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August 25, 1998

VIA FEDERAL EXPRESS

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Special Project No. 980000B-SP

Dear Ms. Bayo:

Enclosed for filing are an original and fifteen (15) copies and a diskette of BOMA's comments regarding the above-captioned matter. I have also enclosed one extra copy of the comments to be date-stamped and returned to me in the enclosed Federal Express envelope.

If you have any questions or comments, please feel free to call.

Very truly yours,

Miller & Van Eaton, P.L.L.C.

By _____
Matthew C. Ames

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ORIGINAL

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION
Tallahassee, Florida

In Re Issue Identification Workshop For Undocketed Special Project: Access by Telecommunications Companies to Customers in Multi-Tenant Environments	)))))	Special Project No. 980000B-SP

PETITION TO INTERVENE OF
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL APARTMENT ASSOCIATION
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS
NATIONAL MULTI HOUSING COUNCIL

Pursuant to the Rule 25-22.039, Florida Administrative Code, the Building Owners and Managers Association International, the Institute of Real Estate Management, the International Council of Shopping Centers, the National Apartment Association, National Association of Real Estate Investment Trusts; and the National Multi Housing Council (the "Real Estate Coalition") hereby petition to intervene in the above-captioned proceeding.

The Real Estate Coalition consists of a group of national trade associations representing the interests of owners and managers of multi-unit properties.[1] None of the members of the

[1] The Building Owners and Managers Association International is a federation of ninety-eight local associations representing 15,000 owners and managers of over six billion square feet of commercial properties in North America. The Institute of Real Estate Management represents property managers of multi-family residential office buildings, retail, industrial and homeowners association properties in the U.S. and Canada.. The International Council of Shopping Centers is the trade association of the shopping center industry, with 30,000 members in 60 countries. The National Apartment Association is the largest industry-wide, nonprofit trade association devoted solely to the needs of the apartment industry. The National Association of Real Estate Investment Trusts is the national trade association for real estate companies; its members are over 250 real estate investment trusts and other public businesses that own, operate and finance income-producing real estate, as well as over 2,000 individuals who advise, study and service

Coalition is a party to this proceeding. Among the issues being studied by the Commission are whether building owners and managers may be required to grant the employees and agents of telecommunications providers access to their premises or permit the placement of facilities owned by telecommunications providers on their premises without the consent of the owner. Thus, the Real Estate Coalition is potentially adversely affected by the proceeding and wishes to offer its views for the Commission's consideration.

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these businesses. The National Multi Housing Council represents the interests of more than six hundred of the nation's largest and most respected firms involved in the multi-family rental housing industry, including owners and managers of cooperatives and condominiums.

The Real Estate Coalition respectfully requests that the Commission grant its Petition to Intervene in order to accept and consider the attached Comments.

Respectfully submitted,

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August 26, 1998
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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION
Tallahassee, Florida

In Re Issue Identification Workshop For Undocketed Special Project: Access by Telecommunications Companies to Customers in Multi-Tenant Environments	)))))	Special Project No. 980000B-SP

COMMENTS OF
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL APARTMENT ASSOCIATION
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS
NATIONAL MULTI HOUSING COUNCIL

Introduction

The Building Owners and Managers Association International, the Institute of Real Estate Management, the International Council of Shopping Centers, the National Apartment Association, the National Association of Real Estate Investment Trusts; and the National Multi Housing Council (the "Real Estate Coalition") respectfully submit these Comments in connection with the Commission's consideration of issues related to access by telecommunications companies to private property.

The Real Estate Coalition is a group of national trade associations representing the interests of owners and managers of multi-unit properties.[2] The Real Estate Coalition was created

[2] The Building Owners and Managers Association International is a federation of ninety-eight local associations representing 15,000 owners and managers of over six billion square feet of commercial properties in North America. The Institute of Real Estate Management represents property managers of multi-family residential office buildings, retail, industrial and homeowners association properties in the U.S. and Canada.. The International Council of Shopping Centers is the trade association of the shopping center industry, with 30,000 members in 60 countries. The

to inform regulatory agencies and other decision makers of the views of the real estate industry concerning forced access to buildings by telecommunications providers. During the course of this proceeding, representatives of various telecommunications companies have made statements regarding the legal basis for forced access and the status of forced access proposals at the federal level and in states other than Florida. The Real Estate Coalition believes that the Commission would benefit from a more complete understanding of the state of the law at the federal level and in California and Texas. The Real Estate Coalition also strongly opposes all proposals for forced access and urges the Commission to recognize the legal pitfalls of any effort to establish a forced access regime in Florida.

I. MANDATORY PHYSICAL ACCESS TO BUILDINGS CONSTITUTES A TAKING UNDER THE FIFTH AMENDMENT.

Representatives of the telecommunications industry often blithely ignore or sweep aside the complex issues associated with forcing physical access to buildings. Chief among these is the prohibition on the taking of private property contained in the Fifth Amendment to the federal Constitution. In *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the U.S. Supreme Court declared that a state law that gives a service provider the right to physically occupy the property of a third party constitutes a taking. "The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Id.* at 435-36. This holding remains unrestricted and unchallenged. Therefore, any attempt to

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National Apartment Association is the largest industry-wide, nonprofit trade association devoted solely to the needs of the apartment industry. The National Association of Real Estate Investment Trusts is the national trade association for real estate companies; its members are over 250 real estate investment trusts and other public businesses that own, operate and finance income-producing real estate, as well as over 2,000 individuals who advise, study and service these businesses. The National Multi Housing Council represents the interests of more than six hundred of the nation's largest and most respected firms involved in the multi-family rental housing industry, including owners and managers of cooperatives and condominiums.

establish a forced access regime in Florida – whether through legislation or regulation – will raise important Constitutional issues.[3]

The recent decision in *Gulf Power Co. v. U.S.*, 998 F. Supp. 1386 (N.D. Fla. 1998) applies the rule of *Loretto,* and states that forced access is a *per se* taking. The court held that 47 U.S.C. § 224(f)(1) effects a taking because it requires a utility to provide all telecommunications carriers and cable companies with access to its poles, ducts, conduits and rights-of-way. The court found that Section 224(f)(1) differs from the earlier version of 47 U.S.C. § 224 upheld in *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), because Section 224(f)(1) gives the utility no discretion. A utility must allow any carrier that requests access to use its poles; because the utility has no choice, the statute effects a taking. Similarly, any Florida law or regulation that would require building owners to allow telecommunications providers to install facilities on their premises would constitute a taking.

In addition, any taking must be expressly authorized by law. *Bell Atlantic Tel. Cos. v. FCC,* 24 F.3d 1441 (D.C. Cir. 1994). The Commission has exclusive jurisdiction over services provided by telecommunications companies under Fla. Stat. § 364.01(2), but this jurisdiction does not extend to building owners. This means that the Commission cannot adopt forced access regulations unless the Florida legislature expands the scope of the Commission's jurisdiction to include building owners, and expressly authorizes the Commission to take private property for this purpose.

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[3] Attached as Exhibit A is an analysis of Fifth Amendment issues prepared for the Real Estate Coalition by Professor Charles Haar of Harvard Law School. Although some of the issues discussed by Professor Haar are not directly on point because the analysis was prepared for a proceeding before the Federal Communications Commission ("FCC") addressing related but somewhat different issues, the analysis discusses *Loretto* and related cases. It also illustrates both the complexity of takings issues, and the range of arguments available to property owners faced with takings.

But even if the legislature were to adopt the necessary legislation, the matter would not end there. The Fifth Amendment permits takings only if they are for a "public purpose," and if affected property owners receive "just compensation." Thus, any legislation or subsequent rule that might be adopted in Florida would be subject to this two-pronged test.

