

**TEXAS**

## Sec. 54.257. Interference With Another Telecommunications Utility.

If a telecommunications utility constructing or extending the utility's lines, plant, or system interferes or attempts to interfere with the operation of a line, plant, or system of another utility, the commission by order may:

- (1) prohibit the construction or extension; or
- (2) prescribe terms for locating the affected lines, plants, or systems.

Acts 1997, 75th Leg., ch. 166, Sec. 1, eff. Sept. 1, 1997.

## Sec. 54.258. Maps.

A public utility shall file with the commission one or more maps that show each utility facility and that separately illustrate each utility facility for transmission or distribution of the utility's services on a date the commission orders.

Acts 1997, 75th Leg., ch. 166, Sec. 1, eff. Sept. 1, 1997.

## Sec. 54.259. Discrimination by Property Owner Prohibited.

(a) If a telecommunications utility holds a consent, franchise, or permit as determined to be the appropriate grants of authority by the municipality and holds a certificate if required by this title, a public or private property owner may not:

- (1) prevent the utility from installing on the owner's property a telecommunications service facility a tenant requests;
- (2) interfere with the utility's installation on the owner's property of a telecommunications service facility a tenant requests;
- (3) discriminate against such a utility regarding installation, terms, or compensation of a telecommunications service facility to a tenant on the owner's property;
- (4) demand or accept an unreasonable payment of any kind from a tenant or the utility for allowing the utility on or in the owner's property; or
- (5) discriminate in favor of or against a tenant in any manner, including rental charge discrimination, because of the utility from which the tenant receives a telecommunications service.

(b) Subsection (a) does not apply to an institution of higher education. In this subsection, "institution of higher education" means:

- (1) an institution of higher education as defined by Section 61.003, Education Code; or
- (2) a private or independent institution of higher education as defined by Section 61.003, Education Code.

(c) Notwithstanding any other law, the commission has the jurisdiction to enforce this section.

Acts 1997, 75th Leg., ch. 166, Sec. 1, eff. Sept. 1, 1997.

## Sec. 54.260. Property Owner's Conditions.

(a) Notwithstanding Section 54.259, if a telecommunications utility holds a municipal consent, franchise, or permit as determined to be the appropriate grant of authority by the municipality and holds a certificate if required by this title, a public or private property owner may:

(1) impose a condition on the utility that is reasonably necessary to protect:

(A) the safety, security, appearance, and condition of the property; and

(B) the safety and convenience of other persons;

(2) impose a reasonable limitation on the time at which the utility may have access to the property to install a telecommunications service facility;

(3) impose a reasonable limitation on the number of such utilities that have access to the owner's property, if the owner can demonstrate a space constraint that requires the limitation;

(4) require the utility to agree to indemnify the owner for damage caused installing, operating, or removing a facility;

(5) require the tenant or the utility to bear the entire cost of installing, operating, or removing a facility; and

(6) require the utility to pay compensation that is reasonable and nondiscriminatory among such telecommunications utilities.

(b) Notwithstanding any other law, the commission has the jurisdiction to enforce this section.

Acts 1997, 75th Leg., ch. 166, Sec. 1, eff. Sept. 1, 1997.

Sec. 54.261. Shared Tenant Services Contract.

Sections 54.259 and 54.260 do not require a public or private property owner to enter into a contract with a telecommunications utility to provide shared tenant services on a property.

Acts 1997, 75th Leg., ch. 166, Sec. 1, eff. Sept. 1, 1997

**FLORIDA**

**718.1232 Cable television service; resident's right to access without extra charge.—**

No resident of any condominium dwelling unit, whether tenant or owner, shall be denied access to any available franchised or licensed cable television service, nor shall such resident or cable television service be required to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by residents of, or providers of such services to, single-family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such services.

**History.**—s. 16, ch. 81-185.

**CALIFORNIA**

8/6/98

Decision REVISED DRAFT DECISION OF ALJ PULSIFER (Mailed 7/7/98)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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

R.95-04-043  
(Filed April 26, 1995)

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

I.95-04-044  
(Filed April 26, 1995)

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independent trench. Likewise, electric utilities should not bear the cost of modifications which benefit only telecommunications carriers.

We shall adopt an advance notice requirement of at least 60 days prior to the commencement of a physical modification to apprise affected parties, 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.

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.

Additionally, the Coalition asks that ILECs be required to promptly meet their responsibilities for connecting CLC network interconnection devices (NIDs) with their own. (See, Interconnection Order I, ¶¶ 392-96.) Finally, the Coalition asks that ILECs and incumbent EUs 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.

As a basis for this recommendation, the Coalition cites the Commission's "shared tenant services" ("STS") decision, D.87-01-063.<sup>24</sup> In the STS decision, the Commission adopted a set of guidelines aimed at insuring 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

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<sup>24</sup> *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.

