

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

Fiber Technologies Networks, L.L.C.,)	
)	
Complainant,)	
)	
v.)	File No. EB-03-MD-005
)	
Duquesne Light Company,)	
)	
Defendant.)	

ORDER

Adopted: May 22, 2003

Released: May 27, 2003

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Order, we reject a Petition To Stay Termination Of Pole Attachment Rights¹ that complainant Fiber Technologies Networks, L.L.C., (“Fibertech”) filed in this matter pursuant to sections 1.1403(d) and 1.1415 of the Commission’s rules.² Fibertech’s Stay Petition asks the Commission to stay any attempt by defendant Duquesne Light Company (“Duquesne”) either to terminate a pole attachment agreement between Fibertech and Duquesne or to remove or seek removal of Fibertech’s facilities from Duquesne’s poles, pending the Commission’s decision on a complaint that Fibertech filed against Duquesne³ alleging that Duquesne violated section 224 of the Communications Act of 1934, as amended (the “Act”).⁴ As explained below, we conclude that the Petition should be dismissed as moot to the extent that it seeks to stay any effort by Duquesne to remove or seek removal of Fibertech’s facilities from Duquesne’s poles. Moreover, to the extent

¹ Petition To Stay Termination Of Pole Attachment Rights, File No. EB-03-MD-005 (filed April 8, 2003) (“Stay Petition” or “Petition”).

² 47 C.F.R. §§ 1.1403(d) and 1.1415.

³ Complaint, File No. EB-03-MD-005 (filed April 8, 2003) (“Complaint”). Sections 1.1401 – 1.1418 of the Commission’s rules, 47 C.F.R. § 1.1401 – 1.1418, provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have non-discriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms and conditions that are just and reasonable. *See* 47 C.F.R. § 1.1401. Although the Complaint does not cite to these rules, we will adjudicate the Complaint in accordance with the procedures set forth therein.

⁴ 47 U.S.C. § 224.

that the Petition seeks to stay any attempt by Duquesne to terminate the parties' pole attachment agreement, we conclude that the Petition should be denied on the ground that Fibertech has failed to show that, in the absence of a stay, it will suffer irreparable harm from the actual or threatened termination of that agreement.

II. BACKGROUND

2. Fibertech filed its Complaint against Duquesne on April 8, 2003. The Complaint alleges that Fibertech is a telecommunications carrier within the meaning of section 224 of the Act.⁵ It further alleges that defendant Duquesne is a corporation engaged in the provision of electric utility service in Pennsylvania.⁶ The Complaint charges that Duquesne has violated section 224 of the Act by, *inter alia*, imposing unreasonable delays and unreasonable expenses on Fibertech's attachment of facilities to Duquesne's poles.⁷ Specifically, the Complaint alleges that Duquesne impeded Fibertech's access to its poles by unreasonably delaying execution of a pole attachment agreement with Fibertech,⁸ and imposed unnecessary expense on Fibertech's network expansion by imposing unjust and unreasonable charges for pole survey, engineering, and make-ready work following the parties' execution of a pole attachment agreement.⁹ The Complaint seeks an order: (i) requiring Duquesne to refund to Fibertech allegedly unlawful engineering and make-ready charges that Duquesne allegedly forced Fibertech to pay; (ii) terminating additional unlawful charges totaling \$570,643 that Duquesne has attempted to collect from Fibertech, and which Fibertech has refused to pay;¹⁰ (iii) declaring that certain terms and conditions of attachment imposed by Duquesne are unjust and unreasonable; and (iv) and prohibiting Duquesne from terminating the Pole Attachment Agreement based on Fibertech's refusal to pay disputed amounts, and from removing Fibertech's facilities from Duquesne's poles.¹¹

3. Fibertech filed its Stay Petition on April 8, 2003, the same day that it filed the Complaint. The Petition alleges that Duquesne issued a Notice of Termination of Fibertech's Pole Attachment Agreement to become effective on April 8, 2003.¹² The alleged Notice of Termination consisted of a letter that Duquesne sent to Fibertech on February 7, 2003.¹³ The February 7 Letter stated that Fibertech had not paid invoices that Duquesne submitted to Fibertech in amounts totaling \$565,814. The February 7 Letter asserted that the parties' Pole Attachment Agreement requires Fibertech to pay submitted invoices within 30 days, and that the \$565,814 amount had been past due for more than 30 days. The February 7 Letter further stated:

Fibertech's failure to timely pay the amounts due for services provided under the Agreement constitutes a breach of a material

⁵ Complaint at 2-3, ¶¶ 1, 9.

