

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 224 of the Act)	WC Docket No. 07-243
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51

OPPOSITION TO MOTION FOR STAY

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OPPOSITION TO MOTION FOR STAY

tw telecom inc. (“TWTC”), through its undersigned counsel and pursuant to Section 1.45(d) of the Commission’s rules, hereby submits this Opposition to the Emergency Motion for Stay,¹ filed by a coalition of power companies (collectively “Petitioners”) in the above-referenced proceeding. In the *Motion*, the Petitioners seek a stay of the changes to the cost allocation formula for telecommunications carrier pole attachment rates adopted in the *Pole Attachment Order*.² As explained below, all four of the factors the Commission considers in assessing stay requests weigh heavily against granting a stay of the new telecommunications carrier cost allocation formula. The Commission should therefore deny the *Motion*.

¹ See Emergency Motion for Stay of American Electric Power Services Corp., et al, WC Docket No. 07-245, GN Docket No. 09-51 (May 25, 2011) (“*Motion*”).

² *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (“*Pole Attachment Order*”).

DISCUSSION

In considering a request for a stay of an order, the Commission assesses whether the party requesting the stay has shown “(1) a likelihood of success on the merits; (2) an irreparable injury that will result in the absence of relief; (3) that a stay will not harm other parties; and (4) that the public interest favors a stay.”³ The Petitioners have failed to make any of these showings.

First, the Petitioners have failed to show that they are likely to succeed on the underlying merits of their arguments on appeal. The Petitioners apparently plan to argue on appeal that the Commission’s revised interpretation of “cost” as used in Section 224(e) exceeds the Commission’s authority and is arbitrary and capricious. Neither assertion has merit.

As the Commission explained in the *Pole Attachment Order*, the term “cost” as used in Section 224(e) is ambiguous. *See Pole Attachment Order* ¶ 156. This conclusion is entirely justified. As the Commission observed, Section 224(e) “does not specify a cost methodology.” *Id.* Moreover, the Supreme Court has held that “‘without any better indication of meaning than the unadorned term, the word ‘cost’ . . . is ‘a chameleon’ . . . a ‘virtually meaningless’ term As Justice Breyer put it in *Iowa Utilities Bd.*, words like ‘cost’ ‘give ratesetting commissions broad methodological leeway; they say little about the ‘method employed’ to determine a

³ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities*, Order Denying Stay Motion, 25 FCC Rcd 9115, ¶ 8 (2010) (“*TRS Stay Denial*”).

particular rate.”⁴ Accordingly, the Commission’s interpretation of the term “cost” is subject to substantial deference on appeal and must be upheld if reasonable.⁵

The Commission’s interpretation of the term “cost” as used in Section 224(e) is reasonable. Under the Commission’s prior interpretation of cost in Section 224(e), telecommunications carriers have been required to pay pole attachment rates that were as much as two-and-a-half-times higher than the rates paid by their cable company competitors in the downstream retail market for broadband services. *See Pole Attachment Order* at n.399. This differential skews investment decisions in broadband, and leads to costly disputes regarding the appropriate rate. *See id.* ¶ 174. In contrast, the Commission’s new interpretation will largely eliminate these inefficiencies while yielding fully compensatory pole attachment rates. *See id.* ¶¶ 182-198.

The Petitioners argue, rather half-heartedly, that “Congress clearly envisioned two different rates, and that the telecom rate would be higher than the cable rate in most instances.” *See Motion* at 3. But as the Commission explained at length in the *Pole Attachment Order*, neither the terms of Section 224 nor the inconclusive statutory history in any way indicates that Congress expected that telecommunications carriers would be required to pay different and higher pole attachment rates than cable companies. *See Pole Attachment Order* ¶¶ 155-171. In providing this explanation, the Commission responded to and rejected the precise argument that the Petitioners make here. The Petitioners do not even attempt to argue that the Commission’s reasoning was flawed.

⁴ *Pole Attachment Order* ¶ 158 (quoting *Verizon Communications, Inc., v. FCC*, 535 U.S. 467, 500-01 (2002)).

