will not be productive, but will frustrate the introduction of competition, especially for facilities-based CLCs. The Coalition notes that either through existing affiliates, such as Pacific Bell Communications or GTE Card Services, Inc., and through affiliates that will likely soon be formed by electric utilities, the incumbents will offer competitive telecommunications services of their own. The incumbents' ROW and support structures will be valuable assets for themselves and their affiliates in competing against CLCs.

The Coalition and CCTA propose that the Commission therefore require incumbent electric and telephone utilities to file pole attachment "compliance tariffs" (in compliance with specific provisions in the Commission's decision). The compliance tariffs envisioned by the Coalition and CCTA would, (1) incorporate by reference the rules governing access to incumbent utilities' ROW and support structures adopted by the Commission; (2) contain the per pole attachment rates and per linear foot conduit usage rates presently charged to cable television companies under the contracts which they have entered into pursuant to § 767.5; and (3) set forth the specific charges a utility would collect for copies of any necessary maps, diagrams, and drawings. The Coalition agrees that while some items may be impossible to reduce to tariff form simply because of their infinite variety, negotiation for access to support structures and ROW should always be an option open to an CLC, as long as contracting is not mandatory.

*6 The Coalition is not opposed to CLCs entering into negotiated agreements with incumbent utilities which reflect compensation arrangements different from those contained in the incumbent utility's tariffs. The Coalition believes, however, that negotiations for alternative compensation arrangements are more likely to be successful if, but only if, all parties know, through the adoption of rules requiring incumbent utilities to file "minimum" tariffs, what the standard charge is.

The ILECs and electric utilities oppose the adoption of detailed rules and tariff filing requirements, but believe that the Commission should leave it to the carriers to freely negotiate ROW access through individual contracts. The incumbents argue that the Commission should intervene only where individual carriers cannot agree on specific terms of access. The incumbents argue that detailed rules will unduly constrain the flexibility of parties to creatively negotiate terms and conditions which best fit the individual circumstances of a given carrier. Pacific objects to the Coalition's proposed rules as being overly inclusive, inflexible, and one-sided in favor of the CLCs. Pacific believes that no single set of rules can take into account all of the issues involved in the context of a single installation. In the event that the Commission chooses to adopt detailed rules, Pacific and PG&E have proposed specific modifications to the rules proposed by the Coalition and CCTA. Edison argues that utilities have the best understanding of their system requirements and operating characteristics, and that utility decisions about necessary restrictions to access should be given deference as long as the utility applies its rules in a nondiscriminatory manner to all carriers.

Pacific argues that the Act permits negotiated agreements, which implies that individual rates will differ among CLCs. Pacific disagrees that the term "nondiscriminatory rates" requires exactly uniform rates for all CLCs, including those that also act as cable television providers.

Rather than the tariffing of rates, GTEC advocates the use of negotiated agreements based upon an appropriate costing methodology. With tariffed rates, terms, and conditions, GTEC argues, there is little incentive for parties to negotiate anything different, and the tariffed rate(s) in effect becomes the ceiling. GTEC argues that if the Commission decides that tariffing is appropriate, then an expiration date of no longer than one year be set on the applicability of the tariff. GTEC believes that market forces could then determine what the

rates, terms, and conditions for such access should be in the future.

B. Discussion

Given the complexities of utility facilities and the diversity of ROW access needs, it is not feasible to craft a set of rules or tariffs which addresses every conceivable situation which may arise. Individual carriers must negotiate the terms of ROW access based on the particular circumstances of each situation. On the other hand, the adoption of certain general guiding principles and minimum performance standards concerning ROW access is appropriate to promote a more level competitive playing field in which individual negotiations may take place. In order to guide parties in negotiations, we shall therefore adopt a general set of rules governing ROW access which strike a balance in providing some degree of detailed performance standards while leaving discretion to parties to tailor specific terms to the demands of individual situations.

*7 It is unrealistic to expect that all ROW access agreements will be uniform with respect to prices, terms, or conditions. Differences are acceptable as long as they are justified by the particular circumstances of each situation, and do not merely reflect anticompetitive discrimination among similarly situated carriers. Because telecommunications carriers' ROW requirements and constraints are too diverse to lend themselves to a uniform set of tariff rates and rules for every situation, we shall not require the filing of tariffs covering the terms of ROW access. A similar approach to that adopted for interconnection arrangements in D.95-12-056 is appropriate here. In D.95-12-056, in setting interim rules governing interconnection arrangements for local exchange service, we considered whether interconnection arrangements should be instituted by the filing of tariffs or by contract. Historically, the use of utility tariffs has been relied upon as a way to assure that the rates and terms of service offered by the utility are available on a nondiscriminatory basis. We concluded in D.95-12-056, however, that given

the inflexibility and inefficiencies of tariffs, interconnection should be arranged by contract rather than tariff. We concluded that the use of contractual negotiations was more appropriate for the newly emerging world of multiple co- carriers.

We recognize, however, that while the local exchange markets have been opened to competition for some time now, the incumbent utilities still hold a significant advantage in the control of essential ROW corridors and support structures in comparison with CLCs which have only recently entered the local exchange market. We are concerned that the advantages of incumbent status of ILECs and electric utilities may have the potential incentive for discriminatory treatment in negotiating terms of access. In D. 95-12-056, we addressed parties' concerns over imbalance in negotiating power by prescribing a set of "preferred outcomes" which were intended to lead to the most efficient and economic interconnection solutions should the Commission be required to become involved. In approving interconnection agreements, the Commission would consider how well a contract achieved the "preferred outcomes." The "preferred outcomes" were not mandatory requirements, however, and the Commission would still approve an interconnection contract with different terms from those prescribed by the "preferred outcomes" if the proposed terms were mutually agreeable to the parties, were not unduly discriminatory or anticompetitive, and did not violate other Commission rules.

Likewise, we conclude that a similar use of "preferred outcomes" is called for in connection with access-to-ROW arrangements. We shall, therefore, adopt a set of rules as prescribed in Appendix A governing ROW arrangements, and shall administer the rules in the form of "preferred outcomes." Parties may negotiate their own terms and conditions different from those set forth in our rules, tailored to the particular circumstances of a given situation. Yet, the presence of the "preferred outcomes" embodied in our rules will provide a disciplined point of reference as recourse for negotiations to proceed in a

competitively neutral manner. The use of these rules as "preferred outcomes" will help guard against unbalanced negotiating power and unfairly discriminatory treatment, yet provide the necessary flexibility to facilitate mutually agreeable arrangements.

*8 In resolving disputes over ROW access, we shall consider how closely each party has conformed with our adopted "preferred outcomes" and whether proposed terms are unfairly discriminatory or anticompetitive. The burden of proof shall be on the party advocating a departure from our adopted standards in prevailing in a disputed agreement. Within the parameters of our prescribed "preferred outcomes" as default criteria, parties shall have the flexibility to negotiate their agreements governing access, tailored to the particular circumstances of each situation.

III. General Definitions and Applicability of Rules

A. Utility Categories Covered Under ROW Rules

1. Parties' Positions

Parties express differing views concerning what categories of utilities should be subject to Commission ROW access rules. In the draft decision previously circulated to parties for comment, the rules were defined broadly to apply to gas, water, and steam utilities, in addition to electric and telecommunications utilities. Comments were filed by certain gas, water, and smaller electric utilities, raising concerns that these rules should not be extended to include them since there had been no previous consideration on the implications of extending the rules to additional categories of utilities. SDG&E argues that the Commission should consider extending the rules to apply to railroad facilities, noting that PU Code § 767 calls for access to subways and tracks in addition to poles and wires.

2. Discussion

For purposes of the rules we adopt in this

decision, we shall limit the public utilities covered to the large and mid-sized ILECs, to the CLCs, and to the major electric utilities, PG&E, Edison, and SDG&E. In D. 97-09-115 in which we adopted initial local competition rules for the service territories of the mid-sized ILECs, RTC and CTC, we concluded that the basic rules we had previously adopted for the major ILECs should also be applied to the mid-sized ILECs. We find no reason here to deviate from our previously adopted policy, and conclude that the ROW access rules we adopt herein should generally apply to the mid-sized ILECs. We acknowledge, however, that the mid-sized ILECs lack the resources of their larger counterparts to respond as quickly to inquiries regarding access. We shall therefore leave it to the parties to negotiate individual response times in the case of the mid-sized ILECs. In all other respects, we shall apply the same rules to them as to the larger ILECs.

In the workshops conducted for the instant proceeding and in written comments that were produced relating to ROW access, we did not address the implications of extending the rules adopted herein to other utility industries such as gas, water, or steam. We also did not consider the implications of extending the rules to smaller electric utilities or to other utility industries. We recognize the usefulness of, and will later explore, expanding the coverage of our rules to include other utility industries. We shall provide all potentially affected entities with due notice and opportunity to be heard concerning any further proceedings of this nature.

