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

In the matter of	)	
	)	
Fiber Technologies Networks, L.L.C.,	)	
	)	
Complainant,	)	
	)	File No. EB-05-MD-014
v.	)	
	)	
	)	
North Pittsburgh Telephone Company,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 2007 **Released: February 23, 2007**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant a Complaint[1] filed by Fiber Technologies Networks, L.L.C. ("Fibertech") against North Pittsburgh Telephone Company ("NPTC"), pursuant to section 224 of the Communications Act of 1934, as amended ("the Act")[2] and sections 1.1401-1.1418 of the Commission's rules.[3] The Complaint alleges that NPTC violated section 224 by denying Fibertech access to NPTC's poles for the placement of Fibertech's attachments.[4] Fibertech requests that the Commission grant it immediate access to NPTC's poles, and require NPTC to take all actions necessary to accommodate Fibertech's access.[5] For the reasons stated below, we grant Fibertech's Complaint and order NPTC to provide Fibertech immediately with nondiscriminatory access to NPTC's poles.

II. FACTUAL AND REGULATORY BACKGROUND

2. Fibertech provides facilities-based fiber-optic telecommunications capacity and services.[6] Fibertech holds four Certificates of Public Convenience ("Certificates") from the Pennsylvania Public

[1] Complaint of Fiber Technologies Networks, LLC, File No. EB-05-MD-014 (filed Jul. 8, 2005) ("Complaint").

[2] 47 U.S.C. § 224.

[3] 47 C.F.R. §§ 1.1401-1.1418.

[4] *See*, *e.g.*, Complaint at 5, ¶ 19 and 7, ¶ 29.

[5] Complaint at 8-9, ¶ 34.

[6] *See*, *e.g.*, Complaint at 1, ¶ 2; Response to Complaint filed by NPTC, File No. EB-05-MD-014 (filed Aug. 10, 2005) ("Response") at 1, ¶ 2.

Utilities Commission ("PaPUC") to provide "telecommunications services to business customers, other carriers and public and private institutions."[7] The Certificates authorize Fibertech to "offer, render, furnish, or supply telecommunications services" "to the public" "in the Commonwealth of Pennsylvania" as (1) "a Reseller of Interexchange Toll Services;"[8] (2) "a Competitive Access Provider;"[9] and (3) "a Facilities-Based Interexchange Carrier."[10]

3. Fibertech has filed tariffs with the PaPUC ("Tariffs") offering to provide a variety of telecommunications services throughout the Commonwealth of Pennsylvania, including, for example: (i) intrastate interexchange resale toll services, such as switched and dedicated long distance services for business customers; (ii) competitive access services, such as trunk-side transport termination, local transport, SS7 out-of-band signaling, 800 data base access, and dedicated high-speed digital services; and (iii) intrastate facilities-based interexchange services, such as interLATA switched long-distance service and intraLATA switched long-distance service.[11]

4. NPTC is a "local exchange carrier" and a "utility" within the meaning of section 224(a)(1) of the Act. It provides facilities-based, switched access, telecommunications services to subscribers in portions of Allegheny, Armstrong, Butler, and Westmoreland Counties, Pennsylvania.[12] As a "utility," NPTC must provide "a cable television system *or any telecommunications carrier*" with

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[7] Order of the PaPUC dated September 28, 2001 approving Fibertech's certification applications in PaPUC Docket A-311101, A-311101 F0002, A-311101 F0003, and A-311101 F0004 ("*PaPUC Fibertech Order*") at 2, attached to Letter dated October 25, 2005 from J.D. Thomas, Counsel for Fibertech, to Marlene Dortch, Federal Communications Commission, Office of the Secretary, File No. EB-05-MD-014 ("Fibertech October 25 Letter"). *See* Complaint at 4-5, ¶ 17; Response at 1, ¶ 2 n.1; 7-8, ¶ 17. *See also* Certificates of Public Convenience granted by the PaPUC ("Certificate A-311101," "Certificate A-311101 F0002," "Certificate A-311101 F0003,"), attached to Fibertech October 25 Letter, and ("Certificate A-311101 F0004"), attached to Letter dated August 15, 2006 from Genevieve D. Sapir to Marlene H. Dortch, Secretary, Federal Communications Commission, File No. EB-MD-014 ("Fibertech Aug. 15 Letter").