According to the U.S. Supreme Court, a taking must be "rationally related to a conceivable public purpose." *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992). We do not believe that a taking designed to allow one group of private parties to obtain the use of property belonging to another group of private parties at rates lower than those normally negotiated in the free market is necessarily for a "public purpose." The ostensible purpose would be to promote competition in the telecommunications market but there are now over 200 certificated carriers in the State of Florida.[4] The enormous growth in the number of carriers in just a few years indicates that new providers are able to reach their customers. The actions of building owners are not impeding the growth of competition. Consequently, taking the property of building owners through forced access regulation would not be rationally related to the goal of enhancing competition.

Furthermore, even if forced access were found to be for a public purpose, building owners are entitled to just compensation. Establishing a mechanism for determining compensation is not as simple as some may argue. For example, it is not at all clear that an administrative body like the Commission is permitted to determine just compensation. A leading Supreme Court decision on takings in general states that decisions concerning just compensation are the responsibility of the courts. *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312 (1893).

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[4] According to State Telephone Regulation Report (Aug. 21, 1998), Florida has the largest number of competitive local exchange carriers in the country, more than New York and Illinois combined.

In that case, the Court struck down a federal statute that purported to establish the amount of compensation to be paid for the condemnation of a lock and dam on the Monongahela River. Under *Monongahela*, neither the Florida legislature nor the Commission may establish in advance the amount of compensation to be paid to a building owner who is forced to permit the physical occupation of his property. Furthermore, the *Monongahela* Court stated that "Whatever be the true value of that which [the government] takes from the individual owner must be paid to him, before it can be said that just compensation for the property has been made." 148 U.S. at 336. Any effort to establish guidelines or standards for determining compensation by statute or regulation is therefore constitutionally suspect, because the property owner is entitled to the "true value" of the property, and preexisting standards may ignore factors needed to determine the true value.

We understand that some parties have relied on the *Gulf Power* decision to argue that the Commission or the legislature may set compensation for a taking. In addition to declaring, quite correctly, that the FCC's pole attachment rules effect a taking, *Gulf Power* held that the FCC may set the amount of compensation. But as just discussed, this is not at all clear.[5] Furthermore,

[5] There are numerous other problems with relying on *Gulf Power*. First, the decision is currently on appeal at the Eleventh Circuit, and the holding regarding the ability of an administrative agency to establish compensation may be reversed. Second, the decision is not supported by a decision of either the Eleventh Circuit or the Supreme Court. Third, the principal case on which *Gulf Power* relies is itself seriously flawed. *Wisconsin Central Limited v. Public Service Comm'n of Wisconsin*, 95 F.3d 1359 (7th Cir. 1996), assumes that the right of judicial review of compensation established by an administrative agency is equivalent to the right to have compensation set by a court. But agency decisions may be reviewed under standards that make them more difficult to overturn than court compensation awards, and an administrative agency's condemnation procedures may not offer the same rights and protections as a court's. For all these reasons, any regulatory scheme that relies on *Gulf Power* is subject to attack and could be overturned.

even if it were correct, we do not believe that either the legislature nor the Commission wish to enter this morass, for several reasons. For example, we do not believe that the Commission is in a position to make individual determinations on compensation. With hundreds of carriers and thousands of buildings in the State of Florida, there are likely to be thousands of individual takings if the State adopts forced access. While the courts have extensive experience in handling takings cases and the resources to do it, the Commission does not. To avoid taking on this enormous caseload, the Commission would have to adopt a flat fee mechanism, which is clearly prohibited by *Monongahela*.

In addition, any attempt to establish general guidelines for determining compensation rather than a flat fee is also suspect under *Monongahela* and will surely be challenged. Even if the Commission adopted a mechanism allowing for building owners to seek individual review of their cases if they believed the rules did not provide for adequate compensation, it would have to review many cases each year. The Commission should not forget that it has no expertise in real estate matters, and, as discussed earlier, has no jurisdiction over building owners.

We also do not believe that the state legislature is likely to endorse such a massive taking of private property.

Finally, this is simply not an appropriate case for regulation of any kind. Any regulatory scheme will interfere with the free market and force building owners either to accept less than just compensation, or incur excessive transaction costs. It is far more effective for the parties to reach individual negotiated solutions than for the government to try to impose a solution. This is true under any compensation scheme the Commission or the legislature might try to establish. If the Commission attempts to establish flat fees or a standard fee structure, many property owners

will be undercompensated. And condemnation proceedings impose greater transaction costs than the free market, which is why they should be reserved for truly public purposes.

Accordingly, the Commission and the legislature would be on weak ground if they were to attempt to adopt a forced access requirement. There is no question that any forced access scheme would constitute a taking, and any attempt to permit the Commission to establish compensation is subject to constitutional challenge.

II. THE FEDERAL COMMUNICATIONS COMMISSION HAS EXPRESSLY CONSIDERED WHETHER TO IMPOSE FORCED ACCESS, AND HAS NOT DONE SO.

Over two years ago, the FCC initiated a rulemaking to consider, among other issues, whether telecommunications service providers should be granted access to private property. In *Telecommunications Services Inside Wiri ıg*, Docket 95-184, Notice of Proposed Rulemaking, 11 FCC Rcd. 2747 (1996), the FCC sought comment on the following issues:

- The current status of the law regarding access to private property by cable operators ı ıd telephone companies.
- Whether and how rules governing access to customers' premises should be harmonized if telephone, video, and other services can be provided over a single wire.
- Whether allowing a company that possesses an easement for one service provider to use the easement to provide another service would constitute a Fifth Amendment taking.
- Whether the FCC should attempt to create access parity among service providers, and whether there are any statutory or constitutional impediments to that goal.

Id. at 2775-2776.

After considering extensive comments from the telecommunications industry and other interested parties, including the Real Estate Coalition, the FCC decided not to adopt rules requiring building owners to allow service providers to enter their premises. *Telecommunications Services Inside Wiring*, Docket 95-184, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd. 3659, 3742-3744 (1997) ("Inside Wiring Order"). The FCC noted that its interconnection rules – which are currently under reconsideration – address the issue of access to the facilities and rights-of-way of telephone companies. *Id.* at 3742. Those rules do not give telecommunications providers the right to install their facilities on private property without the owner's consent. *See Implementation of Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No, 96-98 and *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* CC Docket No. 95-185, First Report and Order, 11 FCC Rcd 15499 (1996).

The FCC also noted that numerous court decisions have held that 47 U.S.C. § 541(a)(2) does not provide cable operators access to private utility easements, and the FCC declined to reexamine those decisions. *Inside Wiring Order* at 3743.

Consequently, there is no FCC regulation that would permit a telecommunications provider to enter a building without the consent of the owner. Nor is there any provision of federal law granting such a right. Although the FCC has attempted to reserve the right to adopt such regulations, it has no authority to do so under present law. As discussed above, any requirement for forced physical access constitutes a taking, and the FCC does not have the power to effect a taking without express statutory authority, under the holding of *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994). Consequently, without Congressional action, the FCC cannot adopt forced access regulations.

III. THE CALIFORNIA PUBLIC UTILITY COMMISSION IS APPARENTLY ABOUT TO REJECT CALLS FOR FORCED ACCESS.

We understand that various parties have cited California as an example for Florida. We concur, because to date the California Public Utility Commission has not adopted a forced access requirement, and it now appears that it will explicitly reject such an approach.