B. Definition of Rights of Way

1. Parties' Positions

***9** The Coalition argues that the term "rights of way" should be understood as analytically distinct from, and larger than, the physical support structures to which wires may be attached for wire communication but should also include the underlying ROW that the utility controls.

The Coalition and CCTA propose that the

term "right-of-way" should be defined broadly to encompass:

"all the real property, physical facilities and legal rights for use of such property and facilities which provide for access on, over, along, under, through or across public and private property for placement and use of poles, pole attachments, anchors, ducts, innerducts, conduits, guy and support wires, remote terminals, vaults, telephone closets, telephone risers, and other support structures to reach customers for communications purposes." (Proposed Rule II.K.)

GTEC objects to this proposed Coalition definition as being overly broad, arguing that the term "right-of-way" has long held particular legal significance, as a right to pass or cross over the real property of another, but that it does not encompass the right to use the personal property of another, such as telephone closets, vaults owned by a telecommunications carrier. Pacific and GTEC argue that the Commission's rules regulating access to ROW should not be interpreted to include all possible pathways to the customer, as sought by the Coalition and CCTA. GTEC believes this Commission should delineate the scope of access by competing carriers to "poles, ducts, conduits, and right-of-ways," as defined in § 251 (b)(4) permitting carriers to "piggyback" along utilities distribution networks.

Edison proposes that transmission support structures or rights-of-way be excluded from the scope of these rules because of the heightened safety and system reliability concerns raised by such access. Since electric utilities' distribution systems are concentrated in urban areas where telecommunication providers most desire access, Edison argues there should be little need to provide mandatory access to transmission facilities.

If the Commission contemplates including transmission support structures and rights-of-ways with these rules, Edison urges the Commission to seek the input of the Independent System Operator (ISO) which now operates and controls utility transmission

facilities throughout California. Edison argues that the electric utilities' ability to comply with certain mandatory time limits in the rules (e.g. completion of requests for information, requests for access, and make ready work) may have to be substantially lengthened to account for the complexities of dealing with the transmission system. For example, installing fiber optic on transmission towers may require ISO coordination and approval (the timing of which the electric utility cannot control) and even planned outages along certain segments of the transmission system. Moreover, Edison claims that the utilities' ability to reserve or take back space for capacity additions may also have to be expanded to ensure the smooth, uninterrupted operation of the transmission system.

2. Discussion

*10 We conclude that the Coalition's proposed definition of ROW is overly broad, and decline to adopt it. As stated in the FCC Order, the intent of Congress in § 224(f) was to permit cable television operators and telecommunications providers to "piggyback" along distribution networks owned or controlled by utilities as opposed to granting access to every piece of equipment or real property owned or controlled by the utility. [FNal] We shall delineate the scope of access to refer to the poles, ducts, conduits, and ROW as defined by § 251(b)(4). An overly broad interpretation of ROW would be unduly burdensome on the owners of facilities and is unnecessary to provide for the reasonable access needs of third parties.

FNal. First Report and Order, para. 1185

In view of the potential problems in terms of logistics, system reliability and safety associated with mandatory access to electric transmission facilities, we shall include only electric utilities' distribution poles, support structures, and rights-of-way within the scope of these rules at this time.

C. Definition of Nondiscriminatory Access

1. Parties' Positions

The Coalition defines "nondiscriminatory access" as access that is uniformly equal in fact, for all rates, terms, and conditions, to the access provided to cable television companies, and equal to the access that ILECs provide to themselves. The Coalition believes that the Act, PU Code § 767, and cable television companies' existing rights to attach to utility support structures in California at just and reasonable rates pursuant to PU Code § 767.5 create a solid foundation for telecommunications carrier to gain access to utility ROW.

Pacific objects to the Coalition's proposed definition of nondiscriminatory access as being "uniformly equal in fact" with respect to the access which the ILEC provides itself, and to every other telecommunications carrier or cable television provider. Pacific argues that such a definition would effectively eliminate any type of creatively negotiated agreements between individual parties and would require an owner to treat itself as a third party. Pacific argues that the Act only requires a utility to provide "access" to its facilities, but not to divest itself of all the benefits (and burdens) of ownership. This provision would also require disbandment of the joint pole associations, in Pacific's opinion.

In order to achieve the Commission's goal of opening the local telecommunications market to active competition, CCTA argues that the Commission's resolution of ROW issues must incorporate the broadest possible definitions to ensure competitive access to all real property pathways to the customer, including poles, conduits, ROW, easements, and licenses. CCTA seeks, however, to exclude cable television inside wire and drops from the facilities subject to ROW access. CCTA makes this assertion on the grounds that cable television inside-wiring is a federal matter under the purview of the FCC, and has different characteristics than does telephony inside-wiring. Unlike telephone service, CCTA argues that the cable network is not an essential service, and cable and telephone technologies have different power

requirements, signal leakage concerns, and tolerances of interference.

*11 GTEC argues that the Coalition's proposed rules and definitions would turn the ILECs into construction managers and financiers for the CLCs, making every possible piece of equipment and support structure that the ILEC owns subject to access by CLCs at the below-cost rate set for cable television providers.

PG&E states that the Commission must distinguish between the underlying ROW and the support structures which may be located in an easement that grants ROW. (PG&E Comments, p. 7.)

The Coalition objects to PG&E's proposed definition of a utility pole which would apply only to wood utility distribution poles with electric supply cables of no greater than 50 kV. The Coalition argues that there is no basis to prohibit telecommunications facilities from being attached to electric support structures with supply cables greater than 50 kV.

2. Discussion

We shall consider nondiscriminatory access to mean that similarly situated carriers must be provided the opportunity to gain access to the ROW and support structures of the incumbent utilities under impartially applied terms and conditions on a first-come, first-served basis. Nondiscriminatory access does not mean that the incumbent utility is divested of all of the benefits or relieved of the obligations of ownership. The utility must maintain the ability to manage its assets. No party may attach to the ROW or support structures of another utility without the express written authorization from the utility.

Nondiscriminatory access does mean, however, that the incumbent utility cannot deny access simply to impede the development of a competitive market and to retain its competitive advantage over new entrants. The incumbent utility may only restrict access to a particular facility or may place conditions on access for specified reasons relating to safety

or engineering reliability. We discuss these conditions below in Section VII. We also discuss below in Section VII the restrictions on third parties' access to space which the incumbent utility seeks to reserve for its own future growth needs. In situations where there is no available space for an additional attachment, the incumbent utility is obliged to negotiate with the carrier seeking access to attempt to find some alternative solution such as rearrangement or modification of the existing space to accommodate the latter carrier's needs. In the event that the Commission must resolve disputes over access rights, the burden shall be on the incumbent to justify any claims asserted in defense of its refusal to permit access.

D. Renegotiation of Existing Agreements to Conform to Commission Rules

1. Parties' Positions

The Coalition proposes that existing contracts between utilities and CLCs be subject to renegotiation, with Commission review pursuant to General Order (GO) 96-A, if the results of such negotiations yielded anticompetitive terms and conditions based on the rules adopted by this decision.

GTEC believes that any rules which the Commission may adopt relative to ROW and access be applicable to all users of those facilities, regardless of whether a party has an existing agreement entered into during the era of noncompetitive telecommunications providers. Existing agreements for pole attachments and access are subject to the Commission's continuing jurisdiction, and typically include clauses that make them subject to renegotiation or modification in view of an applicable Commission ruling.

*12 Edison and SDG&E disagree with any attempt to require renegotiation or to unilaterally change the terms of existing access agreements with electric utilities that were negotiated between the parties to these agreements. Edison questions how an existing contract would be found "anticompetitive" under the Coalition's proposal. Edison argues

that GO 96-A does not provide a basis for non-consensual modification of existing access agreements, but only relates to contracts "for the furnishing of any public utility service." Edison contends that the access to electric utility facilities provided by existing access contracts is not public utility service and therefore is not governed by GO 96- A. Edison argues that the Commission has a long history of respecting freely- negotiated contracts, even when one of the parties to an agreement later expresses dissatisfaction with some of the terms.

2. Discussion

We shall not require parties to renegotiate preexisting contracts to conform with the rules adopted in this decision in the cases where the contract does not prescribe that it is subject to renegotiation to conform to any subsequent Commission rules. Parties mutually negotiated such contracts based upon information available to each side at the time. We respect the mutual obligations and rights of parties to enter into, and to bind each other to, such contracts.

In cases where contracts contain provisions requiring renegotiation in the event that subsequently adopted Commission rules come into conflict with the preexisting contract, however, parties to such contracts may seek renegotiation consistent with their prior agreement. If parties to such renegotiation efforts are unable to agree on revised contract terms, they may seek a remedy through the dispute resolution procedures we adopt elsewhere in this order.

On a prospective basis, our adopted rules shall serve as "preferred outcomes" to guide parties in negotiating new ROW agreements subsequent to the effective date of this order.

