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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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In the Matter of)	
)	
Implementation of Section 703(e))	
of the Telecommunications Act)	CS Docket No. 97-151
Of 1996)	
)	
Amendment of the Commission's Rules)	
and Policies Governing Pole)	
Attachments)	

COMMENTS OF TEXAS UTILITIES ELECTRIC COMPANY

Texas Utilities Electric Company ("TUEC"), submits these comments on the Notice of Proposed Rulemaking (the "Notice") in the above-referenced proceeding.

DISCUSSION

The Commission has released the Notice seeking comment on the methodology that should be used to implement Section 703(e) of the Telecommunications Act of 1996 (the "1996 Act"), which requires the Commission to prescribe regulations pertaining to pole attachments used for telecommunications services. Among other things, the Notice seeks comment on whether attachments used to provide dark fiber to unrelated entities should qualify for regulated rates under Section 224, and whether the Commission should prohibit utilities from restricting overlashing.¹ For the reasons set forth more fully below, TUEC opposes any suggestion that attachments used to provide dark fiber to others should be entitled to regulated rates pursuant to Section 224. Further, TUEC disagrees with the Commission's tentative conclusion that telecommunications carriers should be permitted, without separate permitting, to

¹ TUEC will not herein address the particulars of the rate making methodologies proposed in the Notice, which will be fully analyzed in the comments of the utility industry groups participating in this proceeding. Further, TUEC will not address issues relating to the attachment of RF devices to utility poles or the use of transmission towers. Until broader jurisdictional questions regarding such matters are resolved, TUEC does not believe it makes sense to address more detailed rate questions about such facilities (which presuppose such rate jurisdiction). If nothing else, it should be clear to all concerned that the rate methodology and underlying assumptions under consideration here for pole attachments have no relationship to the costs, and burdens associated with the use, of such very different facilities.

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overlash their own lines and opposes the suggestion that entities with permitted attachments should be allowed to overlash the facilities of third parties.

I. The Commission Should Not Reach Beyond The Specific Statutory Grant Of Authority In Section 224.

Prior to the 1996 Act, regulated pole attachment rates under Section 224 applied to “any attachment of a cable television system.”² Based on this language, the United States Court of Appeals for the District of Columbia Circuit held that cable operators were entitled to regulated rates both for traditional video services and nontraditional (*i.e.*, data) services that were provided on a “commingled basis over a single network within [a] cable franchise area.”³ Thus, under the prior version of Section 224, it was essentially irrelevant what the attachment was being used for, so long as it was actually being used as an integrated part of a cable system.

Since the Heritage case was decided, Congress has amended Section 224 in several important respects. First, with respect to cable operators, the statute is now quite specific that only pole attachments used by cable systems “solely to provide cable service” are encompassed within its terms.⁴ In effect, Congress has overruled the Heritage decision in so far as it held that Section 224 applies to any cable system attachment, regardless of the use of the attachment within the system.

Second, Section 224 now also protects any pole attachment of a “provider of telecommunications service.”⁵ The rates for attachments used to provide “telecommunications service,” however, are subject to different statutory requirements and may differ under the statute from the rates applicable to pole attachments used “solely to provide cable service.”⁶ Thus, the identity of the entity requesting the attachment, as well as the type of service provided on the facilities so attached, are both relevant in determining the application of new Section 224.

² 47 U.S.C. § 224(a)(4) (1995).

³ TUEC v. FCC, 997 F.2d 925, 928-29 (D.C. Cir. 1993) (the “Heritage” case).

⁴ 47 U.S.C. § 224(d)(3).

⁵ Id. § 224(a)(4).

⁶ Id. § 224(e); see also Notice ¶ 1 (“The 1996 Act expanded the scope of Section 224 ... to telecommunications carriers and created a distinction between pole attachments used by cable systems solely to provide cable service and pole attachments used by cable systems or by telecommunications carrier to provide any telecommunications service.”).

