

BEFORE THE
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)

Promotion of Competitive Networks)
In Local Telecommunications Markets)

WT Docket No. 99-217

Wireless Communications Association)
International, Inc. Petition for Rulemaking to)
Amend Section 1.4000 of Commission's Rules)
To Preempt Restrictions on Subscriber Premises)
Reception or Transmission antennas Designed)
To Provide Fixed Wireless Services)

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OFFICE OF THE SECRETARY

Cellular Telecommunications Industry)
Association Petition for Rule Making and)
Amendment of the Commission's Rules)
To Preempt State and Local Imposition of)
Discriminatory And/Or Excessive Taxes)
And Assessments)

Implementation of the Local Competition)
Provisions in the Telecommunications Act)
Of 1996)

CC Docket No. 96-98

COMMENTS OF CINERGY CORP.

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Dated: August 13, 1999

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EXECUTIVE SUMMARY

In its Notice of Proposed Rule Making in this proceeding, the Federal Communication Commission (Commission) seeks comments on, among other matters, the scope of access to utility property granted by the Telecommunications Act of 1996.

In tentatively concluding that Congress did not intend to grant cable television systems and telecommunications carriers access to all property owned or controlled by utilities, the Commission appropriately looked to the unambiguous language of the statute, limiting the access granted to those specifically delineated classes of property. Furthermore, limiting the access granted cable television systems and telecommunications carriers to specifically delineated classes of property does not place further anti-competitive obstacles before these service providers.

The Commission is inappropriately expanding the scope of the Pole attachment section of the 1996 Act where it seeks to extend the definition of “rights-of-way” to property owned by utility companies and used as part of its distribution system. The common use of the term “right-of-way” as the right to pass over the property of another cannot be reasonably interpreted to include the situation in which a utility uses property owned in fee simple in the manner of a right-of-way.

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COMMENTS OF CINERGY CORP.

Pursuant to § 1.415¹ of the rules of the Federal Communications Commission (Commission), Cinergy Corporation (Cinergy) respectfully submits its Comments in

¹ 47 C.F.R. § 1.415.

response to the Notice of Proposed Rulemaking (NPRM) in the above-mentioned proceeding.²

INTRODUCTION

The Commission issued the NPRM in this proceeding to foster competition in local telecommunications markets.³ It has initiated this rulemaking proceeding to consider certain actions aimed at facilitating the development of competitive telecommunications networks. Specifically, the NPRM seeks to ensure that competitive providers will have reasonable and nondiscriminatory access to rights-of-way, buildings, rooftops, and facilities in multiple tenant environments. Cinergy is providing its comments to the Commission's inquiry urging the Commission to make dispositive its tentative conclusion that section 224 of the Communications Act⁴ does not confer a general right of access to utility property. Additionally, Cinergy asserts that the meaning of the term "rights-of-way" in section 224⁵ does not include land used for distribution facilities if it is held by the utility in fee simple absolute.

² In the Matter of Promotion of Competitive Networks In Local Telecommunications Markets, Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of Commission's Rules To Preempt Restrictions on Subscriber Premises Reception or Transmission antennas Designed To Provide Fixed Wireless Services, WT Docket No. 99-217, Notice of Proposed Rulemaking and Notice of Inquiry (Released July 7, 1999); Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes And Assessments, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking (Released July 7, 1999) (the "NPRM").

³ See NPRM ¶ 1

⁴ 47 U.S.C. § 224, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act).

⁵ 47 U.S.C. § 224(f)(1)

BACKGROUND

Cinergy is one of the largest diversified energy companies in the United States and is the parent company of The Cincinnati Gas & Electric Company (CG&E) in Ohio and PSI Energy, Inc. (PSI) in Indiana. Together, these operating companies serve 1.4 million electric and 455,000 gas customers in Ohio, Indiana and Kentucky. Being a utility company under the definition provided in section 224 of the Communications Act⁶, Cinergy could be affected by any decisions the Commission makes with respect to the interpretation of the Communications Act.

Specifically, Cinergy has an interest in maintaining its right to exclusive use and possession of its corporate utility property. The Communications Act does not make such property subject to cable television system and telecommunication carrier access. Loss of Cinergy's right to exclusive use and possession of corporate utility property will adversely affect Cinergy's rate-payers, who will be forced to support a scheme for the placement of cable television system and telecommunication equipment that is less efficient than the current market-driven approach. The marketplace today functions as an effective and efficient means for enabling building owners, including utility companies, to reap fair market value for the leasing of property to cable television systems and telecommunications carriers. Should the Commission expand the scope of the section 224 to provide cable television systems and telecommunication carriers with nondiscriminatory access to all Cinergy property, Cinergy and its rate-payers will suffer the loss of the fair market value of its property. Cinergy is providing these comments in order to preserve this interest.

