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

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

REPLY OF TEXAS UTILITIES ELECTRIC COMPANY

Texas Utilities Electric Company ("TUEC"), submits this reply to the comments filed in the above-referenced proceeding.

DISCUSSION

Based on the comments filed, two points should be clear. First, as virtually every commenting party — with the exception of those representing the franchised cable interests — noted, the earlier decisions by the Commission and the court in the Heritage case[1] have been superseded by the Telecommunications Act of 1996 (the "1996 Act").[2] Second, although certain parties seeking attachments would have the Commission promulgate rules requiring utilities, in essence, to transfer their property interest in their poles to the attaching entities, the Commission has no authority or general mandate from Congress to do so. For these reasons alone, the Commission should avoid creating regulations that would deny utilities a reasonable opportunity to manage, and enjoy the benefits of, their poles.

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[1] Heritage Cablevision Association of Dallas, L.P. v. TUEC, 6 FCC Rcd 7099 (1991); aff'd TUEC v. FCC, 997 F.2d 925 (D.C. Cir. 1993).

[2] See, e.g., Comments MCI at 3-4; Comments of Ameritech at 4; Comments of Duquesne Light Company at 21-23; Joint Comments of the Edison Electric Institute and UTC, The Telecommunications Association at 9-10; Comments of Ohio Edison Company at 23; Comments of Union Electric Company at 19; Comments of USTA at 3.

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List A B C D E

I. The Commission Should Not Base Its Interpretation Of Section 224 On The Heritage Decisions, Which Were Issued Prior To The 1996 Act Amendments.

Sections 224(d)(3) and 224(e)(1) now explicitly distinguish between cable services and telecommunications services, even when both are provided by a cable television system. Section 224(d)(3) limits 224(d)(1) cost treatment solely to cable attachments providing cable-only services.[3] The clear intent is to provide favorable rates for cable services, not cable operators. Thus, as virtually every commenting party recognized, new Section 224 is unlike its predecessor, which focused almost exclusively on the identity of the entity requesting attachment. For this reason, the Commission should not promulgate rules under new Section 224 that are based on constructions of the statute made prior to the 1996 Act amendments.

Specifically, the Commission should not extend its holding in the Heritage case. To do so not only would contravene plainly stated Congressional intent, it would also create competitive imbalances in newly-opened markets.[4] One of the overarching goals of the 1996 Act was to promote competition between cable operators and telecommunications carriers. If the Commission, however, continues to rely on, and indeed extends, its Heritage decision such that cable operators offering telecommunications services will receive different, and presumably better, attachment rates than telecommunications carriers providing the same service, the Commission will create a competitive disparity that will distort competition in the market.

Instead, to qualify for the Section 224(d)(1) cable rate, cable operators should be required to certify that the attachment in question will be used, in fact, solely for cable service as directed by the statute.[5] Attachments used to provide telecommunications services, on the other hand, even when provided by a cable operator, are entitled to rates established in accordance with Section 224(e)(1), and attachments used to provide neither cable nor telecommunications services, *e.g.*, attachments used to provide dark fiber, should not be entitled to regulated cable or telecommunications rates.[6] This

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[3] 47 U.S.C. § 224(d)(3).

[4] See Comments of MCI at 5 (if cable companies are allowed to receive cable attachment rates for attachments or overlashed facilities that are used to provide non-cable services, including telecommunications services, cable operators will benefit from unduly preferential rates).

[5] See Comments of the Edison Electric Institute and UTC, The Telecommunications Association at 10.

[6] As one party correctly noted, "dark Fiber ... does not constitute 'telecommunication' which is defined under the Act as the transmission of information between or among points, as specified by the user. Further dark fiber is not typically offered directly to the public on an indiscriminate basis, and is therefore not the rendering of a telecommunications service." Id. at 14 (emphasis in original).

interpretation fully accords with the new statute and would avoid the competitive disparity problems that arise when attachment rates are set, as they were under the prior version of Section 224, based on the identity of the attaching entity rather than the services that will be provided.

II. Section 224 Authorizes The Commission To Regulate Pole Attachment Rates For Specific Entities Providing Specific Services.

According to NCTA, "permitting third parties to use dark fiber within a carrier's original lines will enhance competition by increasing the number of entities able to offer service over limited capacity pole plant."[7] It uses a similar argument to justify third party overlashing. These arguments and those like them should be rejected.