Where Congress clearly has manifested its intent in a statute, administrative agencies are not free to substitute their own judgment.⁷ This rule of construction carries particular weight when a broader interpretation of the statute would result in a taking of private property.⁸ As the D.C. Circuit held in refusing to defer to the Commission's broad interpretation of its statutory power to order physical collocation for competitive access providers, "deference to agency action that creates a broad class of takings claims ... would allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen."⁹

In this case, the intent of Congress is clear. Section 224 explicitly identifies the entities and services that are covered by its terms. Any broader interpretation of the statute that would require utilities to provide pole attachment space to entities not specifically covered in the statute or for services that are beyond the scope of the statute would constitute a taking of private property compensable under the Fifth Amendment. The Commission, should, therefore construe the statute narrowly consistent with the express terms of Section 224.

II. The Commission Has No Authority To Prohibit Utilities From Conditioning Or Limiting The Provision Of Attachment Space For Uses Other Than Those Specifically Identified In The Statute.

As outlined above, Section 224 now specifically governs the rates for the pole attachments of cable systems used to provide cable and telecommunications service and the pole attachments of telecommunications carriers used to provide telecommunications services. Based on the holding in the Heritage case, the Commission asks in the Notice whether it should extend its pole attachment rate regulations to other uses of attachment space.¹⁰ In particular, the Commission has asked whether utilities should be able to restrict attachments used to provide dark fiber to third parties or to prohibit third-party overlashing on permitted attachments. Because these uses would exceed the scope of Section 224 and implicate substantial

⁷ E.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

⁸ Any "permanent physical occupation [of private property] authorized by the 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, 435 (1982)(the right to exclude others "has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); see also Yee v. Escondido, 112 S. Ct. 1522, 1526 (1992).

⁹ Bell Atlantic Tel. Co. v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

¹⁰ Notice ¶ 13.

takings concerns, TUEC opposes any Commission regulation that would attempt to extend the protections of Section 224 to such attachments.

A. The Provision Of Dark Fiber Is Not A Cable Or Telecommunications Service And, Therefore, Attachments Used To Provide Dark Fiber Are Not Governed By Section 224.

Nowhere in the text of Section 224 or in the legislative history of the statute is there any indication that Congress intended for regulated attachment rates to apply to attachments used only to provide transmission capacity to third parties, *i.e.*, dark fiber. Therefore, unless dark fiber is itself a cable or telecommunications service, attachments used to provide dark fiber are not governed by Section 224. Based on the statutory definitions of these terms and Commission precedent, it is clear that the provision of dark fiber does not constitute a cable or telecommunications service.

“Cable service” is defined in the Communications Act of 1934, as amended, as “the one-way transmission to subscribers of (i) video programming, or (ii) other programming service.”¹¹ “Telecommunications service,” on the other hand, is defined 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.”¹² “Telecommunications,” in turn, is defined as the “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”¹³

Based on these statutory definitions, it is clear that the provision of dark fiber is not a cable or telecommunications service. The provision of dark fiber does not involve the transmission of video programming or any other programming service. Indeed, the provision of dark fiber does not involve any “transmission” at all. Dark fiber is merely a facility; a pipeline through which others may or may not transmit information. For this reason, the provision of dark fiber also does not constitute a “telecommunications service.” When one entity provides dark fiber to another, it does not “transmit” any information, much less information of the user’s choosing. As a definitional matter, therefore, dark fiber is not a cable or telecommunications service.

¹¹ 47 U.S.C. § 602(6).

¹² *Id.* § 153(46).

¹³ *Id.* § 153(43).

Because dark fiber is not a cable or telecommunications service, attachments used to provide it are not governed by Section 224. Nor should they be. Section 224 was intended to promote competition in the cable and telecommunications markets. There is no suggestion in the statute or the legislative history of the statute that it was intended to create an arbitrage market in which entities entitled to regulated pole attachment rates could take advantage of their artificially low rates to sublease attached facilities to others at a discount off market rates.

Indeed, were that the case, there would be no market rates left. Cable and telecommunications service entities would be able to obtain attachments at the regulated rates, sublease capacity to other entities who otherwise would have to go directly to the utility to employ its poles, and the only parties that would profit from the utilities' poles would be the cable and telecommunications carriers making a market in attachments. This clearly was not the intent of the statute. Any party seeking an attachment for any non-regulated use can and should deal directly with the owner of the poles to which it seeks to attach its facilities. The Commission has no congressional mandate to deprive utilities of the right to so enjoy the fruits of their property. Further, like any holder of a valuable property, it is reasonable for a utility to ask that it have direct privity with the users of its property so as, among other things, to be in the best possible position to understand and limit its potential liability exposure.