In March 1996, the California Commission initiated a proceeding to address issues related to the entry of Competitive Local Exchange Carriers in the California market. During this proceeding, various parties filed comments urging the California Commission to establish a right of forced access in California. In response to the concerns of the Real Estate Coalition, the California Commission modified its original draft decision to make it clear that no provider may install its facilities in a building or use easements granted to another provider without first obtaining the consent of the underlying property owner. The California Commission also acknowledged that if does not have express statutory authority to regulate building owners, nor to require them to provide carriers with equal access. Relevant portions of the revised draft decision are attached as Exhibit B. The draft decision has not been adopted, but the matter is on the agenda for a meeting of the California Commission to be held on September 3. As it stands, there is no right of forced access in California, and it appears that this will remain the case for the foreseeable future.

IV. THE TEXAS PUBLIC UTILITY COMMISSION HAS NOT PROMULGATED RULES REGULATING THE RELATIONSHIP BETWEEN BUILDING OWNERS AND TELECOMMUNICATIONS PROVIDERS.

In late 1997, the staff of the Texas Public Utility Commission requested comments on a proposed enforcement policy that would have governed negotiations between property owners and telecommunications providers, including establishing requirements concerning compensation for access to buildings. The staff initiated the proceeding at the request of

telecommunications providers. After receiving comments from the telecommunications industry and other parties, including the Real Estate Coalition, the staff presented the matter to the Texas Commission, but no action was ever taken.

Among the questions posed by the draft enforcement policy were:

- Whether compensation mechanisms should be based on the number of tenants served, the amount of revenues generated by the provider, or the amount of space occupied by the provider.
- Whether new providers should be treated the same "in all respects" as incumbents.
- Whether preexisting contracts should continue to be enforced.
- Whether providers should be allowed to enter a building before they actually have customers in the building.

The Real Estate Coalition argued that the Texas Commission should not regulate, and should allow the market to determine what form of compensation is reasonable. Building owners will not behave unreasonably, because they must provide the services that their tenants want. We also noted that "nondiscrimination does not mean equal treatment." There are many reasons for distinguishing among providers, and regulation will only interfere with on-the-spot business judgments.

Furthermore, although Texas law ostensibly requires building owners to grant access on nondiscriminatory terms, many believe that the law is unconstitutional. The constitutionality of the statute remains to be tested; to date, neither providers nor owners have sought to resolve the question in court. Property owners and telecommunications providers continue to negotiate contracts just as they have in the past. Consequently, the statute and the draft enforcement policy currently serve only to intimidate small property owners who do not have the resources to deal

on equal terms with telecommunications providers. As we noted in our comments before the Texas Commission, telecommunications providers do not need special rights or government protection. They especially do not need to be protected from building owners. Telecommunications providers are perfectly capable of holding their own in negotiations with building owners. Even "small" CLEC's are giants when compared to the many truly small real estate companies with revenues of only a few million dollars a year, or less.

Any attempt to adopt a forced access law or regulation in Florida will end the same way as the Texas effort. It will either be found unconstitutional, once a suitable case arises, or it will be honored only in the breach.

Conclusion

The Commission should neither adopt any form of forced access, nor recommend that the Florida legislature do so. Forced access constitutes a taking of private property, and interferes with the free market.

Respectfully submitted,

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August 26, 1998

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EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Preemption of Local	)	
Zoning Regulation	)	IB Docket No. 95-59
of Satellite Earth Stations	)	
	)	
In the Matter of	)	
	)	
Implementation of Section 207	)	
of the Telecommunications	)	CS Docket No. 96-83
Act of 1996	)	
	)	
Restrictions on Over-the-Air	)	
Reception Devices:	)	
Television Broadcast Service	)	
and Multichannel Multipoint	)	
Distribution Service	)	
	)	

DECLARATION OF CHARLES M. HAAR
IN SUPPORT OF REPLY COMMENTS OF
NATIONAL APARTMENT ASSOCIATION
BUILDING OWNERS AND MANAGERS ASSOCIATION
NATIONAL REALTY COMMITTEE
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL MULTI HOUSING COUNCIL
AMERICAN SENIORS HOUSING ASSOCIATION
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS

I, Charles M. Haar, declare as follows:

I submit this Declaration in support of the Reply Comments of the above-named associations.

I am a Professor of Law at Harvard Law School and have served in this capacity since 1955. I have taught and written on property and constitutional law issues for thirty years. A

copy of my resumé is attached. I have edited a Casebook on Property and Law (with L. Liebman), and a Land-Use Planning Casebook (5th ed. 1996). The most recent book is Suburbs Under Siege: Race, Space, and Audacious Judges (Princeton U. Press 1996). I was Chief Reporter for the American Law Institute's Model Land Development Code in 1963-65; Assistant Secretary for Metropolitan Development in the U.S. Department of Housing and Urban Development in 1965-68; Chair of Presidential Commissions on housing and urban development (Presidents Johnson and Carter); and Chairman of the Massachusetts Housing Finance Agency.

Based on the foregoing, I submit to the Commission in this Declaration the following analysis making two points: (1) a regulation that would require placement of antennae on owners' and common private property (by tenants or other occupants, involuntarily by owners or by third parties), or limit restrictions in private agreements on such action, would be a taking under the Fifth Amendment, according to several lines of cases; and (2) because of the Fifth Amendment implications, the Commission must apply a narrow construction of the Section 207 prohibition on certain private restrictions.

I. THE PROPOSED REGULATION IS A TAKING

A. A "PER SE" TAKING

Under current United States Supreme Court precedent, "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). Loretto involved a New York statute which authorized the installation of cable television equipment on plaintiff Loretto's apartment building rooftop. The Court held that this statute constituted a taking under the Fifth Amendment as applied to the states under the Fourteenth Amendment. The installation involved the placement of cables along the roof "attached by screws or nails penetrating the

masonry," and the placement of two large silver boxes along the roof cables installed with bolts. Id. at 422. In finding a taking, the Court noted that "physical intrusion by government" is a property restriction of unusually serious character for purposes of the Takings Clause. Id. at 426.

In the Commission's Further Notice of Proposed Rulemaking, the Commission seeks comments on a proposed rule in connection with Section 207 of the Telecommunications Act of 1996 (the "Proposed Regulation"). The Proposed Regulation, in requiring that owners allow placement of antennae (by occupants, involuntarily by owners or by third parties) on owners' and common private property, or limit restrictions in private agreements on such action, would directly implicate the Loretto rule. Such installation of reception equipment would be precisely the kind of permanent physical occupation deemed as a taking by Loretto and the line of cases which follow its analysis.

The reasoning of Loretto extends from an analysis of the character of property rights and the nature of the intrusion by government. The Court did not look at the justification for the government's physical intrusion, but exclusively at what the government had done to the claimant. It considered the injury to the claimant to be particularly serious not because of the financial loss involved or other factors, but because of the intrusiveness of the government's action. The Court found that the claimant could not use the physical area occupied by the cable equipment and concluded that it is unconstitutional permanently to prevent an owner from occupying her own property. Consequent upon the occupation, the "owner has no right to possess the occupied space himself ... [he] cannot exclude others [from the space, and he] can make no nonpossessory use of the property." Id. at 435-36. A permanent physical occupation is an especially severe incursion on the ordinary prerogatives of ownership, and constitutes a per se

taking of property; this per se rule provides certainty and underscores the constitutional protection of private property.