E. Applicability of Rules to Cable Companies

In its comments on the revised draft decision filed July 24, 1998, CCTA noted that the draft rules make reference only to "telecommunications carriers." Yet, CCTA believes that the draft rules were intended to

incorporate the Commission's jurisdiction over both cable and telecommunications providers, in accordance with Section 224 of the Act. CCTA argues that Section 224 of the Act provides for State preemption of both cable and telecommunications services vis a vis rights of way, but require a State to issue effective rules and regulations implementing the State's authority. To remove any ambiguity as to the intent or scope of the rules, CCTA proposes that the decision be amended to explicitly state that the rules shall apply to cable corporations, as well as to CLCs. Otherwise, CCTA is concerned that cable corporations will be faced with separately litigating each and every rule before the Commission to ensure their applicability to cable video, internet, and data services.

*13 The incumbent utilities object to including cable corporations within the scope of the adopted rules. GTEC argues that the stated purpose of the proceeding is to adopt rules to open to competition the local exchange market-- not the well-established cable market. GTEC argues that because the proceeding has not pertained to providers of solely cable service, the Commission cannot simply apply these rules to that very different industry without any evidence or analysis. GTEC proposes that if the CCTA wants the Commission to consider adopting ROW rules designed to address issues relating to the cable television market, CCTA should ask the Commission to open a proceeding to do so. GTEC objects to any "last-minute clarification" to a proceeding intended to address rules for local exchange competition.

1. Discussion

The question of the applicability of our rules to cable corporations shall be addressed in three components: first, the rights of cable corporations to come under the protections offered by the rules; second, the obligations of cable corporations to offer nondiscriminatory access to telecommunications carriers under the rules; and third, the reach of our jurisdiction into the dealings between municipalities that grant franchises to

providers of cable TV services and those providers' plans to extend facilities to provide cable TV. We conclude that it is appropriate to require the ILECs and electric utilities to extend the same rates and terms of access offered to CLCs under the rules to cover cable corporations, as well. While we agree with GTEC that the focus of this proceeding is on promoting competition in the local exchange telecommunications market, we must simultaneously consider the interrelationship between the local exchange and cable industries in seeking to promote a competitive infrastructure. As we explain below in our discussion of pole attachment rates, various cable corporations have in recent years become certificated as CLCs, and now offer telecommunications services over the same connections previously used only for cable services. For the same reasons that we have determined to apply uniform pole attachment rates for both cable and telecommunications services, we conclude that the rules governing other terms and conditions of access should likewise apply uniformly. By applying our rules uniformly both to cable corporations and telecommunications carriers, we will avoid potential disputes over whether our adopted rules apply to a particular service offered over an attachment used to provide multiple services. By applying our rules in this manner, we seek to minimize potential litigation which may threaten to impede the growth of the local exchange competitive infrastructure. In the succeeding sections of this decision addressing the applicability of our rules, references to CLCs shall therefore be understood to include cable companies, unless explicitly stated otherwise.

We shall not at this time, however, require cable companies to offer reciprocal terms and conditions of access to telecommunications carriers, as we have done for CLCs. Cable companies are not public utilities as defined in Section 216 (a) of the PU Code, but are separately defined in Section 215.5 of the PU Code. This Commission's jurisdiction is limited to the regulation of public utilities. Since cable companies are not public utilities, they are not subject to this Commission's jurisdiction with respect to the rates or terms

of service which they offer. Therefore, we shall not impose upon cable companies the obligations to provide access to telecommunications carriers. Similarly, we shall not require CLCs to provide access to cable companies. We shall thus limit the obligations to provide access to cable companies to the ILECs and electric utilities until we obtain additional evidence in this proceeding.

*14 Further, we will not at this time intervene in the relationship between municipalities that grant cable franchises and those same franchisees inasmuch as those franchisees are not telecommunications carriers certified by this Commission. If a cable franchisee is looking to expand its facilities for the provision of cable TV only, then the procedural avenues described below to address disputes between carriers and cities will not be available. We will seek further comment on whether we have jurisdiction in this area and how this jurisdiction, if it exists, should be exercised.

F. Applicability of Rules to Commercial Mobile Radio Service (CMRS)

1. Parties' Positions

AWS argues that under the nondiscrimination principles of the Act, incumbent utilities must provide all telecommunications carriers, including commercial mobile radio service (CMRS) providers, the same type of access they would afford themselves, regardless of the technology the telecommunications carrier employs. AWS states that CMRS providers will be using poles and other utility facilities in ways perhaps not contemplated by traditional land-line providers, and that any rules adopted by the Commission must be able to accommodate innovative pole uses required by new technologies.

Among other things, in implementing its own new technology plans, AWS will seek to: (1) place micro-cell devices on top of existing poles; (2) replace some existing poles with taller poles in order to improve signal

reception; and (3) use poles similar to those of a traditional land-line telecommunications carrier, transporting and carrying the call through telephone lines attached to existing poles, to AWS's switch.

Traditionally, CLCs have not sought access to the tops of poles, nor have they sought pole "change outs," or replacements, purely to improve signal reception. AWS argues that any rules adopted by the Commission should accommodate CMRS providers' need for taller poles and access to the top of poles.

Teligent is a CLC which utilizes radio spectrum and point-to-multipoint microwave technology to provide local service. Teligent is thus a "fixed- wireless CLC" in contrast to CMRS providers which provide ubiquitous mobile wireless service and which are not certificated by this Commission to provide local exchange service. Teligent argues that while fixed wireless CLCs rely heavily upon the innovative use of radio spectrum for their infrastructure, they also use conventional wireline facilities. Unlike CMRS providers, fixed wireless CLCs such as Teligent do not seek to place any attachments on top of utility poles, nor to place large towers in the public ROW.

The ILECs and electric utilities oppose the inclusion of CMRS providers within the scope of rules adopted in this proceeding. Pacific argues that the proposed rules have been developed with traditional facilities in mind, and that there is not a sufficient record to apply the rules to incorporate the unique safety, reliability, and space allocation issues for wireless attachments. PG&E also highlights safety concerns regarding CMRS providers' attempts to access taller poles or the tops of utility poles.

2. Discussion

*15 We agree that under the Section 224(f)(1) provisions of the Act, CMRS providers should not be subjected to unfair discrimination. Yet, the primary focus of this proceeding has been on wireline local exchange service, not CMRS. The technological and market dynamics of the

CMRS industry are distinct from those of the local exchange market. The rationale underlying the pole attachment rates and access requirements we adopt with respect to local exchange service may not necessarily apply in the case of CMRS service. The regulation of CMRS providers has been addressed in a separate docket (I.93-12- 007) based upon specific characteristics peculiar to the CMRS industry. Likewise, CMRS carriers have different space requirements than do CLCs with respect to ROW access. For example, CMRS providers request access to the tops of existing utility poles to install communications devices. The work involved in pole-top access raises special safety concerns. While we do not minimize the importance of ROW access rights for CMRS carriers, we believe that a further record needs to be developed regarding safety, reliability and special access needs before we determine the applicability of our adopted ROW access rules to the CMRS industry. Accordingly, we shall defer consideration of the applicability of our rules to CMRS carriers to a later phase of the proceeding.

In contrast to CMRS providers are "fixed wireless" CLCs such as Teligent. Unlike CMRS systems, fixed wireless providers, such as Teligent, are certificated to provide local service as a CLC. Teligent and other fixed wireless providers use a different technology from CMRS carriers by providing customers with point-to-multipoint transmission service at fixed locations, rather than ubiquitous mobile service. As a result, fixed wireless providers require fewer antennas to be deployed in order to provide the necessary service coverage than do CMRS providers.

For the sake of consistency in the treatment among CLCs, we shall apply the adopted rules to include those CLCs which utilize fixed wireless technology. Nonetheless, we remain concerned that the radio spectrum and microwave technologies used by fixed wireless carriers entail different safety and health issues than do the technologies of conventional wireline CLCs. Therefore, with respect to negotiations for access involving fixed wireless CLCs, we shall permit the incumbent utility

the discretion to prescribe restrictions it deems necessary to safeguard public or employee health and safety.

G. Applicability of Rules to Municipalities and Governmental Agencies

1. Parties' Positions

The Coalition argues that the Commission's rules for mandating access to utility ROW and support structures should apply equally to municipally owned utilities and investor owned utilities in order to promote a competitive market. The Coalition argues that local governmental agencies and municipally owned utilities must be required to make their ROW and support structures accessible to CLCs on a nondiscriminatory basis if all California residents are to benefit from a competitive telecommunications market.

*16 PU Code § 767.5(a)(1) excludes "publicly owned public utilities" from the definition of "public utility," such that the Commission does not have jurisdiction to set the pole attachment rates paid by cable television corporations to municipal utilities. In contrast, PU Code § 767 does not specify any such exclusion for "publicly owned public utilities." The Coalition infers therefore that the Commission has jurisdiction under § 767 to order "publicly owned" (i.e., municipal) public utilities to provide access to their ROW to telecommunications carriers, and to regulate the rates paid for such attachments, where public convenience and necessity so require.

