

placement of poles on private or inaccessible property, may be much more significant in determining the time required for review. If space is available, no make-ready work is required, and the requesting CLC is next on the first-come-first-served list for the space in question, then GTEC agrees to grant access immediately.

***33** GTEC states that the requesting CLC should also complete a "Pole Attachment Request and/or a Conduit Occupancy Request" in order to establish the CLC on a first-come-first-served list for the facilities in question. CLCs and GTEC would need to negotiate an agreement specifying the terms and conditions of the pole attachment or conduit occupancy. Once an agreement is entered into, its terms and conditions would automatically apply to all future requests, unless otherwise agreed.

PG&E recommends that the Commission not adopt any specific time limit for responding to an applicant's request for information about space availability because of the diversity of requests involved. PG&E proposes that a request for access not be deemed made until the telecommunications carrier has provided a specific request, identifying each support structure it wishes to connect to and providing complete field information for the structure and accurate, complete engineering studies for the telecommunications facilities on the structure, including windloading, vertical loading and bending moment. PG&E argues that the utility not be obligated to respond to the request for access until the telecommunications carrier has made advance payment for the utility's engineering work.

PG&E sees no reason to burden an electric utility with requirements to respond to general requests for information by telecommunications carriers. PG&E believes telecommunication requests should in no case be given priority ahead of other types of essential electric utility work or governmental work such as municipal street widening projects.

Based upon their experience in processing access requests, Edison and SDG&E claim the

utility needs at least 45 days to review drawings and specifications and complete a field survey to determine space availability. If the utility must also determine if existing property rights are sufficient to permit third-party access (which sometimes involves locating records a century old), Edison and SDG&E argue that the utility needs additional time for review, with the flexibility to extend the processing time if an emergency condition exists, if the request is unusually large or complex, or if the volume of requests exceeds normal workload levels. Edison and SDG&E also oppose a requirement that all make-ready work be completed within 30 days of an access request, arguing that the amount of work to be done to make facilities ready will vary depending on the type, location, and number of affected facilities.

B. Discussion

We agree that, given the varying degrees of complexity and geographic coverage involved in requests for information, there is no single standard length of time for responses which will fit all situations. The rigid enforcement of response times which bear no relationship to the scope or complexity of a given request could impose unreasonable burdens or inefficient use of resources on the incumbent utility. On the other hand, if no standard for response times is imposed, there will be little incentive for incumbent utilities to provide timely information. The CLC could be faced with unreasonable delays in receiving information if the utility's response time obligations were open-ended, and there were no performance standards against which to hold the utility responsible. Such delay could impede the ability of the CLC to enter the market or expand its operations to compete efficiently.

***34** Given our findings above that the incumbent utilities hold an advantage in negotiations, it is, therefore, appropriate to adopt standards for response times to be used as guidelines in negotiations. While the incumbent utilities objected to setting standard deadlines for responding to requests for information, the adoption of such

guidelines will help to promote greater parity in the bargaining power of CLCs relative to incumbents. At this time, we shall prescribe standard response times only for the two large ILECs, Pacific, and GTEC, since the record is insufficient to apply a specified response time to other utilities. We reserve the right to prescribe standardized response times for electric or other utilities at a later time based upon further development of the record. In the interim, we shall direct that all utilities must provide responses on a good faith basis as promptly as the conditions of each request permit. The ILECs' response time shall be considered presumptively reasonable if it falls within our adopted standard.

These guidelines for response times are not intended to preclude the parties from exercising flexibility in negotiations to tailor the time frames for providing requested information and confirming availability of access to the specific demands of each situation. Rather, the purpose of the guidelines is to discipline the negotiation process and promote more equal bargaining strength between incumbent utilities and CLCs. In the event of a dispute brought to us for resolution, we shall consider these guidelines as a starting point for evaluating parties' claims. The response time guidelines are to be used in good faith in the negotiation process. Where it is clear that the response time guidelines are not realistic for a particular situation, we expect the parties to negotiate their own mutually agreeable response times. In particular cases, either a shorter or a longer response time may be appropriate. The guidelines are not to be used as a license to demand unreasonable or unrealistic response times. We shall take a dim view of any such behavior in adjudicating any disputes that come before us. We may consider modifying or refining these adopted response time guidelines at a later date if subsequent experience of negotiations or resolved disputes provide a basis to do so.

As a preliminary step in preparing an initial inquiry regarding the availability of space, the CLC should meet and confer with the incumbent utility to help clarify and focus the

scope of the request in order to make the most efficient use of the incumbent's time and resources in responding to the request. In some cases, a CLC may find it more efficient to obtain certain information from public sources instead of relying on the incumbent utility. In the event that parties are unable to agree on the terms for response time for information requested of the utility, they may bring the dispute before the Commission using the dispute resolution procedure outlined below. The incumbent utility shall have the burden of proving in such disputes why it cannot meet the requested response time, and of showing what time frame for a response is appropriate. It shall not be sufficient for the incumbent utility merely to argue for an openended period to respond, with no established deadline.

***35** In setting a deadline for Pacific's and GTEC's responding to CLC general requests for information concerning ROW access, we shall adopt as guidelines the time frames proposed by the Coalition and CCTA. The Coalition's and CCTA's proposed time frames reflect the actual time frames which were mutually agreed to by Pacific and AT&T as reasonable and workable between themselves. We find no reason why these time frames should not be applied generally for Pacific and GTEC.

We shall adopt the following guidelines for response time for Pacific and GTEC based on the previously referenced Pacific/AT&T agreement. For initial requests concerning the general availability of space shall not exceed 10 business days if no field survey is required, and shall not exceed 20 business days if a field-based survey of support structures is required. In the event that more than 500 poles or 5 miles of conduit are involved, the response time shall be subject to negotiations between the carriers involved. We recognize that there may be situations involving fewer than 500 poles or 5 miles of conduit which still involve considerable complexity and require more time than provided for in the adopted guidelines. We expect parties to take into account the time and complexity involved in negotiating response times. In the event

parties cannot agree, they may submit the matter to the Commission for resolution.

In the event that a telecommunications carrier decides after the initial response concerning availability that it wishes to use the incumbent utility's space, the telecommunications carrier must so notify the incumbent in writing. The telecommunications carrier must provide sufficient detail to identify each support structure to which it wishes to connect. In order to finalize its written request, the telecommunications carrier should contact the incumbent utility to arrange for completion of any necessary preliminary engineering studies for the telecommunications facilities on the structure, including windloading, vertical loading, and bending moment. Pacific and GTEC will be required to respond to the telecommunications carrier within 45 days after receipt of the written request, with a list of the rearrangements or changes required to accommodate the carrier's facilities, and an estimate of the utility's portion of the rearrangements or changes.

We agree that the electric utilities should not compromise their primary obligations to serve their own customers in the process of complying with telecommunications carriers' requests for information or for ROW access. In the event a carriers and an electric utilities cannot agree to a response date and the dispute is submitted to the Commission for resolution, the burden shall be on the electric utility, to identify any alleged essential utility work which it claims as the cause of its delay in responding.

VI. Treatment of Confidential Information

A. Parties' Positions

The Coalition seeks a rule prohibiting both ILECs and incumbent electric utilities from disclosing CLCs' requests for information and requests for access to their ROW and support structures. The Coalition argues such information should be available only to persons with an actual, verifiable "need to know" for the purposes of responding to such

requests, and proposes that violation of such regulations should be visited with harsh sanctions by the Commission, accompanied by findings of fact that violation of such regulations by ILECs are a breach of the duty to fulfill the requirements of §§ 251(b) and 251(c) of the Act, to negotiate for interconnection, in good faith.

***36** The Coalition proposes use of a standard nondisclosure agreement to protect the confidentiality of requests for information concerning the availability of space on utility support structures, or requests for access to available space, as well as any maps, plans, drawings or other information that discloses a competitor's plans for where it intends to compete against incumbent utilities.

Pacific objects to the Coalition's proposed treatment of the CLC's confidential information as overly broad and one-sided with no reciprocal duty not to disclose the utility's proprietary information. Pacific believes in most cases, a request for access should not be considered proprietary, and a utility should not be required to erect the "Great Wall of China" around employees responsible for responding to requests for access.

Pacific proposed measures to protect the confidentiality of its own information, requiring the party requesting competitively sensitive information to sign a nondisclosure agreement. Pacific believes the party providing the information should have the right to redact any information that is non-vital to the requesting party. Edison asserts that its pole data and inventory maps are confidential and competitively sensitive, and that utilities should be permitted to require telecommunications carriers to execute the utility's nondisclosure agreements before receiving competitively sensitive pole data and mapping information.

B. Discussion

We recognize that various sorts of data exchanged between parties in negotiating access rights may contain commercially

sensitive information, and each party should be permitted to request that certain data be kept confidential. As competition for telecommunications services becomes more pervasive, the need to protect commercially sensitive information from competitors may become more of an issue. The standard for protection of confidential data should not be one-sided, but should equally apply to CLCs, incumbent utilities, and any other party to an access agreement. The dissemination of information which a party has identified as commercially sensitive should be subject to reciprocal protective orders and limited only to those persons who need the information in order to respond to or process an inquiry concerning access. Parties providing confidential information should be permitted to redact nonessential data and require that nondisclosure agreements be signed by those individuals who are provided access to such materials.

VII. Restrictions on Access to Utility Capacity

A. Safety and Reliability Issues

1. Parties' Positions

Parties expressed differing views concerning the extent to which an incumbent utility may deny or limit access to its facilities based on safety and reliability considerations. Parties generally agree that the facilities of electric utilities pose greater and more complex safety concerns than those of the ILECs.

Edison and SDG&E seek the discretion to refuse or limit all carriers' access to facilities where, in the utility's best judgment, access would create safety concerns or pose a risk to the electric system's reliability or stability. In particular, Edison and SDG&E seek to categorically exempt facilities that are in direct proximity to primary energized voltage conductors from any mandatory access requirements, [FN13] arguing that the potential harm to worker safety, public safety and system reliability outweigh the benefit of access to these facilities.

FN13. Primary energized voltage conductors

"are electric distribution conductors that are energized at 600 volts or greater."

*37 PG&E argues that the Commission's rules need to distinguish between nondiscriminatory access to telecommunications facilities as opposed to electric utility facilities to avoid detrimental consequences to a safe, reliable, and efficient electric system. Electric utilities are in a completely different business which requires different technical, engineering, and safety standards from telecommunications.

PG&E seeks to preserve the option of electric utilities to deny telecommunications carriers access based on safety, reliability, and other reasonable terms. PG&E argues that applicable GO rules need to be strictly followed, especially for underground installations, to protect the safety of its work force and the reliable and safe installation, operation and repair/replacement of power cables. The reliability of PG&E's transmission facilities is further governed by the Western Systems Coordinating Council operating guidelines which prescribe how PG&E will operate its transmission facilities to maintain the reliability of the Western regional United States transmission grid system. Once an independent system operator assumes operational control of PG&E's transmission system, additional requirements above and beyond GOs 95 and 128 may be established. PG&E further argues that differences in legal and regulatory requirements may raise issues which are unique to Electric utilities. For example, Electric Tariff Rules 15 and 16 govern electric line and service extensions, while PU Code § 783 places procedural requirements on changes to line extension rules. PG&E also argues that any rules adopted providing for access to electric distribution facilities should not be allowed to create conflicts with electric industry restructuring.

