

having been unable to reach agreement, they submit the dispute to the Commission for resolution, the Commission's rules should apply as the default rate based upon the use historical embedded costs.

33. Prices based on the recovery of operating expenses and embedded capital costs reasonably compensate the utility for the provision of access to its poles and support structures.

34. Embedded cost data used to derive attachment rates shall be gathered from publicly filed documents, and pole attachment rates shall be calculated pursuant to the Commission's Decision in 97-03-019.

35. Given the varying degrees of complexity and of geographic coverage involved in requests for information concerning facility availability and requests for access, there is no single standard length of time for utility responses which will fit all situations.

36. The CLC could suffer unreasonable delays in receiving information concerning ROW access inquiries if the utility's response time obligation was open-ended, with no performance standards against which to hold the utility, thereby impeding the ability of the CLC to enter the market or to expand its operations to compete efficiently.

37. The major ILECs' guideline for response time for initial requests concerning availability of space should not exceed 10 business days if no field survey is required, and should not exceed 20 business days if a field-based survey of support structures is required. The corresponding response times for electric utilities and midsized ILECs should be subject to parties' negotiations.

38. In the event that an initial inquiry to an ILEC involves more than 500 poles or 5 miles of conduit, the response time shall be subject to the negotiations of the parties involved.

39. If an incumbent utility is required to perform make-ready work on its poles, ducts or conduit solely to accommodate a carrier's

request for access, the utility shall perform such work at the carrier's sole expense within 60 business days of receipt of an advance payment for such work, except that this period will be subject to negotiation for extraordinary conditions such as storm-related service restoration. If the work involves more than 300 poles or conduit, the parties will negotiate a mutually satisfactory time frame to complete such make-ready work.

40. 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, providing the necessary identifying and loading information and copies of pertinent documents showing the attacher's right to occupy the right of way.

41. The work of a CLC to execute make ready work and the subsequent attachment and installation of the CLC's wire communication facilities on a utility's poles, conduits or rights-of-way in connection with a request for access that has been granted, shall be deemed sufficient for purposes of the granting utility if such personnel or third-party contractors meet an incumbent utility's published guidelines for qualified personnel.

*70 42. The major ILECs shall then respond to the telecommunications carrier within 45 days, thereafter, 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, except as noted in the following COL. The response times for electric utilities and midsized ILECs shall be subject to negotiation.

43. In the event that a request for space involves more than 500 poles or 5 miles of conduit, requires the calculation of pole loads by a joint owner, or the scope and complexity of the request warrant longer deadlines, the response time shall be subject to the negotiations of the parties involved.

44. The standard for protection of confidential

data should not be one-sided, but should be equally applied to CLCs, incumbent utilities, and any other party to a ROW access agreement.

45. The dissemination of information which has been identified as commercially sensitive should be limited only to those persons who need the information in order to respond to or to process an inquiry concerning access.

46. The incumbent utility should be permitted to impose conditions on the granting of access which are necessary to ensure the safety and engineering reliability of its facilities.

47. Telecommunications carriers seeking to attach to utility poles and support structures should comply with applicable Commission GOs 95 and 128, and other applicable local, state, and federal safety regulations including those prescribed by Cal/OSHA.

48. The rules governing attachments to wood poles should be evaluated relative to any restrictions on access subsequently adopted in A.94-12-005/I.95-02-015 regarding design standards for utility wood pole loading requirements subject to the affected parties having an opportunity to comment on the applicability such restrictions or standards.

49. Until the evaluation of design standards for utility wood pole loading requirements are completed in A. 94-12-005/I.95-02-015 or other proceedings, incumbent utilities are authorized to use an interim designated safety factor of 2.67 for Grade A poles in accordance with GO 95.

50. A fine of \$500 per each unauthorized pole attachment should be imposed on carriers that attach to such poles without a fully signed contract with the incumbent utility.

51. In resolving disputes over ROW access, the burden of proof shall be on the incumbent utility to justify any proposed restrictions or denials of access which it claims are necessary to address valid safety or reliability concerns and to show they are not unduly

discriminatory or anticompetitive.

52. All other factors being equal, competing carriers' access to utility facilities should be granted on a first-come, first-served basis.

53. The ILECs should not be permitted to deny access to other telecommunications carrier based on claims that the capacity must be reserved for their own future needs, provided than ILEC may reserve space for immediate need within nine months of the denial of an access request. Likewise, CLCs must utilize space within nine months the denial of an access by an ILEC.

*71 54. In the case of a grant of access by an electric utility, any telecommunications carrier, whether an ILEC or CLC must exercise its access rights within 90 days of a grant of access.

55. The Commission's preferred approach for meeting new capacity needs is through new construction rather than the reclamation of existing space occupied by CLCs.

56. In order to justify a capacity reservation claim, the electric utility should 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.

57. Because rearrangements for electric facilities can be substantially more expensive than for telecommunications facilities, it may be more cost effective for an electric utility to reserve capacity for some defined period rather than to provide interim access to a CLC with subsequent eviction or to incur related costs for rearrangements.

58. The restrictions regarding reservations of capacity adopted in this order in no way constitute an unlawful taking in violation of the incumbent utilities' constitutional rights, but merely constitute regulation of the terms under which parties may negotiate for access.

59. All costs of capacity expansion and other modifications, including joint trenching, should be shared among the particular parties benefiting from the modifications on a proportionate basis corresponding to the share of usable space taken up by each benefiting party.

60. 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.