⁵ *See Chevron, Inc. v. Natural Res. Def. Council, Inc. (NRDC)*, 467 U.S. 837, 843-45 (1984), *reh’g denied*, *Chevron, Inc. v. NRDC*, 468 U.S. 1227 (1984).

Moreover, in making this argument, the Petitioners seem to assume that the cable companies' attachment rates are governed by the statutory language in Section 224(d), the subsection that sets forth the requirements governing attachments used solely to provide cable service. *See* 47 U.S.C. § 224(d). But this is not the case. The vast majority of cable companies use pole attachments to provide commingled services. Such attachments are governed by Section 224(b). That provision only requires that pole attachment rates are just and reasonable. *See* 47 U.S.C. § 224(b). It includes no reference to cost allocations at all. Section 224(e), which governs telecommunications carrier pole attachment rates, also requires that pole attachment rates be just and reasonable. There is no basis for concluding that Congress expected a differential in the pole attachment rates governed by Section 224(b) and those governed by Section 224(e).

The Petitioners also argue that the Commission failed “to adequately justify its departure from fifteen years of precedent and by utilizing a results-oriented approach completely lacking in factual record support.” *Motion* at 4. But the Commission did in fact provide an extensive explanation as to why it is sound policy to ensure that all competitors pay the same or similar prices for upstream pole attachment inputs. As the Commission explained, there is record evidence that both the high rental rates produced by the telecommunications carrier formula and the disputes caused by the differential between the telecommunications carrier formula and the cable provider formula have slowed the deployment of broadband. *See Pole Attachment Order* ¶¶ 174 & n.540 (describing record evidence). At the same time, the record shows that the lower rate yielded by the cable formula has spurred deployment of broadband. *See id.* ¶¶ 174, 176. This is unsurprising because, as the Commission explained, basic economics teaches that rates set based on cost-causation, as the cable and the new telecommunications carrier formula are,

yield efficient outcomes. *See id.* at n.425. In light of this evidence, the FCC had the affirmative duty to reassess its prior rules and adopt a more efficient pole attachment regime. *See id.* ¶ 158.

Second, the Petitioners have failed to show that they will be irreparably injured in the absence of a stay. In order to be irreparable, the “injury must be ‘both certain and great [and] it must be actual and not theoretical.’”⁶ That is, “Petitioners must provide ‘proof indicating that the harm is certain to occur in the near future.’” *Tower Siting Stay Denial* ¶ 9. If the harm in question is “insubstantial, purely economic in nature, or speculative,” it is not irreparable. *See id.* ¶ 10. Moreover, in the case of regulated rates, the adoption of a regime requiring lower rates does not result in irreparable harm where the rates in question are compensatory. *See TRS Stay Denial* ¶ 20.

Applying this standard to the *Motion*, it is clear that the Petitioners have not demonstrated that they will experience irreparable harm if a stay is granted. Petitioners assert that the new telecommunications carrier formula will cause them to experience a reduction in pole attachment rental income. But the Commission has explained that the vast majority of regulated pole attachments are currently subject to the lower cable rate formula, and there are relatively few telecommunications carrier pole attachments. *See Pole Attachment Order* ¶ 151. Of the small number of attachments that are subject to the telecommunications carrier rate, only a subset are governed by contracts between the attacher and utility that give the attacher the right to automatically receive the benefit of the new rules. As a result, the Petitioners are likely to

⁶ *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance; Emergency Motion for Stay of the National Association of Telecommunications officers and Advisors, et al.*, Order, 25 FCC Rcd 1215, ¶ 9 (2010) (“*Tower Siting Stay Denial*”).

experience an insubstantial reduction in actual pole attachment rents during the pendency of their appeal.

Nor can there be any doubt that the new telecommunications carrier formula will yield compensatory rates. *See id.* ¶¶ 182-198. Thus, the Petitioners will experience no cognizable injury where the new telecommunications carrier formula does apply.

In all events, the Petitioners have made no attempt to quantify the reduction in pole attachment rents they would experience while their appeal is pending. Petitioners' claim of reduced pole rental income is therefore entirely theoretical. Accordingly, the Petitioners have failed to show that the reduction in telecommunications carrier rental rates during the pendency of their appeal will result in actual injury that is both "great" and "certain."