DISCUSSION

I. THE COMMISSION SHOULD REAFFIRM ITS PAST PRECEDENCE THAT SECTION 224 OF THE COMMUNICATIONS ACT DOES NOT CONFER A GENERAL RIGHT OF ACCESS TO UTILITY PROPERTY.

- A. Expanding the scope of section 224 beyond Congress' intended limitations on cable television systems' and telecommunication carriers' access to utility owned or controlled property would be arbitrary and capricious.**

The FCC, in its *Local Competition First Report and Order*⁷, held that section 224 of the 1996 Act⁸ does not confer upon cable television systems or telecommunications carriers a general right of access to utility property. Despite a petition from WinStar arguing that section 224 grants telecommunication carriers a right of access to all real property owned or controlled by a utility, the FCC has tentatively, and correctly, concluded that the scope of section 224 is not to be broadened beyond the clearly expressed intent of Congress.⁹

Section 224 provides in part:

A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.¹⁰

⁶ 47 U.S.C. § 224(a)(1)

⁷ *Local Competition First Report and Order*, 11 FCC Rcd. at 16084-85, ¶ 1185. See also *In the Matter of Telecommunications Services Inside Wiring; Customer Premises Equipment; In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, 13 FCC Rcd. 3659, ¶ 178

⁸ 47 U.S.C. § 224

⁹ See *NPRM* ¶ 40

¹⁰ 47 U.S.C. § 224(f)(1)

The Supreme Court has held that where Congressional intent is clear, an agency “must give effect to the unambiguously expressed intent of Congress.”¹¹ Only where a statute is silent or ambiguous as to a specific issue may the agency provide an interpretation of Congressional intent.¹²

Section 224 speaks clearly to the right conferred upon cable television systems and telecommunications carriers to gain access to property owned or controlled by the utility. Congress specifically limited the right of communication providers to access only clearly delineated classes of utility property such as poles, duct, conduit and rights-of-way. Had Congress intended for cable television systems and telecommunications carriers to have access to all utility property, they would have spelled this intent out clearly.

As a point of comparison, section 251 of the Communications Act provides for physical collocation of equipment necessary for interconnection.¹³ Here, where Congress intended to provide telecommunication carriers with access to the *physical premises* of another carrier, it specifically provided for this in the statute:

(6) Collocation. The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation

¹¹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. et al.*, 467 U.S. 837 at 842, 843

¹² *Id.* at 843

¹³ 47 U.S.C. § 251(c)(6)

is not practical for technical reasons or because of space limitations.¹⁴

Cinergy emphasizes that had Congress the intention of providing cable television systems and telecommunications carriers physical access to all of a utility's property, it had the capacity to do so; the express language of section 224 clearly indicates that Congress did *not* so intend.

The section in which Congress provided cable television systems and telecommunications carriers limited access to utility property also serves to illuminate Congressional intent. Section 224 codified the Pole Attachment Act of 1978¹⁵ with the intent of addressing a perceived danger of anti-competitive practices by utilities with respect to cable television service.¹⁶ Citing the Senate Report,¹⁷ the Court recognized the Senate's concerns over cable television systems access to available space on *existing poles*. Likewise, the Supreme Court has recognized that section 224 was enacted to grant the Commission the authority to regulate the rates, terms and conditions associated with attachments to utility *poles*.¹⁸ When Congress sought to provide cable television systems and telecommunication carriers nondiscriminatory access to utility property, by enacting the 1996 Act, it did so by placing the statutory language within the section of Title 47 labeled "Pole attachments". The fact that Congress amended this specific section of the code further communicates their intention to limit access to utility property to the classes of property specifically delineated within section 224.

¹⁴ 47 U.S.C. § 251(c)(6)

¹⁵ 47 U.S.C. § 224

¹⁶ *Texas Util. Elec. Co. v. FCC, et al.*, 997 F.2d 925 at 932 (1993)

¹⁷ S. Rep. No. 95-580, 95th Cong., 1st Sess. at 13 (1977)

Accordingly, Cinergy asserts that should the FCC expand the scope of section 224 beyond the clear Congressional intent, and not limit the access granted to cable television systems and telecommunication carriers to poles, ducts, conduits and rights-of-way of utility companies, the FCC would be engaging in arbitrary and capricious interpretation of the 1996 Act.

B. Providing cable television systems and telecommunication carriers access to all real property owned or controlled by a utility will not remove barriers to competition, but rather will place an unfair burden on utility companies

As indicated in the NPRM,¹⁹ in passing the Telecommunications Act of 1996,²⁰ Congress' objective was to open all telecommunications markets to competition so as to make advanced telecommunications and information technologies and services available to all Americans.²¹ However, broadening the scope of section 224 to provide cable television systems and telecommunications carriers access to all utility property will not advance competition in telecommunications. Rather, it will simply burden utility companies, and their rate-payers, in a discriminatory fashion.