61. An advance notice should be given at least 60 days prior to the commencement of a physical modification to a ROW to apprise affected parties, except in the case of emergencies where shorter notice may be necessary.

62. In order to justify a reclamation of space being occupied by a CLC, the incumbent utility should be required first to permit the CLC the option of paying for necessary rearrangements or expansions to maintain the attachment. The utility must also show that the space is reasonably and specifically needed to serve its customers, and that there is no other cost effective solutions to meet its needs.

63. In the event of disputes over reclamation of space and displacement of a CLC, the incumbent shall not displace the CLC without first notifying the Commission's Telecommunications Division and obtaining Commission authorization to do so.

64. Parties may use our dispute resolution procedure to resolve disputes over CLC displacements due to reclamation of space.

65. The burden of proof in disputes over reclamation of space shall be on the incumbent utility to show that it has met all the applicable requirements.

*72 66. Any order of this Commission granting an incumbent utility the right to

reclaim space in its ROW should contain a plan for continued telecommunications service to affected end-users of those services.

67. Incumbent utilities with vacant space in existing entrance facilities (e.g., conduit) into commercial buildings should make such space available to competitors, subject to consent of the building owner or manager, up to the minimum point of entry to the extent the incumbent utility owns or controls such facilities.

68. The minimum point of entry, as defined in D.90-10-064, is the demarcation point in or about a customer's premise where the utility's inside wire stops and the customer's inside wire begins.

69. As prescribed by D.92-01-023, for multi-unit properties built or extensively remodeled after August 8, 1993, Pacific was to establish a single MPOE as close as practical to the property line of the multi-unit building, and to transfer ownership and responsibility for certain telephone cable and inside wire to property owners.

70. For multi-unit properties built after prior to August 8, 1993, the only network plant that was to be unbundled and conveyed to property owners consisted of Intrabuilding Network Cable within the building that was already in place. However, other utility-owned network plant including 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.

71. All carriers should be prohibited on a prospective basis from entering into any type of arrangement with private property owners which 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.

72. Any carrier may file a formal complaint against any other carrier with an access agreement with a private building owner, including any executed prior to the date of this decision, that allegedly has the effect of

restricting access of other carriers or discriminating against the facilities of other carriers, such as CLCs.

73. In the case of such complaints, the complainant will have the burden of proving that the defendant carrier is the exclusive provider of service or the beneficiary of better terms of access in violation of the policies of this order.

74. If, after a hearing, we find that a carrier's agreement or arrangement with a private building owner is unfairly discriminatory with respect to other carriers, we shall direct that within 60 days, the agreement be renegotiated. Failing that, at the end of 60 days, a fine shall be imposed ranging from \$500 to \$20,000 per day based on the number of lines served in the building until the agreement is renegotiated to remove the discrimination.

75. Incumbent utilities are not required to exercise their powers of eminent domain to expand the incumbent existing ROW over private property to accommodate a telecommunications carrier's request for access.

*73 76. For purposes of resolving disputes between telecommunications carriers and pure cable companies and incumbent electric utilities or ILECs regarding ROW accesses, the rules adopted in Appendix A of this order patterned after Resolution ALJ 174, should generally apply.

77. The arbitration rules previously adopted in Resolution ALJ 174, effective June 25, 1997, for mediating and arbitrating disputes involving interconnection agreements pursuant to Section 251 and 252 of the Act, are likewise useful as a vehicle for Commission resolution of ROW access disputes.

78. The time requirements prescribed under ALJ 174 should be modified as appropriate, to accommodate the specific needs for ROW dispute resolution.

79. Before the Commission will process a dispute resolution, the parties must show they were unable to reach a mutually agreeable solution consistent with the rules and policies set forth in this decision after good faith efforts at negotiation.

80. The burden of proof should generally be on the party which asserts that a particular constraint exists which is preventing it from complying with the proposed terms for granting ROW access.

81. Any party to a negotiation for ROW access covered under these rules may request this Commission to arbitrate the dispute pursuant to the process set forth in the Appendix A Rules.

ORDER

IT IS ORDERED that:

1. The rules set forth in Appendix A concerning the rights and obligations of the major electric utilities and incumbent local exchange carriers to provide access to telecommunications carriers to their poles, ducts, conduits, and rights of way are hereby adopted.

2. The assigned Administrative Law Judge shall solicit further comments concerning the outstanding issues raised in this decision.

3. The Motion of the Real Estate Coalition and of the Building Owners and Managers Association of California, each requesting to become a party, is granted.

4. The motion of the League of California Cities, the Cities of Los Angeles, Sacramento, San Carlos, San Jose, Santa Monica, the City and County of San Francisco, and the San Mateo County Telecommunications Authority ("the Cities"), requesting to become parties is granted.

5. Pacific, GTEC, Pacific Gas & Electric, Southern California Edison, and San Diego Gas & Electric shall each publish objective guidelines within 180 days of its order, so that

CLC personnel or third-party contractors used by CLCs can quickly and efficiently establish their engineering qualifications.

Dated October 22, 1998, at San Francisco, California.

I concur in part and dissent in part.