Edison argues that no third party should install or modify an attachment without providing prior notice to, and receiving approval from, the utility. For instance, changing the size or type of any attachment,

or increasing the size or amount of cable support by an attachment (including overlashing existing cable with fiber optic cable) has safety and reliability implications that the utility must evaluate before work begins. Edison and SDG&E argue that the telecommunication providers should comply with at least the same safety practices as trained and experienced electric utility workers when working on an electric utility facilities or ROW to avoid exposing the public to grave danger and potentially fatal injuries. Further, Edison believes that utilities must receive advance notice and supervise all facility installations and modifications to ensure adherence to appropriate design and safety standards.

Edison believes that the Commission's GO 95 and the provision of the California Office of Occupational Safety and Health Administration (CAL-OSHA) Title 8 adequately address the safety issues that arise from third-party access to the utility's overhead distribution facilities. GO 95 prescribes uniform requirements for overhead electrical line construction to ensure safety of workers and the general public as well as reliability. Edison expresses reservations, however, about allowing telecommunications carrier access to underground electrical facilities without strictly-observed notification and utility supervision requirements that supplement GO 128 and CAL-OSHA Title 8, because of the confined space in underground electric facilities (e.g., underground vaults) and the associated increased safety concerns. GO 128 requires separation between the underground facilities of telecommunications carriers and those of electric utilities and prohibits the collocation of telecommunications carriers facilities in the conduit systems of electric utilities except under certain specific conditions. Edison states that each utility has developed unique operating practices tailored to the type of electric equipment contained in a particular structure and, in some cases, the type of structure itself. Installation, repairs, and maintenance performed by workers who are unfamiliar with the existing system and its unique characteristics create the danger of

accidents, personal injury, damage to property, and service interruptions.

*38 PG&E notes that installation and construction sometimes need to be done at a level slightly above the published GO standards, and that GO 95 and 128 should be viewed as the minimum standards which the utility must meet. At times, safety needs will arise from other laws or standards. In addition, PG&E believes that because not all situations can be anticipated in the GOs or other rules, electric utilities should be allowed to exercise their judgment if they determine that something is required for safety or reliability reasons.

PG&E states that, to determine if poles have adequate space and strength to accommodate a new or reconstructed attachment, the telecommunications carrier requesting the attachment should be required to give the electric utility a complete and accurate engineering analysis for each pole or anchor location. The analysis would show the loading on the pole (a) from existing telecommunications equipment, and (b) from all telecommunications equipment after the attachment, and would consider windloading, bending moment, and vertical loading to determine if the pole(s) are or will be overloaded and overstressed. PG&E argues that, until the engineering analysis is done and the pole (s) either is found to have sufficient space and strength for the new attachment, or is upgraded as needed, the telecommunications carrier should not make its attachment. If there are potentially serious or costly consequences for allowing use of electric facilities to provide telecommunications, PG&E argues that the electric utility should not have to allow that access at its peril.

PG&E argues that the ROW access issues in this proceeding overlap to a considerable extent with issues before the Commission in Application (A.)94- 12-005/Investigation (I.) 95-02-015, regarding PG&E's response to the severe storms of December 1995. During the evidentiary proceedings reviewing PG&E's response to the December 1995 storm, the

Commission staff questioned the adequacy of the windloading requirements in GO 95 for wood power poles. The Division of Ratepayer Advocates (now the Office of Ratepayer Advocates (ORA)) and the Utilities Safety Branch (USB) sponsored testimony in that proceeding, expressing concern that:

"increasing numbers of joint-use wood power line poles have been found to be structurally overstressed by excessive loading of electrical and communication wires and equipment under the main electrical conductors." (A.94-12-005, Exhibit 510, p. 5-1.)

ORA recommended a complete inspection of PG&E's entire pole inventory for overstressed poles (which would span several years), and the improvement of communications among utilities utilizing the poles. ORA and PG&E disagreed over the interpretation of GO 95 as applied to loading capacity of wire attachments to wood power line poles. ORA's interpretation would increase the threshold at which the existing poles require upgrades and replacements to meet GO 95 standards before any additional facilities could be attached to the pole. PG&E anticipates that under ORA's interpretation, a large percentage of power poles would need to be replaced with stronger grade poles before any additional attachments could safely be made by CLCs. In that proceeding, PG&E, the ORA, and the USB filed joint testimony (Exhibit 517) proposing that the Commission establish an Order Instituting Investigation (OII) to review, among other things, GO 95 design standards on wood pole loading requirements. A Commission decision is pending in A.94-12-005. PG&E believes that there is considerable tension between the requirements and goals in A.94-12-005 and the demands by CLCs in this case for prompt, immediate access to poles, and that the potential for extensive buildout and reconstruction by CLCs complicate and aggravate the problem of overloading and overstressing the poles.

***39** Pacific believes that for jointly owned poles, the standards agreed to by the owners in conjunction with GO 95 and national requirements adequately address safety

concerns. With an increased number of parties seeking attachments, however, Pacific believes that the owners should coordinate attachments by third parties in order to ensure the continuing safety and reliability of the facilities.

The Coalition acknowledges the need for utilities to provide for the safety and reliability of their facilities - so long as the safety and reliability concerns are genuine and have not been manufactured as excuses for a plainly discriminatory access policy. The Coalition argues that any utility that contends that safety and reliability concerns preclude additional attachments should bear the burden of demonstrating that such concerns have not been fabricated as an excuse of denying access.

2. Discussion

We generally agree that the incumbent utility, particularly electric utilities, should be permitted to impose restrictions and conditions which are necessary to ensure the safety and engineering reliability of its facilities. In the interest of public health and safety, the utility must be able to exercise necessary control over access to its facilities to avoid creating conditions which could risk accident or injury to workers or the public. The utility must also be permitted to impose necessary restrictions to protect the engineering reliability and integrity of its facilities.

Telecommunications carriers must obtain express written authorization from the incumbent utility and must comply with applicable notification and safety rules before attempting to make a new attachment or modifying existing attachments. Any unauthorized new attachments or modifications of existing attachments are strictly prohibited. Before an attachment to a utility pole or support structure is made, we shall require successful completion of a fully executed contract.

In order to provide carriers with a strong economic disincentive to attach to poles or

occupy conduit without a fully signed contract and authorization to proceed, any carrier found to have engaged in such action, or which has performed an unauthorized modification, shall pay a penalty fee. GTEC has proposed a penalty of five times the recurring monthly rate for each month of the violation. Edison, PG&E, and SDG&E agree that a penalty fee is warranted, but believe that GTEC's proposed penalty is too small to deter unauthorized attachments. Edison argues that many attaching parties may believe such a small penalty is an acceptable risk for unauthorized attachment rather than to incur the costs for negotiating and administering an access request. PG&E and SDG&E propose a \$100 fee as an adequately large penalty to discourage unauthorized attachments while Edison proposes a \$500 fee. We shall impose an automatic penalty of \$500 per violation for unauthorized attachments, based on the proposal of Edison. For purposes of applying the \$500 penalty, each unauthorized pole attachment shall constitute a separate violation. The setting of the penalty level at \$500 is consistent with PU Code Section 2107 which prescribes default penalties for violations of Commission orders of not less than \$500, or more than \$20,000, for each offense. If violations continue to occur despite the imposition of this penalty, we may consider increasing the amount of the penalty at a future time.

*40 We shall not adopt specific detailed rules addressing a comprehensive set of safety and reliability requirements given the complexity and diversity of the technical issues involved. Historically, the Commission's GO 95 and GO 128 have dealt with safety requirements for clearances and separation between conductors on poles or in common trenches. These rules have become accepted industry practice and parties agreed generally that they should continue to be enforced. At a minimum, parties must comply with GOs 95 and 128, as well as other applicable local, state, and federal safety regulations including those prescribed by Cal/OSHA Title 8. Attachments to wood poles may be impacted by any rules or restrictions which we subsequently adopt in response to the recommendations made by

parties in A.94-12-005/I.95-02-015 regarding PG&E's design standards for utility wood pole loading requirements.

We agree with PG&E that pending the resolution of the parties' dispute over the safety factor for pole attachment loading standards in A.94-12-005/I.95-02-015, an interim safety factor should be adopted. The higher the safety factor is rated, the greater the number of poles which must be replaced before an attachment can be made. The adoption of an interim minimum safety factor for pole loadings will help avoid delays in negotiations over pole attachments relating to claims of pole overloading.

PG&E proposes that an interim windloading safety factor of 2.67 for Grade A poles be adopted in this proceeding as a minimum standard until the Commission reaches a final resolution in A.95-12-005/I.95-02-015. The Coalition concurs in PG&E's proposal to use the 2.67 windloading factor as an interim measure. The basis for the 2.67 windloading factor was explained in the report submitted by the Commission's Utility Safety Branch (USB) in A.94-12-005/I.95-02-015:

"USB believes that due to pole deterioration, G.O. 95 allows the minimum safety factor to be reduced. Section 44.2 modifies the minimum safety factor by reducing it (for Grade A and B construction) to not less than 2/3. As stated in this section, a reduction is allowed for 'deterioration or changes in construction arrangement or other condition subsequent to installation.' As an example, a safety factor of 4 can be reduced to 2.67 as allowed by Section 44.2."

Exhibit 511, USB Report, at 32

While the Commission's USB accepted PG&E's interpretation in the PG&E proceeding, ORA did not. PG&E subsequently agreed with ORA and USB in Exhibit. 507 of the PG&E proceeding to not allow facilities to be added to Grade A poles such that the safety factor would be reduced below 4.0 until an OII on GO 95 was completed.

We shall adopt an interim safety factor for utility wood pole loading requirements to equal to 2.67, based upon the proposal by PG&E and USB in A.94-12-005/I.95-02-015. This interim factor shall be subject to revision pending further action in A.94-12-005/I.95-02-015. Once a decision has been issued in that proceeding, we shall solicit comments from parties to this proceeding concerning the general applicability in this docket of any requirements adopted in the PG&E proceeding.

*41 We recognize that electric utility underground facilities pose particular safety hazards. A single mistake in an underground facility could result in fatal injuries to the worker and expose the public to grave danger. Telecommunication providers shall therefore be required to comply with all of the same safety practices as trained and experienced electric workers use in underground facilities. Any utility operating practice that the utility requires of its own employees shall be conclusively presumed to be reasonable and justifiable.

Telecommunications providers shall comply with utility notice, supervision, and inspection requirements for all installation, repair and maintenance activities, but especially work in underground facilities, from entry to procedures for securing the facility when work is completed. These requirements will help ensure that work can be appropriately supervised and inspected, and that it will not interfere with planned electric utility repairs or work being done by other telecommunications carriers.