Cable television systems and telecommunication carriers today are free to negotiate with building owners to place facilities on building rooftops. Although these communication providers are subject to fair market rates for the leasing of space on rooftops, this can hardly be said to hinder competition.

¹⁸ *FCC et al. v. Florida Power Corp. et al.*, 480 U.S. 245 at 247 (1987)

¹⁹ See NPRM ¶ 2

Building owners, free to negotiate with whomever they choose, and free to refuse to allow access to their rooftops, maintain a powerful bargaining position. Should utility companies be required to allow telecommunication equipment to be placed on any of their buildings, including corporate offices, as asserted by the WinStar Petition,²² utility companies will be subject to less favorable bargaining positions *vis-à-vis* those non-utility building owners. This burden of forced negotiation will simply deny the utility companies the fair market rates for its rooftop real estate, and may mean higher prices to utility rate-payers.

Again, Cinergy encourages the FCC to make dispositive its tentative conclusion that the scope of section 224 will not be broadened to require utility companies to provide cable television systems and telecommunication carriers access to any property other than poles, ducts, conduits and rights-of-way.

II. SECTION 224 DOES NOT IMPOSE ON A UTILITY THE OBLIGATION TO PROVIDE CABLE TELEVISION SYSTEMS AND TELECOMMUNICATIONS SERVICE PROVIDERS WITH ACCESS TO PROPERTY THAT IT OWNS AND WHICH IT USES AS PART OF ITS DISTRIBUTION NETWORK.

A. The Commission lacks the authority to interpret the term “rights-of-way” as encompassing property held by the utility in fee simple absolute.

²⁰ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* (1996 Act)

²¹ S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. at 1 (1996)

²² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, WinStar Communications, Inc. Petition for Clarification or Reconsideration (filed Sept. 30, 1996) (WinStar Petition)

In the NPRM, the Commission asks whether the term “rights-of-way” as used in section 224 encompasses property that a utility owns and that it uses as part of its distribution network.²³ Citing the holding of the Michigan Public Service Commission that land held by a utility company in fee simple absolute would be considered a right-of-way, the Commission asserts that this interpretation of the term “right-of-way” is consistent with the common use of the term to include land used for a right-of-way.²⁴

Cinergy believes the Commission is inappropriately expanding the definition of the term “right-of-way” in this instance. The Commission asserts that the common use of the term “right-of-way” denotes, in addition to the right to pass over the property of another, the land that is used for a right-of-way, referencing Black’s Law Dictionary.²⁵ However, a strict reading of Black’s reveals that the common use of the term “right-of-way” to denote the land owned in fee simple, but used as a right-of-way by the fee simple owner, is limited to the use of the land on which railroad companies construct their roadbed²⁶ rather than to the land owned by utility companies and on which their distribution systems reside.

Further, the Commission, in its NPRM, has cited case law to equate the term “right-of-way” to an easement, defining the latter as a right to use or pass over property of another.²⁷ By its own assertion that a right-of-way is equivalent to an easement, the Commission is excluding from the definition of “right-of-way” property owned in fee simple absolute. An easement is defined as:

²³ See NPRM ¶ 43

²⁴ *Id.*

²⁵ *Id.*

²⁶ Black’s Law Dictionary at 1326 (6th ed. 1990)

A right of use over property of another ...
An interest which one person has in the land
of another ...²⁸

Thus the common use of the term “easement” refers only to the right of use of land owned *by another*. Additionally, where an easement is held by the owner of the servient estate, the easement merges with the servient estate²⁹ and is extinguished. Thus, where the Commission asserts that the term “right-of-way” is synonymous with an easement, it implicitly excludes from the definition of “right-of-way” land that is owned in fee simple absolute, in that the presumed “right-of-way” would merge with the land owned in fee simple and would be extinguished. This merging of interests strongly suggests that property owned in fee simple by a utility cannot be brought within the definition of the term “right-of-way”, regardless of how the land is used.

Accordingly, Cinergy asserts that the Commission lacks the authority to expand the use of the term “right-of-way” to include property held by a utility in fee simple absolute whether or not this property is used in the manner of a right-of-way.

CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, Cinergy respectfully asks the Commission to act in the public interest in accordance with the proposals set forth herein.

²⁷ See *NPRM* ¶ 42.

²⁸ Black’s Law Dictionary at 509 (6th ed. 1990)

²⁹ *Kenney, Hardt, Hodgson, Siemion v. Babbitt*, 1993 U.S. App. LEXIS 9637 at 2 (9th Cir. 1993), citing *Zavarelli v. Might*, 749 P.2d 524 at 527 (Mont. 1988)

Respectfully submitted,

Handwritten signature of Paul A. Colbert in cursive script, enclosed in a large right-facing parenthesis.

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Dated: August 13, 1999

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 1999, I caused true and correct copies of the Comments of the foregoing "Comments of Cinergy Corporation" to be served via hand delivery on:



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