[8] Certificate A-311101, attached to Fibertech October 25 Letter.

[9] Certificate A-311101 F0003, attached to Fibertech October 25 Letter.

[10] Certificate A-311101 F0004, attached to Fibertech Aug. 15 Letter. Fibertech has also received a Certificate from the PaPUC authorizing it to "offer, render, furnish, or supply telecommunications services" as a "Reseller and Facilities-Based Competitive Local Exchange Carrier to the public within the service territory of Verizon Pennsylvania, Inc." Certificate A-311101 F0002, attached to Fibertech October 25 Letter.

[11] *See* Letter dated November 30, 2005 from J.D. Thomas, David L. Sieradzki, Genevieve D. Sapir, Counsel for Fibertech, to Barbara Esbin, Market Disputes Resolution Division, Enforcement Bureau, File No. EB-05-MD-014 ("Fibertech Nov. 30 Letter"), attaching Fibertech's PaPUC Tariffs and a Declaration of Frank Chiaino, Executive Vice President and Chief Operating Officer of Fibertech Networks, ("Chiaino Declaration"), which describes Fibertech's Tariff offerings at 1-3, ¶¶ 2-5. The Tariffs attached to the Fibertech Nov. 30 Letter include Fiber Technologies Networks, L.L.C., Reseller of Interexchange Toll Services Tariff, PA P.U.C. No. 1, Effective June 19, 2002 ("IXC Reseller Tariff"); Fiber Technologies Networks, L.L.C., Competitive Access Tariff, Supplement No. 4 to PA P.U.C. No. 3, Effective September 30, 2005 (revising PA P.U.C. No. 3, Effective June 19, 2002) ("CAP Tariff"); Fiber Technologies Networks, L.L.C., Facilities-Based Interexchange Toll Services Tariff, Supplement No. 1 to PA P.U.C. No. 4, Effective September 30, 2005 (revising PA P.U.C. No. 4, Effective June 19, 2002) ("IXC Tariff"); and Fiber Technologies Networks, L.L.C., Switched Access Service for Connection to Communications Facilities Tariff, PA P.U.C. No. 5, Effective June 19, 2002 ("Switched Access Tariff"). *See* Complainant's Reply File No. EB-05-MD-014 (filed Aug. 30, 2005) ("Reply") at 9-10; Letter dated October 6, 2005 from J.D. Thomas and Genevieve Sapir, to Marlene Dortch, Federal Communications Commission, Office of the Secretary, File No. EB-05-MD-014 at 1, attaching Declaration of James Baase, Vice President, Engineering, of Fibertech Networks, LLC, at 1, ¶ 2.

[12] *See*, *e.g.*, Complaint at 1, ¶ 3; Response at 2, ¶ 3.

"nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it,"[13] unless it can show that a denial of access is justified due to "insufficient capacity" or "for reasons of safety, reliability and generally applicable engineering purposes."[14]

5. In April and May 2005, Fibertech sought access to NPTC's poles to extend into NPTC's service territory a fiber optic network already operating elsewhere in Pennsylvania.[15] Fibertech explained that it sought to build in NPTC's service territory a network extension of Fibertech's Pittsburgh-area network, enabling Fibertech to satisfy the needs of an initial end-user customer as well as "many other future customers,"[16] pursuant to Fibertech's Certificates and Tariffs.[17]

6. NPTC promptly denied Fibertech's request for access to NPTC's poles.[18] NPTC construed the information supplied by Fibertech as showing that Fibertech was planning to (i) construct a private network for only one customer rather than a common carriage network available to the public, and (ii) offer only dark fiber rather than lit fiber. Thus, in NPTC's view, Fibertech was not a "telecommunications carrier" with pole access rights under section 224(f)(1) of the Act.[19]

7. On July 8, 2005, Fibertech filed the instant Complaint requesting that the Commission grant Fibertech immediate rights of access to NPTC's poles.[20] The key question presented by Fibertech's Complaint is whether Fibertech is a "telecommunications carrier" with statutory rights of access to NPTC's poles under section 224(f)(1) of the Act. Answering that question requires examination of certain statutory and common law definitions described below.