In the event of an emergency (e.g. a downed pole or poles, an earthquake or power outage) electric utility repairs shall take precedence over telecommunications repairs, to the extent the electric utility determines that both types of repairs cannot occur at the same time. In an emergency situation such as downed pole, if the electric utility determines that it must disconnect, remove or repair telecommunications equipment for safety or reliability reasons, these rules permit the electric utility to do so.

We expect parties to resolve most issues relating to safety and reliability restrictions not explicitly covered in our rules through mutual negotiation among themselves. In the event that parties cannot resolve disputes among themselves over whether a particular restriction or denial of access is necessary in order to protect public safety or ensure the engineering reliability of the system, any party to the negotiation may request Commission intervention under the dispute resolution procedures we adopt below. In the event of such dispute, the burden of proof shall be on the incumbent utility to justify that its proposed restrictions or denials are necessary to address valid safety or reliability concerns and are not unduly discriminatory or anticompetitive.

B. Reservations of Capacity

Parties' Positions

The parties generally agree that access to finite capacity should be granted on a first-come, first-serve basis, but disagree concerning whether or to what extent access to facilities may be denied based on the incumbent utility's right to reserve currently unused capacity for its own future growth needs.

Pacific and GTEC each argue that the ILEC, as a provider of last resort, must have the ability to reserve capacity for future growth of its own loop network to serve all customers. Pacific's current practice is to construct its conduit and pole lines with sufficient capacity to meet anticipated needs based only on the information available at the time of construction. Pacific does not, however, install all of the cables in all of the ducts at the time of the conduit construction. Upon a request for access, Pacific's forecasts are reviewed and updated to determine current availability. If the original forecast is no longer valid, Pacific will make available the reserved duct for use by third parties. If Pacific is unable to reserve space for future use, it will be forced either to install all of its cables at the time of construction, build additional conduit to meet its service needs, or evict users of the needed

duct space under GO 69-C. GO 69-C permits a utility to grant easements, licenses or permits for the use of its operating property without special authorization by the Commission as long as the utility retains the right to reclaim its property if necessary to serve its customers. As GO 69-C promotes both reciprocal access and a utility's continuing ability to provide service upon demand, Pacific believes it is applicable to these proceedings.

*42 Pacific proposes that, at a minimum, ILECs and other attaching carriers be allowed to reserve space for "imminent use" if the ILEC has a construction plan in place which requires the installation of the ILEC's facilities within six months of a request for access (or within 18 months if construction will be delayed as a result of an action by a third party such as a permitting body). In such cases, Pacific proposes that the ILEC be permitted to deny the request for space.

Pacific and GTEC both contend that a complete prohibition against their ability to reserve capacity, particularly when that capacity has been reserved for a future use, is a taking of property within the meaning of the Fifth Amendment. In *Federal Communications Commission v. Florida Power Corporation*, (1986) 480 U. S. 245, the United States Supreme Court held that the prior requirements of § 224, which applied only to cable companies, did not effect an unconstitutional taking, since utility companies were neither required to permanently give cable companies space on utility poles nor prohibited from refusing to enter into attachment agreements: "Since the Act clearly contemplates voluntary commercial leases rather than forced governmental licensing, it merely regulates the economic relations of utility company landlords and cable company tenants, which regulation is not a per se taking." *Id.* at 250.

Pacific notes that the Supreme Court, however, was not deciding what the outcome would be if the FCC in the future required utilities to enter into, renew or refrain from terminating pole attachment agreements.

"[Property] law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the innovations." *Id.* at 252 quoting *Loretto v. Teleprompter Manhattan CATV Corporation*. (1982) 458 U.S. 419, 436.

Pacific and GTEC claim that denial of their right to reserve space would permit a third party to exercise dominion over the LEC's property, thereby triggering Fifth Amendment scrutiny. At the very least, Pacific argues, the Commission should permit an LEC to reclaim space previously provided to a third party that is necessary for use by the LEC to meet its own service needs.

GTEC argues that it must be able to satisfy both its current needs as well its future space requirements relative to the poles and conduits which it owns, places, and maintains. GTEC forecasts its future space requirements on the basis of a five-year horizon. In order to ensure continued investment in facilities infrastructure, GTEC argues that facilities owners must be allowed correspondingly to reserve reasonable space for future use, while treating all competitors equally. GTEC argues that depriving it of the ability to maintain reserved capacity would impair service to the public, cause an extraordinary cost increase, and have a significant adverse effect on GTEC's future investment in poles and conduits. If GTEC cannot reserve space in its own facilities, it argues, there is no incentive to construct facilities sufficient to satisfy future needs, with a resulting loss of economic and efficient investment, with long-range strategic planning rendered impossible.

*43 GTEC objects to the FCC's interpretation of § 224(f)(1) as prohibiting GTEC from reserving space on its own facilities for its own

future needs. GTEC argues that this interpretation conflicts with § 224(f)(1), which applies the nondiscrimination requirement only to those for whom access must be "provided," not to the owner, whose "access" is synonymous with its ownership right. GTEC contends that the concept of "nondiscriminatory access" does not mean that its rights as an owner of poles and conduits must be relegated to the status of a mere licensee occupant, but only that GTEC must treat equally all companies seeking access.

GTEC further argues that if the Commission were to adopt the FCC's interpretation of the term "nondiscriminatory access" (as used in 47 U.S.C. § 224(f)(1)) precluding an ILEC from reserving space on its own facilities for its own needs, the Commission would effect an unconstitutional taking of GTEC's property. GTEC contends that such a restriction would interfere with its "investment-backed expectations" and "eviscerate" a "critical expectation of GTE" that "additional space would be available as needed in the future."

The Coalition disputes GTEC's argument, noting that § 767.5 only permits attachments in "vacant space" or "excess capacity" on or in utility support structures, and that the statute requires that:

"... the cable television corporation shall either (1) pay all costs for rearrangements necessary to maintain the pole attachment or (2) remove its cable television equipment at its own expense." (PU Code § 767.5(d).)

Thus, the Coalition argues, a utility has no need to reserve vacant space or excess capacity and keep it, as it were, "lying fallow" until such time as it may need it since the utility can reclaim vacant space if needed.

CCTA notes that the FCC Interconnection Order does allow an electric utility to reserve space for its future use, but only if it is in accordance with a "bona fide development plan" for the delivery of electricity through specific projects. [FN14] CCTA argues that for purposes of providing any communications services, an electric utility should be on equal

terms with other telecommunications companies and the reservation of space for communications would not qualify as a "bona fide development plan." The electric utility must allow the space to be used until it has an actual need for it.

FN14. In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, and Interconnection between LECs and Commercial Mobile Radio Service providers, First Report and Order, CC Docket No. 95-185, FCC 96-325, ¶ 1170 (August 8, 1996) ("Interconnection Order").

Edison and SDG&E propose that the amount of capacity made available for access be limited to only what is expected to be needed by the telecommunications carrier within a specified time period. Any capacity that the telecommunications provider does not use within that period would revert to the electric utility and become available for another telecommunications provider's use. PG&E also states that the electric utility should be allowed to call back capacity that a telecommunications carrier has utilized in the interim when the need materializes.

*44 PG&E's present practice is to allow telecommunications providers access to overhead distribution facilities until PG&E needs the capacity for electric service. Each telecommunication provider thereby decides between incurring the upgrade costs at the outset, or deferring upgrade until the electric utility's need materializes. PG&E argues that this approach makes sense because future electric distribution capacity needs usually are planned on an area basis, and not on a specific pole/line basis.

PG&E also proposes that the following matters should be completed before a first-come-first-served access authorization is applied in a particular situation: (a) successful completion of negotiations with a fully executed contract; (b) identification of the specific ROW support structures for which an attachment is requested; and (c) payment of the attachment fee in accordance with the

executed contract. (PG&E Comments, p. 27.)

The Coalition believes that the Commission should not permit reservations of capacity or, if allowed at all, that they should be strongly disfavored, and permitted only for electric utilities that can demonstrate there is no other feasible solution and that they had a bona fide development plan prior to the request justifying the reservation. The Coalition argues that adoption of such a policy is critical to the vigorous development of facilities-based competition in California. The Coalition argues that permitting reservations of capacity for an incumbent's own use enables the incumbent to discriminate against all carriers as long as it has treated them all in an equally harsh and equally discriminatory manner.

Edison and SDG&E oppose the Coalition's proposal requiring the electric utility to demonstrate it has a "bona fide development plan" prior to requesting a reservation of capacity. Edison and SDG&E argue that electric utilities' obligation to provide safe and reliable electric service can only be met if the utilities can reserve capacity for future use or take back the capacity when needed for electric utility purposes.

Both Edison and SDG&E conduct their capacity planning based on five-year forecasts of the need for additional capacity within different parts of the system. Detailed planning that identifies the specific facilities affected by the need to provide additional capacity usually does not occur until shortly before the need for additional capacity arises. Edison and SDG&E argue that it would be time-consuming and expensive for the utility to make detailed annual capacity forecasts for every facility within its service territory. Moreover, even if there is no anticipated need for additional capacity at a specific facility within a particular one-year period, there will frequently be occasions when there is a need for the capacity after the one-year window. Edison and SDG&E believe "take-back" provisions are essential for meeting these future needs; the utility must either have the ability to "reclaim" such space, or be entitled

to construct additional space at the expense of the carrier(s) that otherwise would be "displaced" to make additional room for the utility.

Discussion

*45 We must balance two opposing interests in resolving the dispute over reservations of capacity for future use, those of the incumbent utilities and those of the CLCs. On the one hand, incumbent utilities need to be able to exercise reasonable control over access to their facilities in order to meet their obligation to provide reliable service to their customers over time and plan for capacity needs to accommodate future customer growth. On the other hand, CLCs need to be able to gain access to the ROW and support structures of the incumbent utilities in order to provide local exchange service on a nondiscriminatory basis. We shall separately discuss the obligations of ILECs and electric utilities.

The ILEC's reservation of capacity for its own future needs could conflict with the nondiscrimination provisions in § 224(f)(1) of the Act which prohibit a utility from favoring itself or affiliates over competitors with respect to the provision of telecommunications and video services. If the ILEC were permitted to deny access to CLCs by reserving capacity for its own needs under more favorable terms than are offered to the CLCs, the ability of CLCs to compete effectively with the incumbent could be significantly compromised. By virtue of their previous status as monopoly providers of utility service, ILECs have significant control of bottleneck facilities. New competitors lack the advantages of incumbency, and must build and interconnect their systems. The ILECs could use the reservation-of-capacity defense as a means of staving off competitors and perpetuating their competitive advantage over CLCs. Accordingly, we shall not permit the ILECs to deny access to other telecommunications carrier based on general claims that capacity must be reserved for their own future needs.

While we shall not permit ILECs to deny

requests for access based on the need to reserve capacity for extended periods, we recognize that ILECs should maintain control over their facilities to plan for their own future growth and to provide for sufficient capacity to serve future customers in a reliable manner. Likewise, CLCs also may require a certain lead time for the actual utilization of space beyond the date at which an access agreement is executed with an incumbent utility.

