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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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

Dear Ms. Salas:

On behalf of WinStar Communications Inc., please find enclosed for filing an original and eleven copies of WinStar's reply to comments supporting and opposing Petitions for Reconsideration filed in the above referenced proceeding.

Should you have any questions regarding this filing, please contact the undersigned.

Sincerely,

Michael F. Finn

Michael F. Finn

Enclosures

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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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In the Matter of)
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Implementation of Section 703(e))
of the Telecommunications Act)
of 1996)
)
Amendment of the Commission's)
Rules and Policies Governing)
Pole Attachments)

CS Docket No. 97-151

REPLY OF WINSTAR COMMUNICATIONS, INC.

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May 22, 1998

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SUMMARY

Both SBC and Texas Utilities Electric Company ("TUEC") argue that attachments by wireless carriers are beyond the scope of Section 224. This view is contrary to the plain language of the statute and prior Commission precedent. Accordingly, the Commission should confirm that wireless carriers are entitled to the benefits and protections of Section 224.

EI/UTC and Sprint erroneously assert that the issue of access to utilities' rooftop rights-of-way was considered and rejected by the Commission in the Local Competition Order. However, the Commission only decided that utilities need not make space available on the roofs of their corporate offices. Hence, the issue of access to rights-of-ways secured by utilities on building rooftops is properly before the Commission in this proceeding.

Both EI/UTC and GTE overstate the potential difficulties faced by utilities in granting access to private rights-of-way, including rights-of-way to building rooftops. Commission precedent and prior case law support a broad view of utilities' ability to grant telecommunications carriers access to rights-of-way. Moreover, use by utilities of poles, ducts, conduits, and rights-of-way in support of their own and others' telecommunications offerings, including wireless telecommunications offerings, further undercuts arguments that private rights-of-way can not be made available to telecommunications carriers.

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REPLY OF WINSTAR COMMUNICATIONS, INC.

WinStar Communications, Inc. ("WinStar"), by its attorneys, hereby files its Reply to Oppositions filed in response to Petitions for Reconsideration of the above-captioned proceeding.¹

I. INTRODUCTION.

Wireless competitive local exchange carriers ("CLECs") such as WinStar require access to building rooftops, risers, and inside wiring in order to deliver their services. As detailed by both WinStar and Teligent in their comments in this proceeding, many landlords and building owners have attempted to exact monopoly rents in exchange for building access or refused access altogether, despite granting access to utilities and incumbent local exchange carriers ("ILECs"). Without recourse to the provisions of Section

¹ Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Report and Order, FCC 98-20 (rel. Feb. 6, 1998) ("Order").

224, wireless CLECs such as WinStar will be unable to negotiate reasonable rates, terms, and conditions for access to buildings through utilities' poles, ducts, conduits, and rights-of-way and, consequently, will be unable to offer competitively-priced wireless services. Clarification that Section 224's reference to "rights-of-way" contemplates reasonable access to buildings will ensure that wireless CLECs can compete on equal footing with ILECs and effectuate Congress' goal of competition in the local loop.²

II. WIRELESS CARRIERS ARE ENTITLED TO THE BENEFITS AND PROTECTIONS OF SECTION 224.

SBC and Texas Utilities Electric Company ("TUEC") support the Edison Electric Institute and UTC, the Telecommunications Association's ("EEI/UTC") Petition for Reconsideration and continue to dispute the application of Section 224 to wireless carriers.³ SBC argues that application of Section 224 to wireless attachments is "unfair and discriminatory" because utilities will be required to provide wireless access at "rent control" prices while non-utility building owners will be permitted to

² It should be noted that the number of parties that actually will require access to building rooftops, risers, and inside wiring will be quite limited, *i.e.*, only those parties seeking to install their own facilities (facilities-based carriers) will have a need to secure access to rooftops, risers, and inside wiring under Section 224. Resellers and many fiber carriers use existing ILEC facilities in the building and thus do not require physical access.

³ See SBC Comments on Petitions for Reconsideration at 17-18; TUEC Comments on Petitions for Reconsideration at 6.

charge rates that are "hundreds of times higher than the regulated rates."⁴ However, as made clear by WinStar and AT&T in their oppositions to EEI/UTC's petition, the plain language of the Telecommunications Act of 1996 and the Commission's decisions in this and other proceedings make clear that Congress intended the provisions of Section 224 to apply to all "telecommunications carriers," including wireless carriers.⁵ Moreover, in extending the protections of Section 224 to all telecommunications carriers, Congress deliberately sought to remove bottleneck facilities, such as poles, ducts, conduits, and rights-of-way from utility (including ILEC) control.⁶

TUEC argues that Section 224 does not extend to wireless carriers because "Section 224(a)(1) defines the category of entities to which the pole attachment rules

⁴ SBC Comments on Petitions for Reconsideration at 17-18.