The Coalition states that CLCs have encountered particular difficulty in attempting to gain access to ROW controlled by the California Department of Transportation (CalTrans), a state governmental agency which controls many of the most important ROW corridors (including major highways and "bottleneck" facilities like the San Francisco-Oakland Bay Bridge). The Coalition claims that CalTrans seems to have little or no awareness of the public utility status, rights, and needs of CLCs, or of the adverse impacts of delays in responding to CLC requests for information and access

which can cause CLCs to lose potential customers. Streets and Highways Code § 671.5 requires CalTrans to either approve or deny an application for an encroachment permit within 60 days of receiving a completed application. Yet, the Coalition claims that CalTrans frequently fails to meet this time limit.

The Coalition asks the Commission to coordinate with the Governor's Office to urge CalTrans to respond, whenever possible, both sooner and more favorably within no more than 60 days to CLC requests for access to ROW, and to urge CalTrans to adopt a basic "working rule" or presumption that CLC requests for access to its ROW will be granted unless there is, in fact, inadequate space or unless public safety concerns require the request for access to be denied.

CCTA argues that the Commission is required by the California Constitution to exercise its jurisdiction consistent with federal law as provided in the Communications Act of 1934, as amended by the 1996 Act. (Cal. Const., art. III, § 1.) CCTA contends that § 253 of the Act requires a municipal government to manage the use of its public ROW by telecommunications providers on a competitively neutral and nondiscriminatory basis.

CCTA asks the Commission to render conclusions of law in this proceeding concerning limitations on fees that municipal or other governmental entities may charge for the access to their ROW and facilities by CLCs. CCTA asks the Commission to prohibit governments from attempting to circumvent the limitations on fees which a state or local governmental agency may charge under Article XIII A of the California Constitution. Enacted through Proposition 13, this provision restricts the ability of state and local governmental agencies to enact taxes without a two-thirds vote of the state legislature. CCTA asks the Commission not to permit local governments to attempt to "masquerade" a tax by labeling it a "fee." The Coalition argues that state law limits governmental fees to cost for access to the government's own

ROW. If the fee charged exceeds actual cost, CCTA argues, the fee is considered to be a tax as a matter of law, and is subject to the cost limits of Article XIII A.

*17 Regulatory fees cover the cost attributable to the government activity regulating the payor. Charges "levied for unrelated revenue purposes" or which exceed the cost of the regulatory activity are not fees but revenue-raising devices and hence taxes, according to CCTA (Beaumont 165 Cal. App. 3d at 234; United Business Comm. 91 Cal. App. 3d at 165).

Also excluded from special taxes are "user fees" which are charged for a service provided by the government to the fee payor. Typical examples include "developers' fees" charged as a condition of issuance of a building permit to cover costs of providing government benefits to the developed property. [FN7] (Garrick Development Co. v. Hayward Unified School District (1992) 3 Cal. App. 4th 320 ("Garrick") [school facilities fee]; Bixel 216 Cal. App. 3d at 1216 [fire hydrant fee]; Beaumont 165 Cal. App. 3d at 231 [water system facility "hook-up" fee].)

FN7. (Bixel, supra, 216 Cal. App. 3d at 1218, emphasis added.)

CCTA argues that for exemption from Proposition 13, a user or development fee, like a regulatory fee,

"must not exceed the reasonable cost of providing the service for which the fee is charged, and the basis for determining the amount of fee allocated to the developer must bear a fair and reasonable relationship to the developer's benefit from the fee."

Pacific argues that while investor-owned utilities must provide access to any telecommunications carrier or cable television operator under § 224(f), municipal electric utilities are not included within the definition of "utilities" and therefore have no federal statutory duty to provide access at reasonable rates, terms, and conditions. Likewise, Pacific does not believe that municipal electric

utilities are subject to the state statute governing attachments by cable television operators (PU Code § 767.5), or the statute requiring access to the facilities of one public utility by another public utility (PU Code § 767). Under the current legal and regulatory framework, therefore, Pacific claims that municipal electric utilities are free to deny access, or to impose onerous terms and conditions.

GTEC believes that both municipal and investor-owned electric utilities have the immediate potential to be formidable competitors in the telecommunications market. In addition, municipal utilities may enjoy other benefits not available to non-governmental providers such as the ability to raise capital tax-free in the public sector and the potential in some instances to regulate advantages for themselves over private utility competitors. Thus, GTEC argues that the rules that are established for the LEC/CLC relationship should be consistently applied to municipal and investor-owned electric utilities as well.

Comments were filed jointly by the League of California Cities, the Cities of Los Angeles, Sacramento, San Carlos, San Jose, Santa Monica, the City and County of San Francisco, and the San Mateo County Telecommunications Authority ("the Cities"). [FN8]

FN8. The above-referenced parties (collectively, "the Cities") concurrently filed a motion seeking to intervene as parties to the proceeding. The Cities seek to become parties to address their concerns regarding issues raised in the revised draft decision as to jurisdiction over local governmental ROW access matters. There is no opposition to the motion, and it shall be granted.

*18 The Cities argue that the Commission does not have jurisdiction over the management of public ROW owned or controlled by local governmental bodies. As owners of fee title to many of their streets and highways, the Cities argue that they have an interest in any development that increases the

costs of maintaining their property or the intensity of its use by investor-owned utilities. The Cities claim that attempts of this Commission to assert ROW jurisdiction over them would interfere with their power to adopt and enforce regulations that balance the legitimate interests of utilities, consumers, property owners, and the traveling public.

The Cities deny that any PU Code Section can be cited to show that the Commission has any jurisdiction over local governments with respect to access to public ROW. The Cities argue, for example, that while certain limited authority is granted to telephone corporations under Section 7901 to construct facilities along public ROW subject to regulation by the cities, this authority does not confer any jurisdiction on the Commission. Likewise the Cities note that the siting authority granted to the Commission in Section 762 is in reference to public utilities, not local governmental bodies.

The Cities argue that the California Constitution expressly excludes from Commission jurisdiction, and expressly reserves to charter cities jurisdiction over municipal affairs relating to public utilities. Article XII, Section 8 states that a city "may not regulate matters over which the Legislature grants regulatory power to the Commission." However, this section "does not affect power over public utilities relating to the making and enforcement of police, sanitary and other regulations concerning municipal affairs pursuant to a city charter existing on October 10, 1911...." (Cal. Const. Art. XII, Sec. 8.) The Cities argue that power to regulate the manner of the use of city streets, such as access to public ROW, has traditionally fallen within the scope of cities' power over municipal affairs. (See, e.g., *City of Walnut Creek v. Silveira* (1957) 47 Cal.2d 804, 812; *City of San Jose v. Lynch* (1935) 4 Cal.2d 760, 764; *Byrne v. Drain* (1900) 127 Cal. 663, 667.)

The Cities further argue that the Legislature has specified that a city may not surrender to the Commission.

"[I]ts powers of control to supervise and

regulate the relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets, and the speed of common carriers operating within the limits of the municipal corporation." (PU Code § 2902 (emphasis added); see also PU Code § 2906.)

Thus, the Cities argue that they exclusively retain regulatory power over access to public ROW.

2. Discussion

*19 We shall address separately the ROW access issues related to municipal utilities and to other local governmental bodies. We conclude that it is beyond the authority of this Commission to regulate municipally-owned utilities with respect to nondiscriminatory access to their poles, ducts, conduits, and ROW. In *County of Inyo v. Pub. Util. Comm'n*, 26 Cal.3d 154, 166 (1980), the California Supreme Court stated that under established doctrine, "[i]n the absence of legislation otherwise providing, the Commission's jurisdiction to regulate public utilities extends only to the regulation of privately-owned utilities." (citation omitted) "The commission has no jurisdiction over municipally-owned utilities unless expressly provided by statute." *Id.* Among other things, the court construed § 216, defining a "public utility" and § 241, defining a "water corporation" as not encompassing a municipally-owned utility.

In light of *County of Inyo*, § 767 of the PU Code -- which provides that, subject to certain conditions, the commission may require that a public utility provide access to its conduits, poles, and other facilities that are on, over, or under any street or highway, to another public utility -- pertains only to a privately-owned utility.

In § 767.5(a)(1), a "public utility" is specifically defined to "include [] any person,

firm, or corporation, except a publicly owned public utility, which owns or controls, or in combination jointly owns or controls, support structures or rights-of-way used or useful, in whole or in part, for wire communications." The purpose of § 767.5 was to codify existing practice and to require investor-owned utilities to make available, as a public utility service to cable television corporations, the excess capacity or surplus space on their facilities for pole attachment. The Commission, in turn, was authorized to regulate the terms and conditions of such public utility service. The Legislature was careful not to broaden the scope of the Commission's then existing jurisdiction over public utilities, and so explicitly exempted publicly-owned public utilities from the scope of § 767.5.