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 which 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.

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.

Comments were also filed jointly by a group known as the "Real Estate Coalition"<sup>17</sup> 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.

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*

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<sup>17</sup> 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

*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 do not have jurisdiction to require non-utility third parties to grant utilities access to their properties. We recognize, however, 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.

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. This requirement will enable CLCs to gain access to building cellars, telephone closets, and network interconnection devices (NIDs) in such buildings. We shall also require that ILECs promptly meet their responsibilities for connecting CLC NIDs with their own. 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 disagree with the Coalition's claim that owners or managers of buildings may be classified as "telephone corporations" subject to Commission jurisdiction under PU Code § 234 merely because they provide access to their building facilities to telecommunications services to the tenants of their building. A telephone corporation must hold itself out as a provider of service to the public or some portion thereof. Merely because a building owner or manager provides private service to tenants within the building, is no basis for treatment as a "telephone corporation" as defined by § 234.

We recognize, moreover, that the private property rights of building owners must be observed. Building owners must retain authority to supervise

and coordinate on-premises 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 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 express consent of the building owner or manager.

We disagree with the Coalition's analogy seeking to apply the Commission's treatment of STS providers to all building owners which provide access to one or more telecommunications carriers. Building owners are in the business of providing environments in which people live and work. Building owners typically do not provide telephone service to their tenants. We disagree with the Coalition's claim that a building owner provides a form of "special access" telecommunications service through the act of making available its building facilities to a telecommunications provider. By merely providing a telephone carrier with access to a building's facilities, the building owner does not become a telecommunications utility. If we were to accept such a definition as proposed by the Coalition, we would also have to find that building owners are also electric utilities, water utilities, and every other type of business that requires access to a building to reach customers.

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. While the Commission does

not regulate building owners as telecommunications utilities, we still retain jurisdiction under PU Code Section 762 to order the erection and fix the site of facilities of a public utility where necessary “to secure adequate service or facilities.” Likewise, under PU Code Section 701, the Commission is authorized to “do all things which are necessary and convenient in the exercise of [its] jurisdiction.” Accordingly, in light of the Commission’s jurisdiction in this regard, building owners may not unreasonably deny access to competing carriers with impunity.

## **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.

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.

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**

We conclude that the provisions governing third-party access to utility facilities previously discussed should also apply in the case of facilities which are owned collectively through joint pole associations or similar arrangements. 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.

## **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).)

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 45<sup>th</sup> 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:

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,<sup>18</sup> to achieve technically sound,

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<sup>18</sup> 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.

consistent and timely interpretations. PG&E also recommends that the expedited proceeding allow for an evidentiary record to be transcribed.

## **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 they have 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 be on the party which asserts that a particular constraint exists preventing it from complying with the proposed terms for granting ROW access.

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.

In order to formally initiate the process for binding arbitration, a party to the dispute shall file a formal complaint with the Commission, with an attached motion requesting that the matter be submitted to the Commission for binding arbitration. This option shall be invoked only where all parties to the dispute must consent to be bound by the results of the arbitrators' decision. To expedite the process, the motion should affirm whether all parties to the dispute consent to be bound by the arbitration outcome. Under the binding arbitration option, parties shall have 15 days from the filing of the complaint to prepare for the arbitration. An arbitration hearing shall be held before a panel of three hearing officers.

Each party to the arbitration may present witnesses, but no more than two days of hearings shall be permitted, with each party allocated one day. Within 15 days of the conclusion of hearings, the parties may submit pleadings setting forth their respective positions. The arbitration panel shall then issue a decision on each of the contested issues in the dispute within 20 days of receipt of the pleadings. The arbitrators' decision will be the final decision rendered on the dispute.

While the arbitration process is proceeding, parties may continue to seek an informal resolution of their dispute, and may pursue a mediated solution on a parallel track to the arbitration process. In the event parties pursue mediation on such a parallel track, they may request that the Commission

appoint a mediator or may contract for their own mediation services. The mediator will have discretion to schedule mediation sessions as warranted given the particular situation involved. The prospects of an arbitrated outcome may provide parties with the incentive to seek their own mediated solution as means of retaining control over the outcome. In the event no mediated solution has been achieved by the time scheduled for the arbitrator's decision, the mediation process shall be terminated.

In the event that all parties to the dispute do not consent to be bound by an arbitrated decision, the arbitration option may not be used. The dispute will be resolved through the formal complaint process pursuant to the Commission's Rules of Practice and Procedure. These rules are governed by the provisions of Senate Bill (SB) 960, under which complaint filings are categorized as adjudicatory proceedings. In view of the competitively sensitive nature of ROW access disputes, we appreciate the need for an expedited resolution of filed complaints relating to ROW access. Within the bounds of the statutory requirements of SB 960, we shall expedite the complaint process as much as possible in order to minimize the adverse competitive impacts of delays in resolving disputes.