APPENDIX A

COMMISSION-ADOPTED RULES GOVERNING ACCESS TO RIGHTS-OF-WAY AND SUPPORT STRUCTURES OF INCUMBENT TELEPHONE AND ELECTRIC UTILITIES

I. PURPOSE AND SCOPE OF RULES

II. DEFINITIONS

III. REQUESTS FOR INFORMATION

IV. REQUESTS FOR ACCESS TO RIGHTS OF WAY AND SUPPORT STRUCTURES

A. INFORMATION REQUIREMENTS OF REQUESTS FOR ACCESS

*74 B. RESPONSES TO REQUESTS FOR ACCESS

C. TIME FOR COMPLETION OF MAKE READY WORK

D. USE OF THIRD PARTY CONTRACTORS

I. NONDISCLOSURE

A. DUTY NOT TO DISCLOSE PROPRIETARY INFORMATION

B. SANCTIONS FOR VIOLATIONS OF NONDISCLOSURE AGREEMENTS

I. PRICING AND TARIFFS GOVERNING ACCESS

A. GENERAL PRINCIPLE OF NONDISCRIMINATION

B. MANNER OF PRICING ACCESS

C. CONTRACTS

VII. RESERVATIONS OF CAPACITY FOR FUTURE USE

VIII. MODIFICATIONS OF EXISTING SUPPORT STRUCTURES

A. NOTIFICATION TO PARTIES ON OR IN SUPPORT STRUCTURES

B. NOTIFICATION GENERALLY

C. SHARING THE COST OF MODIFICATIONS

IX. EXPEDITED DISPUTE RESOLUTION PROCEDURES

X. ACCESS TO CUSTOMER PREMISES

XI. SAFETY

I. PURPOSE AND SCOPE OF RULES

A. These rules govern access to public utility rights-of-way and support structures by telecommunications carriers and cable TV companies in California, and are issued pursuant to the Commission's jurisdiction over access to utility rights of way and support structures under the Federal Communications Act, 47 U.S.C. § 224(c)(1) and subject to California Public Utilities Code §§ 767, 767.5, 767.7, 768, 768.5 and 8001 through 8057. These rules are to be applied as guidelines by parties in negotiating rights of way access agreements. Parties may mutually agree on terms which deviate from these rules, but in the event of negotiating disputes submitted for Commission resolution, the adopted rules will be deemed presumptively reasonable. The burden of proof shall be on the party advocating a deviation from the rules to show the deviation is reasonable, and is not unduly discriminatory or anticompetitive.

II. DEFINITIONS

A. "Public utility" or "utility" includes any

person, firm or corporation, privately owned, that is an electric, or telephone utility which owns or controls, or in combination jointly owns or controls, support structures or rights-of-way used or useful, in whole or in part, for telecommunications purposes.

B. "Support structure" includes, but is not limited to, a utility distribution pole, anchor, duct, conduit, manhole, or handhole.

C. "Pole attachment" means any attachment to surplus space, or use of excess capacity, by a telecommunications carrier for a telecommunications system on or in any support structure owned, controlled, or used by a public utility.

D. "Surplus space" means that portion of the usable space on a utility pole which has the necessary clearance from other pole users, as required by the orders and regulations of the Commission, to allow its use by a telecommunications carrier for a pole attachment.

E. "Excess capacity" means volume or capacity in a duct, conduit, or support structure other than a utility pole or anchor which can be used, pursuant to the orders and regulations of the Commission, for a pole attachment.

F. "Usable space" means the total distance between the top of the utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance.

*75 G. "Minimum allowable vertical clearance" means the minimum clearance for communication conductors along rights-of-way or other areas as specified in the orders and regulations of the Commission.

H. "Rearrangements" means work performed, at the request of a telecommunications carrier, to, on, or in an existing support structure to create such surplus space or excess capacity as is necessary to make it usable for a pole attachment. When an existing support structure does not contain adequate surplus space or excess capacity and cannot be so

rearranged as to create the required surplus space or excess capacity for a pole attachment, "rearrangements" shall include replacement, at the request of a telecommunications carrier, of the support structure in order to provide adequate surplus space or excess capacity. This definition is not intended to limit the circumstances where a telecommunications carrier may request replacement of an existing structure with a different or larger support structure.

I. "Annual cost of ownership" means the sum of the annual capital costs and annual operation costs of the support structure which shall be the average costs of all similar support structures owned by the public utility. The basis for computation of annual capital costs shall be historical capital cost less depreciation. The accounts upon which the historical capital costs are determined shall include a credit for all reimbursed capital costs of the public utility. Depreciation shall be based upon the average service life of the support structure. As used in this definition, "annual cost of ownership" shall not include costs for any property not necessary for a pole attachment.

J. "Telecommunications carrier" generally means any provider of telecommunications services that has been granted a certificate of public convenience and necessity by the California Public Utilities Commission. These rules, however, exclude Commercial Mobile Radio Service (CMRS) providers and interexchange carriers from the definition of "telecommunications carrier."

K. "Cable TV company" as used in these rules refers to a privately owned company, that provides cable service as defined in the PU Code and is not certified to provide telecommunications service.

L. "Right of way" means the right of competing providers to obtain access to the distribution poles, ducts, conduits, and other support structures of a utility which are necessary to reach customers for telecommunications purposes.

M. "Make ready work" means the process of completing rearrangements on or in a support structure to create such surplus space or excess capacity as is necessary to make it usable for a pole attachment.

N. "Modifications" means the process of changing or modifying, in whole or in part, support structures or rights of way to accommodate more or different pole attachments.

O. "Incumbent local exchange carrier" refers to Pacific Bell and GTE California, Inc., Roseville Telephone Company, and Citizens Telecommunications Company of California, for purposes of these rules, unless explicitly indicated otherwise.

