

WC 10-101

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Federal Communications Commission
Office of the Secretary

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Milly O. Bernard
Chairman
Public Service Commission of Utah
330 East 4th South
Salt Lake City, Utah 84111

Re: Opposition to Order Granting
Request for Certification
to Federal Communications
Commission (Case #81-999-08)

Dear Ms. Chairman:

On behalf of Wentronics, Inc., a company which provides cable television service to the town of Moab, Utah, we hereby file official notice of protest to the Public Service Commission of Utah's ("Commission") Order granting the request for certification of pole attachment rate jurisdiction to the Federal Communications Commission ("FCC"). The Commission, by an Order dated February 23, 1981, proposed to certify that the Commission has sufficient statutory jurisdiction to regulate pole attachment rates, terms and conditions. Wentronics respectfully submits that the Commission lacks the necessary statutory authority to regulate the rates and terms of cable television pole attachment agreements.

In establishing a procedure under which the FCC would withdraw its jurisdiction over pole attachment agreements for states that provided proper "certification", FCC Rule Section 1.1414 expressly states that unless a state can certify that:

1. It regulates rates, terms, and conditions for pole attachments, and

Milly O. Bernard
March 9, 1981
Page Two

2. In so regulating such rates, terms and conditions, the state has the authority to consider and does consider the interests of the cable television services, as well as the interests of the consumers of the utility services, it will be rebuttably presumed that the state is not regulating pole attachments. (emphasis added).

Wentronics submits that it is clear from the language of Utah Code Ann. Section 54-4-13 (1953) that absolutely no statutory authority to regulate the rates and terms of pole attachment agreements is vested in the Commission. Sub-part (1) is totally inapplicable to cable television because it expressly treats only joint property use of two or more public utilities. Cable television, of course, has consistently been held not to be a public utility. ^{1/} Additionally, the distinction made in sub-part (2) of Section 54-4-13 between a "public utility" and "a cable television company" is conclusive evidence of the Utah legislatures belief that cable television is not a public utility.

^{1/} Greater Fremont, Inc. v. City of Fremont, 302 F. Supp. 652 (N.D. Ohio 1968), aff'd sub nom., Wonderland Ventures, Inc. v. Sandusky, 423 F.2d 548 (6th Cir. 1970); Orange County Cable Communications Co. v. City of San Clemente, 59 Cal. App.2d 165, 130 Cal. Rptr. 429 (1976); Illinois-Indiana Cable Television Ass'n v. Illinois Commerce Comm'n, 55 Ill.2d 205, 302 N.E.2d 334 (1973); Minnesota Microwave, Inc. v. Public Service Comm'n, 291 Minn. 241, 190 N.W.2d 661 (1971); Opinion of the Attorney General of Arizona, No. 55-206, 12 P.&F. Radio Reg. 2094 (1955); Re The Mountain States Tel. & Tel. Co., 73 P.U.R.2d 161 (Colo. Pub. Util. Comm'n 1968); Re Southern Bell Tel. & Tel. Co., 65 P.U.R. 3d 117 (Fla. Pub. Serv. Comm'n 1966); Re New England Tel. & Tel. Co., 60 P.U.R.3d 462 (Me. Pub. Util. Comm'n 1965).

Milly O. Bernard
March 9, 1981
Page Three

Sub-part (2) does, in an extremely limited manner, address cable television. That sub-section, however, is confined solely to describing the conditions under which a cable system will be allowed to retain its contractual right to stay on a utility's poles. This sub-section constitutes nothing more than a list of limitations and requirements that a cable system must meet in order to "share in and enjoy the use of the right of way easement...." 1/ There is absolutely no language conferring to the Utah PSC the necessary jurisdiction to regulate pole attachment agreements in consideration of what impact their rates and terms will have upon cable subscribers.

In a similar situation, the Florida Supreme Court in Teleprompter Corporation v. Hawkins 2/ held that the Florida Public Service Commission lacked the necessary jurisdiction to regulate pole attachment agreements and, therefore, had improperly certified to the Federal Communications Commission (see the attached case). The FCC was subsequently forced to delete Florida as a certified state. 3/ Wentronics would here seek to avoid similar time consuming judicial and administrative proceedings.

Wentronics hereby requests that the Commission's consideration of this jurisdictional issue be done on the written submissions alone. Because the only issue involved is purely an issue of law, an oral proceeding would not be of additional probative value.

1/ Utah Code Ann. Section 54-4-13(2) (1953).

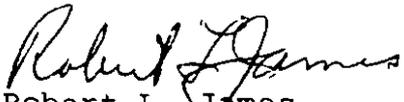
2/ Teleprompter Corporation v. Hawkins, N. 56, 291 (May 29, 1980).

3/ See the attached Public Notice.

Milly O. Bernard
March 9, 1981
Page Four

Wentronics, Inc., therefore, respectfully requests that the Public Service Commission of Utah rescind its pole attachment regulation certification to the Federal Communications Commission.

Respectfully submitted,


BY: /s/ Robert L. James
Robert L. James


BY: /s/ Wesley R. Heppler
Wesley R. Heppler

Attorneys for Wentronics, Inc.

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Commissioners, Utah Public Service Commission

Supreme Court of Florida

No. 56,291

TELEPROMPTER CORPORATION, ET AL.,
Petitioners,

vs.

PAULA F. HAWKINS, ET AL.,
Respondents.

[May 29, 1980]

BOYD, J.