Just as ILECs should not be permitted to favor themselves in reserving capacity at the expense of CLCs, likewise, CLCs should not be permitted more favorable terms in their ability to reserve capacity than are the ILECs. Thus, CLCs should not be permitted to engage in indefinite delay in the utilization of pole space or conduit capacity following the execution of an agreement with an ILEC authorizing access. We recognize that both ILECs and CLCs may require a certain interval between the time a determination is made that space is needed and the actual use of that space to serve customers. In the interests of nondiscriminatory treatment for both the ILECs and CLCs, we shall impose on them all the same requirements with respect to the time interval for reserving capacity.

***46** We shall require that once CLCs have been granted access, these carriers must make use of the capacity that they leased, within a specified period, or the capacity will revert for use by other carriers. Such a requirement is necessary so that particular carriers do not "bank" capacity, and permit it to be idle while it could be used by other carriers to provide service. GTEC has proposed a period of nine months, beginning from the date on which a CLC receives its access authorization from the ILEC, within which the CLC must either place facilities in use and attach to poles or the facilities will revert to the ILEC. We find the nine-month period reasonable for CLCs' use of capacity of an ILEC and will adopt it for that purpose. This period will allow for the uncertainties of customer service demands and weather limitations in scheduling attachments or installations for ILEC facilities.

Since we are placing this nine-month time limitation on the CLCs with respect to the utilization of capacity, a similar time limitation should likewise apply to the ILECs' utilization of their own capacity in order to assure nondiscriminatory treatment among telecommunications carriers. Our guiding principle is that any discretion ILECs have to reserve capacity be no greater, nor lesser, than that provided to the CLCs. We shall therefore allow both ILECs and CLCs the same nine-month period within which to utilize capacity which is subject to a request for access from competing carriers. In the case of an ILEC, the nine months shall count from the date of any denial of a request submitted by a CLC for a specific attachment to pole space or conduit capacity.

To justify denial of access to a CLC, the ILEC must demonstrate that plans are in place for actual utilization or construction to begin within nine months. The ILEC must verify that construction is actually imminent, and not merely "contemplated." If substantial construction activity is not commenced within nine months, the party requesting access must be allowed access to the pole or other support structure forthwith, ahead of the ILEC or other requesting party, unless the delay is demonstrably attributable to severely inclement weather or the delay of a government agency in issuing a needed construction or similar permit. In the latter case, the ILEC may be able to reserve the capacity for an additional period not to exceed nine more months. This same provision shall apply to CLCs.

In the case of any telecommunications carrier's use of capacity of a electric utility, however we conclude that a deadline shorter than nine months is warranted. As noted by SDG&E, particularly in the case of electric utility distribution poles, conditions existing at the time access is granted do not remain static for long. The longer the delay in a telecommunications carrier's exercise of its access rights to poles or conduit, the more significant the potential for major changes to take place in those facilities that could affect the carrier's ability to attach or the safety and

engineering aspects of the attachment. Based on review of both GTEC's and SDG&E's comments, we conclude that a shorter duration for telecommunications carriers to exercise their access rights may be more critical in the case of electric utilities. We shall therefore adopt SDG&E's proposal to permit a period of no more than 90 days for a telecommunications carrier to exercise its access rights to the poles and conduits in the case of an electric utility.

*47 We shall permit a somewhat less restrictive policy regarding the electric utilities' ability to reserve capacity for their own use. Since electric utilities have traditionally been engaged in a separate industry from telecommunications, electric utilities have not been in direct competition with CLCs. Accordingly, the specific anticompetitive concerns regarding ILECs' ability to favor themselves at the expense of CLCs have not applied in the case of electric utilities as long as they applied only to core electric service. More recently, however, at least one electric utility has sought entry into the local exchange market. [FN15] While electric utilities shall not unfairly discriminate against CLCs in responding to CLCs requests for access to pole space or conduit capacity, electric utilities do not violate the nondiscriminatory provisions of the Act, but only so long as they are giving preference to the needs of their own core electric customers over the requests of CLCs. Consistent with the approach followed in the FCC First Report and Order (paragraph 1169), we will permit an electric utility to reserve the space if such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core electric utility service within one year. Each electric utility must permit use of its reserved space by telecommunications carriers until such time as the utility has an actual need for that space. At that time, the utility may recover the reserved space for its own use per the rules in the next section of this order.

FN15. On August 19, 1998, SCE filed a petition in this docket seeking certification as

a facilities-based CLC. SCE's petition is the first California electric utility to competitive seek entry into the local exchange telecommunications market.

In those situations where parties cannot agree on the terms of access due to a claim by an electric utility asserting the need to reserve capacity for its own future needs, we shall resolve such situations through our dispute resolution process. In order to justify its capacity reservation claim, the electric utility will be required to show that it had a bona fide development plan for the use of the capacity prior to the request for access, and that the reservation of capacity is needed for the provision of its core utility services within one year of the date of the request for access. In cases where the capacity will be needed at a future date beyond one year, the electric utility may not assert the reservation of capacity claim as a basis to deny access. As we have stated above, our preferred outcome for meeting future capacity needs is the expansion of facilities rather than reclamation.

We conclude that the above policy regarding reservations of capacity in no way constitutes an unlawful taking in violation of the incumbent utilities' constitutional rights under the fifth amendment. The rules we establish merely constitute regulation of the terms under which parties may negotiate for access. The access policy we establish does not eliminate the incumbents' ownership of their property nor does it give CLCs dominion over the incumbents' property. Property ownership rights, however, do not give incumbent utilities unlimited discretion to deny access to telecommunications carriers unilaterally. As noted by the Coalition, public utilities are affected with a public interest and are therefore subject to regulation for the public good. The incumbents still retain autonomy over their planning and forecasting of future capacity requirements. Under the rules we establish, the incumbents still retain ultimate control over their property by virtue of their rights to require a signed contract expressly granting permission before third-party access may proceed.

*48 Moreover, third parties which elect to remain on the pole shall be required to pay for the cost of any rearrangements to the extent they benefit there-from as discussed below. Therefore, the incumbents are fairly compensated for the use of their property, and there is no unlawful taking.

VIII. Capacity Expansion, and Modification, and Reclamation

A. Parties' Positions

An issue which is closely related to reservation of capacity is that of expansion or modification of existing capacity to accommodate third party carriers' requests for access or to accommodate the incumbent utility's needs for existing space which is being used by an attaching carrier. If there is no available space on a given utility facility for which access is requested, it may become necessary to expand or rearrange the existing facility to make room for a new attachment. The principle of nondiscrimination set forth in § 224(f)(1) requires that a utility cannot simply deny requests for access on the basis that no space is available without first seeking to accommodate the request through modification of existing facilities or expansion of existing capacity for telecommunications carriers just as it would to meet its own needs for growth.

Pacific and PG&E believe that the party or parties for whose benefit special modifications to facilities are made should assume the cost of the modifications including the cost of rearranging the facilities of parties not participating in the modification. GTEC believes the carriers which require the capacity should incur the expense of new construction once capacity is exhausted. Because of the many variables associated with expanding capacity, GTEC believes no minimum time frames should be set for completion of the expansion. Alternatively, if minimum time frames are to be established, GTEC proposes that a CLC which desired to further expedite the process should be required to pay any extra charges associated with the escalation.

The Coalition proposes that the costs of support structure capacity expansion and other modifications, including joint trenching, be shared by parties attaching to utility support structures according to the principles set forth in the FCC Rules (First Report Secs. 1161-1164; 1193-1216). Under the FCC rules, parties must bear their proportionate share of the cost of a modification to the extent that the modification is made for the specific benefit of the participating parties.

As a general principle, the Coalition believes that the proportionate share of cost assigned to each carrier should correspond to the proportion of total usable capacity used by that carrier. In the case of joint trenching costs, however, the Coalition argues this approach may not always be appropriate in the case of electric utilities. Due to safety considerations, trenching and installation of conduit for the placement of underground gas pipelines and electric conductors is more elaborate than for direct burial or placement of conduit wire for communications facilities. A deeper and wider trench is required for power utilities' conduits or pipelines. The different requirements for underground placement of power utilities' facilities result in higher costs being incurred than would be the case if only communications facilities were involved. The Coalition argues that telecommunications carriers should not have to pay more than the costs they would have incurred, based on an independent bid, had they done their own trenching for their own facilities.

*49 Under the FCC rules, written notification of a modification is required at least 60 days prior to the commencement of the physical modification itself, absent a private agreement to the contrary. The Coalition proposes this Commission adopt the FCC notification requirement. Notice is to be specific enough to apprise the recipient of the nature and scope of the planned modification. The notice requirement would not apply if the modification involved an emergency situation.

GTEC would support a type of simple voluntary notification plan, much like a

docket service list, to notify companies of joint trench work, with most carriers agreeing to participate in view of the cost savings. GTEC does not believe ILECs should be placed in the position of being the sole coordinators of such functions for the industry.

B. Discussion

In the interest of promoting a competitive market, our preferred approach to meeting needs for new capacity is through expansion or rearrangement of existing capacity rather than through reclamation and eviction of a CLC currently occupying space on an attachment or in conduit. We shall require that the costs of capacity expansion and other modifications, including joint trenching, be shared among only those parties specifically benefiting from the modifications on a proportionate basis corresponding to the share of new usable space taken up by each benefiting carrier. In the event an energy utility incurs additional costs for trenching and installation of conduit due to safety or reliability requirements which are more elaborate than a telecommunications-only trench, the telecommunications carriers should not pay more than they would have incurred for their own independent trench. Likewise, electric utilities should not bear the cost of modifications which benefit only telecommunications carriers.

In the case where an incumbent utility (either ILEC or electric) has need of existing space which is being occupied by the equipment of attaching CLCs, we shall require that the incumbent utility first give the option to the attaching CLCs to pay for the costs of rearrangements or expansions necessary to maintain their attachment. In order to justify a reclamation of existing space, the incumbent utility must justify that the space is reasonably and specifically needed to serve its customers. Electric utilities must show the space is needed to serve core electric utility service. The incumbent utility must also show that there are no other cost effective feasible solutions to meet its needs, or there are no technological means of increasing capacity of the support structure for additional

attachments. The incumbent utility must also show that it has attempted to negotiate a cooperative solution to the capacity problem in good faith with the party being evicted from the incumbent's pole or conduit.

We shall permit incumbent utilities to reclaim space in cases where they have met the above conditions, and in addition where some or all of the attaching parties have refused to pay the costs of rearrangements necessary to maintain their pole attachment or use of conduit. In the latter case, the attaching parties shall be required to promptly remove their telecommunications equipment from the attachment at their own expense subject to the restrictions described below. This approach is consistent with prescriptions of PU Code § 767.5 (d) with respect to the treatment of cable television attachments.

***50** We remind CLCs, however, that all carriers have an obligation to complete the calls of their customers, even if they disagree with the underlying interconnection arrangements, as prescribed in D.97-11-024. Therefore, even in the event a CLC is notified by the incumbent utility of its intention to reclaim space currently occupied by the CLC's equipment, the CLC still has a primary obligation to ensure the service continuity of its customers. If continuation of the use of the incumbent's space is no longer feasible, the CLC is obliged to find other means to provide uninterrupted service to its customers before removing its equipment from the incumbent's space.