Subsequent Court opinions explicitly reaffirm the Loretto rule: a regulation that has the effect of subjecting property to a permanent physical occupation is a taking per se no matter how trivial the burden thus imposed.1

In Loretto, the Court addressed the issue of the public benefit of the proposed regulation, finding that

> where the character of governmental action is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.2

Following this reasoning, the Proposed Regulation effects a Fifth Amendment taking on a property owner who -- pursuant to a lease or other private agreement -- cannot prevent placement on the owners' or common private property of one or what could be many satellite dishes, microwave receivers, and other antennae. The Court will not entertain any weighing of the relative costs and benefits associated with the regulation in the case of a permanent physical occupation. Therefore, any public benefit or purpose (such as increased competition in video services or the provision of video services with educational and cultural benefit to the consumer) is irrelevant to the analysis of whether a taking has occurred. Once it is established that a regulation authorizes a permanent physical occupation, as the Proposed Regulation would, a

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1 See, e.g., Nollan v. California Coastal Commission, 483 U.S. 825, 831 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 489 n.18 (1987); Yee v. City of Escondido, 503 U.S. 519, 527 (1992).

2 Loretto, 458 U.S. at 434-35 (citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978)).

taking has occurred and further analysis of importance of public benefits or degree of economic impact on the owner is moot.

B. ASSUMING ARGUENDO THAT CERTAIN RECEPTION EQUIPMENT IS NOT A PERMANENT INSTALLATION, THE PROPOSED REGULATION REMAINS A TAKING

Some commenters have suggested that some installations of reception equipment pursuant to the Proposed Regulation may not be "permanent" and thus not subject to the Loretto per se takings rule.3

The Court addressed a situation in Nollan in which the occupation (a requirement of public access) was characterized as not permanent yet the Court still found a taking. There is a literal sense in which Nollan's land was not subject to a "permanent" physical occupation as Loretto's was, but the Court dismissed this contention. What is pivotal in the Court's view must be the state of being legally defenseless against invasion at any time. Even for non-permanent antennae installations, Court precedent would render the Proposed Regulation a taking.

A regulation falling outside the per se takings rule for permanent physical occupations would be construed under the Penn Central factual analysis. Penn Central identifies three factors which have "particular significance" in this analysis: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with investment-backed expectations"; and (3) "the character of the governmental action."4 An examination of each of these factors in the context of the Proposed Regulation renders the same outcome as under the Loretto rule: the Proposed Regulation works a taking on the property owner.

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3 Perhaps certain equipment could be placed on a balcony and secured by ballast or its own weight, owned by the occupant and removed when the occupant vacated the premises.

4 Penn Central, 438 U.S. at 124. See also Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

a. Severe economic impact of the Proposed Regulation on owners. The market for residential as well as commercial property depends in large part on the appearance of the building itself and the area surrounding the building. If occupants (be they condominium owners, apartment tenants, commercial lessees or owners without exclusive use or control of the building) were allowed to install reception equipment at their discretion around the property, the value of the property on the market could decrease substantially.

Moreover, the Proposed Regulation would interfere with the ability of an owner (or association of owners) to manage its property. Effective property management requires an owner to decide on a property-specific basis the physical aspects, facilities (including rapidly evolving communications equipment) and service offerings of its property based on its own complex, multiyear analysis of consumer demands, supply opportunities and costs. Instead of market-oriented management, the Proposed Regulation would require owners to devote substantial resources to implementing the government-imposed rules, including resources associated with, among other things, training property managers on the rules, monitoring whether occupants' requests and actions comply with the Commission's rules as well as applicable health and safety codes, developing and collecting charges as allowed by the rules, sorting out interfering requests from multiple occupants or services providers, and implementing procedures and training for various emergency situations.

In the context of CC Docket No. 96-98, the Commission concluded in August 1996 that a right of access to roofs and riser conduit "could impact the owners and managers of small buildings . . . by requiring additional resources to effectively control and monitor such rights-of-way located on their properties." (FCC 96-325, at Par. 1185.)

b. Substantial interference with investment backed expectations. Any regulation which may interfere with the market value of a piece of property would naturally affect any expectations of investors who financed the building as well.

c. Character of the Proposed Regulation authorizes a physical invasion. Even if the structure is temporary, the Proposed Regulation authorizes a physical appropriation of the property as well as a permanent and continuous right to install such a structure. In Nollan, 483 U.S. at 832, the Court stated that a permanent physical occupation occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." Under Nollan, the right to traverse the property, whether or not continually exercised, effected an impermissible taking. It is the "permanent and continuous right" to install the equipment which works the taking, because the right may be exercised at any time without the consent of the owner of the property.

Therefore, the regulation would constitute a taking based on the three-factor analysis set forth in the Penn Central line of cases.

C. CLOAKING THE PROPOSED REGULATION AS A REGULATION OF THE OWNER/OCCUPANT RELATIONSHIP FAILS TO SAVE THE PROPOSED REGULATION FROM THE TAKINGS CLAUSE

1. The Loretto footnote is not applicable to the Proposed Regulation

Some commenters argued that the holding in Loretto was "very narrow" and applies only to the situation of physical occupation by a third party of a portion of the claimant's property. Moreover, a footnote in Loretto states that "[i]f [the statute] required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question

before us, since the landlord would own the installation." Loretto, 458 U.S. at 440 n.19. The footnote continues to describe how in this scenario where the owner would provide the service at the occupant's request, the owner would decide how to comply with the affirmative duty required by this hypothetical statute. Further the footnote indicates that the owner would have the ability to control the physical, aesthetic and other effects of the installation of the service.

Reliance on this dicta and footnote is misplaced in the context of the Proposed Regulation. Unlike a hypothetical statute requiring an owner to install a single cable interconnection, the Proposed Regulation may require an owner or association of owners to install multiple (an open-ended number) satellite dishes (DirecTV vs. Primestar vs. C-Band vs. others), microwave receivers (MMDS vs. LMDS vs. others) and other antennae. Such multiple installations may be in ways and areas which may affect the physical integrity of a roof and other building structures, a building's safety, security and aesthetics, and thus its economic value. Moreover, the Proposed Regulation may require an owner to install the cabling associated with multiple antennae in limited riser space. Under the demands of accommodating multiple video antennae, the ability of an owner to control the physical, aesthetic and other effects of the installation of the service may be far more limited than envisioned in the Loretto footnote for a single installation, and thus a taking would be caused.

2. FCC v. Florida Power is not applicable to the Proposed Regulation

Certain commenters and perhaps the Commission appear to rely on FCC v. Florida Power Corp., 480 U.S. 245, 252 (1987), as further evidence of the limited application of the per se takings rule enunciated in Loretto. However, the holding of Florida Power is inapplicable to the Proposed Regulation and its effects on owners. In particular, Florida Power holds that the Loretto per se takings rule does not apply to that case because the Pole Attachments Act at issue

in Florida Power, as interpreted by the Court, did not require Florida Power to carry lines belonging to the cable company on its utility poles. Similarly, the Court in Yee, 503 U.S. at 528, analyzed a local rent control ordinance and found that Loretto did not apply because the ordinance involved regulation without a physical taking or taking of the property owners' right to exclude: "Put bluntly, no government has required any physical invasion of petitioners' property."

In contrast, the Proposed Regulation would do exactly the opposite by requiring owners to install antennae.

D. BUNDLE OF RIGHTS OWNED BY A PROPERTY OWNER

The recent trend in the Court applies the doctrine of "conceptual severance" in taking cases. By continually referring to an owner's "bundle of property rights," the Court is adopting the modern conceptualization of property as an aggregation of rights rather than a single, unitary thing.5 Any regulation that abstracts and impacts one of the traditional key powers or privileges of property rights -- use or exclusion, for example -- is found to be a taking under the eminent domain clause.