***76 III. REQUESTS FOR INFORMATION**

A. A utility shall promptly respond in writing to a written request for information ("request for information") from a telecommunications carrier or cable TV company regarding the availability of surplus space or excess capacity on or in the utility's support structures and rights of way. The utility shall respond to requests for information as quickly as possible consistent with applicable legal, safety, and reliability requirements, which, in the case of Pacific or GTEC, 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 the request involves more than 500 poles or 5 miles of conduit, the parties shall negotiate a mutually satisfactory longer response time.

B. Within the applicable time limit set forth in paragraph III.A and subject to execution of pertinent nondisclosure agreements, the utility shall provide access to maps, and currently available records such as drawings, plans and any other information which it uses in its daily transaction of business necessary for evaluating the availability of surplus space or excess capacity on support structures and for evaluating access to a specified area of the utility's rights of way identified by the carrier.

C. The utility may charge for the actual costs

incurred for copies and any preparation of maps, drawings or plans necessary for evaluating the availability of surplus space or excess capacity on support structures and for evaluating access to a utility's rights of way.

D. Within 20 business days of a request, anyone who attaches to a utility-owned pole shall allow the pole owner access to maps, and any currently available records such as drawings, plans, and any other information which is used in the daily transaction of business necessary for the owner to review attachments to its poles.

E. The utility may request up-front payments of its estimated costs for any of the work contemplated by Rule III.C., Rule IV.A. and Rule IV.B. The utility's estimate will be adjusted to reflect actual cost upon completion of the requested tasks.

IV. REQUESTS FOR ACCESS TO RIGHTS OF WAY AND SUPPORT STRUCTURES

A. INFORMATION REQUIREMENTS OF REQUESTS FOR ACCESS

The request for access shall contain the following:

1. Information for contacting the carrier or cable TV company, including project engineer, and name and address of person to be billed.
2. Loading information, which includes grade and size of attachment, size of cable, average span length, wind loading of their equipment, vertical loading, and bending movement.
3. Copy of property lease or right-of-way document.

B. RESPONSES TO REQUESTS FOR ACCESS

1. A utility shall respond in writing to the written request of a telecommunications carrier or cable TV company for access ("request for access") to its rights of way and support structures as quickly as possible, which, in the case of Pacific or GTEC, shall

not exceed 45 days. The response shall affirmatively state whether the utility will grant access or, if it intends to deny access, shall state all of the reasons why it is denying such access. Failure of Pacific or GTEC to respond within 45 days shall be deemed an acceptance of the request for access.

*77 2. If, pursuant to a request for access, the utility has notified the telecommunication carrier or cable TV company that both adequate space and strength are available for the attachment, and the entity seeking access advises the utility in writing that it wants to make the attachment, the utility shall provide this entity with a list of the rearrangements or changes required to accommodate the entity's facilities and an estimate of the time required and the cost to perform the utility's portion of such rearrangements or changes.

3. If the utility does not own the property on which its support structures are located, the telecommunication carrier or cable TV company must obtain written permission from the owner of that property before attaching or installing its facilities. The telecommunication carrier or cable TV company by using such facilities shall defend and indemnify the owner of the utility facilities, if its franchise or other rights to use the real property are challenged as a result of the telecommunication carrier's or the cable TV company's use or attachment.

B. TIME FOR COMPLETION OF MAKE READY WORK

1. If a utility is required to perform make ready work on its poles, ducts or conduit to accommodate a carrier's or a cable TV company's request for access, the utility shall perform such work at the requesting entity's sole expense. Such work shall be completed as quickly as possible consistent with applicable legal, safety, and reliability requirements, which, in the case of Pacific or GTEC shall occur within 30 business days of receipt of an advance payment for such work. If the work involves more than 500 poles or 5 miles of conduit, the parties will negotiate a mutually satisfactory longer time frame to complete

such make ready work.

C. USE OF THIRD PARTY CONTRACTORS

1. The ILEC shall maintain a list of contractors that are qualified to respond to requests for information and requests for access, as well as to perform make ready work and attachment and installation of wire communications or cable TV facilities on the utility's support structures. This requirement shall not apply to electric utilities. This requirement shall not affect the discretion of a utility to use its own employees.

2. A telecommunications carrier or cable TV company may use its own personnel to attach or install the carrier's communications facilities in or on a utility's facilities, provided that in the utility's reasonable judgment, the carrier's or cable TV company's personnel or agents demonstrate that they are trained and qualified to work on or in the utility's facilities. To use its own personnel or contractors on electric utility poles, the telecommunications carrier or cable TV company must give 48 hours advance notice to the electric utility, unless an electrical shutdown is required. If an electrical shutdown is required, the telecommunications carrier or cable TV company must arrange a specific schedule with the electric utility. The telecommunications carrier or cable TV company is responsible for all costs associated with an electrical shutdown. The inspection will be paid for by the attaching entity. The telecommunications carrier or cable TV company must allow the electric utility, in the utility's discretion to inspect the telecommunication's attachment to the support structure. This provision shall not apply to electric underground facilities containing energized electric supply cables. Work involving electric underground facilities containing energized electric supply cables or the rearranging of overhead electric facilities will be conducted as required by the electric utility at its sole discretion. In no event shall the telecommunications or cable TV company or their respective contractor, interfere with the electric utility's equipment or service.

*78 3. Incumbent utilities should adopt

written guidelines to ensure that telecommunication carriers' and cable TV companies' personnel and third-party contractors are qualified. These guidelines must be reasonable and objective, and must apply equally to the incumbent utility's own personnel or the incumbent utility's own third-party contractors. Incumbent utilities must seek industry input when drafting such guidelines.