In the event of disputes over reclamation of space and displacement of a CLC, we shall require that the incumbent shall not displace the CLC without first notifying the Commission and obtaining authorization to do so. We shall permit parties to use our dispute resolution procedure to resolve disputes over CLC displacements due to reclamation of space. In resolving any dispute, we shall place the burden of proof on the ILEC or electric utility to show whether the incumbent has adequately satisfied the prerequisites for reclamation, as described above. Nonetheless,

irrespective of the disposition of any disputes concerning forced displacement of CLC equipment due to reclamation, the primary service obligation remains with the CLC whose customers are potentially affected by a displacement. Any order of this Commission granting the incumbent utility the right to reclaim space must contain a plan for continued telecommunications service to affected end-users of the CLC.

We shall adopt an advance notice requirement of at least 60 days prior to the commencement of a physical modification, except in the case of emergencies where shorter notice may be necessary.

IX. Obtaining Third-Party Access to Customer Premises

A. Parties' Positions

During the ROW workshops, various parties raised the issue of how the Commission could assist utilities seeking to obtain access to the full pathway up to and including the minimum point of entry (MPOE) to a customer's premises.

Pacific states that the pathway up to and including the MPOE to a customer's premises usually includes facilities in the public ROW and facilities on the property to be served. An LEC only controls the supporting structure that is in the public way; the property owner provides and owns the supporting structure on his or her property. Pacific claims it cannot supercede the property rights of owners by permitting access to third parties. If the utility is able to successfully negotiate access with the property owner, Pacific offers to provide access to its equipment rooms and other facilities as long as the security and safety of its equipment is not compromised.

In some cases the property owner has determined that a single entity shall provide service to the premises. While acknowledging this can create difficulties if a tenant desires service from a different carrier, Pacific claims this is an issue between the tenant and the property owner, and cannot be resolved by the

carrier.

*51 Pacific believes that the Commission should require all utilities to permit nondiscriminatory access to facilities on private property that they own or control, but should not dictate to owners which carrier they must choose to provide service. Pacific proposes that the Commission consider limiting the amount of access or rental fees a carrier is permitted to pay a property owner for access rights.

GTEC agrees to provide access up to the MPOE, to the extent that GTEC owns and there is availability on the poles, conduits, ducts, or the ROW in question. Since the property owner is responsible for facilities beyond the MPOE, however, GTEC opposes a Commission regulation that would abrogate private agreements between such property owners and a carrier which would allow other carriers the ability to trespass on such property without negotiating their own agreement.

While the Coalition acknowledges that this Commission lacks jurisdiction to require non-utility third parties to grant utilities access to their properties, the Coalition argues that there are still important actions the Commission can take to assist CLCs in this area. First, the Coalition asks the Commission to make findings of fact regarding the importance of the development of a new telecommunications infrastructure and deployment of alternative facilities to customer premises by CLCs. The Coalition believes such findings would be useful in eminent domain proceedings to gain access to tenants' facilities.

The Coalition further asks the Commission to require utilities that have vacant space (excess capacity) in existing entrance facilities (e.g., conduit) into commercial buildings to make such space available up to the MPOE so that competitors may gain access to building cellars, telephone closets (or cages) and risers, network interconnection devices and/or frames, and so forth, in such buildings. Further, the Coalition asks the Commission to

require that ILECs not impede such access where it is requested by landlords on behalf of their tenants. Finally, the Coalition asks that ILECs and incumbent electric utilities be required to exercise their own powers of eminent domain, just as they would on their own behalf to obtain or expand an existing ROW over private property, in order to accommodate a CLC's request for access.

The Coalition argues that under no circumstances should a building owner or manager be allowed to charge CLCs for use of its inside wire while allowing ILECs unlimited use of the same facilities at no charge. The Coalition suggests that the Commission can exercise its influence to prevent such discriminatory treatment in the following manner. Assuming that the Commission has the authority to regulate building owners as "telephone corporations" as defined under PU Code § 234, the Coalition suggests that the Commission could declare it will refrain from such regulation if, but only if, the building owner makes access to inside-wire available to ILECs and CLCs alike on a nondiscriminatory basis.

*52 As a basis for this recommendation, the Coalition cites the Commission's "shared tenant services" ("STS") decision, D.87-01-063. [FN24] In the STS decision, the Commission adopted a set of guidelines aimed at ensuring that, among other things, tenants in buildings or campus-like settings where the landlord provides PBX services to tenants (via a PBX switch and inside wire owned by the landlord) continue to have options for obtaining telephone services from the provider of their own choosing. The decision provided that landlords would not be regulated as a public utilities, even though they appeared to fit within the literal terms of PU Code §§ 233 and 234, if but only if, they complied with the STS guidelines. The rationale underlying the decision is that the Commission could have asserted jurisdiction, had it wanted to do so, over such telecommunications services providers under the statutory definitions of a "telephone line" in PU Code § 233 and of a "telephone corporation" in PU Code § 234. The Coalition claims that a similar sort of

Commission authority should apply to any landlord who is charging certificated telephone corporations, ILECs and/or CLCs, for access to a building system or systems of entrance facilities, tie down blocks, frames, wires, fibers, closets, conduits, risers, etc. The Coalition argues that the building owner or manager is not providing such service to tenants, but to telecommunications carriers. The Coalition characterizes such as directly akin to a special access service through which situation, the building owner or manager is, or, if necessary in a given case, certainly could be held to be, operating a "telephone line," and offering service to the public or a portion thereof (i.e., to certified carriers) within the meaning of PU Code § 233.

FN24. Re Pacific Telephone and Telegraph Company (D.87-01-063) 23 CPUC 2d 554, 1987 Cal. PUC LEXIS 838 ("the STS decision"), modified (D.87-05-009) CPUC 2d 179, 1987 Cal. PUC LEXIS 725.

Edison and SDG&E argue that an electric utility must be allowed to deny access requests when its property rights do not allow use of the property by a third party. Edison and SDG&E also oppose being required to exercise their powers of eminent domain in order to accommodate a telecommunications provider's request for access, claiming that such an exercise of powers would go beyond the legally authorized limits for electric utilities. Edison argues that its powers of eminent domain do not allow it to condemn property for the benefit of telecommunications providers. Edison believes that since certificated telecommunication providers have the power of eminent domain, they should not depend upon the electric utilities to secure their access rights.

Electric utilities also frequently obtain easements or licenses containing provisions that limit use of the property to operations directly related to the generation, transmission or distribution of electricity. Edison argues that it should not be obligated to negotiate broader easements or licenses to allow telecommunications carriers to access the property, since this would impose

additional costs on the utility and its customers and shareholders.

*53 Comments were also filed jointly by a group known as the "Real Estate Coalition" [FN16] representing the interests of owners and managers of multiunit real estate. The Real Estate Coalition concurrently filed a motion for leave to intervene and become a party in the proceeding. Separate comments were filed by the Building Owners and Managers Association of California (BOMA) with a similar motion to intervene. There is no opposition to either of the motions for leave to intervene, and the motions shall be granted. Both parties represent very similar interests.

FN16. The Real Estate Coalition is composed of the Building Owners and Managers Association International, the Institute of Real Estate Management, the National Apartment Association, the National Association of Real Estate Investment Trusts, the National Multihousing Council

The Real Estate Coalition argues that the Commission lacks jurisdiction to regulate building owners, and opposes rules permitting telecommunications carriers to enter the premises of multiunit buildings and install facilities without the express consent of the underlying property owner. The Real Estate Coalition believes forced access by telecommunications carriers would constitute an unlawful taking under *Loretto v. TelePrompTer Manhattan CATV Corp*, 458,US 420 (1982), because it would entail a physical occupation without the owner's consent.

The Real Estate Coalition identifies a number of effects that are triggered by telecommunication carriers' access to buildings, including fire and safety code compliance, tenant security, and the ability of building owners to manage finite physical space needs.

BOMA argues that the Commission should not attempt to regulate access issues between the telecommunications industry and private

property owners in order to avoid distorting an otherwise free and functioning market. BOMA argues that the real estate industry is highly competitive, and building owners have a strong incentive to satisfy the telecommunications needs of their tenants, and have no incentive to ban or restrict telecommunications service providers. BOMA argues that building owners must have the freedom and power to select and coordinate which telecommunications companies have access to their buildings.

B. Discussion

We recognize, that the development of a competitive telecommunications infrastructure and deployment of alternative facilities to customers' premises by CLCs are important to the health of California's economy. The adoption of rules to facilitate the CLCs' ability to negotiate access to customer premises is consistent with our policy of opening all telecommunications markets to competition. To the extent that owners of buildings and their tenants are able to choose among multiple telecommunications carriers, they are likely to benefit from higher quality service at lower cost and with greater responsiveness to customers' needs.

We agree that one way to facilitate competition within the multi-unit buildings is to require the opening of access up to the MPOE of the building.

*54 Requirements for establishing demarcation points, or MPOEs, at multi-unit properties are governed by regulations adopted by this Commission and by the FCC. On June 14, 1990, the FCC released a report in CC Docket No. 88-57 establishing a new definition for demarcation points. This Commission in Decision (D.) 90-10-064 and D.92-01-023 added clarification to the demarcation point ruling, including approval of a Demarcation Settlement Agreement among Pacific and other telephone carriers. The changes were to become effective on August 8, 1993, and were intended to foster competition by transferring ownership and responsibility for certain telephone cable and

inside wire to property owners, who then more easily would be able to connect to the networks of competitive telephone providers.

For multi-unit properties built or extensively remodeled after August 8, 1993, the rules generally required Pacific to establish a single MPOE as close as practical to the property line. The MPOE became the physical location where the telephone company's regulated network facilities ended and the point at which the building owner's responsibility for cable, wire, and equipment began. Generally speaking, facilities on the building owner's side of the MPOE are designated as Intrabuilding Network Cable (INC), which in all instances, was to be owned by the property owner.

For existing buildings constructed before August 8, 1993, Pacific was required to convey to property owners any cabling that was identified as INC on Pacific's books. [FN17] Pacific's investment in this transferred INC was to be recovered over a five-year amortization period (from August 1993 to August 1998) from the general rate base.

FN17. The Demarcation Settlement Agreement defined INC as "sheathed cables located on utility's side of the current demarcation point inside buildings or between buildings on one customer's continuous property." (See D.92-01-023, Appendix A, p. 10.) The INC that the local carriers were obligated to relinquish was identified by their then-existing specified accounting treatment, i.e., that which was booked to "Part 32 capital account 2426 and expense account 6426." (Id., at p. 10.)

Generally, Pacific's practice prior to 1993 was to install a local loop demarcation point at each building in a multi-unit complex. That meant that Pacific maintained ownership (and responsibility) for INC that often ran hundreds of feet into multi-unit property until reaching an MPOE. It also meant that competing telephone companies had no single point at which to cross-connect to the owner's cabling in these properties. Other carriers were free, of course, to purchase and install

their own cable at these properties.