In Kaiser Aetna, 444 U.S. at 179-80, the Court concentrated upon "the 'right to exclude' so universally held to be a fundamental element of the property right." Loretto referred to this passage (Loretto, 458 U.S. at 435-36) in declaring that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." Again, Nollan employed this severance approach in broadening Loretto's "permanent occupation" concept. In characterizing the right to exclude as "one of the most essential sticks in

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5 See Hohfeld, Fundamental Legal Conceptions as Applied to Judicial Reasoning, 26 Yale L.J. 710 (1917); Michelman, Discretionary Interests -- Takings, Motives, and Unconstitutional Conditions: Commentary on Radin and Sullivan, 55 Alb. L. Rev. 619 (1992).

the bundle of rights that are commonly characterized as property," it construed a public access easement as a complete thing taken, separate from the parcel as a whole. Nollan, 483 U.S. at 831-32.

Hodel v. Irving, 481 U.S. 704 (1987), is perhaps the clearest exposition thus far of the Court's view of certain fundamental private rights being so embodied in the concept of "property" that their loss gives rise to a right to compensation under the Fifth Amendment. The statute under attack in Hodel provided that upon the death of the owner of an extremely fractionated interest in allotted land, the interest should not pass to devisees but should escheat to the tribe whose land it was prior to allotment. The Court conceded a number of factors in favor of validity: the statute would lead to greater efficiency and fairness; it distributed both benefits and burdens broadly across the class of tribal members. However, the particular right affected -- denominated by the Court as "the right to pass on property" -- lies too close to the core of ordinary notions of property rights; it "has been part of the Anglo-American legal system since feudal times". Id. at 716.6

In PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 n.6 (1980), the Court emphasized:

> [T]he term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." . . . It is not used in the "vulgar and

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6 Thus, Hodel adds market alienability as another essential strand of property whose attempted abrogation constitutes a per se taking. In effect, the state may not convert fee simple property into a life estate, even if such conversion is conditioned on the owner's failure to alienate during the owner's lifetime.

The Court cemented, in this fashion, the conceptual severance approach: the Court built onto the "right to exclude others" and the "right to pass on property" as examples of core strands. Both are among "the most essential sticks in the bundle of rights that are commonly characterized as property." See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 518-19 (1987) (dividing up the time elements of property rights).

> untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess."

The Court is most likely to extend the Hodel doctrine of separate and distinct interests to the Proposed Regulation that would bar an owner's right to exclude an occupant from the roof and other premises owned by the property owner, or that prevents the owner from the use and enjoyment of the space occupied by the antennae. That the Proposed Regulation would erect barriers to what are widely held to be fundamental elements of the ownership privilege renders it vulnerable to constitutional attack. Indeed, the Proposed Regulation stands to erode just these essential powers, to exclude or to use, by forcing owners and homeowner associations to permit the installation of reception equipment on their property wherever and whenever the occupant or other owner without exclusive control or use may wish. Once the property owners lose control over the right to exclude installation of items against their wishes, they lose that which distinguishes property ownership itself, the rights "to possess, use and dispose of it." United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

E. PROPERTY RIGHTS IN AESTHETIC CONTROLS

The Commission's action on the § 1.4000 rule suggests that the Commission would give insufficient weight in analyzing the Proposed Regulation to the recognition in modern law that aesthetic controls are a significant component of property values and property rights.

In the § 1.4000 rule, the Commission has created an exemption for restrictions "that serve legitimate safety goals." (Par. 5(b)(1) and Par. 24 of Report and Order.) It has also adopted a rule safeguarding registered historic preservation areas. (Par. 5(b)(2) and Par. 26.)

Having gone this far toward accommodating local interests the Commission halts and treats environmental and aesthetic concerns with less consideration. (Par. 27.) In so doing, it is acting in accordance with the historic and out-dated treatment of aesthetic controls by ordinance, building restriction, lease, homeowners association agreement, or other private agreement. By not considering the modern trends of legislation and adjudication, however, it is sacrificing significant property values; impeding market decision-making by localities, private builders and owners, and associations; and undercutting sensitive environmental concerns. Indeed, some may discern a Philistine air in the Commission's rule and any similar analysis of the Proposed Regulation that runs the danger of the Commission being branded a scoffer of beauty and a derider of efforts to shape the appearance of the built and natural environments.

The Commission agrees that Congress intended that it should "consider and incorporate appropriate local concerns," and "to minimalize any interference owed to local governments and associations." The Commission also (Par. 19) takes tentative steps toward adopting aesthetics as a full-scale exemption by mentioning: a requirement to paint an antenna so that it blends into the background; screening; and, in general, requirements justified by visual impact.7

This hesitant approach to environmental values is a retreat from the advancement and understanding of the goals of community, building and commercial environment appearance. It behooves the Commission to make explicit an exemption for reasonable aesthetic control of dishes and antennae.

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7 See also Par. 37 regarding height and installation restrictions in the BOCA code. Furthermore, the Report and Order states that the Commission does not believe that the rule would adversely affect the quality of the human environment in a significant fashion (Par. 26): "While we see no need to create a general exemption for environmental concerns," it argues, it does exempt registered historic preservation areas. Finally, the rule states that the Commission will consider granting waivers where it is determined that the

The history of aesthetic controls in this country is a useful analogy for the Commission's consideration. At the outset, the courts were outrightly hostile to aesthetic values; they were not recognized as a legitimate government interest.8 The modern judicial position accepted in most jurisdictions is that government can regulate solely for aesthetics, as described below.

Aesthetic controls, public or private, over the form and placement of antennae and dishes reflect values representative of community-wide sentiment. Eyesores should not be permitted to undermine coherent community goals. Owners and homeowner associations can define what is attractive and what is ugly about antennae and reception devices, the same way they outlaw junkyards and rag-strewn clotheslines.9

Over the past two decades, aesthetic considerations flourished and became routine on federal as well as state levels. There are numerous examples of legislative assertions of beauty as an appropriate end of government activity.10 For example, the status of aesthetic values is

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particularly unique environmental character or nature of an area requires the restriction. (Par. 27).

8 See Haar and Wolf, eds., Land-Use Planning 518-555 (4th ed. 1989). Aesthetic values were deemed too subjective and vague to warrant legal protection; consequently, the courts went so far as to say that the presence of aesthetic motives would taint an ordinance otherwise valid under the traditional health, safety, morals, and welfare components of the police power. As the early Passaic v. Peterson Bill Posting Co., 62 A. 267, 268 (N.J. 1905), put it: "[A]esthetic considerations are a matter of luxury and indulgence rather than of necessity . . . ." This gave way -- not without a struggle -- to intermediate judicial acceptance when it was seen that aesthetic values advanced such traditional goals as the preservation of property values.

9 See People v. Stover, 191 N.E.2d 27 (N.Y. 1963). It is increasingly recognized that community consensus can protect against arbitrary application of regulation or restriction. See United Advertising Corp. v. Borough of Metuchen, 198 A.2d 447 (N.J. 1964). In a fundamental sense, there is a collective property right to the neighborhood or commercial environment exercised by its owners.

10 The Report and Order itself incorporates elements of the National Historic Preservation Act of 1976 in its use of the National Register for Historic Places in carving out an exemption for historic districts.

sharply recognized in the National Environmental Policy Act of 1967, 42 U.S.C. § 4321 (NEPA). Section 4331(b)(2) of NEPA includes, among the purposes of its "Environmental Impact Statements," the assurance of "healthful, productive and aesthetically and culturally pleasing surroundings." See Ely v. Velde, 451 F.2d 1130, 1134 (4th Cir. 1971) ("other environmental . . . factors" than those directly related to health and safety are "the very ones accepted in . . . NEPA").11

Perhaps the most direct acceptance of aesthetic controls on the federal level is that of Justice Douglas in Berman v. Parker, 348 U.S. 26, 33 (1954):

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.12

In light of the Commission's exemption for historic districts, the statements of Penn Central are especially pertinent; there the Court emphasized that "historic conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing -- or perhaps developing for the first time -- the quality of life for people." Penn Central, 438 U.S. at 108.