In 1994, the Legislature enacted § 767.7 recognizing that the requirement that public utilities make available the excess capacity and surplus space on their facilities should apply not just to cable television corporations but to all telecommunications corporations. In explaining the purpose and intent of § 767.7, the Legislature distinguishes in § 767.7 (a)(2), between privately and publicly-owned utilities in discussing the practices of each, and recognizes that some utilities that have dedicated space on their support structures are "not under the jurisdiction of the commission."

In § 767.7 (a)(3), the Legislature continues to distinguish between "public utility" and "publicly owned utility" support structures, and to note that the use of the latter facilities by those seeking to install fiber optic cable is with the "voluntary permission of the publicly owned utility." Similarly, in § 767.7 (a)(4), the Legislature distinguishes "electric public utilities" and "publicly owned utilities" and finds that both types of utilities may access the fiber optic cables installed by telecommunications corporations to better serve their electric customers.

*20 In § 767.7(b), the Legislature states its intent that "public utilities and publicly owned utilities be fairly and adequately compensated for the use of their rights of way

and easements for the installation of fiber optic cable" and that electric utilities and publicly owned utilities have access to fiber optic cables for their own use. While some parties may read §§ 767.5 and 767.7 as an intent by the Legislature to narrow the commission's jurisdiction as if it previously extended to both publicly-owned and privately-owned utilities, in fact the opposite is true. In these sections, the Legislature has simply clarified that the Commission's previously-recognized jurisdiction with respect to only privately-owned facilities continues to apply.

Hence, the Commission lacks authority over a publicly-owned public utility's provision of access to its support structures or ROW to a telecommunications carrier. The publicly-owned public utility, however, must set just and reasonable terms for such access. A party that believes that the terms are not just and reasonable may pursue whatever remedies are available under laws directly governing publicly-owned public utilities. No remedy, however, appears to be available under federal law, which expressly exempts publicly-owned public utilities from the FCC's jurisdiction. [FN9]

FN9. Section 703(6) of the Act amended § 224 of the Communications Act of 1934 to require, among other things, that the poles, ducts, conduits and ROW owned or controlled by utilities are made available on reasonable terms and conditions to all telecommunications carriers. Section 224(a)(1), however, limits the definition of utility to investor-owned public utilities.

The Coalition argues that we can exert jurisdiction over publicly-owned municipal utilities by regulating the joint pole associations to which some municipal utilities belong. We believe that the relationships between joint pole association members and their access agreements for pole attachments warrant further scrutiny within the framework of our jurisdiction over the various members of such associations. We shall direct the ALJ to solicit further comments concerning the implications of joint pole

associations attachment agreements as they relate to nondiscriminatory access.

The obligations of a city, county or other political subdivision's to provide access to ROW under its control is addressed under Part 3 of the PU Code. The Legislature has expressly recognized the duties and responsibilities of a "municipal corporation", and the ability of a municipal corporation to retain or surrender control of some of its powers to the Commission. Municipal corporations are expressly authorized not to surrender the power to supervise and regulate the relationship between such public utilities and the general public "in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets...." (Section 2902.)

*21 In § 7901.1(a), the Legislature has further stated its intent, however, for local governmental bodies not to abuse their discretion or to arbitrarily or unfairly deny requests for access, but that "municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." Under § 7901.1(b), the "control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner." Under § 7901.1(c), "[n]othing in this section shall add to or subtract from any existing authority with respect to the imposition of fees by municipalities." Article XI, § 9 of the California Constitution expressly recognizes the authority of a city to prescribe regulations governing persons or corporations that provide public utility service.

While local governments thus may regulate the time, location, and manner of installation of telephone facilities in public streets, they may not arbitrarily deny requests for access by public utilities in public roads or highways that are located within the rights of way. The PU Code recognizes the rights of telecommunications carriers to obtain

reasonable access to public lands and ROW to engage in necessary construction. PU Code § 7901 states:

"Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

In addressing the Commission's role in relation to that of local governments with respect to ROW access, we believe it is appropriate to consider the general approach adopted in General Order ("GO") 159-A, (D.96-05-035), revising rules relating to the construction of cellular radiotelephone facilities in California. Recognizing local government's interest in cell siting locations and land use policies as well as the Commission's interest in promoting development of wireless technologies and its duty to protect ratepayers, the Commission ceded regulatory jurisdiction in circumstances where the local agency has a specific interest, yet recognized this Commission's obligation to protect the overriding state interests. GO 159-A, acknowledges that primary authority regarding cell siting issues belongs to local authorities. Local authorities continue to issue permits, oversee the California Environmental Quality Act ("CEQA") compliance, and adopt and implement noticing and public comment requirements, if any. In like manner, local agencies have an interest in managing local ROW and requiring compensation for the use of public ROW. The Commission, on the other hand, has an interest in removing barriers to open and competitive markets and in ensuring that there is recourse for actions which may violate state and federal laws regarding nondiscriminatory access and fair and reasonable compensation. Moreover, PU Code § 762 also authorizes this Commission to order the erection and to fix the site of facilities of a public utility where found necessary "to

promote the security or convenience of its employees or the public...to secure adequate service or facilities...."

***22** The statewide interest in promoting competition and the removal of barriers to entry and nondiscrimination are equally important with respect to both investor-owned utilities and municipally-owned ROW access rights. This is particularly true to the extent that many municipalities are themselves offering, or intending to offer, communications and cable television services, and thus, are or will become competitors to other providers of those services. Accordingly, the Commission shall intervene in disputes over municipal ROW access only when a party seeking ROW access contends that local action impedes statewide goals, or when local agencies contend that a carrier's actions are frustrating local interests. In this manner, the Commission reserves jurisdiction in those matters which are inconsistent with the overall statewide procompetitive objectives, and ensure that individual local government decisions do not adversely impact such statewide interests.

The Commission's authority shall be exercised in the following manner. In the event that a telecommunications carrier is unable to satisfactorily resolve a dispute with a local governmental body over the terms and conditions of access to a public ROW, we shall direct the carrier to file an application with this Commission seeking a certificate of public convenience and necessity for specific siting authority to gain access to the public ROW pursuant to Chapter 5 of the PU Code, "Certificates of Public Convenience and Necessity." We shall require that, prior to making such filing, the telecommunications carrier first make a good-faith effort to obtain all necessary local permits and to negotiate mutually acceptable terms of access with the local governmental body. In order to be processed, the application must provide a demonstration showing that this requirement has been met. We intend to limit our inquiry in such applications only to a consideration of whether the actions of the local governmental body impedes a statewide interest in the

development of a competitive market. We shall require a showing as to what specific terms or conditions of access the CLC claims constitutes such an impediment, and what alternative the CLC proposes to remedy the matter.

We shall rule upon the requested authority sought in the application following an opportunity for interested parties, including the local governmental body, to respond or protest. In ruling upon such an application, any orders issued will be directed toward the telecommunications carrier pursuant to our jurisdiction over public utilities. We recognize that the Commission lacks the jurisdiction to directly order a local governmental body to grant access. In the event that we grant the siting authority sought in the application, it will be the responsibility of the telecommunications carrier to notify the local governmental body of the Commission's order. In the event that we grant such an application, and the local governmental body still refuses to grant access in accordance with the Commission order, the telecommunications carrier's recourse shall be to file a lawsuit in the appropriate court of civil jurisdiction seeking resolution of the dispute over access. The telecommunications carrier may use the Commission's order authorizing access in support of its case in civil court. We conclude that this procedure appropriately reconciles the respective roles of the Commission in relation to the cities in terms of resolving disputes with telecommunications carriers over access to public ROW.

***23** We, here also acknowledge parties' concerns over ROW access difficulties with state agencies such as CalTrans. We shall seek to promote greater awareness by CalTrans of the importance of CLCs' accessibility to essential state-controlled ROW in the interests of California's legislative mandate to promote the development of a competitive telecommunications market and shall inform CalTrans that CLCs are telephone corporations with all the rights of the incumbent LECs. To that end, we shall serve a copy of this order on CalTrans.

H. Reciprocity of Rights-of-Way Access Between Incumbents and CLCs

1. Parties' Positions

As amended by the Act, 47 U.S.C. § 224(f)(1), requires a utility to grant telecommunications carriers and cable operators nondiscriminatory access to all poles, ducts, conduits, and ROW owned or controlled by the utility. A utility's rights under § 224(f)(1), however, do not extend to ILECs. ILECs are excluded from the definition of "telecommunications carriers" under 47 U.S.C. § 224(a)(5) which "operates to preclude the incumbent LEC from obtaining access to the facilities of other LECs." FCC Interconnection Order 1, ¶ 1157. The Coalition argues that therefore, under the Act, ILECs do not have a reciprocal right of access to the ROW and support structures of the CLCs, and that the Commission should adopt the same policy in interpreting California PU Code § 767. The Coalition claims that an ILEC's requests for reciprocal access rights could be the product of anticompetitive motives, made solely to disrupt the operations of a new market entrant that may not have the same range of alternative facilities as an incumbent utility has. Until the date when CLCs have extensive ROW and support structures of their own, the Coalition argues that the Commission should not require a reciprocal access policy.