There is no doubt that "pole plant capacity" is limited and it may well be true that new entrants into other markets will need access to some pole capacity in order to compete. The issue that NCTA has carefully avoided, however, is not whether new entrants should be able to obtain pole attachments, but rather who should be compensated for such attachments — the owner of the pole or an entity such as a cable operator or telecommunications carrier that is the beneficiary of an artificially low regulated attachment rate.

Rather than grapple with this issue, NCTA merely assumes, based on the Heritage case, that cable operators may make "cable" attachments at "cable" rates under Section 224(d)(1) for the purpose, not of providing cable service, but to lease line capacity or overlashing space to others. Such a assumption would be shocking in any other context. Pole owners have property interests in their poles. They may, with the exceptions specifically enumerated in Section 224, control who may have access to their poles and determine the terms on which they may do so.

As Ameritech noted in its comments, the "right to attach is not a property interest assignable by the attaching party, but rather is a service personal to the attaching party."[8] Much as the cable operators would like it to, Section 224 does not divest utilities of their ownership rights in their poles in favor of cable operators or any other entity.

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[7] Comments of NCTA at 9.
[8] Comments of Ameritech at 5.

To the extent that new entrants desire access to utility poles for the purpose of providing cable, telecommunications, or any other service, they may negotiate with the pole owner, in accordance with the limitations and restrictions of Section 224. NCTA's claim that there are no countervailing "considerations" arguing against the subleasing of dark fiber or overlashed facilities misses the most important such "consideration" — the poles do not belong to the attaching entity and the statute does not provide that pole ownership passes upon attachment. SBC Communications, Inc. made this point most clearly, noting that a Commission requirement that pole owners allow subleasing would "give attachers an attribute of ownership that Section 224 does not authorize. Section 224 does require utilities to allow attachers to have access for purposes of providing telecommunications or cable services, but it does not require access for purposes of subleasing or sublicensing space to third parties."[9]

Arguments premised on the assertion that subleasing dark fiber or overlashed facilities does "not require additional physical pole space and therefore [is] not appropriately subject to an additional attachment fee,"[10] similarly miss the point. At the outset, the Commission should note that the premise of the argument is, at least partially, flat wrong; overlashing does impose additional physical requirements on the poles to which the primary facilities are attached. Moreover, the ultimate question is not whether subleasing requires additional attachment space or adds weight to attachments, but whether the statute passed by Congress authorizes the Commission to regulate utilities' ownership and management of their own poles with respect to attachments used for anything but cable and telecommunications services. It does not.

Suggestions that attaching entities should be permitted to overlash their facilities at will also defies common sense. As Ameritech explained in its comments, "physical access to the pole (or conduit) requires notice to, and coordination with, the pole owner to ensure that the workers have the training and skill adequate for the job and.... to ensure that poles are safely and effectively managed by the pole owner."[11] Simply put, a utility must have adequate information to evaluate the loading on poles in order to

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[9] See Comments of SBC Communications, Inc., at 9-10.

[10] E.g., Comments of KMC Telecom, Inc. at 8. KMC also posits that such restrictions would be difficult to police. That, of course, is a red herring. The Commission need not prohibit attachments used for non-Section 224 services; it merely should leave pole owners free to regulate such attachments. To the extent that a pole owner elects to do so, enforcement will be the pole owner's problem.

[11] Comments of Ameritech at 5.

ensure that attachments do not exceed pole capacity and risk, not only service interruptions, but physical damage to life and property.[12]

Finally, allowing attaching entities to sublease their attached facilities will create an unintended arbitrage opportunity wherein cable operators, for instance, will be "able to fully capture the difference between the cable and telecommunications rates."[13] Having added nothing of value (and lacking any ownership interest in the poles), cable operators and telecommunications carriers benefiting from below-market rates for their attachments should not be allowed to expropriate from the pole owner the attachment fees of others. Congress amended Section 224 to promote competition in the cable and telecommunications markets, not for the purpose of transferring the most fundamental incidents of pole ownership from utilities to cable and telecommunications carriers.

CONCLUSION

TUEC opposes the extension of regulated rates to attachments used to sublease capacity, whether through the provision of dark fiber or by means of overlashing.

Respectfully submitted,
TEXAS UTILITIES ELECTRIC COMPANY

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[12] See Comments of the City of Colorado Springs at 3.
[13] Comments of MCI at 6.