The Demarcation Settlement Agreement approved by the Commission in D.92-01-023 provides that for multi-unit properties built prior to August 8, 1993, the only network plant that was to be unbundled and conveyed to property owners consisted of "INC within building (riser and lateral) that was in place prior to August 8, 1993." (D.92-01-023, Attachment B (proposed tariffs), at No. A2, 2.1.20(E)(3)(b).) Pacific was required to relinquish ownership of this embedded INC to the building owner upon full recovery of the utility's capital investment. (Id. at No. A8, 8.4.3(A)(3).) However, other utility-owned network plant (described as "Non-INC") -- and this included network cable stretching from a utility's central office to each MPOE at individual buildings -- was not affected by the tariff or the Commission's order. [FN18]

FN18. "Utility owned plant facilities (Non INC) between buildings on existing continuous property" remains the property of Pacific, but non-INC plant that is no longer useful can be sold to property owners as set forth in Schedule Cal. P.U.C. No. A2.8. (See Tariff A2, 2.1.20(E)(3)(b)(1); 2.8.1(B)(1).)

***55** To facilitate the development of the competitive telecommunications infrastructure, we shall require that incumbents with vacant space in existing entrance facilities (e.g., conduit) into commercial buildings make such space available to competitors up to the MPOE to the extent the incumbent has the right to assign its interest to another. This requirement will enable CLCs to gain access to building cellars, telephone closets, and network interconnection devices (NIDs) in such buildings. THE MPOE shall be defined in accordance with the demarcation points as prescribed in D.90-10-064 and D.92-01-023.

We shall also prohibit all carriers from entering into any type of arrangement with private property owners that has the effect of restricting the access of other carriers to the owners' properties or discriminating against the facilities of other carriers such as CLCs.

For example, an agreement which provides for the exclusive marketing of ILEC services to building tenants may be improper if the agreement has the effect of preventing a CLC from accessing, and providing service to, a building because of the building owner's financial incentives under the marketing agreement. Similarly, a situation in which a building owner, either for convenience or by charging disparate rates for access, favors the access of the ILEC to the detriment of a CLC will also be in violation of our rules herein. Such arrangements conflict with our stated policy promoting nondiscriminatory ROW access.

On a prospective basis, we will prohibit all carriers from entering into any kind of arrangement or sign any contract with building owners that result in exclusive or discriminatory access. Although we will not disturb any agreements predating the effective date of this order, we will permit any carrier to file a formal complaint against another carrier that the complainant believes is benefiting from exclusive or discriminatory access to private property. The complainant carrier will have the burden of proving that the defendant carrier, either by its actions or the actions of the building owner, is the exclusive provider of service or the beneficiary of better terms of access in violation of the policies of this order. If after hearing the evidence we find that the agreement or arrangement is unfairly discriminatory with respect to other carriers, we shall direct that the agreement be renegotiated or use Commission authority under PU Code §§ 2107 and 2108 to impose a fine for continuing violations against the carrier for everyday that the agreement or arrangement is in effect. Such fine would be based on the number of lines served in the building multiplied by the number of days of violation, and be levied in the range of \$500 to \$20,000 per day per statute. A carrier will have 60 days to renegotiate a contract deemed discriminatory by the Commission or else the fine will begin to accrue.

This solution permits the Commission to employ its jurisdiction over

telecommunications carriers to effectuate the desired policy for nondiscriminatory access to buildings without addressing our jurisdiction if any, over private property.

***56** We recognize, however, that the private property rights of building owners must be observed. Building owners must retain authority to supervise and coordinate on-premise activities of service providers within their building. Installation and maintenance of telecommunications facilities within a building may disrupt tenants and residents, and could cause physical damage to the building. Unauthorized entry into a private building by a third party whether an ILEC or a CLC could compromise the integrity of the safety and security of occupants of the building. The building owner or manager is uniquely positioned to coordinate the conflicting needs of multiple tenants and multiple service providers. Telecommunications carriers' access to private buildings shall therefore be subject to the negotiation of terms of access with the building owner or manager.

While building owners are entitled to exercise due discretion in managing and controlling access to their premises for the protection and security of the building occupants, they may not abuse such discretion in a manner that would unfairly or capriciously discriminate against carriers seeking ROW access in order to offer competitive local exchange service. In the event a carrier is unable to reach a mutually satisfactory arrangement with a building owner for access to the building premises to serve customers, then the carrier may seek resolution of its dispute in the appropriate court of civil jurisdiction or file a complaint as described above if the carrier believes that another carrier is benefiting from exclusive or unfairly discriminatory access.

Lastly, incumbent utilities shall not be required to exercise their powers of eminent domain to expand their existing ROW over private property to accommodate a CLC's request for access. The CLC, as a telephone corporation, has independent authority

sufficient to pursue its own eminent domain litigation, and there is no basis to require contracting for such litigation through the incumbent. The eminent domain powers of a CLC are covered under PU Code § 616, which states that "a telephone corporation may condemn any property necessary for the construction and maintenance of its telephone system."

We will not at this time extend the requirements and procedural vehicles described above to electric-utility access to private property for the purpose of providing electric service only. We may do so in a future order in this docket or on a case-by-case basis.

X. Third Party Access to Jointly-Owned Facilities

A. Parties' Positions

Utility distribution poles and anchors have been traditionally owned under joint ownership agreements between two or more entities with a need to have their lines or equipment strung on common poles to reach customers throughout a given geographic area. Joint pole associations have traditionally fostered access to and the joint ownership of pole facilities. Membership is comprised of ILECs, CLCs, wireless providers, municipalities, and electric and water utilities. Pursuant to such joint pole associations, third parties have acquired access to jointly owned poles as tenants of one of the owners. In their comments, parties addressed the issue of whether existing joint pole associations were an adequate vehicle to protect the interests of third parties seeking access to facilities.

*57 GTEC recommends that the existing process of access through joint pole associations has worked well and should continue and not be supplanted with an untested method. Those third parties who are non-members may apply to become members of the association. GTEC argues that it is not necessary for yet another organization to be established to protect the interest of third parties, as this would be incompatible with the

current joint pole association process, and would needlessly complicate a currently effective system.

PG&E believes that provisions addressing the rights and responsibilities of a joint owner are needed when allowing third parties access to the jointly owned poles as tenants. PG&E argues that third party connections also must comply with safety and reliability requirements, and should not take precedence over the use of the pole by any joint owner for its current or future utility service.

PG&E believes that, with the restructuring of the telecommunications and the electric industry, the Commission needs to carefully consider how the obligations and compensation for pole ownership and/or use should be structured to provide a reasonable balance between responsibility for and benefits from the pole system. PG&E believes that ultimately all users will need to pay for their pole use in a manner that is either market based or economically equivalent to sharing fully the ownership costs and responsibilities for facilities subject to shared ownership.

PG&E argues that third party tenants' quality of access cannot exceed the access which their licensor or lessor enjoys under the Joint Pole Agreement, and that the joint owner must be able to provide for its own capacity requirement before accommodating third party requests. PG&E suggests that a telecommunications entity which does not wish to join the Joint Pole Association, but still desires the same quality of access as an owner, can negotiate a separate joint ownership agreement with the entity or entities holding ownership interests in the pole.

The Coalition states that new distribution facilities constructed by a member of a joint pole organization will ordinarily be subject to the rules governing members of that organization, whereas new distribution facilities constructed by a party that is not a member of a joint pole organization would not be subject to joint pole association rules. Since

several of the members of the Coalition are also members of joint pole associations, the Coalition states it is not in a position to comment on whether a different vehicle is needed to protect the interests of third parties.

Since such organizations are controlled by regulated utilities, they are agents of parties subject to the Commission's jurisdiction. Even though joint pole organizations are not themselves public utilities, the Coalition argues they are fully subject to Commission jurisdiction and control, through the operation of the ordinary principles of agency law. Therefore, the Coalition believes the Commission can take whatever steps it deems necessary to protect the interest of third parties. The Coalition further claims that the Commission has authority to provide for reciprocal access by privately-owned utilities to the ROW and support structures owned by local governmental agencies to the extent those agencies are members of joint pole associations and receive benefits from such membership.

***58** The Coalition argues that the utility members of any joint pole organization must not be permitted to degrade access to utility support structures and ROW directly or indirectly, simply because an attaching party has chosen not to become a full member of such an organization.

B. Discussion

Based on parties' comments, we find no need at this time to make any further modifications in the existing arrangements governing joint pole associations to protect third parties that do not belong to a joint pole association. Likewise, no party seeking access to a utility pole should be discriminated against merely because it is not a member of such an association. We may at a later time consider the needs for additional rules to protect against unfair discriminatory treatment for nonmembers of joint pole associations. As we have stated previously, the ALJ shall solicit further comments concerning the implications of joint pole associations as they relate to nondiscriminatory access.

XI. Expedited Dispute Resolution

A. Parties' Positions

Parties present differing views regarding how the Commission should facilitate the resolution of disputes in the event parties cannot reach agreement through negotiations over the terms and conditions of ROW access.

In its proposal, the Coalition distinguishes disputes over requests for initial access versus all other disputes over access. The Coalition recommends that the Commission develop a new type of expedited and informal proceeding for resolving disputes concerning initial access to utility support structures, patterned after the Commission's existing Law and Motion procedure for discovery dispute resolution. This new type of proceeding would be presided over by an ALJ, assisted by Telecommunications Division or the Safety and Enforcement Division staff with relevant experience and knowledge of utility support structures. The hearing would not be reported. The ALJ would hear the initial access dispute and resolve it, either at the hearing or within no more than three working days, employing such fact finding techniques as necessary for expeditious resolution of the initial access dispute.

The Coalition claims that the Commission's existing formal complaint process is much too slow and cumbersome for resolution of such disputes. Absent an expedited dispute resolution procedure, the Coalition argues, the CLC must either comply with the terms of access, which may be difficult, expensive and time-consuming, or file a complaint for relief at this Commission, which may be an equally difficult, expensive, and time-consuming process, while, in the meantime, access is denied.

For all other disputes between ILECs and telecommunications carrier involving access to ILEC utility support structures (i.e., disputes concerning other than initial access), the Coalition agrees that arbitration is a useful alternative to the use of the Commission's existing complaint process. (See,

Interconnection Order 1, ¶¶ 1227, 1228; see also, Commission Resolution ALJ- 174 (adopting arbitration procedures for resolution of interconnection agreement disputes.)

***59** CCTA believes that the process established by the Act and the FCC provide a good starting point for expedited resolution by this Commission of disputes involving denial of access. The FCC Order requires the requesting party to provide the ROW or facility owner a written request for access. If access is not granted within 45 days of the request, the ROW or facility owner must confirm the denial in writing by the 45th day. Upon the receipt of a denial notice from the ROW or facility owner, the requesting party has 60 days to file its complaint with the FCC, and final decisions relating to access are to be resolved by the FCC expeditiously. (Interconnection Order ¶ 1225.) The requesting party also may seek arbitration pursuant to § 252 of the Act which governs procedures for the negotiation, arbitration, and approval of certain agreements between ILECs and telecommunications carriers. If arbitration is undesirable or proves unsuccessful, then court proceedings are an alternative.