V. NONDISCLOSURE

A. DUTY NOT TO DISCLOSE PROPRIETARY INFORMATION

1. The utility and entities seeking access to poles or other support structures may provide reciprocal standard nondisclosure agreements that permit either party to designate as proprietary information any portion of a request for information or a response thereto, regarding the availability of surplus space or excess capacity on or in its support structures, or of a request for access to such surplus space or excess capacity, as well as any maps, plans, drawings or other information, including those that disclose the telecommunications carrier's or cable TV company's plans for where it intends to compete against an incumbent telephone utility. Each party shall have a duty not to disclose any information which the other contracting party has designated as proprietary except to personnel within the utility that have an actual, verifiable "need to know" in order to respond to requests for information or requests for access.

B. SANCTIONS FOR VIOLATIONS OF NONDISCLOSURE AGREEMENTS

1. Each party shall take every precaution necessary to prevent employees in its field offices or other offices responsible for making or responding to requests for information or requests for access from disclosing any proprietary information of the other party. Under no circumstances may a party disclose such information to marketing, sales or customer representative personnel. Proprietary information shall be disclosed only to personnel in the utility's field offices or

other offices responsible for making or responding to such requests who have an actual, verifiable "need to know" for purposes of responding to such requests. Such personnel shall be advised of their duty not to disclose such information to any other person who does not have a "need to know" such information. Violation of the duty not to disclose proprietary information shall be cause for imposition of such sanctions as, in the Commission's judgement, are necessary to deter the party from breaching its duty not to disclose proprietary information in the future. Any violation of the duty not to disclose proprietary information will be accompanied by findings of fact that permit a party whose proprietary information has improperly been disclosed to seek further remedies in a civil action.

VI. PRICING AND TARIFFS GOVERNING ACCESS

A. GENERAL PRINCIPLE OF NONDISCRIMINATION

1. A utility shall grant access to its rights-of-way and support structures to telecommunications carriers or cable TV company and cable TV companies on a nondiscriminatory basis. Nondiscriminatory access is access on a first-come, first-served basis; access that can be restricted only on consistently applied nondiscriminatory principles relating to capacity constraints, and safety, engineering, and reliability requirements. Electric utilities' use of its own facilities for internal communications in support of its utility function shall not be considered to establish a comparison for nondiscriminatory access. A utility shall have the ability to negotiate with a telecommunications carrier or cable TV company the price for access to its rights of way and support structures.

*79 2. A utility shall grant access to its rights-of-way and support structures to telecommunications carriers and cable TV companies on a nondiscriminatory basis, access to or use of the right-of-way, where such right-of-way is located on private property and

safety, engineering, and reliability requirements. Electric utilities' use of their own facilities for internal communications in support of their utility function shall not be considered to establish a comparison for nondiscriminatory access. A utility shall have the ability to negotiate with a telecommunications carrier or cable TV company the price for access to its rights-of-way and support structures.

B. MANNER OF PRICING ACCESS

1. Whenever a public utility and a telecommunications carrier, or cable TV company, or associations, therefore, are unable to agree upon the terms, conditions, or annual compensation for pole attachments or the terms, conditions, or costs of rearrangements, the Commission shall establish and enforce the rates, terms and conditions for pole attachments and rearrangements so as to assure a public utility the recovery of both of the following:

a. A one-time reimbursement for actual costs incurred by the public utility for rearrangements performed at the request of the telecommunications carrier.

b. An annual recurring fee computed as follows:

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

(2) For support structures used by the telecommunications carrier or cable TV company, other than poles or anchors, a percentage of the annual cost of ownership for the support structure, computed by dividing the volume or capacity rendered unusable by

the telecommunications carrier's or cable TV company's equipment by the total usable volume or capacity. As used in this paragraph, "total usable volume or capacity" means all volume or capacity in which the public utility's line, plant, or system could legally be located, including the volume or capacity rendered unusable by the telecommunications carrier's or cable TV company's equipment.

c. A utility may not charge a telecommunications carrier or cable TV company a higher rate for access to its rights of way and support structures than it would charge a similarly situated cable television corporation for access to the same rights of way and support structures.

C. CONTRACTS

1. A utility that provides or has negotiated an agreement with a telecommunications carrier or cable TV company to provide access to its support structures shall file with the Commission the executed contract showing:

*80 a. The annual fee for attaching to a pole and supporting anchor.

b. The annual fee per linear foot for use of conduit.

c. Unit costs for all make ready and rearrangements work.

d. All terms and conditions governing access to its rights of way and support structures.

e. The fee for copies or preparation of maps, drawings and plans for attachment to or use of support structures.

2. A utility entering into contracts with telecommunications carriers or cable TV companies or cable TV company for access to its support structures, shall file such contracts with the Commission pursuant to General Order 96, available for full public inspection, and extended on a nondiscriminatory basis to all other similarly situated telecommunications carriers or cable TV companies. If the contracts are mutually

negotiated and submitted as being pursuant to the terms of 251 and 252 of TA 96, they shall be reviewed consistent with the provisions of Resolution ALJ-174.

D. Unauthorized Attachments

1. No party may attach to the right of way or support structure of another utility without the express written authorization from the utility.