⁶ Complaint at 2, ¶ 2.

⁷ Complaint at 4-9, ¶¶ 16-33; 9-27 ¶¶ 34-103.

⁸ Complaint at 4-9, ¶¶ 16-33.

⁹ Complaint at 9-27 ¶¶ 34-103. The pole attachment agreement that Fibertech and Duquesne executed, entitled "Joint Use Agreement," is attached as Exhibit 3 to the Complaint ("Pole Attachment Agreement" or "Agreement").

¹⁰ Complaint at vi; 1-2

¹¹ Complaint at 1-2; 28

¹² Petition To Stay at 3-4.

¹³ Letter from Andrew J. Tomko, Supervisor, Engineering, Duquesne, to Contracts and Rights of Way Manager, Fibertech, dated February 7, 2003, attached to Petition as Exhibit 1 ("February 7 Letter"). The February 7 Letter was also attached as Exhibit 8 to the Complaint.

term. Pursuant to Section 1.2.01 of the Agreement, [Duquesne] will have the right to terminate the Agreement sixty (60) days from the date of this notice if Fibertech has not cured its breach. [Duquesne] intends thereafter to exercise its rights to the full extent provided in the Agreement under applicable law.

4. Section 1.2.01 of the Pole Attachment Agreement provides that Duquesne “has the right to terminate this Agreement upon sixty (60) days written notice for a breach of any material term.”¹⁴ Section 1.2.05 of the Pole Attachment Agreement provides that, in the event of termination of the agreement, “the attaching party shall remove its facilities from Duquesne’s structure within sixty (60) days from the date of termination . . . ;”¹⁵ and section 1.2.06 provides that, if the attaching party does not remove its facilities within the sixty-day time period specified in section 1.2.05, Duquesne “shall have the right to remove them at the expense of the attaching party”¹⁶ In its Petition, Fibertech requests that the Commission stay Duquesne’s purported attempt to terminate the Pole Attachment Agreement between Fibertech and Duquesne, and stay any efforts by Duquesne to remove or seek removal of Fibertech’s facilities from Duquesne’s poles pending a decision on the Complaint, arguing, *inter alia*, that it will suffer irreparable injury in the absence of a stay.¹⁷

5. Under 47 C.F.R. § 1.1403(d), Duquesne was permitted to file a response to the Stay Petition within 7 days after it was filed. On April 22, 2003, Commission staff, having not received a response to the Petition, telephoned Duquesne’s counsel, David Pawlik, to inquire as to whether Duquesne intended to file a response. Mr. Pawlik advised staff that his client, Duquesne, did not intend to file a response to the Petition, and that Duquesne had no intention of removing Fibertech’s facilities from its poles pending the resolution of the dispute set forth in Fibertech’s Complaint.

6. On April 24, 2003, Commission staff issued a letter order in this proceeding that recounted Mr. Pawlik’s representation to staff that Duquesne has no intention of removing Fibertech’s facilities pending resolution of this dispute, and stated that this representation appeared to render moot the request for relief set forth in Fibertech’s Stay Petition.¹⁸ The Letter Order directed the parties to advise staff in writing as to whether they agree that the Petition should be dismissed as moot based on the representations of Duquesne’s counsel, and to provide full support for any objection to such dismissal.¹⁹

7. On May 1, 2003, Duquesne’s counsel filed a letter in which he affirmed that Duquesne “does not intend to remove any [Fibertech] facilities from [Duquesne] poles while the dispute set forth in Fibertech’s Complaint . . . is pending before the Commission,”²⁰ and he agreed that the

¹⁴ Pole Attachment Agreement at 2, § 1.2.01 .