Under the requirements of SB 960, a party has 30 days to file an answer to a complaint, and the complaint must be resolved within 12 months of the filing. For complaints involving ROW access disputes, we believe that final decisions can be rendered much sooner than the 12 months permitted by SB 960. We shall not require a separate scoping memo or a prehearing conference for such complaints since the rules in this decision form the basis for the scope of any complaint relating to ROW access disputes. Parties shall have 10 days to prepare for an evidentiary hearing once the answer has been filed. At the end of the 10 days, the assigned hearing officer will convene an evidentiary hearing.

Each party may present witnesses, but no more than two days of hearings shall be permitted, with each party allocated one day. Within 15 days of the conclusion of hearings, the parties may submit pleadings setting forth their respective positions. The principal hearing officer shall then issue a decision on each of the contested issues in the complaint within 20 days of receipt of the pleadings. The decision will be the final decision unless challenged by a member of the Commission, in conformance to SB 960 rules.

We will leave it to the discretion of the hearing officer to conduct the dispute resolution proceeding, to establish service lists, and to determine the need for any written submittals in the proceeding. The motion requesting need only be served on parties to the dispute, the assigned ALJ, and the Director of the Telecommunications Division. The motion should also be served on the Docket Office which will publish a notice of the motion in the Daily Calendar.

To facilitate the speedy resolution of disputes, we will generally discourage parties who are not part of the dispute from participating in the mediation or arbitration process.<sup>19</sup> Any resolution that results from the dispute resolution process will generally be nonprecedential. However, if a dispute raises generic issues or affects others, the presiding ALJ may solicit comments and testimony from all parties to the dispute; and the Commission may issue decisions. 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

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<sup>19</sup> To avoid a party's need to become part of the service list of a specific dispute in order to obtain an ALJ ruling on the merits of the dispute, we shall make copies of the ALJ ruling available through our Formal Files.

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.

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

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

8. Given the advances in technological capabilities of cable television providers to offer a wide array of both one-way and two-way communications services over their cable facilities, it has become increasingly difficult to clearly delineate a cable television provider as offering only "cable video" service as opposed to "telecommunications" services.

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

10. 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.

11. 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.

12. Sections 224(d) and (e) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (47 U.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.

13. 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.

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

15. 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, fully accounts for the relative use of usable and non-usable space on the pole.

16. The use of embedded cost as a pricing basis for pole attachments is more conducive to the development of competitive market than the use of incremental costs.

17. Prices based on embedded costs of utility pole attachments are lower than incremental costs due to the fact that many of the poles were installed decades ago and have largely been depreciated for accounting purposes over time.

18. If incumbent utilities were free to charge incremental-cost-based rates or even higher rates based on their bargaining leverage, they would be able to extract excessive economic rents associated with these highly depreciated assets while forcing the CLCs to pay rates which may impede their ability to compete.

19. Under the terms of an 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, and within 20 business days, if a field-based survey of availability was required.

20. Under the terms of their 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.

21. 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.

22. 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.

23. 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.

24. There is no evidence that the overlashing or replacement of conductors by cable television corporations occupies more pole space. Instead new electronics or replacement conductors are added to existing support strands without need for treatment as a new attachment, which has been the pre-existing practice. The FCC has strongly endorsed such overlashing improvements as pro-competitive.

25. 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.

26. 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.

27. 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 carrier access to underground electrical facilities in addition to the requirements of GO 128 and CAL-OSHA Title 8.

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. The incumbents' reservation of capacity for their own future needs could conflict with the nondiscrimination provisions in § 224(f)(1) of the Act which

prohibits a utility from favoring itself or affiliates over competitors with respect to the provision of telecommunications and video services.

34. Since electric utilities are not yet in direct competition with CLCs, but are engaged in a separate industry, the potential concerns over a reservation policy permitting discriminatory treatment of a competitor are not as pronounced as compared with ILECs.

35. 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.

36. 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.

37. 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.

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

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

51. 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.

52. 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.

53. 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.

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

55. The Commission does not have jurisdiction to regulate building owners or managers as "telephone corporations" under PU Code § 234, nor to require that they provide equal access to all carriers.

56. For purposes of resolving disputes between telecommunications carriers and incumbent electric utilities or ILECs regarding ROW accesses, the rules adopted in Appendix A of this order should generally apply.

57. Before the Commission will process a dispute resolution, the parties must show they were unable to reach a mutually agreeable solution consistent with