

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

OCT 31 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of the Local Competition)
Provisions of the Telecommunications) CC Docket No. 96-98
Act of 1996)
)
Section IX. C. -- Definition of)
Telecommunications Carrier)

To: The Commission

DOCKET FILE COPY ORIGINAL

UTC CONSOLIDATED COMMENTS
ON PETITIONS FOR CLARIFICATION

Pursuant to Section 1.429 of the Commission's Rules, UTC, The Telecommunications Association (UTC),¹ respectfully submits the following consolidated comments on various "Petitions for Clarification" of the *First Report and Order (FR&O)*, FCC 96-325, released August 8, 1996, in the above-captioned matter. UTC's comments are limited to those petitions that seek clarification of issues addressed in Section IX.C. related to the definition of "telecommunications service."

¹ UTC, The Telecommunications Association, was formerly known as the Utilities Telecommunications Council.

No. of Copies rec'd
DATE

0711

I. Comments

Section 3 of the Telecommunications Act of 1996 defines “telecommunications service” as:

The offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Four separate petitions for clarification were filed with respect to the Commission’s interpretation of this definition.² All of these petitions urged the Commission to resolve an ambiguity that has been created by the last sentence of paragraph 994 of the *FR&O*, as amended by errata. The sentence reads as follows:

“Providing to the public telecommunications (e.g., selling excess capacity on private fiber or wireless networks), constitutes a telecommunications service and thus subjects the operator of such a network to the duties of section 251(a) to that extent.”³

All of the petitions note that contrary to the plain language of the statute, and a long-line of FCC and court precedents, this sentence seems to imply that the FCC will henceforth consider the provision of telecommunications capacity as a regulated “telecommunications service,” regardless of the manner in which it is offered. As APPA makes clear such an interpretation will discourage electric utilities and others from making telecommunications capacity and infrastructure available to third party carriers, and will

² Petitions were filed by the American Public Power Association (APPA); the Association of American Railroads (AAR); the Lower Colorado River Authority (LCRA); and UTC.

³ *Errata*, DA 96-1321, released August 19, 1996.

result in a decrease in facilities based telecommunications competition.⁴ Utilities, pipelines and other entities have provided, or intend to provide, telecommunications capacity or facilities under long-term leasing agreements with third-party telecommunications service providers. These facilities are provided pursuant to privately negotiated, individualized contracts, under the assumption that the underlying facility provider will not be regulated as a common carrier.

As UTC and other petitioners note, the Commission and courts have historically distinguished between regulated “common carriers” and unregulated “private carriers” based on whether or not the carrier offered to provide service on an indiscriminate basis to the public.⁵ By defining “telecommunications service” in the Telecommunications Act by reference to the “offering of telecommunications for a fee directly to the public,” Congress carried forward *NARUC I*’s concept of an indiscriminate holding out to the general public as a critical element of the definition. As LCRA notes, the “class of users effectively available directly to the public” clause does not alter this analysis because it still implies that the subclass of the public must be sufficiently numerous that they represent a “virtual” public before an operator would be deemed a “telecommunications carrier.”

Accordingly, based on the above and consistent with the petitions of APPA, AAR and LCRA, UTC urges the FCC to clarify that the provision of capacity on a private carrier basis does not constitute the offering of a telecommunications service. Specifically, the

⁴ APPA, p. 5.

⁵ See, *NARUC v. FCC (NARUC I)*, 525 F 2d 630 (1976).

Commission should indicate that the revised last sentence of paragraph 994 (and particularly the parenthetical example) should be read in the full context of the entire paragraph; that is, the lease of capacity on a private fiber or microwave system does not constitute a “telecommunications service” except to the extent the operator is “offering ‘telecommunications’ for a fee directly to the public.”

WHEREFORE, THE PREMISES CONSIDERED, UTC respectfully requests the FCC to take action in accordance with these consolidated comments with regard to the definition of "telecommunications service."

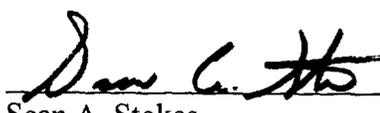
Respectfully submitted,

UTC

By:



Jeffrey L. Sheldon
General Counsel



Sean A. Stokes
Associate General Counsel

UTC
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, D.C. 20036
(202) 872-0030

October 31, 1996.

CERTIFICATE OF SERVICE

I, Ryan Oremland, hereby certify that I have caused to be sent, on this 31st day of October 1996, a copy of the foregoing to each of the following:

By Hand Delivery

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

The Honorable James H. Quello
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 818
Washington, D.C. 20554

The Honorable Susan Ness
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

The Honorable Rachelle B. Chong
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Gina Keeney
Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Suite 500
Washington, D.C. 20554

Richard Metzger
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, D.C. 20554

James Baller
Lana Meller
The Baller Law Group
1820 Jefferson Place, N.W.
Suite 200
Washington, D.C. 20036
Attorneys for the
American Public Power Association

Thomas J. Keller
Kathy D. Smith
Verner, Liipfert, Bernhard, McPherson &
Hand, Chtd.
901 - 15th Street, N.W.
Suite 700
Washington, D.C. 20005
Counsel for the Association of
American Railroads

Thomas J. Keller
Kathy D. Smith
Verner, Liipfert, Bernhard, McPherson
& Hand, Chtd.
901 - 15th Street, N.W.
Suite 700
Washington, D.C. 20005
Counsel for the Lower Colorado
River Authority



Ryan Oremland