Pacific contends that this exclusion could lead to irrational and unfair results, and that the Commission should continue to require reciprocal access in California. Under both federal and state law, investor-owned electric utilities are required to provide access to their facilities. Section 224, however, excludes the ILEC from the definition of "telecommunications carrier," and therefore permits an electric utility to unilaterally deny access to the ILEC, or charge unreasonable rates. Pacific views this policy as illogical and inequitable, and asks the Commission to continue to require all utilities to provide access under reasonable terms and conditions.

Pacific argues that reciprocal access among all utilities has long been required in

California under PU Code § 767. Section 767 provides that, if public convenience and necessity requires the use of the conduits and other facilities of one public utility by another public utility, the Commission may order it and establish reasonable compensation.

GTEC disagrees with the Coalition's interpretation of Section 224(a)(5) of the Act. While Section 224(a)(5) excludes ILECs from the definition of a telecommunications carrier for purposes of this Section, GTEC argues, this simply means that the nondiscrimination provision does not apply to ILECs. GTEC does not interpret it to mean that ILECs can completely be denied access to CLC facilities and ROW, for this would be at odds with the requirements of Section 251(b)(4).

*24 GTEC notes that Section 251(b)(4) states that all LECs, not merely incumbent LECs, have the duty to afford access to the poles, ducts, conduits, and ROW of such carriers to competing providers of telecommunications service on rates, terms, and conditions that are consistent with Section 224.

2. Discussion

As a practical matter, we expect that CLCs will need access to the support structures and ROW of incumbent utilities on a much greater scale than incumbents will need access to CLC facilities. Nonetheless, the general provisions of PU Code § 767 relating to reciprocal access of utility support structures and ROW apply to all public utilities, independently of any reciprocal requirements under the Act. Consistent with the requirements of PU Code § 767, a CLC or an electric utility may not arbitrarily deny an ILEC's request for access to its facilities or engage in discrimination among carriers. We believe that the rules for access which we adopt herein should be applied evenhandedly among the ILECs and CLCs, and shall make our ROW access rules reciprocal. Nonetheless, we expect any requests for access by an incumbent utility to be made in good faith, and to take into account the limited resources of new CLCs to accommodate requests for access to their own facilities.

IV. Pricing Issues

A. Parties' Positions

Parties disagree concerning the manner in which prices for third-party attachments to facilities of utilities should be determined. Pricing includes (1) the one-time charge for any necessary rearrangement of facilities performed by the utility to accommodate the additional attachment of the requesting telecommunications carrier and (2) an annual recurring fee for the cost of providing the ongoing attachment to poles, supporting anchors, or other support structures of the utility. In addition, utilities' charges may also include out-of-pocket costs associated with any work done by the utility to respond to third-party requests concerning the availability of space for an attachment. Parties generally agree on the pricing for the one-time costs of rearrangements based on actual out-of-pocket expenses incurred. Parties' pricing disputes focus principally on the proper basis for the pricing of the recurring charge for attachment to poles and other support structures of the utility.

The Coalition argues that attachments to poles, anchors, and other support structures for telecommunications services should be priced on the basis of historic or embedded costs of the utility less accumulated depreciation, under the same formula as is required for cable services under PU Code § 767.5(c)(2) in order to ensure nondiscriminatory treatment among all telecommunications carriers.

PU Code § 767 (which generally covers all public utilities) prescribes no specific formula for fixing the annual recurring fee for pole attachments for telecommunications services such as is found in PU Code § 767.5(c)(2) (which covers only cable corporations). Section 767 generally authorizes the Commission only to "prescribe a reasonable compensation and reasonable terms and conditions for the joint use" of facilities in the event parties fail to negotiate an agreement. The Coalition believes, however, that there is no legislative prohibition on the Commission's adopting the

cable television formula (when it acts pursuant to § 767) for fixing the rate for pole attachments generally by all telecommunications carriers. Moreover, the Coalition argues that such an approach is mandated by nondiscrimination principles. Since the Commission cannot, by statute, vary from the pricing formula set forth in PU Code § 767.5(c)(2) [FN10] when it sets pole attachment rates applicable to cable television systems, the Coalition argues that all telecommunications carriers, including those that are not cable operators, must be given the same nondiscriminatory rate treatment. The Coalition claims that access to utility support structures and ROW for telecommunications carriers must therefore be set at the same rates, and on the same terms and conditions, as are afforded to cable companies pursuant to PU Code § 767.5. The Coalition claims that competition would be severely skewed if one type of telecommunications provider, (i.e. cable companies or their affiliates acting as telecommunications carriers) enjoyed access to utility ROW and support structures on more favorable rates, terms, and conditions than other telecommunications carriers.

FN10. Under Section 767.5(c)(2), the annual recurring fee is computed as follows:

i. For each pole and supporting anchor actually used by cable television operator, the annual fee shall be two dollars and fifty cents (\$2.50) or 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor, whichever is greater, except that if a public utility applies for establishment of a fee in excess of two dollars and fifty cents (\$2.50) under this rule, the annual fee shall be 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor.

ii. For support structures used by the cable television operator, other than poles or anchors, a percentage of the annual cost of ownership for the support structure, computed by dividing the volume or capacity rendered unusable by the telecommunications carrier's equipment by the total usable volume or capacity. As used in this paragraph, "total

usable volume or capacity" means all volume or capacity in which the public utility's line, plant, or system could legally be located, including the volume or capacity rendered unusable by the telecommunications carrier's equipment.

***25** The Coalition denies that any clear distinctions can be made between the services of a cable provider which are considered cable-only versus those which are considered telecommunications. The Coalition argues that cable operators are rapidly expanding their use of coaxial cables, optical fibers and other facilities attached to utility structures to offer both telecommunications and traditional cable (video) services. The Coalition claims that cable operators (or their telecommunications carrier affiliates) already are or soon will be using their pole attachment rights, originally obtained for the purpose of disseminating cable television programming, for provision of competitive telecommunications services. Therefore, the Coalition does not believe it is valid to charge cable television operators different rates for pole attachments depending on what services they offer.

Pacific objects to the use of the statutory formula in § 767.5 for pricing of telecommunications carrier pole attachments and believes that the Commission is under no obligation to apply the statutory formula for cable television services to all attachments by telecommunications carriers in order to ensure nondiscriminatory access. Pacific claims that § 224(e)(1) of the Act prescribes a different pricing formula to be used to develop rates for attachments by telecommunications carriers and cable companies providing telecommunication services than the one currently used for cable-only attachments.

Pacific proposes that any pricing methodology prescribed by the Commission should permit use of forward-looking costs, consistent with the methodology approved for pricing Pacific's other services in the Open Access and Network Architectural Development (OANAD) proceeding. Pacific has used Total Service Long Run Incremental Cost (TSLRIC)

to cost the ROW and support structures within its own retail services, and argues that access to ROW and support structures by telecommunications carriers should be priced to at least recover TSLRIC. Pacific proposes that the Commission consider using the formula found in §§ 224(e)(2) and (3) of the Act, which requires attaching parties to pay their share of the costs of the common portion of any support structures.

GTEC argues that the current rate for cable television attachments has no applicability to CLCs generally, and that its current tariffed access rate of \$2.92 for cable television attachments is below cost and cannot be sustained for CLCs. GTEC believes this cable access rate was established solely for cable television service prior to the entry of CLCs to reflect policy goals of an earlier era to foster cable television attachments and correspondingly, the viability of that industry. GTEC states that once its cost studies are adjudicated through an arbitration, nondiscriminatory treatment of carriers will result in a uniform rate for pole attachment for all carriers. It is only the make-ready costs, which must take into account the specific circumstances of poles and the surrounding terrain, which will vary depending on the particular poles to which a carrier desires to attach.

***26** GTEC notes that in the past, Pacific has negotiated attachment rates with cable television and other carriers, resulting in a rate that was several dollars higher than GTEC's rate. Section 252(a) of the Act provides for such negotiation of attachment and access rates, and GTEC states that it is currently in the course of such negotiations with several carriers. Under § 252(b), if parties are unable to agree to a rate, then the Commission may determine the rate through arbitration. GTEC proposes that the rental rates for pole and conduit/duct space should be based on TSLRIC plus a contribution to common costs. All other charges for provision of space (e.g. make-ready, audits, field surveys, record check) should be reimbursed by the requesting CLC based on the actual labor and material costs incurred, according to

GTEC.