The Proposed Regulation would be evaluated in the context of this evolution and progress of aesthetic and environmental goals. The Report and Order, in its gingerly handling of roof line controls, may be faulted as out of step with the modern legislative and judicial

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11 The aesthetic-environmental language is also found in the so-called Little NEPAs of the states. See, e.g., State v. Erickson, 285 N.W.2d 84 (Minn. 1979). Similarly, the National Highway Beautification Act regulates the manner and placement of billboards along federally assisted highways.

12 More recently, in Members of City Council of City of Los Angeles v. Taxpayer for Vincent, 466 U.S. 789, 805 (1984), the Court stated" "It is well settled that the state may legitimately exercise its police powers to advance aesthetic values." See also Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981).

endorsement of aesthetic values and design review. Certainly Paragraph 46's tentative conclusion that "nongovernmental restrictions appear to be related primarily to aesthetic concerns," and the further tentative conclusion "that it was therefore appropriate to accord them less deference than local government regulations that can be based on health and safety considerations" will raise eyebrows in many circles.13

Increasingly, private design review is the most effective way for property owners to implement a consensual decision on the aesthetic appearance of their community.14 Widespread agreement -- expressed often in terms of enhanced property values -- exists on ensuring that utilitarian objects are hidden from sight on or around buildings. Mechanical equipment on roofs (ventilators, exhaust outlets, air conditioners), as part of the policy for community or commercial environment appearance, is usually not permitted to be visible from the street. Regulating the appearance of a community, building or commercial environment is the proper domain of the community itself and the owner(s) since the local community and owner(s) are the best judges of what is desirable for that community, building or commercial environment. Further, there is a direct line between aesthetics and property values: "economic and aesthetic considerations

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13 See, e.g., Williams, Jr. and Taylor, 1 American Planning Law § 11.10 (1988 Revision): "[n]o trend is more clearly defined in current law than the trend towards full recognition of aesthetics as a valid basis for regulations". The demotion of aesthetics proffered by the Commission is an outdated view of the law.

14 Reid v. Architectural Board of Review, 192 N.E.2d 74 (Ohio 1963), is the classic case upholding such controls. Private design review, as an alternative or supplement to local government, controls aesthetics of the physical environment by private agreement, typically through community associations. See Baah, Private Design Review in Edge City in Design Review, Challenging Urban Aesthetic Control 187 (Scheer and Preisiev eds. 1994). In many communities with design review, Baah adds, "unsightly physical features -- such as graffiti, billboards, chain-link fences, weeds and overgrown landscaping -- are now only found in public property." Id. at 196.

together constitute the nearly inseparable warp and woof of the fabric upon which the modern city must design the future."15

So long as the private design review process is conducted along procedural due process requirements it is a legitimate and desirable exercise of property owners' interests which will be upheld by the courts. The design and environmental purposes of public and private restrictions, reasonably limited and nondiscriminatory, should be an exemption extended by the Commission.

Protection against abuse of restrictions on devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution services, or direct broadcast satellite services is afforded by the discipline of the market. Deregulation and the freeing of competitive forces already put in place by the Commission are effective restraints on abuse. Thus, analysis of the Proposed Regulation should give substantial weight to aesthetic controls imposed by landlords and owners through private agreements.

F. RELIANCE ON PRUNEYARD IS UNWARRANTED

Several commenters have relied upon PruneYard in supporting the Proposed Regulation. In analyzing the Proposed Regulation to determine whether it violates the Takings Clause, access to video information services does not rise to the level of a colorable constitutional argument based on the First Amendment.

As described in connection with Loretto, government policies and public benefits are irrelevant in per se takings. As to First Amendment concerns, the Loretto Court acknowledged it had no reason to question the finding of the New York Court of Appeals that the act served the legitimate public purpose of "rapid development of and maximum penetration by a means of communication which has important educational and community aspect." Loretto, 458 U.S. at

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15 Metromedia, Inc. v. City of Pasadena, 216 Cal. App. 2d 270 (1963), app. dism'd, 376

425. Nevertheless, the Court concluded that "a permanent physical occupation authorized by government is a taking without regard to the public interests it may serve." Id. at 426.

In PruneYard, which dealt with a state constitutional right to solicit signatures in shopping centers, there was no permanent physical invasion of the property (unlike the Proposed Regulation) and the Court applied the Penn Central three-factor analysis. PruneYard does not support a First Amendment limitation to or weighting in such analysis. In holding that a taking did not occur, a key finding for the Court was that preventing shopping center owners from prohibiting this sort of activity would not unreasonably impair the value or use of their property. PruneYard, 447 U.S. at 83. As the concurring opinion of Mr. Justice Marshall (the author of the subsequent Loretto opinion) states, "there has been no showing of interference with appellant's normal business operations." Id. at 94. Indeed, the use of the shopping center's property in PruneYard was consistent with the reasons that the property was held open to the public, namely that it is "a business establishment that is open to the public to come and go as they please." Id. at 87.

The decision quoted from the California Supreme Court's opinion which distinguished this shopping center, with 25,000 persons of the general public daily using the property, from other properties (or even portions of properties, such as roof space) where use is more restricted:

> A handful of additional orderly persons soliciting signatures and distributing bandbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations . . . would not markedly dilute defendant's property rights.

Id. at 78.

This situation differs completely from the position of property owners subject to the Proposed Regulation in that the owner's opening of the property to the tenant does not extend an

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U.S. 186 (1964).

invitation to use the private property of the owner, such as the roof, which is specifically excluded from the demised premises. The notion of implied consent to use the property which the Court relies on so heavily in PruneYard is not applicable here where the owners are careful to delineate the boundaries of the demised property to exclude areas such as the roof and exterior walls.

In particular, the PruneYard Court was careful to distinguish on the Penn Central three-factor grounds the facts and state constitutional right in PruneYard from the findings of unconstitutional takings despite claims of First Amendment protections in Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972) (finding against First Amendment claims challenging privately owned shopping center's restriction against the distribution of handbills), and Hudgens v. NLRB, 424 U.S. 507, 517-21 (1976) (finding against First Amendment claims challenging privately owned shopping center's restriction against pickets). PruneYard, 447 U.S. at 80-81.

G. INCREASED EMPHASIS BY COURTS AND LEGISLATURES UPON THE PROTECTION OF PROPERTY RIGHTS

As explained above, the general movement of the Court is to protect private property under the Taking Clause.16

Along the same lines is Executive Order 12630 of March 15, 1988, "Governmental Actions and Interference with Constitutionally Protected Property Rights." Referring to Court decisions, it states that in reaffirming the fundamental protection of private property rights they have also "reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required."

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16 This trend has been underlined by many experts on constitutional law, including Chief Judge Oakes of the Second Circuit Court of Appeals. Oakes, "Property Rights" in Constitutional Analysis Today, 56 Wash. L. Rev. 583 (1981).

Section 1(b) requires that government decision-makers should review their actions carefully to prevent unnecessary takings.

Section 3 lays down general principles to guide executive departments and agencies. Section 3(b) cautions that "[a]ctions undertaken by government officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property." Section 3(e) warns that actions that may have a significant impact "on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc." Finally, Section 5(b) requires executive agencies to "identify the takings implication" of proposed regulatory actions.