Petitioners also state that there is a "potential for under-recovery" that "could" prevent Petitioners from immediately recovering a reduction in pole attachment rental income from increases in the rates paid by utility ratepayers. *See Motion* at 5. Again, by describing this as a "potential" outcome, the Petitioners concede that it is not "certain." They also make no attempt to quantify the harm. There is no basis for concluding that the harm would, if it exists at all, be "great."

Furthermore, a reduction in rental income and the possibility that such reduction might not be immediately recoverable through higher electric utility rates is "purely economic" and therefore not irreparable. The Petitioners implicitly concede that they will have the ability to recover any reduction in rental income at some point through increases in regulated utility rates. *See id.* As the FCC has held, harm is not irreparable where the petitioner has the opportunity to recover the lost revenues in the future. *See TRS Stay Denial* ¶ 19. Such recovery need not be

immediate in order to defeat a claim that it is irreparable. *See id.* For this reason as well, Petitioners have failed to show that they will experience irreparable financial harm absent a stay.

Petitioners next assert that they will incur litigation expenses as a result of disputes in connection with the implementation of the new telecommunications carrier formula. Again, this claim is entirely speculative. The Commission has held that “speculation” that petitioners “will incur costs of litigation” during the pendency of an appeal is “not the sort of harm that can support a stay.” *Tower Siting Stay Denial* ¶ 10.

Finally, the Petitioners’ vague claim that application of the new telecommunications carrier formula will result in “strain placed on the relationships between electric utility pole owners and attachers” fares no better. *Motion* at 8. Petitioners make no effort to explain the nature or magnitude of such “strain,” and there is no basis in Commission precedent for finding that such a consequence of new rules constitutes irreparable harm. Petitioners have therefore failed to show that such purported “injury” is anything more than theoretical and speculative.

Third, the Petitioners have failed to account for the harm other parties would experience if a stay were granted. As the Commission explained, the differential between the rates yielded by the cable formula and the legacy telecommunications carrier formula have caused “carriers like TWTC” to experience “competitive disadvantages” in the market for downstream services like broadband. *See Pole Attachment Order* ¶ 176. Maintaining the legacy telecommunications carrier formula would simply perpetuate these “competitive disadvantages” and would therefore inflict significant harm on TWTC.

Fourth, the Petitioners have failed to show that a stay would be in the public interest. The Petitioners state only that a stay is in the public interest because allowing the new telecommunications carrier rate formula to take effect would result in “turmoil and uncertainty.”

Motion at 7. Any such “turmoil and uncertainty” is entirely of Petitioners’ own making as they seek to maintain pole attachment rates for telecommunications carriers that are far in excess of the levels needed to ensure just compensation. In any event, as the Commission explained, by reducing the difference between the pole attachment rates paid by cable companies and telecommunications carriers, the new telecommunications carrier formula will actually reduce the likelihood of litigation, and therefore “turmoil and uncertainty,” regarding the appropriate pole attachment rate. *See Pole Attachment Order* ¶ 174.

Moreover, a stay would delay the enormous benefits that implementation of the new telecommunications carrier formula will likely yield. As the Commission found, eliminating the differential between cable company and telecommunications carrier rates and setting the telecommunications carrier rates in accord with cost causation principles will encourage the deployment of broadband, a major policy objective of the Communications Act. *See id.* ¶¶ 172-181. It is hard to conceive of a more significant public policy benefit in telecommunications regulation. The new rule will accomplish this outcome while at the same time ensuring that Petitioners are fully compensated for the costs caused by third-party pole attachers. The public interest therefore overwhelmingly favors denying the Petitioners’ request for a stay.

CONCLUSION

For the foregoing reasons, the Commission should deny the Petitioners’ *Motion*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Matthew Jones, do hereby certify that on this day, June 1, 2011, I caused to be served a true and correct copy of the foregoing Opposition to Motion for Stay of tw telecom inc. via First-Class U.S. Mail, postage prepaid, to the following:

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