Edison believes that the pricing of access should be market-based as determined through negotiations between the parties. As long as the utility's cost structure can support a negotiated rate lower than the cost for the carrier to construct an alternate path, Edison argues, both will have an incentive to negotiate a mutually agreeable access price. In those instances where the market is unable to support a negotiated rate greater than or equal to the utility's cost, Edison proposes that the utility's after-tax cost should become the price. Edison argues that a floor price of the utility's after-tax cost will protect the utility from subsidizing the communications industry. Edison believes utilities should recover the fully allocated costs associated with permitting, implementing, and maintaining attachments, and costs associated with facility modification or make-ready work. In some cases, there are also subsequent costs incurred due to temporary or permanent relocation of third party facilities as a result of mandatory reconfigurations of the electric utility system to meet safety and reliability needs or changing rules and regulations. Edison believes the costs of these necessary activities should be borne entirely by the parties seeking access to the facilities. Edison also argues that the utility should be allowed to contractually require telecommunications carriers (and their contractors or sub-contractors) to maintain appropriate insurance and to indemnify the utility from all costs due to damage or injury to persons or property resulting from the carriers' installation, maintenance or operation of telecommunications equipment.

PG&E likewise argues that the cable television formula fails to provide fair and just compensation for telecommunications carrier's access to its distribution poles. [FN11] PG&E opposes the use of historic embedded cost pricing, arguing that such pricing does not recognize the utility's ongoing financial obligation to keep the distribution poles fit for service. PG&E advocates the use of market-based pricing through negotiation, but believes that principles such as replacement

cost new less depreciation should be incorporated into the development of distribution pole pricing if market-based pricing is not allowed. At a minimum, PG&E seeks to recover fully allocated costs for the use of its ROW support structures. Anything less would raise serious constitutional questions, in PG&E's view, including the taking of property without just compensation.

FN11. Since its current effective cable television attachment rate was established in a contract which was developed more than ten years ago, PG&E argues that the present rate would need to be updated to determine what the § 767.5 formula would produce based on current data.

B. Discussion

*27 Utilities should be allowed to recover their actual costs for make-ready rearrangements performed at the request of a telecommunications carrier, and their actual costs for responding to requests for space availability and requests for access, including preparation of studies, maps, drawings, and plans for attachment to or use of support structures. We recognize that such types of costs are specific to the demands of a particular attachment and cannot be set at any standard rate. We shall therefore prescribe that telecommunications carriers reimburse the utility for such reasonable costs based on actual expenses incurred.

The telecommunications carrier shall also pay for the costs of required engineering studies. The carrier should not, however, be required to pay for redundant, or unnecessary studies. Where a request for access includes an engineering review that has been performed by qualified CLC personnel, such a review does not need to be completely re-performed by the electric utility or ILEC personnel, but merely checked for accuracy. To protect CLCs from being forced to incur unnecessary expenses, the Coalition proposes that the Commission (a) require electric utilities and ILECs to publish in advance the criteria by which they would determine whether a CLC's engineering study has been performed by

professional engineering personnel and (b) specify that electric utilities and ILECs should not require CLCs to pay for redundant engineering studies where a check for accuracy discloses no errors. We find these measures reasonable, and shall adopt them in order to avoid duplicative costly engineering analyses which could undermine the economic advantages of building a carrier's own facilities.

We shall direct the electric utilities and ILECs to publish objective guidelines within 180 days of its order, so that CLC personnel or third-party contractors used by CLCs can quickly and efficiently establish their engineering qualifications to do pole loading and sizing calculations. Any party seeking access should be allowed to employ its own workers which meet criteria established by the utility. In secured areas where safety or system reliability concerns are an issue, however, the utility should retain the discretion to require its own escort to supervise the work of CLC agents. When working in public, unsecured areas of a utility, the CLC should not be charged for a utility escort.

By contrast, the basic cost of attachment per pole or per linear foot of conduit usage are examples of charges which can be more readily standardized based upon the costs of each incumbent utility. We shall prescribe standards for the pricing of overhead pole and underground conduit as set forth below. As previously noted, we will not require the tariffing of these charges. Our prescribed standards are not intended to create a disincentive for parties to negotiate their own arrangements tailored to individual circumstances, but rather are intended to provide default prices and terms in the event parties fail to reach agreement. For example, a carrier may agree to pay a higher attachment rate if acceptable concessions are made in the other terms and conditions offered through negotiations.

***28** The parties' principal controversy over pricing centers around the rates which should be charged for attachments to poles and other

support structures. The beginning point for resolving the dispute over pricing principles applicable to utility pole attachments and support structures is to identify the underlying rights, interests, and obligations of the respective parties. The incumbent utilities have a right to be fairly compensated for the use of their property. Their interest is in obtaining the most favorable rates and terms possible in order to maximize the wealth of the firm. Their obligation is to provide access to their poles and support structures at reasonable terms and prices.

The CLCs have a right to obtain access to utility poles and support structures at reasonable terms and prices which do not impose a barrier to competition. Within the bounds of what may be considered fair terms, the incumbents will seek the highest prices and the CLCs will seek to pay as little as possible. In a competitive market setting, the relative bargaining between a willing buyer and willing seller produces a market clearing price which is acceptable to both sides. We must therefore consider whether the relative bargaining power of the incumbent utilities is balanced in relation to CLCs. We conclude, that by virtue of their incumbent status and control over essential ROW and bottleneck facilities, the local exchange carriers (LECs) and electric utilities have a significant bargaining advantage in comparison to the CLC with respect to ROW access. While theoretically the CLC could seek an alternative to attachment to utility support structures, the practical alternatives are frequently limited or cost prohibitive. For example, municipalities often resist the installation of any additional utility poles on public streets. The municipalities also are often unreceptive to repeated reopening of street surfaces for installation of new conduit systems. In such instances, CLCs would be forced to deal with the incumbent utilities for access to the utilities' facilities and would not be readily able to seek an alternative if the incumbents proposed unreasonable terms.

Once facilities-based competition becomes more established, the ROW infrastructure might evolve to where the present incumbent

utilities will not be in control of bottleneck facilities. Yet, since we are only in the nascent stages of facilities-based competition, a truly competitive market for providing alternative means of access to support structures for CLCs does not yet exist. Therefore, we cannot presently rely exclusively on the negotiation process to necessarily produce reasonable prices for ROW access. Given the inherent bargaining advantage of incumbents, the next question is what pricing basis will promote a more competitively neutral outcome.

In considering the proper compensation for pole attachments, we address the dispute over whether the statutory formula for pole attachment rates in § 767.5 for cable television corporations applies to all services for which the pole attachment is used, including telecommunications services. CCTA argues that the statute dictates that cable television corporations are, by law, entitled to the same pole attachment rate whether the attachment is used for telecommunications or cable television service. The statute defines "pole attachment" as "any attachment to surplus space...by a cable television corporation for a wireline communications system...." The defining characteristic of the statute, however, is that it applies to wire communications used by a "cable television corporation." The cable pole attachment statute was enacted in 1980, years before the telecommunications markets were opened to competition. No provision in the statute nor elsewhere in the PU Code indicates that the rate for pole attachments was intended to apply without limitation to any future service that a cable corporation might conceivably offer, other than cable television programming. Instead, PU Code Section 215.5 defines a "cable television corporation" as "any corporation or firm which transmits television programs by cable to subscribers for a fee." We find no basis to read into the statutory definition additional provisions which are not there.

***29** Although § 767.5 does not legally require that the pole attachment formula prescribed for cable television service must be extended to every other service which may be offered by

a cable corporation, neither does it prohibit the Commission from exercising discretion to apply the same pole attachment rate to other regulated services offered by a cable corporation, where appropriate, based upon public policy considerations. For the reasons discussed below, we conclude that such a policy is the most appropriate one, and we shall adopt such a policy.

We acknowledge that the FCC has prescribed a phased-in rate differential for cable operators' pole attachments based upon whether or not they also offer telecommunications services in its implementation of the provisions of the Act.

In reference to applicable rates for pole attachments, § 224(d)(3) of the Act states that:

"This subsection shall apply to any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e), this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service."

Under Subsection 224(e), the FCC is to prescribe new regulations within two years after enactment of the Act for pole attachments for carriers offering telecommunications services. These new regulations, however, would not apply to pole attachments used by cable operators exclusively offering cable television service. Therefore, in implementing § 224 (e) of the Act, the FCC explicitly applies different rate provisions to cable operators depending on whether they offer cable television service exclusively or whether they also offer telecommunications services.

Notwithstanding these federal actions, we are not bound by these FCC rules. Moreover, we find no convincing rationale justifying the adoption of different pole attachment rates for cable operators depending on whether or not they offer telecommunications services.