In addition, several states have passed different forms of takings impact assessment laws and value diminution laws imposing compensation requirements when a taking, variously defined, is imminent.

Loretto and Hodel are judicial inventions for putting some kind of halt to the denaturalization and disintegration of the concept of property. As the Court continues its century-long struggle to define an acceptable balance between individual and societal rights, it is apparent at least to the justices of the Court that this constitutional riddle needs more definite answers. By referring to the common understanding of what property at the core is all about, the settled usage that gives rise to legally recognized property entitlements, the Court is building up trenchant legal tests for a taking.

This is a reaction to its finding how hard it is to maintain an open-ended balancing posture; in the Penn Central case, the Court acknowledged difficulty in articulating what constitutes a taking. A per se rule, whether it be a permanent physical occupation or another core stick of the bundle denominated "property," is a bright line that provides a trenchant legal

test for a taking, one that can be understood by a lay person and one that lawyers can utilize in advising clients. The cases laying down hard-and-fast rules are a token of the limitations on popular government by law.

The Court's trend toward defining the Fifth Amendment to set up of a private sphere of individual self-determination, securely buffered from politics by law, militates against the adoption of the Proposed Regulation. Elimination of the private property owner's power of possession, use, and enjoyment of the space used for antennae installations and removal of the power to control entry by an occupant is not likely to survive judicial (or legislative) scrutiny.

II. THE COMMISSION MUST APPLY A NARROW CONSTRUCTION OF THE STATUTORY PROHIBITION ON CERTAIN PRIVATE RESTRICTIONS

The relevant case law is clear that, in light of the substantial Fifth Amendment implications described above in this Declaration, the FCC must narrowly interpret Section 207. The statutory directive "to prohibit restrictions" and the House Report explanation that Congress intended to preempt "restrictive covenants or encumbrances" fall far, far short of a broad statutory mandate to promote various video signal delivery businesses through a requirement that owners allow placement of or place antennae at the sole discretion of occupants on owners' or common private property.

As the D.C. Circuit Court of Appeals held in Bell Atlantic v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994), "[w]ithin the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions."17 The court went on to state that when administrative interpretation of a statute would create a class of cases with an

17 Citing Rust v. Sullivan, 500 U.S. 173, 190-91 (1991); Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575-78 (1988).

unconstitutional taking, use of a "narrowing construction" prevents executive encroachment on Congress's exclusive powers to raise revenue and to appropriate funds. Id.

A fair interpretation of Section 207 does not require construing the statutory direction to prohibit certain private restrictions as going beyond the restrictions covered by the implementing rule the Commission adopted in August 1996. That rule -- addressing "any private covenant, homeowners' association rule or similar restriction on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property" -- encompasses the full extent (and perhaps more) of what the House Report intended as "restrictive covenants or encumbrances." The Proposed Regulation -- whether as a right to installation by occupants, an obligation on owners, a right to installation by third parties, or other limit on restrictions in private agreements on such action -- would be contrary to the narrowing construction of Section 207 required to avoid an unconstitutional taking.

Moreover, the Commission does not contend in its Further Notice (and cannot reasonably contend) that the proposed implied taking power is necessary in order to avoid defeating the authorization in and purpose of Section 207. See Bell Atlantic, 24 F.3d at 1446. While the Commission asks whether a further requirement on landlords is authorized under Section 207, the § 1.4000 rule does not depend on restrictions on owners' or common private property.

The constitutional demand for a narrowing construction of Section 207 against the Proposed Regulation is particularly strong in light of the contrast between Section 207 and three other sections of the Telecommunications Act of 1996. These other sections clearly and specifically authorize a physical occupation of certain facilities, office space or other property as to certain other entities. In contrast, proponents of the Proposed Regulation can only argue that

the physical taking for video reception equipment should be promulgated pursuant to a purported implied broad mandate and general policy from Section 207.

1. Section 224(f)(1) states that a "utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduct, or right-of-way owned or controlled by it." Sections 224(d)-(e) address compensation, and Section 224(f)(2) addresses insufficient capacity, safety, reliability and generally applicable engineering purposes.

Reflecting the huge complexities that would be involved in implementing the Proposed Regulation for landlords, the Commission in its August 8, 1996 interconnection order (CC Docket No. 96-98) concluded that "the reasonableness of particular conditions for access imposed by a utility should be resolved on a case-specific basis." (Par. 1143) In particular, the Commission rejected the request by WinStar Communications to interpret this right of access to include roofs and riser conduit; the Commission recognized that "an overly broad interpretation of ['pole, duct, conduit, or right-of-way'] could impact the owners and managers of small buildings . . . by requiring additional resources to effectively control and monitor such rights-of-way located on their properties."18

2. Section 251(b)(4) requires local exchange carriers to "afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services at rates, terms, and conditions that are consistent with section 224".

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18 Par. 1185 (emphasis added) & n.2895; WinStar Communications Petition for Clarification or Reconsideration at 4-5 (Sept. 30, 1996).

3. Section 251(c)(6) requires incumbent local exchange carriers to provide "physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier." This section also specifies "rates, terms and conditions that are just, reasonable, and nondiscriminatory," and addresses space and other technical limitations.

When Congress intended a taking with compensation in these other circumstances, it clearly and specifically indicated that intention in the Telecommunications Act of 1996. Nothing in Section 207 addresses a taking or compensation for placement of antennae on owners' or common private property, and no such requirement can be implied.

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EXHIBIT B

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)

OPINION

By this decision, we take a further significant step in our program to open the local exchange market within California to competition. We adopt rules herein governing the nondiscriminatory access to the poles, ducts, conduits, and rights-of-way (ROW) applicable to all competitive local carriers (CLCs) competing in the local exchange market within the service territories of the large and mid-sized incumbent local exchange carriers (ILECs)[1]. In order for broadly available facilities-based competition to succeed, CLCs need access to the poles, ducts, conduits, and ROW, owned not only by ILECs, but those owned by other entities controlling essential ROW including electric utilities and by local governments. The rules adopted herein shall apply to the major investor-owned electric utilities [2]as well as to the two major ILECs, Pacific and GTEC. We shall not at this time apply these rules to the small or midsized ILECs. We also address herein ROW access issues relating to municipal utilities and local governments. At this time, we shall not apply these rules to other categories of investor-owned public utilities such as gas, water, or steam utilities. We will consider expanding the scope of the rules at a later time to cover additional classes of utilities.

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[1] Pacific Bell (Pacific); GTE California Incorporated (GTEC); Roseville Telephone Company (Roseville); and Citizens Telecommunications Company of California (Citizens).

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

I. Procedural Background

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

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

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

A second ROW workshop on June 17, 1996, which included representatives of municipal and investor-owned electric utilities, provided participants an opportunity to discuss and to further define the relevant ROW issues to be addressed through subsequent written comments. Based on the input from the workshops, a list of issues was prepared by the assigned Administrative Law Judge (ALJ) and submitted for comments by ruling dated September 10, 1996. Opening comments were received on October 22, 1996, with reply comments on November 13, 1996. Comments were filed by the large and mid-sized ILECs, a group of small ILECs[3], by the major California electric utilities[4], by a group of CLCs known as the California Rights-of-Way Coalition (Coalition)[5], by the California Cable Television Association (CCTA) and by AT&T Wireless Services, Inc. (AWS).

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

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

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

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.[24] 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 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

[24] *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.

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"[17] 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 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

[17] 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

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.