8. NPTC must provide Fibertech access to NPTC's poles if Fibertech is a "telecommunications carrier" in NPTC's territory.[21] The Act defines "telecommunications carrier," in

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[13] 47 U.S.C. § 224(f)(1) (emphasis added). *See* 47 U.S.C. §§ 224(a)(4) (defining "pole attachment" as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility"). *See also National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002) ("*NCTA v. Gulf Power*").

[14] 47 U.S.C. § 224(f)(2).

[15] Complaint at 3, ¶ 10; Exhibit 1, Letter dated April 11, 2005 from Julie S. Adams, Director of Regulatory Affairs and Compliance, Fibertech to Mr. Kevin Albaugh, Vice President Regulatory Affairs, NPTC ("Fibertech April 11 Letter") and Exhibit 3, Letter dated May 5, 2005 from Charles B. Stockdale, Vice President and Corporate Counsel, Fibertech to Mr. Kevin Albaugh, Vice President Regulatory Affairs, NPTC ("Fibertech May 5 Letter") at 1; Response at 4, ¶ 10.

[16] Fibertech May 5 Letter at 1. *See* Fibertech April 11 Letter at 1.

[17] Fibertech April 11 Letter at 1; Fibertech May 5 Letter at 1.

[18] Complaint at 3, ¶ 11 and 4, ¶ 13; Exhibit 2, Letter dated May 4, 2005 from Kevin J. Albaugh, Vice President Regulatory Affairs, NPTC, to Julie S. Adams, Director of Regulatory Affairs and Compliance, Fibertech ("NPTC May 4 Letter") (seeking additional information about Fibertech's attachment request); Exhibit 4, Letter dated May 25, 2005 from John A. Alzamora, Counsel to NPTC to Charles B. Stockdale, Vice President and General Counsel, Fibertech ("NPTC May 25 Letter") at 1-4 (denying attachment request); Response at 4-5, ¶ 11.

[19] NPTC May 4 Letter at 1; NPTC May 25 Letter at 1-4.

[20] *See*, *e.g.*, Complaint at 8-9, ¶ 34. Specifically, Fibertech seeks an order, *inter alia*, requiring NPTC to: (1) immediately commence survey and engineering work on the poles in NPTC's service area to which Fibertech seeks to attach; (2) immediately commence good-faith negotiations for a pole attachment agreement, with a commitment to execute a new pole attachment agreement no later than 30 days from the date of such order; (3) grant access to NPTC's poles without a formal agreement in the event NPTC fails to complete a just and reasonable pole attachment agreement within the 30-day time period; and (4) commence make-ready/facilities arrangements no later than 15 days from the date of such order. Complaint at 9, ¶ 34.

[21] 47 U.S.C. § 224(f)(1).

pertinent part, as "any provider of *telecommunications services* …," and specifies that "[a] telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing *telecommunications services*."[22] The term "telecommunications service" is defined as "the offering of *telecommunications* for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[23] "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[24]

9. In interpreting those statutory definitions, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) affirmed the Commission's conclusions that (i) the term "telecommunications service" "is intended to encompass only telecommunications provided on a *common carrier* basis,"[25] and (ii) the term "telecommunications carrier," which was added to the Act in 1996, has essentially the same meaning as the pre-existing term "common carrier."[26] Courts construing "common carrier" have held, *inter alia*, that "the primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently;" and a "second prerequisite to common carrier status" is that "'customers transmit intelligence of their own design and choosing."[27] Such offering of service indiscriminately to the public may be either a wholesale offering to other carriers or a retail offering to end users.[28]

III. DISCUSSION

A. Fibertech Has Established A *Prima Facie* Case That It Is A "Telecommunications Carrier" With A Right Of Access To NPTC's Poles Under Section 224(f)(1) Of The Act

10. In a case such as this challenging a utility's denial of access to its poles, section 1.1409(b) of our rules provides that the complainant bears the burden of establishing a *prima facie* case that the denial of access violates section 224(f) of the Act.[29] Once the complainant establishes a *prima facie* case,

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[22] 47 U.S.C. § 153(44) (emphases added).