This cause is before us to review an order by the Public Service Commission certifying that it has authority to regulate "pole attachment" agreements. We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

Pole attachment agreements are lease agreements between utilities and cable television companies which authorize the latter to use the excess space on utility poles for the purpose of providing their customers cable television service. Because the utilities have superior bargaining position by virtue of their ownership and control over utility poles along with the accompanying easements, Congress granted the Federal Communications Commission (FCC) the authority to regulate these agreements except where such matters are regulated by the state.

Each such state needed to certify that:

- (A) it regulates such rates, terms, and conditions;
and
- (B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of cable television services, as well as the interests of the consumers of the utility services.

Communications Act Amendments of 1978, Pub. L. No. 95-234,
(47 U.S.C. § 224(c)(21)).

In response to this impending federal regulation, the commission sent notice of certification to the FCC. Subsequently, the commission gave notice and called for briefs from interested parties, following which it entered an order declaring that it has the authority to regulate pole attachment agreements. The petitioners claim that the commission does not have authority to regulate the agreements or consider the interests of cable television subscribers. We agree.

Several years ago the commission held that it could not require utilities to enter into pole attachment agreements. Southern Bell Tel. & Tel. Co., 65 PUR 3d 117 (Fla. Pub. Ser. Comm'n. 1966). In doing so it reasoned:

In 1913, when the Florida legislature enacted a comprehensive plan for the regulation of telephone and telegraph companies in this state, and conferred upon the commission authority to administer the act and to prescribe rules and regulations appropriate to the exercise of the powers conferred therein, the science of television transmission and the business of operating community antenna television systems were not in existence. The 1913 Florida legislature, therefore, could not have envisioned --much less have intended to regulate and control--the television transmission facilities and services with which we are concerned. This is exactly the same kind of situation described by the supreme court of Florida in practically identical language in its opinion in the case of Radio Teleph. Communications v. Southeastern Teleph. Co. (Fla. Sup. Ct. 1964) 57 PUR 3d 136, 170 So.2d 577, when it held that this commission did not have jurisdiction over radio communication service, notwithstanding the interconnection of such radio service with a regulated utility's telephone landline. As the court pointed out in that case, the legislature of Florida has never conferred upon this commission any general authority to regulate "public utilities." Traditionally, each time a public service of this state is made subject to the regulatory power of the commission, the legislature has enacted a comprehensive plan of regulation and control and then conferred upon the commission the authority to administer such plan. This has never been done in so far as television transmission and community antenna television systems are concerned. Community antenna television systems have never been defined as "public utilities" by the legislature, nor is there anything in this record which would justify the conclusion that such systems are vested with a public interest; in actual fact, they may be of such character as to justify public regulation and control. That, however, is a matter for determination by the state legislature. We must conclude on the basis of the record before us, and the present status of the laws of this state, that the Florida Public Service Commission has no jurisdiction or authority over the operations of community antenna television systems and the rates they charge, or the service they provide to their customers.

Id. at 119-20. See also, Twin Cities Cable Co. v. Southeastern Tel. Co., 200 So.2d 857 (Fla. 1st DCA 1967).

Since that decision there has been no relevant change in the commission's statutory grant of jurisdiction. Therefore the reasoning in that decision is still relevant. No reason was given for asserting jurisdiction other than to preempt the FCC from regulating pole attachment agreements. Although we share the concern about federal intervention in an area the state may be better equipped to handle, such concern is not enough to extend the Public Service Commission's jurisdiction. Only the legislature can do that.

We therefore quash the commission's order.

It is so ordered.

ENGLAND, C.J., OVERTON, SUNDBERG, ALDERMAN and McDONALD, JJ., Concur
ADKINS, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF
FILED, DETERMINED.

Certiorari to the Florida Public Service Commission

The Law Offices of Hogan and Hartson, Washington, D.C., and William A. Gillen, Edward M. Waller, Jr. and David C. Shobe of Fowler, White, Gillen, Boggs, Villareal and Banker, Tampa, Florida, for Teleprompter Corporation; and George Maxwell III of Rossetter and Maxwell, Melbourne, Florida, for American Television and Communications Corporation,

Petitioners

Prentice P. Pruitt, Barrett G. Johnson and Norman E. Norton, Jr., Tallahassee, Florida, for Florida Public Service Commission,

Respondents

C. Roger Vinson of Beggs and Lane, Pensacola, Florida, for Gulf Power Company,

Intervenor

W. Robert Fokes of Mahoney Radlow and Adams, Tallahassee, for Florida Cable Television Association; and Lee L. Willis and James D. Beasley of Ausley, McMullen, McGehee, Carothers and Proctor, Tallahassee, Florida, for Tampa Electric Company,

Amici Curiae



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POLE ATTACHMENTS

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Pursuant to Section 1.1414(b) of the Commission's Rules on cable television pole attachments, the following States* have certified that they regulate terms, rates, and conditions for pole attachments, and, in so regulating, have the authority to consider the interests of subscribers of cable television services, as well as the interests of the consumers of the utility services.

(Certification by a State preempts the FCC from accepting pole attachments complaints under Subpart J of Part 1 of the Rules.)

Alaska
California
Connecticut
Hawaii
Illinois
Indiana
Louisiana
Massachusetts
Nebraska

Nevada
New Jersey
New York
Oregon
Pennsylvania
Puerto Rico
Vermont
Washington
Wisconsin

The Supreme Court of Florida has ruled that the Florida Public Service Commission does not have jurisdiction to regulate rates, terms, and conditions for pole attachments. Teleprompter Corporation v. Hawkins, No. 56, 291 (May 29, 1980). Accordingly, Florida is deleted from this list.

* "State", by Section 1.1402(g) of the Rules, means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(This Public Notice supercedes the Public Notice of October 29, 1979.)