2. For every violation of the duty to obtain approval before attaching, the owner or operator of the unauthorized attachment shall pay to the utility a penalty of \$500 for each violation. This fee is in addition to all other costs which are part of the attacher's responsibility. Each unauthorized pole attachment shall count as a separate violation for assessing the penalty.

3. Any violation of the duty to obtain permission before attaching shall be cause for imposition of sanctions as, in the Commissioner's judgment, are necessary to deter the party from in the future breaching its duty to obtain permission before attaching will be accompanied by findings of fact that permit the pole owner to seek further remedies in a civil action.

4. This Section D applies to existing attachments as of the effective date of these rules.

VII. RESERVATIONS OF CAPACITY FOR FUTURE USE

A. No utility shall adopt, enforce or purport to enforce against a telecommunications carrier or cable TV company any "hold off," moratorium, reservation of rights or other policy by which it refuses to make currently unused space or capacity on or in its support structures available to telecommunications carriers or cable TV companies requesting access to such support structures, except as provided for in Part C below.

B. All access to a utility's support structures and rights of way shall be subject to the

requirements of Public Utilities Code § 851 and General Order 69C. Instead of capacity reclamation, our preferred outcome is for the expansion of existing support structures to accommodate the need for additional attachments.

C. Notwithstanding the provisions of Paragraphs VII.A and VII.B, an electric utility may reserve space for up to 12 months on its support structures required to serve core utility customers where it demonstrates that: (i) prior to a request for access having been made, it had a bona fide development plan in place prior to the request and that the specific reservation of attachment capacity is reasonably and specifically needed for the immediate provision (within one year of the request) of its core utility service, (ii) there is no other feasible solution to meeting its immediately foreseeable needs, (iii) there is no available technological means of increasing the capacity of the support structure for additional attachments, and (iv) it has attempted to negotiate a cooperative solution to the capacity problem in good faith with the party seeking the attachment. An ILEC may earmark space for imminent use where construction is planned to begin within nine months of a request for access. A CLC or cable TV company must likewise use space within nine months of the date when a request for access is granted, or else will become subject to reversion of its access.

*81 VIII. MODIFICATIONS OF EXISTING SUPPORT STRUCTURES

A. NOTIFICATION TO PARTIES ON OR IN SUPPORT STRUCTURES

1. Absent a private agreement establishing notification procedures, written notification of a modification should be provided to parties with attachments on or in the support structure to be modified at least 60 days prior to the commencement of the modification. Notification shall not be required for emergency modifications or routine maintenance activities.

B. NOTIFICATION GENERALLY

1. Utilities and telecommunications carriers shall cooperate to develop a means by which notice of planned modifications to utility support structures may be published in a centralized, uniformly accessible location (e.g., a "web page" on the Internet).

C. SHARING THE COST OF MODIFICATIONS

1. The costs of support structure capacity expansions and other modifications shall be shared only by all the parties attaching to utility support structures which are specifically benefiting from the modifications on a proportionate basis corresponding to the share of usable space occupied by each benefiting carrier. In the event an energy utility incurs additional costs for trenching and installation of conduit due of 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. Disputes regarding the sharing of the cost of capacity expansions and modifications shall be subject to the dispute resolution procedures contained in these rules.

IX. EXPEDITED DISPUTE RESOLUTION PROCEDURES

A. Parties to a dispute involving access to utility rights of way and support structures may invoke the Commission's dispute resolution procedures, but must first attempt in good faith to resolve the dispute. Disputes involving initial access to utility rights of way and support structures shall be heard and resolved through the following expedited dispute resolution procedure.

1. Following denial of a request for access, parties shall escalate the dispute to the executive level within each company. After 5 business days, any party to the dispute may file a formal application requesting Commission arbitration. The arbitration shall be deemed to begin on the date of the filing before the Commission of the request for arbitration. Parties to the arbitration may

continue to negotiate an agreement prior to and during the arbitration hearings. The party requesting arbitration shall provide a copy of the request to the other party or parties not later than the day the Commission receives the request.

2. Content

A request for arbitration must contain:

- a. A statement of all unresolved issues.
- b. A description of each party's position on the unresolved issues.
- c. A proposed agreement addressing all issues, including those upon which the parties have reached an agreement and those that are in dispute. Wherever possible, the petitioner should rely on the fundamental organization of clauses and subjects contained in an agreement previously arbitrated and approved by this Commission.
- *82 d. Direct testimony supporting the requester's position on factual predicates underlying disputed issues.
- e. Documentation that the request complies with the time requirements in the preceding rule.

3. Appointment of Arbitrator

Upon receipt of a request for arbitration, the Commission's President or a designee in consultation with the Chief Administrative Law Judge, shall appoint and immediately notify the parties of the identity of an Arbitrator to facilitate resolution of the issues raised by the request. The Assigned Commissioner may act as Arbitrator if he/she chooses. The Arbitrator must attend all arbitration meetings, conferences, and hearings.

4. Discovery

Discovery should begin as soon as possible prior to or after filing of the request for negotiation and should be completed before a

request for arbitration is filed. For good cause, the Arbitrator or Administrative Law Judge assigned to Law and Motion may compel response to a data request; in such cases, the response normally will be required in three working days or less.