⁵ The statute plainly states that the pole attachment provisions of Section 224 apply to "telecommunications carriers." 47 U.S.C. § 224(e)(1). As defined in Section 3(44), the term "telecommunications carrier" means "any provider of telecommunications services." 47 U.S.C. § 3(44) (emphasis added). The Commission has recognized that use of the word "any" precludes limiting telecommunications carriers to wireline providers. See Order at ¶ 40; WinStar Comments Supporting and Opposing Petitions for Reconsideration at 3-4; AT&T Opposition to Petitions for Reconsideration at 2-3.

⁶ See Order at ¶¶ 3-4. In implementing the provisions of Section 224, the Commission made clear that "for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers . . . access to its poles." Id. at ¶ 5.

should apply as those who 'own poles, ducts, conduits or rights-of-way used, in whole or in part, for any wire communications.'"⁷ TUEC's interpretation of Section 224(a)(1) is incorrect. This provision defines which utilities are subject to the terms of Section 224 and is irrelevant to the issue of which carriers are entitled to access. As detailed above and in WinStar's opposition to EEI/UTC's petition, the Commission has correctly concluded that all telecommunications carriers are entitled to the protections of Section 224.⁸

III. THE ISSUE OF UTILITIES' ROOFTOP RIGHTS-OF-WAY IS PROPERLY BEFORE THE COMMISSION.

In opposing Teligent's Petition for Reconsideration of the Commission's Order, EEI/UTC and Sprint erroneously assert that the Commission resolved the issue of rooftop access in the Local Competition Order.⁹ As set forth in WinStar's reply comments, the Local Competition Order held only that utilities need not make space available on the

⁷ TUEC Comments on Petitions for Reconsideration at 6.

⁸ See Order at ¶ 39 ("Wireless carriers are entitled to the benefits and protection of Section 224."); WinStar Comments Supporting and Opposing Petitions for Reconsideration at 3-4.

⁹ See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 96-98, CC Docket No. 95-185, *First Report and Order*, 11 FCC Rcd. 15499, at ¶ 1185 (1996) ("Local Competition Order"); see also EEI/UTC Comments on Petitions for Reconsideration at 16-17; Sprint Comments on Petitions for Reconsideration at 1-2.

roofs of their corporate offices for installation of equipment by telecommunications carriers.¹⁰ It did not reach the question of whether utilities must make space available on the roofs of commercial structures or multiple dwelling units where they own or control the right of access or use. Therefore, the issue of access to utilities' rooftop rights-of-way is properly raised in this proceeding.

IV. UTILITIES HAVE OVERSTATED THEIR INABILITY TO GRANT TELECOMMUNICATIONS CARRIERS ACCESS TO PRIVATE RIGHTS-OF-WAY.

A. Commission Precedent and Case Law Support a Broad View of Telecommunications Carriers' Access to Utility Rights-of Way.

Both GTE and EEI/UTC argue that utilities lack the authority to grant telecommunications carriers access to their rights-of-way over the property of third parties or to otherwise expand easements to accommodate requests for access.¹¹ These arguments are contradicted by Commission precedent and case law concerning the scope of cable operators' access to utility easements under the Cable Act and state property law.

As an initial matter, GTE and EEI/UTC's arguments are contrary to the Commission's explicit findings in the Local

¹⁰ See Local Competition Order at ¶ 1185; see also WinStar Reply Comments at 3 n.5.

¹¹ See GTE Comments on Petitions for Reconsideration at 3; EEI/UTC Comments on Petitions for Reconsideration at 17-18. It should also be noted that GTE concedes in its comments that "some easements and rights-of-way for commercial purposes may be alienable and transferable to other companies." GTE Comments on Petitions for Reconsideration at 4.

Competition Order. There, the Commission held that Section 224 commands utilities to "exercise their powers of eminent domain in order to establish new rights-of-way for the benefit of third parties."¹² Hence, a utility will be "expected to expand an existing right-of-way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments."¹³ The Local Competition Order also suggests that rooftop rights-of-way must be made available insofar as the rights-of-way are a component of the utilities' distribution network.¹⁴

GTE and EEI/UTC's views are further belied by cases interpreting Section 621(a)(2) of the Cable Act, which provides cable operators with access to public rights-of-way and easements dedicated for compatible uses by utilities.¹⁵ As noted by WinStar and Teligent in their reply comments, courts have interpreted Section 621(a)(2) broadly to provide cable franchisees access to easements dedicated to electric, gas, and other utility transmissions.¹⁶ For example, the

¹² Local Competition Order at ¶ 1181.

¹³ Id.

¹⁴ See id. at ¶ 1185 ("The intent of Congress in section 224(f) was to permit cable operators and telecommunications carriers to 'piggyback' along distribution networks owned or controlled by utilities.").

¹⁵ See 47 U.S.C. § 541(a)(2).

¹⁶ See WinStar Reply Comments at 13-15; Teligent Reply Comments at 11-13.