Thus, extending regulated rates to pole attachments used to provide dark fiber not only would be bad policy and beyond the Commission's statutory authority, it also would raise significant constitutional questions. For all of these reasons, the Commission should reject any suggestion that it should regulate pole attachments used to provide dark fiber to third parties. To the contrary, given that separate rates now may apply to attachments used for cable, telecommunications, and other services or uses (that are not entitled to any regulated rate), utilities should be permitted to restrict attaching entities to using their attachments for the purpose for which their statutorily mandated rates apply. Additional uses, unprotected by statute, should be a matter left solely to negotiation between the parties and market rates. Further, a utility should be permitted to require certification provisions to protect against unauthorized uses. Otherwise, the Commission's rules will be easily circumvented by cable and telecommunications companies seeking to take advantage of the arbitrage opportunity.

B. Overlapping To Permitted Attachments Is Not Protected By Section 224.

In the Notice, the Commission tentatively concluded that “telecommunications carriers should be permitted to overlap their existing lines with additional fiber when building out their systems.”¹⁴ The Commission goes on in the Notice to ask whether telecommunications carriers should be permitted to allow third parties to “use the overlashed facility” and whether third parties should be permitted to overlap their own facilities to existing attachments of cable systems or telecommunications carriers.¹⁵ For many of the reasons set forth above, TUEC opposes these suggestions and respectfully requests that the Commission reconsider its tentative conclusion.

To begin with, entities with permitted attachments should not be allowed to overlap facilities at their discretion. Absent a specific agreement between the parties to the contrary, any party seeking to overlap a facility should be required to contact the pole owner and obtain express authority to do so. Like any other attachment, overlapping adds to the weight on the supporting pole and it increases the diameter (and hence the wind resistance) of the cables strung on the pole. In addition, the increased surface area of the attached lines allows greater amounts of ice and water to accumulate in storms. Thus, overlapping creates significant safety and engineering concerns that are not addressed by a rule that would allow an attaching party to overlap at will.

For these reasons, the Commission should reconsider its tentative conclusion that telecommunications carriers should be permitted to overlap their own lines. Instead, each instance of overlapping should be treated as a separate attachment; each requiring its own engineering study and fee. A contrary rule will simply allow parties to game the system and avoid attachment fees, while simultaneously increasing the difficulty of maintaining poles in a safe condition. Indeed, the Edison Electric Institute and UTC, the Telecommunications Association, report that cable and telecommunications providers already are engaging in “wholesale evasion of attachment fees by means of overlapping.”¹⁶ Rather than promote this conduct, the Commission should implement rules that will provide pole owners with the flexibility to monitor overlapping and to charge for overlapping when it is found.

¹⁴ Notice ¶ 15.

¹⁵ Id.

¹⁶ Amendment of the Rules and Policies Governing Pole Attachments, CS Docket No. 97-98 Comments of The Edison Electric Institute and UTC, The Telecommunications Association (filed June 27, 1997) at 36.

Even if the Commission concludes that telecommunications carriers should be permitted to overlash their own facilities for purposes of "building out their systems," neither cable systems nor telecommunications carriers should be permitted to sublease their attachments to others by means of overlashing. For all of the reasons set forth above, the provision of bare capacity, whether in the form of dark fiber or by means of overlashing, does not constitute a cable or telecommunications service under Section 224.

Further, the potential for abuse of the system inherent in the scheme suggested in the Notice far outweighs any possible benefit. Entities with existing attachments would be permitted to overlash fiber for others, at a fee, while paying no additional fee to the pole owner. Nonetheless, it is the pole owner that provides the plant affected by attachments, and it is the pole owner that will incur the additional expenses of maintaining a pole with increased weight, increased wind resistance, and increased ice and wind-loading problems. That is, the scheme suggested in the Notice would result in a plain transfer of property from pole owners to cable operators and telecommunications carriers. Such a course is beyond the scope and intent of Section 224, and would constitute an unconstitutional taking without just compensation under the Fifth Amendment.

CONCLUSION

For the reasons set forth above, TUEC opposes the suggestions in the Notice that the Commission should extend its regulations promulgated pursuant to Section 224 to include overlashed facilities and attachments used to provide dark fiber to others.

Respectfully submitted,
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