5. Opportunity to Respond

Pursuant to Subsection 252(b)(3), any party to a negotiation which did not make the request for arbitration ("respondent") may file a response with the Commission within 15 days of the request for arbitration. In the response, the respondent shall address each issue listed in the request, describe the respondent's position on these issues, and identify and present any additional issues for which the respondent seeks resolution and provide such additional information and evidence necessary for the Commission's review. Building upon the contract language proposed by the applicant and using the form of agreement selected by the applicant, the respondent shall include, in the response, a single-text "mark-up" document containing the language upon which the parties agree and, where they disagree, both the applicant's proposed language (bolded) and the respondent's proposed language (underscored). Finally, the response should contain any direct testimony supporting the respondent's position on underlying factual predicates. On the same day that it files its response before the Commission, the respondent must serve a copy of the Response and all supporting documentation on any other party to the negotiation.

6. Revised Statement of Unresolved Issues

Within 3 days of receiving the response, the applicant and respondent shall jointly file a revised statement of unresolved issues that removes from the list presented in the initial petition those issues which are no longer in dispute based on the contract language offered by the respondent in the mark-up document and adds to the list only those other issues which now appear to be in dispute based on the mark-up document and other portions of the response.

7. Initial Arbitration Meeting

An Arbitrator may call an initial meeting for purposes such as setting a schedule, simplifying issues, or resolving the scope and timing of discovery.

*83 8. Arbitration Conference and Hearing

Within 7 days after the filing of a response to the request for arbitration, the arbitration conference and hearing shall begin. The conduct of the conference and hearing shall be noticed on the Commission calendar and notice shall be provided to all parties on the service list.

9. Limitation of Issues

The Arbitrator shall limit the arbitration to the resolution of issues raised in the application, the response, and the revised statement of unresolved issues (where applicable). In resolving the issues raised, the Arbitrator may take into account any issues already resolved between the parties.

10. Arbitrator's Reliance on Experts

The Arbitrator may rely on experts retained by, or on the Staff of the Commission. Such expert(s) may assist the Arbitrator throughout the arbitration process.

11. Close of Arbitration

The arbitration shall consist of mark-up conferences and limited evidentiary hearings. At the mark-up conferences, the arbitrator will hear the concerns of the parties, determine whether the parties can further resolve their differences, and identify factual issues that may require limited evidentiary hearings. The arbitrator will also announce his or her rulings at the conferences as the issues are resolved. The conference and hearing process shall conclude within 3 days of the hearing's commencement, unless the Arbitrator determines otherwise.

12. Expedited Stenographic Record

An expedited stenographic record of each evidentiary hearing shall be made. The cost of preparation of the expedited transcript shall be borne in equal shares by the parties.

13. Authority of the Arbitrator

In addition to authority granted elsewhere in these rules, the Arbitrator shall have the same authority to conduct the arbitration process as an Administrative Law Judge has in conducting hearings under the Rules of Practice and Procedure. The Arbitrator shall have the authority to change the arbitration schedule contained in these rules.

14. Participation Open to the Public

Participation in the arbitration conferences and hearings is strictly limited to the parties negotiating a ROW agreement pursuant to the terms of these adopted rules.

15. Arbitration Open to the Public

Though participation at arbitration conferences and hearings is strictly limited to the parties that were negotiating the agreements being arbitrated, the general public is permitted to attend arbitration hearings unless circumstances dictate that a hearing, or portion thereof, be conducted in closed session. Any party to an arbitration seeking a closed session must make a written request to the Arbitrator describing the circumstances compelling a closed session. The Arbitrator shall consult with the assigned Commissioner and rule on such request before hearings begin.

16. Filing of Draft Arbitrator's Report

Within 15 days following the hearings, the Arbitrator, after consultation with the Assigned Commissioner, shall file a Draft Arbitrator's Report. The Draft Arbitrator's Report will include (a) a concise summary of the issues resolved by the Arbitrator, and (b) a reasoned articulation of the basis for the decision.

*84 17. Filing of Post-Hearing Briefs and

Comments on the Draft Arbitrator's Report

Each party to the arbitration may file a post-hearing brief within 7 days of the end of the mark-up conferences and hearings unless the Arbitrator rules otherwise. Post-hearing briefs shall present a party's argument in support of adopting its recommended position with all supporting evidence and legal authorities cited therein. The length of post-hearing briefs may be limited by the Arbitrator and shall otherwise comply with the Commission's Rules of Practice and Procedure. Each party and any member of the public may file comments on the Draft arbitrator's Report within 10 days of its release. Such comments shall not exceed 20 pages.

18. Filing of the Final Arbitrator's Report

The arbitrator shall file the Final Arbitrator's Report no later than 15 days after the filing date for comments. Prior to the report's release, the Telecommunications Division will review the report and prepare a matrix comparing the outcomes in the report to those adopted in prior Commission arbitration decisions, highlighting variances from prior Commission policy. Whenever the Assigned Commissioner is not acting as the arbitrator, the Assigned Commissioner will participate in the release of the Final Arbitrator's Report consistent with the Commission's filing of Proposed Decisions as set forth in Rule 77.1 of the Commission's Rules of Practice and Procedure.

19. Filing of Arbitrated Agreement

Within 7 days of the filing of the Final Arbitrator's Report, the parties shall file the entire agreement for approval.

20. Commission Review of Arbitrated Agreement

Within 30 days following filing of the arbitrated agreement, the Commission shall issue a decision approving or rejecting the arbitrated agreement (including those parts arrived at through negotiations) pursuant to Subsection 252(e) and all its subparts.

21. Standards for Review

The Commission may reject arbitrated agreements or portions thereof that do not meet the requirements of the Commission, including, but not limited to, quality of service standards adopted by the Commission.