Eleventh Circuit held that Section 621(a)(2) was intended to forbid any private agreements that would prevent a cable franchisee from using dedicated utility easements.¹⁷ The court concluded that it would be inconsistent with the policy of the Cable Act to hold that cable operators could not "piggyback" on access rights granted to other utilities where the exercise of such rights was necessary to the full enjoyment of the related easements.¹⁸ Although the Cable Act does not permit access to private easements, Section 224 applies fully to both public and private easements and rights-of-way.¹⁹ Consequently, these precedents should apply with full force to both public and private easements under Section 224.

Similarly, courts have construed broadly the scope of utility easements under state property law to include the right to string cable television wires along existing utility and telephone easements and rights-of-way. For instance, the Fourth Circuit concluded that West Virginia law construes easements to give easement holders the right to utilize technological improvements, including the

¹⁷ See Centel Cable v. White Dev. Corp., 902 F.2d 905, 909 (11th Cir. 1990).

¹⁸ Id.

¹⁹ Congress was well aware of the fact that rights-of-way may be public or private, as evidenced by Section 253(c)'s preservation of state and local authority over "public rights-of-way." Hence, Congress' use of the term "rights-of-way" without qualifiers in Section 224 indicates that the term includes both public and private rights-of-way. See WinStar Comments at 4 n.8.

addition of cable television wires to communications wires already authorized under a utility right-of-way.²⁰ Many state courts have come to similar conclusions. For example, a California court held that the installation of cable television equipment to an easement originally granted by a private party for use by a utility does not materially increase the burden on the property.²¹ Similarly, a New York court held that easements retained by power and telephone utilities may be apportioned to permit use by a cable company without compensation to the property owner.²² These cases contradict statements by GTE that utilities lack authority under state law to grant telecommunications carriers access to rights-of-way.²³

B. Utilities Use Their Existing Assets, Including Rights-of-Way, for Telecommunications Offerings.

GTE and EEI/UTC's arguments that they are unable to provide access to telecommunications carriers are also undermined by many utilities' use of their poles, ducts, conduits, and rights-of-way for their own and others'

²⁰ See C/R TV, Inc. v. Shannondale, Inc., 27 F.3d 104, 109 (4th Cir. 1994).

²¹ See Salvaty v. Falcon Cable Television, 165 Cal. App. 3d 798, 803 (Cal. Ct. App. 1985).

²² See Hoffman v. Capitol Cablevision Sys., Inc., 383 N.Y.S.2d 674, 677 (N.Y. App. Div. 1976) ("Commercial easements in gross for utilities are particularly alienable and transferable" due to a policy of broadly interpreting easements "to meet progressive inventions.").

²³ See GTE Comments on Petitions for Reconsideration at 3-4.

telecommunications offerings. Utility rights-of-way are ubiquitous.²⁴ As noted in WinStar's Comments Supporting and Opposing Petitions for Reconsideration, electric utility companies such as Southern Company and Texas Utilities are using their existing assets, including poles, ducts, conduits, and rights-of-way, in support of wireless telecommunications offerings.²⁵ A review of the dozens of utilities that have filed for Exempt Telecommunications Company ("ETC") status provides further evidence of utility involvement in wireless telecommunications.²⁶ This evidence suggests that utilities themselves view their easements as compatible with the provision of telecommunications services, including wireless services. Accordingly, the

²⁴ See Marsha M. Hamilton, "The Power to Link the Masses? Pepco Venture to Offer Phone, Cable, Online Service," Wash. Post., at D1, May 22, 1998 (describing joint venture of Pepco and RCN Corp. to offer local and long distance telephone service and Internet connections in the Washington area and noting that "[p]ower companies also own power-line rights-of-way reaching into virtually every corner of urban America").

²⁵ WinStar Comments Opposing and Supporting Petitions for Reconsideration at 14 n.40. Utilities such as Southern Company have converted private radio spectrum to commercial use and then utilized utility infrastructure to build commercial systems. See id.

²⁶ See, e.g., Application of Cinergy Communications, Inc., Order, 11 FCC Rcd. 13941, at ¶ 3 (1996) (granting ETC status to offer, inter alia, "voice and data mobile radio communications services to Cinergy's public utility subsidiaries and their customers as well as to non-affiliates"); Application of Allegheny Communications Connect, Inc., Order, 11 FCC Rcd. 12204, at ¶ 3 (1996) (granting ETC status for services including "location and construction of antenna facilities, as well as maintenance and management of PCS sites for PCS license holders").

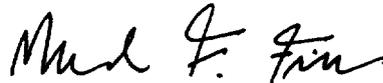
Commission should affirm that utilities' private rights-of-way are accessible by telecommunications carriers such as WinStar.

V. CONCLUSION.

WinStar respectfully urges the Commission to take the actions outlined herein.

Respectfully submitted,

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May 22, 1998

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CERTIFICATE OF SERVICE

I, Sophie J. Keefer, do hereby certify that on this 22nd day of May, 1998, copies of the foregoing "Reply of WinStar Communications, Inc." were delivered by hand, unless otherwise indicated, to the following parties:

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