¹⁵ *Id.* at 3, § 1.2.05 (cited in Petition at 4).

¹⁶ *Id.* at 3, § 1.2.06 (cited in Petition at 4).

¹⁷ Petition at 2, 6, 9.

¹⁸ Letter from Christopher N. Olsen, Assistant Chief, Market Disputes Resolution Division, Enforcement Bureau, to Counsel for Fibertech and Counsel for Duquesne, File No. EB-03-MD-005 (rel. April 24, 2003) (“Letter Order”) at 2.

¹⁹ *Id.*

²⁰ Letter from David H. Pawlik, counsel for Duquesne, to Christopher N. Olsen, Assistant Chief, Market Disputes Resolution Division, Enforcement Bureau, File No. EB-03-MD-005 (filed May 1, 2003) (“Duquesne May 1 Letter”). The Duquesne May 1 Letter attached a letter from Andrew J. Tomko, Supervisor, Engineering, Duquesne, to Christopher N. Olsen, Assistant Chief, Market Disputes Resolution Division, Enforcement Bureau, stating that “Except in emergency situations involving imminent danger to life or property, we do not intend to remove any of the attachments of [Fibertech]

Commission should dismiss the Stay Petition as moot. On May 2, 2003, Fibertech's counsel filed a letter in response to the Letter Order and Duquesne May 1 Letter.²¹ The Fibertech May 2 Letter stated that "Duquesne's promise not to remove Fibertech from the poles is a welcome development, but there exists the remaining question of whether Duquesne still intends to terminate the pole attachment agreement"²² The Fibertech May 2 Letter stated that Fibertech "will immediately withdraw its petition with Duquesne's promise to allow Fibertech to continue operating on Duquesne's poles under the lawful provisions of the parties' pole attachment agreements while this proceeding is pending, including by processing pole attachment applications that Fibertech might submit in accordance with applicable guidelines and timeframes."²³

8. The Fibertech May 2 Letter did not dispute that the portion of Fibertech's Petition that seeks a stay of any efforts by Duquesne to remove or seek removal of Fibertech's facilities from Duquesne's poles should be dismissed as moot. Accordingly, and in reliance on Duquesne's representations, we dismiss as moot Fibertech's Petition to the extent it requests that we stay Duquesne's removal or attempted removal of Fibertech's facilities from Duquesne's poles pending the conclusion of this complaint proceeding.

9. Fibertech's May 2 Letter did, however, suggest that the portion of Fibertech's Petition that requests a stay of Duquesne's attempted termination of the Pole Attachment Agreement was not rendered moot by Duquesne's representation. Accordingly, our discussion will focus on Fibertech's continuing request for a stay of Duquesne's purported attempt to terminate the Pole Attachment Agreement.

III. DISCUSSION

10. Section 1.1403(c) of our rules²⁴ states, in pertinent part, that a utility shall provide a telecommunications carrier no less than 60 days' written notice prior to "[r]emoval of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the . . . telecommunications carrier's pole attachment agreement." Section 1.1403(d) states that a telecommunications carrier may file a "Petition for Temporary Stay" of the action contained in a notice received pursuant to section 1.1403(c) within 15 days of receipt of such notice.²⁵ Section 1.1403(d) further provides:

Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of cable television service or telecommunication service. . . .²⁶

11. We note at the outset that it is not at all clear from the record whether Duquesne's

from our poles while the underlying dispute, contained in the Complaint that [Fibertech] filed on April 8, 2003, is pending before the FCC."

²¹ Letter from J.D. Thomas, counsel for Fibertech, to Christopher N. Olsen, Assistant Chief, Market Disputes Resolution Division, Enforcement Bureau, File No. EB-03-MD-005 (filed May 2, 2003) ("Fibertech May 2 Letter").

²² *Id.* at 1.

²³ *Id.*

²⁴ 47 C.F.R. § 1.1403(c).

²⁵ 47 C.F.R. § 1.1403(d).