CCTA proposes additional dispute resolution procedures for situations in which parties have already entered into contracts for access to ROW. Specifically, CCTA proposes that such disputes be negotiated by field personnel first. If the dispute remained after two days, it could be forwarded to the supervisor of the field representative. After five days, it would go to the Engineering Manager. After five more days, it would go to the Utility Manager-General Agreements. If the dispute remained after five more days, it would go to arbitration.

Pacific supports an expedited dispute resolution process, but argues that parties must be required to attempt to resolve their differences in good faith before bringing them before the Commission. Pacific proposes that if the Commission adopts a similar expedited review process as prescribed by the FCC, the Commission should require the parties to first

attempt to resolve any dispute themselves before going to the Commission. Pacific also argues that it may take longer than 45 days to determine availability for more complicated requests for access.

GTEC does not oppose an expedited process to resolve disputes concerning access to ROW that arise out of negotiated or arbitrated agreements, but asks the Commission not to permit such a dispute resolution process to improperly circumvent or replace of the negotiation process required by § 252 of the Act.

Edison believes that the procedures prescribed in § 252 have the potential to distort the negotiating process and to impose a significant additional burden on the Commission and its staff. Rather than negotiating in earnest, Edison argues, parties may be tempted to state their demands and then insist that the Commission arbitrate a solution. Unless all parties to the negotiation request the Commission's assistance as mediator, Edison argues, the Commission should refrain from any role in the parties' negotiations. If negotiations fail to produce an agreement, Edison believes the Commission's role as arbitrator should be limited to imposing appropriate conditions to prevent discrimination among competing carriers and unreasonable restrictions to access, and the Commission should limit inquiry to the two following issues:

***60** 1. Is the utility insisting on a prohibitive pricing arrangement as a means of favoring one carrier over another?

2. Are the non-pricing terms and conditions sought by the utility reasonably related to legitimate concerns about safety, limitations on liability and system reliability and stability, and are they being applied in a non-discriminatory manner to all similarly situated carriers?

Edison argues that the carrier should have the burden of demonstrating that the utility has discriminated against that carrier or sought to impose unreasonable restrictions to

access.

PG&E believes that to the extent a dispute involves expert engineering issues such as those relating to GO 95, responsibility and authority for hearing and resolving the dispute should be referred to Commission-designated experts whose education and training qualify them to decide engineering matters. Moreover, PG&E believes their interpretations should have precedential authority for GO 95 purposes generally. PG&E therefore recommends that the Commission designate specific members of its engineering staff experienced in GO 95 to be responsible for GO 95 interpretation and implementation, including resolution of disagreements about the application of GO 95 to any specific ROW access dispute, [FN19] to achieve technically sound, consistent and timely interpretations. PG&E also recommends that the expedited proceeding allow for an evidentiary record to be transcribed.

FN19. In making this suggestion, PG&E recognizes that the parties to the December storm proceeding have recommended an OII into design standards in GO 95. Pending the resolution of the OII proposal, however, PG&E argues that users of poles need a way to resolve GO 95 questions which will result in sound engineering results, while also supporting construction of new telecommunication lines, to the extent consistent with GO 95 and other applicable standards.

B. Discussion

The rules, guidelines, and performance standards adopted herein should reduce the extent of disputes and impasses among the parties in negotiating ROW access agreements. Nonetheless, our adopted rules leave discretion to the parties to negotiate individual agreements, and leave the potential for disputes to arise. We shall therefore adopt an expedited procedure for resolving disputes relating to access to ROW and support structures as set forth below. We expect parties to make a good faith effort to

resolve their disputes before bringing them before the Commission. As a condition of the Commission's accepting a dispute for resolution, the moving party must show that it has attempted in good faith to negotiate an arrangement which is consistent with the rules and policies set forth in this decision. This showing must be included in the request for dispute resolution. The burden of proof shall generally be on the party which asserts that a particular constraint exists preventing it from complying with the proposed terms for granting ROW access. Earlier in this order, we have provided specific guidelines regarding who will shoulder the burden of proof regarding certain ROW disputes.

***61** The following prerequisites must be satisfied as evidence of good faith negotiations prior to the Commission's acceptance of a request for resolution of a ROW dispute. The party seeking access must first submit its request to the utility in writing. As discussed previously, we are establishing a default deadline of 45 days for a utility to confirm or deny whether it has space available to grant requests for access to its support structures or ROW. If the request is denied, the utility shall state the reasons for the denial or why the requested space is not available, and include all the relevant evidence supporting the denial. In the event of a denial, Step 1 of the dispute resolution process is invoked. We shall expect the parties to escalate the dispute to the executive level within each company to attempt to negotiate an alternative access arrangement to accommodate their mutual needs. If the parties are unable to reach a mutually agreeable solution after five days of good-faith efforts at negotiation, any party to the negotiations may request the Commission to arbitrate the dispute.

For purposes of arbitrating ROW access disputes, we shall generally follow our arbitration rules previously adopted as Rule 3 of Resolution ALJ 174, effective June 25, 1997. These rules were adopted to provide parties with guidance concerning the Commission's process for mediating and arbitrating disputes involving interconnection agreements between ILECs and CLCs

pursuant to Section 251 and 252 of the Act. We conclude that those rules are likewise useful as a vehicle for Commission resolution of ROW access disputes. We shall modify the time requirements prescribed under ALJ 174, as appropriate, to accommodate the specific needs for ROW dispute resolution. Subsequent references to subsections of Rule 3 in the discussion below relate to Resolution ALJ 174. In Appendix A of this decision, we have incorporated a separate section addressing detailed dispute resolution procedures for ROW access issues patterned after Resolution ALJ 174.

A request for arbitration may be submitted at the end of the five-day period for negotiations at the executive level within each company, as noted above. The request for arbitration shall be filed in the form of an application, which shall be served on the other party or parties to the dispute not later than the date the Commission receives the request. The request for arbitration shall contain the information prescribed in Rule 3.3 of the Resolution ALJ 174.

An arbitrator shall be appointed as prescribed in Rule 3.4 and discovery shall proceed under Rule 3.5. Parties shall have an opportunity to respond as set forth in Rule 3.6, except that the response shall be due within 15 days (instead of 25 days) of the request for arbitration. Within three days (instead of seven days) of receiving the response, the applicant and respondent shall file a revised statement of unresolved issues, per Rule 3.7.

Within seven days (instead of 10 days) after the revised statement is filed, the arbitration conference shall begin per Rule 3.9. The arbitration conference and hearings shall be limited to three days. Within 15 days following the hearings, the Draft Arbitrator's Report shall be filed per Rule 3.17. Each party may file comments on the Draft Report within 10 days of its release. The arbitrator shall file the Final Arbitrator's Report no later than 15 days after the filing date for comments per Rule 3.19. A final Commission decision on the Arbitrator's Report shall be placed on the Commission's agenda 30 days

thereafter.

***62** Based on the schedule outlined above, the following sequence of events may be summarized:

Event	Day Number
Request for Arbitration is filed	0
Responses are filed	15
Revised Arbitration Statement is filed	18
Arbitration hearings conducted	25-27
Draft Arbitrator's Report Issued	42
Comments on Report filed	52
Final Arbitrator's Report Issued	67
Agreement Reflecting arbitrator's report	74
Commission Decision Placed on Agenda	104.

A Commission decision resolving ROW access disputes can be issued within approximately 100 days of the filing of a request for arbitration. We believe this procedure will provide for expedited resolution of ROW disputes in the most efficient manner.

Our normal rules of practice and procedures should be followed at all times during the dispute resolution process.

We shall not adopt PG&E's request that only Commission-designated experts with education and training in engineering be assigned to resolve disputes involving engineering issues. We shall continue to rely on the Commission's long established practice to use ALJs to adjudicate and to mediate contested proceedings which come before the Commission. The ALJ is specifically equipped to resolve contested issues dealing with a variety of technical disputes as well as legal matters. The assigned ALJ routinely consults with technical staff employed by the Commission with education and training in the area of expertise called for by the nature of the dispute as necessary to understand and resolve technically complex disputes. It would not be the best use of Commission resources to deviate from this successful practice by assigning a Commission staff expert with training in engineering matters to be responsible for mediating or arbitrating such contested issues. Therefore, all disputes regarding ROW access, including those dealing with engineering or safety issues shall be referred to an ALJ for resolution. The ALJ shall consult with the Commission's technical staff as appropriate to deal with engineering, safety, or other technically complex issues in

dispute among the parties.

Findings of Fact

1. Under § 224 of the Telecommunications Act of 1996, both incumbent local exchange carriers and electric utilities have an obligation to provide any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.
2. Nondiscriminatory access to the incumbent utilities' poles, ducts, conduits, and rights of way is one of the essential requirements for facilities-based competition to succeed.
3. Given the complexities and the diversity of ROW access issues, it is not practical to craft uniform tariff rules which address every situation which may arise.
4. The adoption of general guiding principles, and minimum performance standards concerning ROW access will promote a more level competitive playing field in which individual negotiations may take place.
- *63 5. The general provisions of PU Code § 767 relating to reciprocal access of utility support structures and ROW apply to all public utilities subject to the rules in Appendix A.
6. On an interim basis, corporations providing solely cable TV services over their facilities will not be subject to the reciprocal access provisions of § 767 vis-a-vis incumbent telephone and electric utilities.

7. On an interim basis, corporations providing solely cable TV services and CLCs will not be obligated to provide each other with reciprocal access to ROW.

8. CMRS providers will be using poles and other utility facilities in ways perhaps not contemplated by traditional land-line providers.

9. Exclusive reliance on the negotiation process will not necessarily produce fair prices for ROW access.

10. Given the advances in technological capabilities of cable television network, it has become increasingly difficult to clearly delineate a cable television provider's offering of "cable" service as opposed to "telecommunications" service on the same wireline communications system.

11. Cable television corporations' provision of different services on their wireline communication system does not normally add any additional physical burden to the use of their facilities attached in the ROW of a public utility company.

12. PU Code § 767.5(a)(3) applies the term "pole attachment" to any attachment to surplus space, or use of excess capacity, by a cable television corporation for a wire communication system on or in any support structure or ROW of a public utility.

13. Requiring telecommunications carriers and cable operators that provide telecommunications services to pay more for pole and conduit attachments than cable operators that do not provide telecommunications services when their attachments are made in the identical manner and occupy the same amount of space would subject such carriers and cable operators to prejudice and disadvantage, would deter innovation and efficient use of scarce resources, and would harm the development of competition in California's telecommunications markets.

14. Sections 224(d) and (e) of the

Communications Act of 1934, as amended by the Telecommunications Act of 1996 (47 Y.S.C. § 224(d) and (e)), do not require states to provide for different rate provisions for cable operators commencing February 8, 2001, depending on whether they offer cable television service exclusively or whether they also offer telecommunications services. Attempting to distinguish "cable television service" from "telecommunications service" would entangle the Commission in semantic disputes and would not represent the best use of the Commission's resources.

15. Since the enactment of the Telecommunications Act of 1996 on February 8, 1996, the California Legislature has not amended California's pole attachment statute, PU Code § 767.5, to add a provision analogous to subsection (e) of the federal pole attachment statute, 47 U.S.C. § 224, which was added to that statute by the Telecommunications Act of 1996. Subsection (e) provides for a higher pole attachment rate for telecommunications carriers and cable operators providing telecommunications services to be phased in between the years 2001 and 2006.

*64 16. The California Legislature has not given this Commission any directive to follow the pole attachment pricing approach in 47 U.S.C. § 224(e).

17. The Coalition's proposed 7.4% allocation of capital costs which may be charged for pole attachments is based on the statutory formula in § 767.5(c), which was based on the FCC's pole attachment formula and fully accounts for the relative use of space on the pole.

18. Under the terms of the interconnection agreement executed between Pacific and AT&T, Pacific agreed to provide information to AT&T regarding the availability of conduit or poles within 10 business days of receiving a written request or within 20 business days if a field-based survey of availability was required.

19. Under the terms of the Pacific/AT&T agreement, if AT&T's written request sought

information about the availability of more than five miles of conduit, or more than 500 poles, Pacific agreed to: (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, Pacific would hire outside contractors at the expense of the requesting party.

20. The terms of the Pacific/AT&T agreement regarding the time frame for responding to requests about access to ROW provide a reasonable basis for formulating generic rules for response times for Pacific and GTEC.

21. It is in the interests of public health and safety for the utility to exercise necessary control over access to its facilities to avoid creating conditions which could risk accident or injury to workers or to the public.

22. When working on an electric utility's facilities or ROW, telecommunications providers' compliance with at least the same safety practices as trained and experienced electric utility workers is necessary to avoid exposing the public to grave danger and potentially fatal injuries.

23. Changing the size or type of any attachment, or increasing the size or amount of cable support by an attachment has safety and reliability implications that the utility must evaluate before work begins.

24. Commission GO 95 and CAL-OSHA Title 8 generally address the safety issues that arise from third-party access to the utility's overhead distribution facilities.

25. In addition to the requirements of GO 128 and CAL-OSHA Title 8, because of the confined space in underground electric facilities (e.g., underground vaults) and the associated increased safety concerns, advance notification and utility supervision is required as conditions of granting telecommunications carriers access to underground electrical facilities.

26. To determine if poles have adequate space and strength to accommodate a new or reconstructed attachment, an engineering analysis may be needed for each pole or anchor location to show the loading on the pole (a) from existing telecommunications equipment, and (b) from all telecommunications equipment after the attachment, accounting for windloading, bending moment, and vertical loading.

*65 27. Any engineering analysis that is required by incumbent utilities must be reasonably required and actually necessary. If such engineering analysis is performed within reasonable written industry guidelines by qualified CLC engineers, it should be deemed acceptable unless a check for accuracy discloses errors.

28. The ROW access issues in this proceeding interrelate with issues before the Commission in Application (A.) 94-12-005/Investigation (I.) 95-02-015, regarding PG&E's response to the severe storms of December 1995.

29. Parties in A.94-12-005 proposed that the Commission establish an Order Instituting Investigation (OII) to review, among other things, the adequacy of GO 95 design standards on wood pole loading requirements.

30. Incumbent utilities need to be able to exercise reasonable control over access to their facilities in order to meet their obligation to provide reliable service to their customers over time and to plan for capacity needs to accommodate future customer demand.

31. The incumbents' reservation of capacity for their own future needs could conflict with the nondiscrimination provisions in § 224(f)(1) of the Act which prohibit a utility from favoring itself or affiliates over competitors with respect to the provision of telecommunications and video services.

32. Since electric utilities have not traditionally been in direct competition with CLCs, but have been engaged in a separate industry, the potential concerns over a reservation policy permitting discriminatory

treatment of a competitor have not been as pronounced as compared with ILECs.

33. On August 19, 1998, SCE filed a petition in this docket as the first California electric utility seeking certification to become a facilities-based CLC offering local exchange service.

34. The development of a new telecommunications infrastructure and deployment of alternative facilities to customer premises by CLCs is important to the development of a competitive market.

35. Unauthorized entry into a private building by a third party whether an ILEC or a CLC could compromise the integrity of the safety and security of occupants of the building.

36. The building owner or manager is uniquely positioned to coordinate the conflicting needs of multiple tenants and multiple service providers

37. Utility distribution poles and anchors have been traditionally owned under joint ownership agreements between two or more entities with a need to have their lines or equipment strung on common poles to reach customers throughout a given geographic area.

38. New distribution facilities constructed by a member of a joint pole organization, will ordinarily be subject to the rules governing members of that organization, whereas new distribution facilities constructed by a party that is not a member of a joint pole organization, would not be subject to joint pole association rules.

39. The Commission has the constitutional mandate to insure the availability of public utility services throughout the State of California including within municipalities.

*66 40. The Commission has previously asserted jurisdiction over the placement of facilities within the rights of way of municipalities in General Order 159.

41. There is a need for an additional expedited resolution process on ROW issues where a limited number of facilities, or at least one customer, are involved.

Conclusions of Law

1. This Commission has jurisdiction under the Act to exercise reverse preemption regarding rules governing nondiscriminatory access to ROW, and is not obligated necessarily to conform to the FCC rules.

2. In order to establish its jurisdiction, the Commission must satisfy the conditions of § 224(c)(2) and (3) which requires the state to certify to the FCC that:

A. The rules herein that govern the rates, terms and conditions of access to incumbent utilities' ROW should apply to cable TV companies regardless of whether they offer telecommunications services; and

B. in so regulating, that it 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. The rules adopted in the instant order meet the requirements of § 224(c)(2) and (3), and constitutes certification to the FCC of this Commission's assertion of its jurisdiction.

4. Consistent with the intent of Congress in enacting § 224(f), cable operators and telecommunications providers should be permitted to "piggyback" along distribution networks owned or controlled by utilities subject to the telecommunications provider having first obtained the necessary access and/or use rights from the underlying property owner(s) as opposed to having access to every piece of equipment or real property owned or controlled by the utility.

5. No party may attach to the ROW or support structure of a utility without the express written authorization from the utility. The incumbent utility may not deny access simply to impede the development of a

competitive market and to retain its competitive advantage over new entrants.

6. Telecommunications carriers access to private buildings shall therefore be subject to the negotiation of terms of access with the building owner or manager.

7. Under the nondiscrimination principles of the Act, incumbent utilities must provide all telecommunications carriers, the same type of access they would afford themselves.

8. The rules herein that govern the rates, terms, and conditions of access to incumbent utilities' ROW should apply to cable TV companies regardless of whether they offer telecommunications services.

9. CMRS providers should not be covered by the ROW rules adopted in this order, until the record is further developed regarding these providers' specific ROW needs.

10. While it is beyond the jurisdiction of this Commission to compel municipally-owned utilities to provide access to their poles, the municipally-owned utilities must, by law, set just and reasonable terms of access.

*67 11. PU Code Section 7901 grants telephone corporations authority to construct telephone lines and erect poles and other support structures along and upon public highways, but to do so in a manner which does not incommode the public use of highways.

12. In § 7901.1(a), the California Legislature stated 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," but under § 7901.1(b), the "control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner."

13. If a municipal corporation fails to discharge its duty to treat "all entities in an equivalent manner" when exercising its powers (§ 7901.1(b)), then a carrier should be able to invoke any available regulatory, administrative, and civil remedies that govern

allegedly unlawful actions by the municipality.

14. PU Code Section 762 authorizes this Commission to order the erection and to fix the site of facilities of a public utility where necessary to secure adequate service or facilities.

15. If a telecommunications carrier cannot resolve a dispute with a local governmental body over access to a public ROW, the carrier should file an application with this Commission for a certificate of public convenience and necessity for specific siting authority to gain access to the public ROW. Consideration of such applications will be limited to an inquiry of whether the actions of the local governmental body impede a statewide interest in the development of a competitive market.

16. In the event an application is filed by a telecommunications carrier seeking specific siting authority within the jurisdiction of a given municipality or local government, the carrier should be required to show that it engaged in good-faith efforts to obtain all necessary permits from said municipality or local government.

17. In resolving such applications, the Commission's order shall be directed toward the telecommunications carrier, since the Commission does not regulate local governments.

18. In the event that such an application is granted, and the local governmental body 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 for resolution. The Commission's order authorizing access may be used in support of its case in civil court.

19. Parties to pre-existing arrangements for access to utility ROW and support structures shall be bound by the terms of such arrangements even though they may differ from the provisions of this decision, unless the

ROW contract expressly provides for amendment or renegotiation to conform to subsequent Commission orders.

20. Consistent with the requirements of PU Code § 767, a CLC may not arbitrarily deny an ILEC's request for access to the CLC's facilities or engage in discrimination among carriers.

21. The incumbent utilities have a right to be fairly compensated for providing third-party access to their poles and support structures.

*68 22. 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 negotiating the terms of ROW access.

23. The pricing formula prescribed in PU Code § 767.5(c) is applicable under the statute only to cable television providers, but the statute does not prescribe any rate for the provision of telecommunications services by cable operators.

24. Apart from any statutory requirements, the pricing formula prescribed in PU Code § 765.5 for pole attachments and for use of conduits should be made available to cable operators providing telecommunications services, and to other telecommunications carriers as a matter of public policy.

25. Requiring telecommunications carriers and cable operators that provide telecommunications services to pay more than cable operators that do not provide telecommunications services when their pole attachments are identical in all relevant respects would subject such carriers and operators to prejudice and disadvantage, would be *unfair and discriminatory*, and would violate the letter and spirit of PU Code § 453.

26. Having certified to the Federal Communications Commission that it regulates pole attachments in compliance with 47

U.S.C. § 224(c), this Commission is not required to follow the provisions of the federal pole attachment statute, 47 U.S.C. § 224(e), that would require the application of a higher pole attachment rate to telecommunications carriers and cable operators that provide telecommunications services than to cable operators that do not offer telecommunications services.

27. Utilities should be allowed to recover their actual expenses for make-ready rearrangements performed at the request of a telecommunications carrier, and their actual costs for preparation of maps, drawings, and plans for attachment to or use of support structures.

28. The Coalition's proposed measures to prevent CLCs' paying for unnecessary up-front expenses, including the incumbent utilities publishing of the criteria for evaluating engineering studies, should be adopted.

29. Pricing principles applicable to pole and support structure attachment rates should be determined in a manner which guards against an unbalanced bargaining position between incumbent utilities and telecommunications providers.

30. Distinction in the rate treatment of cable versus telecommunications attachments based on the nature of the service that a cable operator or telecommunications carriers provides could be unfairly discriminatory to the extent there is no difference in the manner that a cable operator and a telecommunications carrier attach their strand and cables (either copper, fiber, or coaxial) to a utility pole.

31. Utility pole attachments for telecommunications services priced on the basis of historic or embedded costs of the utility less accumulated depreciation will help ensure nondiscriminatory treatment among all telecommunications carriers.

*69 32. Parties may negotiate pole attachment rates which deviate from the cost standards prescribed under this order, but, if