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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 Y.S.C. § 224(d) and (e)), do not require states to provide for different rate provisions for cable operators commencing February 8, 2001, depending on whether they offer cable television service exclusively or whether they also offer telecommunications services. Attempting

to distinguish "cable television service" from "telecommunications service" would entangle the Commission in semantic disputes and would not represent the best use of the Commission's resources.

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.

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

41. The Commission needs to exercise its jurisdiction over existing contracts for rights of way to effectuate the meaning and purpose of the proposed rules.

Conclusions of Law

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

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

A. it regulates such rates, terms, and conditions; and

B. in so regulating, that it has the authority to consider and does consider the interests of the subscribers of the services offered via such attachment, as well as the interests of the consumers of the utility service.

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

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

5. Nondiscriminatory access by the incumbent utility requires that similarly situated carriers be provided access to the ROW and support structures of the incumbent utilities subject to such carriers having first obtained the necessary access and/or use rights from the underlying property owner(s) under impartially applied terms and conditions, but does not divest the incumbent utility of all of the benefits or the management obligations of ownership.

6. No party may attach to the ROW or support structure of a utility without the express written authorization from the utility. The incumbent utility may not deny access simply to impede the development of a competitive market and to retain its competitive advantage over new entrants.

7. Under the nondiscrimination principles of the Act, incumbent utilities must provide all telecommunications carriers, subject to such telecommunications carriers having first obtained all necessary access rights from the underlying property owner, and the same type of access they would afford themselves.

8. Because the provision of telecommunications services is a matter of statewide concern, it is not beyond the jurisdiction of this Commission to compel municipally owned utilities to provide nondiscriminatory access to their poles,

ducts, conduits and ROW if such action is necessary to protect the provision of telecommunications services on a uniform statewide basis, to implement the policies underlying PU Code §§ 7901 and 10107, and to accomplish the purposes for which PU Code §§ 453, 728, 761, 762 and 767 were enacted.

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

10. In § 7901.1(a), the California Legislature stated that "municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed," but under § 7901.1(b), the "control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner."

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

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

13. Parties to pre-existing arrangements for access to utility ROW and support structures are entitled to re-negotiate the terms of such arrangements to conform to the provisions of this decision, providing that such renegotiation is initiated within six months following the effective date of this decision.

14. Any contracts for access to utility ROW and support structures should be renegotiated to conform to these or any subsequent ROW rules adopted by this Commission.

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

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

17. By virtue of their incumbent status and control over essential ROW and bottleneck facilities, the local exchange carriers (LECs) and electric utilities have a significant bargaining advantage in comparison to the CLC with respect to negotiating the terms of ROW access.

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

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

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

21. Having certified to the Federal Communications Commission that it regulates pole attachments in compliance with 47 U.S.C. § 224(c), this Commission is not required to follow the provisions of the federal pole attachment statute, 47 U.S.C. § 224(e), that would require the application of a higher pole attachment rate to telecommunications carriers and cable operators that provide telecommunications services than to cable operators that do not offer telecommunications services.

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

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

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

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

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

27. 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.

28. 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.

29. 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.

30. 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.

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

32. 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.

33. If an ILEC 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.

34. 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.

35. 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.

36. The ILEC 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 shall be subject to negotiation.

37. 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.

38. 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.

39. 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.

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

41. 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.

42. 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.

43. 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.

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

45. 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 three months of an access request.

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

47. 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.

48. 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.

49. The restrictions regarding reservations of capacity adopted in this order in no way constitutes 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.

50. 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.

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 the rules and policies set forth in this decision after good faith efforts at negotiation.

58. The burden of proof should 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.

59. 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.

O R D E R

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 comments concerning the implications of joint pole association attachment agreements as they relate to nondiscriminatory access.

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. 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 _____, at San Francisco, California.

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

A. These rules govern access to public utility rights-of-way and support structures by telecommunications carriers 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 te'ephone 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 communications 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.

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 from the definition of "telecommunications carrier."

K. "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.

L. "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.

M. "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.

N. "Incumbent local exchange carrier" refers to Pacific Bell and GTE California, Inc. for purposes of these rules.

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 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, 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, 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 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 telecommunications carrier's request for access.

2. If, pursuant to a request for access, the utility has notified the telecommunication carrier that both adequate space and strength are available for the attachment, and the carrier advises the utility in writing that it wants to make the attachment, the utility shall provide the carrier with a list of the rearrangements or changes required to accommodate the carrier'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 must obtain written permission from the owner of that property before attaching or installing its facilities. The telecommunication carrier 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 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 request for access, the utility shall perform such work at the carrier's sole expense as quickly as possible 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 telecommunications carriers' wire communications facilities on the utility's support structures. This requirement shall not apply to electric utilities which shall retain the discretion to use their own employees.

2. A telecommunications carrier 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 personnel or agents demonstrate that they are trained and qualified to work on or in the utility's facilities. This provision shall not apply to electric transmission facilities, or electric underground facilities containing energized electric supply cables. Work involving electric transmission facilities, or electric underground facilities containing energized electric supply cables will be conducted as required by the electric utility at its sole discretion.

3. Incumbent utilities should adopt written guidelines to ensure that CLC personnel and CLC's 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 telecommunications carriers 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 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 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 the price for access to its rights of way and support structures.

2. A utility shall grant access to its rights-of-way and support structures to telecommunications carriers on a nondiscriminatory basis. Nondiscriminatory access is access on a first-come, first-served basis and subject to the requesting telecommunications carrier first obtaining any necessary access and/or use rights from the underlying private property owner(s); access that can be restricted only on consistently applied nondiscriminatory principles relating to capacity restraints, underlying applicable restrictions on the 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 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 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 association of telecommunications carriers 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, 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, other than poles or anchors, a percentage of the annual cost of ownership for the support structure, computed by dividing the volume or capacity rendered unusable by the telecommunications carrier's equipment by the total usable volume or capacity. As used in this paragraph, "total usable volume or capacity" means all volume or capacity in which the public utility's line, plant, or system could legally be located, including the volume or capacity rendered unusable by the telecommunications carrier's equipment.

c. A utility may not charge a telecommunications carrier 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 to provide access to its support structures shall file with the Commission the executed contract showing:

   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 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. 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 five times the recurring monthly rate for each month of the violation. This fee is in addition to all other costs which are part of the attacher's responsibility.

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 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 requesting access to such support structures, except as provided for in Part C below.

B. All access to a utilities' 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 through VII.C, an electric utility may reserve space on its support structures 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 three months of a request for access.

VIII. MODIFICATIONS OF EXISTING SUPPORT STRUCTURES

A. NOTIFICATION TO PARTIES ON CR 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. 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. The following time schedule should apply to each step in the dispute resolution process:

Step 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 complaint, with an attached motion requesting Commission arbitration.

Step 2: Parties shall have 15 business days to prepare for arbitration following the filing of the motion.

Step 3: Following arbitration hearings, Parties shall have 15 business days to submit short pleadings, with a Commission decision within 20 business days thereafter to resolve the dispute.

B. In the event that parties do not consent to be bound by an arbitrated decision, the formal complaint process prescribed under Senate Bill 960 shall be used.

C. Each party to an initial access dispute resolved in this manner shall bear its own costs, including attorney and expert witness fees.

D. 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.

X. ACCESS TO CUSTOMER PREMISES

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

B. A utility shall provide access, when technically feasible and not restricted or otherwise prohibited by agreements with property owners, 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 has first obtained all necessary access and/or use rights from the underlying property owners(s).

C. Nothing in these rules is intended to provide to telecommunications carriers or otherwise create any right of access to or across private property against the wishes of the owner(s) and/or operators of such property.

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.

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