Since the opening of the local exchange market to competition, various cable corporations now offer telecommunications services over those same connections used for cable television service. There is generally no difference in the physical connection to the poles or conduits attributable to the particular service involved. In many cases, a cable operator may not be able to delineate exactly what particular services are being provided to a customer at a given time because the customer can use the connection for various services, depending on the equipment attached to the connection at the customer's premises. In such instances, it would be difficult and impractical to police how a given pole attachment is used to provide separate services offered over the same pole connection, or to delineate what portion of the usage was attributable to telecommunications versus other services offered by a cable corporation. Yet, under § 767.5, the statutory formula must apply, at least to the extent that the pole attachment is used for cable television service. Accordingly, to avoid the problems involved in separately measuring different types of data transmission services over the same connection, we conclude that the rate prescribed by the § 767.5 for cable television pole attachments should apply where a cable corporation uses its pole attachment to provide telecommunications services. By applying a consistent rate for use of cable attachments, including provision of telecommunications services, we will avoid protracted disputes over how particular attachments are being used or how separate rates may be prorated based on different volumes of transmissions over the same connection. Moreover, such an approach promotes the incentive for facilities-based local exchange competition through the expansion of existing cable services.

***30** Having concluded that the statutory rate for cable attachments shall apply to telecommunications services offered by the cable operator, we must next consider whether this same rate should be also be applied to other CLCs, including those not owned by or affiliated with a cable corporation. Since we are committed to ensuring that all telecommunications carriers gain access to

utility attachments under nondiscriminatory rates, terms, and conditions, we conclude that all CLCs should be entitled to comparable pole attachment rates as are available to those CLCs affiliated or owned by a cable corporation. The use of the existing cable pole attachment rates for all CLCs will also avoid the need for further protracted proceedings to prepare cost studies and to adjudicate default rates. Accordingly, we will direct that the same pole attachment rate provisions applicable to cable operators providing telecommunications services be extended to all CLCs, including those not owned by or affiliated with a cable corporation.

To be consistent with our treatment of pole attachments, the same principle of embedded cost pricing should apply to underground facilities. We shall accordingly adopt the provisions of § 767.5(c)(2)(B) which prescribe that the rate for attachments to support structures other than poles or anchors shall be equal to a percentage of the annual cost of ownership for the support structure. The percentage is to be computed by dividing the volume or capacity of duct space rendered unusable by the telecommunications carrier's equipment by the total usable duct volume or capacity.

We conclude that the adoption of attachment rates based on the § 767.5 formula provides reasonable compensation to the utility owner, and there is no basis to find that the utility would be unlawfully deprived of any property rights. Section 767.5 provides that the pole attachment rates will be based on the utilities' annual cost of ownership, including historic depreciated capital costs and annual operating expenses. Thus, the rate corresponds to the costs incurred by the utility to provide the attachment. Under the statutory pole attachment formula, the utility is allowed a rate equal to 7.4% of its annual cost of ownership. The 7.4% factor represents portion of the total pole space used to support the one foot for communications space, as typically used by an attaching party. Since the 7.4% allocation applies to the cost of the entire pole, it results in a fair cost apportionment in deriving attachment rates, for either cable or

telecommunications services.

The use of the § 767.5 formula constrains the default amount that may be charged for pole and conduit attachments, and to that extent, promotes the emergence of a competitive local exchange market. While the revenues that the utility realizes from pole attachments under the § 767.5 formula may be less than the amount that could be extracted purely through negotiations, there is no reason to conclude that the reduced revenues constitute an unlawful taking of property. The § 767.5 formula has never been found to be confiscatory with respect to pole attachments for cable operators. As previously found by the courts, "[r]ates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for risk assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so called 'fair value' rate base." (FPC v. Hope Natural Gas Co. (1944) 320 U. § 591.) Likewise, there is no reason to find that the rate would be confiscatory merely by extending its application to the provision of telecommunications services over the same pole attachment.

*31 Further, the formula does not result in a subsidy since the formula is based upon the costs of the utility. A subsidy would require that the rate be set below cost. The fact that the rate is below the maximum amount that the utility could extract for its pole attachment through market power absent Commission intervention does not constitute a subsidy. The embedded cost formula prescribed in § 767.5 applies to capital costs, net of accumulated depreciation, and also allows for recovery of the annual operating expenses of the utility's poles and support structures. This formula will therefore reasonably compensate incumbent utilities for their ongoing operating expenses related to providing access to their support structures. Lastly, the application of the formula as prescribed herein is reasonable since we have determined that CLCs are in a weaker bargaining position vis-a-vis incumbent utilities. It is our purpose as a regulator of

public utilities to protect against anticompetitive pricing by utilities.

The pricing standards we prescribe under our rules should only be triggered, however, in cases where the respective parties fail to negotiate a mutually agreeable pole attachment rate on their own. Parties shall be free to negotiate pole attachment rates which deviate from the standards prescribed under our rules. If they are unable to reach agreement and submit the dispute to the Commission for resolution, we shall apply the rate standards in our rules as the default rate, based upon historical embedded costs, and straight-line depreciation accounting consistent with our findings in C.97-03-019 (CCTA vs. SCE) unless the incumbent utility can show that the facilities being installed occupy more pole space, or otherwise encumber the property, more than do cable television facilities.

V. Obligations to Respond to Requests Concerning Facility Availability and Requests for Access

A. Parties' Positions

The parties are in dispute over how quickly the incumbent utility should respond (1) to initial inquiries from CLCs concerning the availability of space for attachments and (2) to follow-up requests seeking specific attachments.

The Coalition believes that standard time frames should be imposed for requiring ILECs and electric utilities to provide responses to a CLC inquiring about the availability of conduit or poles. The Coalition proposes that the time frames which were previously incorporated into an agreement between Pacific and AT&T should be applied as a general rule for all parties. Under the terms of this agreement, the ILEC or electric utility would provide information regarding the availability of conduit or poles within 10 business days of receiving a written request. And within 20 business days, if a field-based survey of availability is required.

If the written request sought information about the availability of more than five miles of conduit, or more than 500 poles, the incumbent utility would (1) provide an initial response within 10 business days; (2) use reasonable best efforts to complete its response within 30 business days; and (3) if the parties were unable to agree upon a longer time period for response, the incumbent utility would hire outside contractors, at the expense of the requesting party. Before proceeding with such outside hiring, however, the incumbent utility would notify the requesting party of the contractor's expected charge. If the incumbent utility provided an affirmative response to the request for space, access would essentially be granted immediately. If, however, "make-ready work" [FN12] were necessary, the incumbent utility would complete the make-ready work at a reasonable cost, generally within 30 business days. If a longer time period were required, the parties could either agree upon such longer period, or, failing that, the outside contractors would be hired by the requesting party at its expense.

FN12. "Make-ready work" is the work required (generally rearrangement and/or transfers of existing facilities) to accommodate the facilities of the party requesting space. This work may be performed by the owner of the facility or by the requesting party through approved contractors.

*32 The Coalition believes that the time allotted to an incumbent utility for granting access to a CLC should not exceed 45 calendar days (alternatively, 30 business days). The Coalition proposes that make-ready work be required to commence within no more than 15 days after a utility has determined that additional attachments can be accommodated through rearrangements of existing facilities, and to be completed within 30 days, absent special circumstances. Where unusually extensive make-ready work is required, the Coalition believes that the attaching and utility parties should be able to agree on an appropriate period for completing all make-ready work, not to exceed 60 days unless parties agree otherwise. If the attaching-party and utility-party could not agree on the

amount of time or cost required for make-ready work, the attaching-party would be allowed to use a qualified third-party contractor to do the make-ready work, subject to utility supervision, if the attaching-party is satisfied with the contractor's estimates of the time required and the cost of the project.

Pacific is willing to provide information for general planning purposes, but believes the amount of information requested at one time should be limited. In most cases, Pacific believes it would be an inefficient use of resources to require responses within 10 or 20 days for general requests for information. Moreover, in some cases the information is also available from public sources such as the County Assessor's office. Pacific seeks flexibility to negotiate a reasonable response time with each requesting party on a case-by-case basis, and expresses concern about its ability to comply with rigid response time frames in light of the possibility of simultaneous requests by multiple parties.

GTEC believes that no particular time period should be established for responding to a request because the amount of time required to respond to an applicant's inquiry will vary widely based on numerous factors. As an alternative to a set response time for all requests, GTEC proposes to provide the requesting carrier with a status report as to the availability, if certain information cannot be supplied in less than 45 days, with completion of the request or further status update within 15 days thereafter. To facilitate a shortened response time, GTEC states that a CLC's request should be framed to generate information for a specific point-to-point location, rather than general requests.

Depending on the required amount of "make-ready" and rearrangement work, GTEC believes that 30-to-60 additional days may be required after availability is confirmed for releasing the requested space to a CLC so that it may install its facilities. GTEC does not believe that response times should be differentiated based merely on whether a project involves more than five miles or 500 poles, but that other factors, such as the