22. Written Findings

The Commission's decision approving or rejecting an arbitration agreement shall contain written findings. In the event of rejection, the Commission shall address the deficiencies of the arbitrated agreement in writing and may state what modifications of such agreement would make the agreement acceptable to the Commission.

23. Application for Rehearing

A party wishing to appeal a Commission decision approving an arbitration must first seek administrative review pursuant to the Commission's Rules of Practice and Procedure.

24. The party identified by the arbitrator as the "losing party" shall reimburse the party identified by the arbitrator as the "prevailing party" for all costs of the arbitration, including the reasonable attorney and expert witness fees incurred by the prevailing party.

***85 X. ACCESS TO CUSTOMER PREMISES**

A. No carrier may use its ownership or control of any right of way or support structure to impede the access of a telecommunications carrier or cable TV company to a customer's premises.

B. A carrier shall provide access, when technically feasible, to building entrance facilities it owns or controls, up to the applicable minimum point of entry (MPOE) for that property, on a nondiscriminatory, first-come, first-served basis, provided that the requesting telecommunications carrier or cable TV provider has first obtained all necessary access and/or use rights from the underlying property owners(s).

C. A carrier will have 60 days to renegotiate

a contract deemed discriminatory by the Commission in response to a formal complaint. Failing to do so, this carrier will become subject to a fine ranging from \$500 to \$20,000 per day beyond the 60-day limit for renegotiation until the discriminatory provisions of the arrangement have been eliminated.

XI. SAFETY

A. Access to utility rights of way and support structures shall be governed at all times by the provisions of Commission General Order Nos. 95 and 128 and by Cal/OSHA Title 8. Where necessary and appropriate, said General Orders shall be supplemented by the National Electric Safety Code, and any reasonable and justifiable safety and construction standards which are required by the utility.

B. The incumbent utility shall not be liable for work that is performed by a third party without notice and supervision, work that does not pass inspection, or equipment that contains some dangerous defect that the incumbent utility cannot reasonably be expected to detect through a visual inspection. The incumbent utility and its customers shall be immunized from financial damages in these instances.

(END OF APPENDIX A)

Henry M. Duque, Commissioner, concurring in part and dissenting in part:

The policies set in Decision 98-10-058 to facilitate access by carriers to public rights of way and to permit the fair use of existing utility infrastructure constitute an important achievement. D.98-10-058 will further open local telecommunications markets to competition. This decision has my concurrence except for the policies developed in two areas, where I must note my dissent.

The first policies that I cannot support arise from Conclusions of Law 72-74. These conclusions of law change the rules of competition midway through the game. They

invite formal complaints against carriers already having marketing arrangements with businesses or residences whenever a competitor believes that the agreement restricts access to the facilities or is discriminatory. The ex post facto regulation exemplified by Conclusion of Law 72 is wrong, and a court will clearly conclude that it constitutes legal error.

Further, Conclusions of Law 72 through 74 cast a shadow over many agreements that constitute standard marketing arrangements. Will the marketing arrangements that have produced Pacific-Bell Ball Park and the AT&T Pebble Beach Open be the first two contracts that we order renegotiated? Conclusions of Law 72 through 74 are worded too broadly, and only litigation will permit the market to understand the scope of practices that the Commission deems suspect. This approach to the making of regulatory policy is unwise.

*86 Conclusion of Law 74 is particularly unwise. It imposes the risk of a high fine on a carrier whenever a carrier with a contract fails to negotiate changes within 60 days of a ruling by the Commission. Under this regulatory scheme, fines can mount up for the carrier when the building owner refuses to renegotiate. This outcome is not fair. It fines a carrier for actions that are beyond the carrier's control.

Moreover, Conclusions of Law 72 through 74 may well lead to docket-busting work. The Commission has no idea how many existing marketing or access agreements are affected by these new rules. Thus, these regulations make an open-ended promise of regulatory review of actions taken long before the Commission issued any rules. Such a limitless commitment of regulatory resources is unwise, especially when made by a government agency that has found its budgets and personnel decreasing. It will either prove a hollow promise or delay other regulatory actions mandated by statute.

The second policies that I cannot support are those that arise from the failure of D.98-10-058 to assert jurisdiction to protect consumers

from those building owners who use their control over access for unfair advantage. This Commission has seen abuses by mobile home owners who control access to gas, water, and electricity through submetering. In these areas, laws and Commission decisions have made the rules clear and have charted a well-worn path.

Because of laws passed to prevent abuses such as these, the Commission already has the authority under PU Code Sections 233 and 234 to assert its regulatory jurisdiction over owners or managers of multiple dwelling units who in exchange for compensation, own, manage, lease, operate or control any part of a "telephone line." A "telephone line" would include a system's entrance facilities, tie down blocks, frames, wires, fibers, closets, conduits, risers, and all other fixtures for the purpose of facilitating communication. Our failure to exercise our authority today means that our next opportunity to act will likely come when abused consumers appear before us. Moreover, those causing the harm will claim that they have done nothing illegal or prohibited -- they have merely profited from their ability to provide access to customers. Our inaction today gives merit to these claims.

In summary, although I vote in support of Decision 98-10-057, my analysis leads me to two conclusions:

1. Conclusions of Law 72 through 74 constitute legal error and unwise policy;
2. The failure of this Commission to exercise its legal jurisdiction to prevent abuses of consumers by building owners or managers is a mistake.

These conclusions compel me to file this partial dissent.

October 22, 1998

San Francisco

1998 WL 1109255 (Cal.P.U.C.)

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