²⁶ *Id.*

February 7 Letter – which Fibertech calls a “Notice of Termination” – was intended to, or did in fact, terminate the Pole Attachment Agreement effective on April 8, 2003. The words “notice of termination” did not appear on the February 7 Letter. Nor did that Letter state that the Pole Attachment Agreement would automatically terminate 60 days hence if Fibertech did not pay the amount that Duquesne claims it is due. Rather, the Letter simply stated that Duquesne “will have the right to terminate the Agreement” in 60 days “if Fibertech has not cured its breach,” and that Duquesne “intends thereafter to exercise its rights to the full extent provided in the Agreement under applicable law.” Nothing in the record before us indicates whether the Pole Attachment Agreement was, in fact, terminated on or after April 8, 2003.

12. More fundamentally, Fibertech has failed to demonstrate that the actual or threatened termination of the Pole Attachment Agreement has caused or will cause Fibertech to suffer irreparable harm – a showing required under section 1.1403(d).²⁷ Duquesne’s February 7 Letter indicated that Fibertech could avoid termination of the Pole Attachment Agreement by paying the \$565,814 amount that Duquesne claims it is due. Although we understand that Fibertech contends that the \$565,814 constitutes an overcharge in violation of section 224, Fibertech fails to explain, in either the Stay Petition or the Complaint, how it would be irreparably harmed if it simply paid Duquesne the \$565,814 amount now, with the expectation that it would later recover this payment as a refund if it succeeds in proving the section 224 violations alleged in its Complaint. Indeed, the refund Fibertech seeks to recover in this case already includes unlawful charges that Fibertech paid Duquesne in the past. In the case of those earlier charges, Fibertech apparently chose to pay the amount Duquesne demanded, with the intention of later recovering the overcharge in an action before the Commission. Fibertech does not explain how it would be irreparably harmed by handling the \$565,814 charge in the same way as the other alleged overcharges at issue in this case.²⁸ Fibertech’s Petition merely offers the unsupported, conclusory assertion that “forcing Fibertech into the position of paying additional unlawful charges . . . *could* place Fibertech at an even greater competitive disadvantage to Duquesne than it has so far.”²⁹ Moreover, the Petition does not present evidence of any irreparable harm to Fibertech’s relationships with customers, investors, or lenders that would result from termination of the Agreement.

13. We therefore deny Fibertech’s instant request for a stay of Duquesne’s actual or threatened termination of the Pole Attachment Agreement, because Fibertech has failed to demonstrate the irreparable harm required under section 1.1403(d) of our rules.³⁰

²⁷ *Virginia Petroleum Jobbers Ass’n v. F.P.C.*, 259 F.2d 921, 925 (D.C. Cir. 1958) and *Washington Metro. Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977), cited in Fibertech’s Petition at 4-5, also hold that a showing of irreparable harm is a prerequisite for obtaining an interim stay.

²⁸ See e.g., *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d at 925 (observing that “[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough” to establish irreparable harm, and that the “possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.”). *Accord*, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order, 11 FCC Rcd. 11,754 at 11,756-57 (1996); *Bachow/Coastal, L.L.C. v. GTE Wireless of the South*, Order, 15 FCC Rcd. 5801 at 5802 (Enf. Bur. 2000).

²⁹ Stay Petition at 6 (emphasis added).

³⁰ 47 C.F.R. § 1.1403(d).

IV. ORDERING CLAUSES

14. ACCORDINGLY, IT IS ORDERED, pursuant to section 1.1403(d) of the Commission's rules, 47 C.F.R. § 1.1403(d), sections 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 224, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that Fibertech's Petition To Stay Termination Of Pole Attachment Rights is dismissed as moot to the extent that it seeks to stay any effort by Duquesne to remove or seek removal of Fibertech's facilities from Duquesne's poles.

15. IT IS FURTHER ORDERED, pursuant to section 1.1403(d) of the Commission's rules, 47 C.F.R. § 1.1403(d), sections 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 224, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that to the extent that Fibertech's Petition To Stay Termination Of Pole Attachment Rights seeks to stay any attempt by Duquesne to terminate the parties' pole attachment agreement, the Petition is denied on the ground that Fibertech has failed to show that it will suffer irreparable harm from the actual or threatened termination of that agreement in the absence of a stay.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau