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

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)	

CONSOLIDATED COMMENTS OF
TEXAS UTILITIES ELECTRIC COMPANY

Texas Utilities Electric Company ("TUEC"), submits these consolidated comments on the petitions for reconsideration filed regarding the Report and Order (the "Order") released February 6, 1998, in the above-referenced proceeding.

DISCUSSION

The petitions for reconsideration filed in this proceeding make four points clearly. First, the Commission's reliance on the Heritage decision¹ for support of its new pole attachment rules is misplaced. The Heritage court did not make broad policy pronouncements in its decision, but simply determined that the Commission's interpretation of the then-applicable statutory language was reasonable. The language of Section 224 that was at the heart of the decision, however, has since been changed by Congress. TUEC, therefore, supports those petitions for reconsideration that have questioned the Commission's application of, much less the expansion of, the Heritage decision.²

Second, the Commission's effort to extend Section 224 regulated pole attachment rates to attachments used to provide Internet services or to lease dark fiber to others is an exercise in policy making that has no anchor in the text of the statute. TUEC

¹ Texas Utilities Co. v. FCC, 997 F.2d 925 (D.C. Cir. 1993).

² See, e.g., Petition for Reconsideration and Clarification of SBC Communications Inc. at 5 & n.12; Petition for Reconsideration of MCI Telecommunications Corporation at 4-6.

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therefore supports those parties who have petitioned the Commission to reconsider those aspects of the Order.³

Third, TUEC agrees with MCI that "the Commission's treatment of third party overlashing is seriously flawed."⁴ The distinctions that the Commission's rules now involve are unworkable in practice and will invite abuse by attaching entities. The Commission should, therefore, deem all overlashed facilities, regardless of ownership, to be separate attachments.

Finally, TUEC agrees that the Commission erred in attempting to "force the square peg of wireless attachments into the round hole of the pole attachment formula."⁵ TUEC therefore supports reconsideration of that decision.

I. The Commission Has Erred In Its Application Of The Heritage Decision.

As SBC Communications points out, the Commission's reliance on the Heritage case for its conclusion that it may regulate attachment rates beyond the authority granted in Sections 224(d) and (e) is fundamentally in error.⁶ The Commission concluded in the Order that the Heritage decision was not "overruled" by the 1996 Act changes to Section 224.⁷ To the extent it was not, however, it has at least been overtaken by those changes. In light of the new text of Section 224, Heritage now supports the conclusion that the Section 224(d) rate should apply only to attachments used to provide cable television service, and that Section 224(e) rates should apply only to attachments used to provide telecommunications services.

The court's decision in Heritage was not, as the Commission suggests in the Order, based upon broad policy considerations, but instead was an exercise in traditional statutory interpretation using the familiar Chevron analysis.⁸ At the time of the decision, Section 224 applied regulated rates to "any attachment by a cable television system." The court concluded that this term was ambiguous in that it was

³ See, e.g., Petition for Reconsideration of USTA at 3-8; Petition of Bell Atlantic for Reconsideration or Clarification at 3-6.

⁴ MCI Petition at 8.

⁵ Joint Petition for Clarification and/or Reconsideration of the Edison Electric Institute ("EEI") and UTC, The Telecommunications Association ("UTC") at 13.

⁶ SBC Petition at 5 n.12.

⁷ Order ¶ 30.

⁸ Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

“not entirely clear whether the statute places greater emphasis on the type of service to be distributed over the attachment or the type of entity doing the attaching.”⁹

Given this ambiguity, and even though the “Commission certainly was not able to come up with any ‘hard’ evidence that Congress wanted or expected the FCC to regulate pole attachments transmitting nonvideo communications,” the court concluded that the Commission’s interpretation of the statute, which placed greater emphasis on the type of entity doing the attaching than on the type of service being distributed, was reasonable.¹⁰ The Court found the Commission’s interpretation reasonable only because it was “unable to find in the [statutory text] or its legislative history a clearly expressed intent on the part of Congress to limit the FCC’s jurisdiction to pole attachments that are used strictly for traditional video programming.”¹¹ That is no longer the case.

Since the court’s decision in Heritage, Section 224 has changed in important respects. The emphasis in the rate regulation sections no longer is upon the type of entity doing the attaching, but upon the services provided on the attached facilities. New Section 224(d) evidences a “clearly expressed intent on the part of Congress” to limit the Commission’s cable pole attachment rates to pole attachments used “solely to provide cable service.”¹² Likewise, Section 224(e) applies to “pole attachments used by telecommunications carriers to provide telecommunications services.”¹³

Thus, far from supporting the Commission’s expansive reading of Section 224, Heritage suggests that, had the statutory text been what it is today, the Court would not have found it “ambiguous.” To the contrary, given the clear service-specific limitations in Sections 224(d) and (e), the Commission’s interpretation of Section 224 seems wildly inconsistent with the terms of the statute. As SBC Communications explained:

The R & O is in error in assuming that a cable operator’s commingled provision of cable service and data transmission or other nonvideo broadband services can use attachments at the pre-existing cable services rate. Heritage did not construe Section 224(b)(1) to provide the Commission with some general authority over pole attachments; and thus the R & O improperly extends the Heritage holding to a very different Section 224 that includes two regulated rate methods: one solely for cable service use and one for telecommunications. A cable operator’s

⁹ Heritage, 997 F.2d at 930.

¹⁰ Id. at 933.

¹¹ Id. at 927.

¹² 47 U.S.C. § 224(d).

¹³ Id. 224(e)(1).

nonvideo broadband services certainly do not fit in the former, although they may fit into the latter, category.¹⁴

On this basis, TUEC supports reconsideration of the Commission's interpretation of the Heritage decision. Under new Section 224 and the Court's reasoning in Heritage, it should be clear that attaching entities are entitled to regulated rates only to the extent that they are using their attachments to provide the services identified for special treatment in the statute.

II. The Commission's Interpretation Of Section 224 Discounts The Plain Meaning Of The Statute In Favor Of Policy Considerations That Are In No Way Anchored In The Text.

As several parties have noted in their petitions, the Order went beyond the statutory bounds of Section 224 to the extent that it permits cable operators to obtain cable pole attachment rates under Section 224(d) for attachments used to provide non-cable services.¹⁵ Similarly, the Commission has authority under Section 224(e) to regulate rates for attachments used to provide telecommunications services. The Commission does not, contrary to the suggestions in the Order, have authority to regulate rates for attachments used to provide non-cable or non-telecommunications services. Nonetheless, the rules adopted in the Order extend regulated pole attachment rates to attachments used to provide services beyond those identified in the statute.

For instance, the Commission rightly concluded that "commingled Internet services" provided by a cable operator are not "telecommunications services," and that attachments used to provide Internet services are not, therefore, entitled to Section 224(e) rates.¹⁶ In an abrupt about-face, however, the Commission concluded that attachments used to provide "commingled Internet services" should be subject to Section 224(d) cable rates "[r]egardless of whether such commingled services constitute 'solely cable services' under Section 224(d)(3)."¹⁷ Unquestionably, however, Internet service is no more "cable service" than it is "telecommunications service."¹⁸

¹⁴ SBC Petition at 5 n.12.

¹⁵ See, e.g., MCI Petition at 4-6; SBC Petition at 4-7.

¹⁶ Order ¶ 33.

¹⁷ Id. ¶ 34.

¹⁸ Similarly, as EEI and UTC point out, data services, dark fiber leasing, and overlashing should be entitled to regulated rates only in so far as they constitute cable or telecommunications services. See Petition of EEI and UTC at 12 n.14.

In support of its expansive reading of Section 224, the Commission discounts the text of the statute and relies instead upon what it finds to be the pro-competitive purpose of the statute as evidenced primarily by a few passages of legislative history.¹⁹ The Supreme Court has cautioned, however, that courts and agencies should not give authoritative weight to a passage of legislative history that is not reflected in the text of the statute.²⁰

Further, as noted in the petitions for reconsideration, extending regulated rates to attachments of certain entities without regard to the service actually provided using the attachments may confer unfair and unintended competitive advantages to the entities receiving the favored rates.²¹ Thus, even to the extent that policy considerations weigh in the interpretation of Section 224, it is not clear that they support the Commission's expansive reading of the statute.

To the contrary, where, as in this case, the Commission is acting on the margins of its authority (*i.e.*, the Commission does not regulate utilities in the same comprehensive way that it does radio licensees, for instance), it should, as a prudential matter, construe statutory grants of authority narrowly. TUEC therefore supports reconsideration of those aspects of the Order that seek to apply regulated rates to services not specifically identified in Section 224.

III. The Commission's Rules With Respect To Overlapping Will Invite Abuses.

In the Order the Commission draws an artificial distinction between overlapping of "one's own pole attachment" and "third party overlapping."²² With respect to the former, the Commission concludes that "overlapping one's own pole attachment should be permitted without additional charge."²³ Third party overlapping, on the other hand, is deemed to be a separate attachment under the Commission's rules.²⁴

This distinction will invite gamesmanship and abuse by attaching entities. Whatever the actual economic interests involved, attaching entities and their customers

¹⁹ Order ¶ 34 & n.130 (citing Conf. Rep. to S. 652 and Joint Explanatory Statement of the Committee of Conference, 104th Cong., 2d Sess. 98-100).

²⁰ Shannon v. United States, 114 S. Ct. 2419, 2426 (1994).

²¹ See Comments of MCI at 6 (cable operators will be "able to fully capture the difference between the cable and telecommunications rates").

²² See Order ¶¶ 61-69.

²³ Id. ¶ 64.

²⁴ Id. ¶ 69.

will “paper” their transactions to make overlashed facilities appear to be owned by the host-entity. This gamesmanship will simply compound the already considerable problems faced by pole owners in determining who owns overlashed cable. The Commission, then, must either engage in difficult case-by-case line-drawing to determine the actual ownership of overlashed facilities, or accept the fact that its rules have been, and will be, gamed. Unless the Commission is willing to engage in this careful line-drawing, the only consistent, uniform, and fair approach to overlashing is to deem any overlashed facility to be a separate attachment, regardless of ownership.

IV. The Commission Erred in Extending The Statute To Cover Attachments Used To Provide Wireless Services.

Finally, TUEC supports those parties who have called for reconsideration of the Commission’s decision to apply its pole attachment rules to wireless attachments. As EEI and UTC point out, there are “significant distinctions between traditional pole attachments and wireless attachments in terms of the types of equipment, types of facilities, location of attachments, and impact on utility equipment.”²⁵ For that reason, industry practice and the Commission’s pole attachment rules have traditionally contemplated only attachments used to provide wired services.

There is no reason to assume that the statute was meant to expand this understanding. Section 224(a)(1) defines the category of entities to which the pole attachment rules should apply as those who “own poles, ducts, conduits or rights of way used, in whole or in part, for any wire communications.”²⁶ That is, the jurisdictional reach of the statute is consistent with the conventional understanding of pole attachments — that they apply to wired connections. The Commission’s expansion of the statute to include attachments used for wireless communications, therefore, should be reconsidered

²⁵ Petition of EEI and UTC at 13.

²⁶ 47 U.S.C. § 224(a)(1).

CONCLUSION

For the reasons set forth above, TUEC supports reconsideration of the Commission's decision to the extent that it extends the pole attachment rules beyond the express terms of Section 224.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 1998, I caused copies of the foregoing Consolidated Comments of Texas Utilities Electric Company to be served by first class mail on the following:

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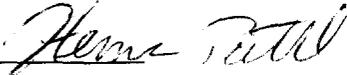
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