[23] 47 U.S.C. § 153(46) (emphasis added).

[24] 47 U.S.C. § 153(43).

[25] *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921, 927-30 (D.C. Cir. 1999) ("*Vitelco*") (emphasis added) (affirming *AT&T Submarine Sys., Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 21585 (1998)).

Vitelco, 198 F.3d at 924-27. *See, e.g.*, *Cable & W ireless plc,* Memorandum Opinion and Order, 12 FCC Rcd 8516, 8521-23, ¶¶ 12-17 (1997); *Federal-State Joint Board on Universal Service,* Report and Order**,** 12 FCC Rcd 8776, 9177-78, ¶ 785 (1997) (subsequent history omitted) ("*Universal Service Order*"). The Act defines "common carrier" or "carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio ...." 47 U.S.C. § 153(10).

[27] *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994) (quoting *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (internal quotes and footnotes omitted)). *See*, *e.g.*, *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976).

[28] *See, e.g.*, *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11556, ¶ 115 (1998) ("*Universal Service Report to Congress*"); *Universal Service Order*, 12 FCC Rcd at 9177-78, ¶ 785 (holding that "[c]ommon carrier services include services offered to other carriers, such as exchange access service, which is offered on a common carrier basis, but is offered primarily to other carriers"). *See generally MTS and WATS Market Structure, Phase I*, Third Report and Order, 93 FCC 2d 241, 246-47, 249-50, ¶¶ 13-14, 23 (1983) ("*MTS/WATS Market Structure Order*") (stating that access charges are regulated services and include "carrier's carrier" services).

[29] 47 C.F.R. § 1.1409(b).

the respondent utility has the burden of proving that its denial was lawful.[30] Therefore, Fibertech bears an initial burden to establish a *prima facie* case that it is a "telecommunications carrier" with a right of access to NPTC poles within the meaning of the Act. As discussed below, we conclude that Fibertech has met that burden by showing that it possesses valid state authorizations to provide telecommunications services, and has filed state tariffs offering such services to the public.

11. Fibertech has offered proof of its status as a "telecommunications carrier" in NPTC's territory by submitting in the record (i) its Certificates from the PaPUC authorizing Fibertech to "offer, render, furnish, or supply telecommunications services" as a reseller and facilities-based carrier of interexchange toll services ("IXC"), and as a competitive access provider ("CAP");[31] and (ii) the telecommunications service Tariffs that it has publicly filed with the PaPUC pursuant to its authorizations to provide intrastate telecommunications services.[32] We find that the decisions of the PaPUC to issue Certificates of Public Convenience authorizing Fibertech to provide intrastate "telecommunications services" and to allow Fibertech to publish its Tariffs reflect judgments by an expert regulatory agency that the services set forth in Fibertech's Tariff constitute "telecommunications services" and that Fibertech will offer those services for a fee to the public. Such judgments suffice to establish a *prima facie* case.

12. NPTC observes that the Pennsylvania statutory provisions defining who is a "telecommunications carrier" providing "telecommunications service" are not identical to the definitions of those terms provided in the Act.[33] An examination of the Pennsylvania definitions, however, reveals that they are, in fact, very similar to the federal definitions, although not identical. The applicable Pennsylvania statute defines "telecommunications carrier" as "[a]n entity that provides telecommunications services subject to the jurisdiction of the [PaPUC]," and defines "telecommunications service" as "[t]he offering of the transmission of messages or communications for a fee to the public."[34] Like the Act, the Pennsylvania statute provides that, to qualify as a "telecommunications carrier" providing "telecommunications service," an entity must offer transmission of communications for a fee to the public.

13. Recognizing that the Pennsylvania statute provides that a "telecommunications carrier" is subject to the jurisdiction of the PaPUC, NPTC focuses on the definition of "public utility" in § 102 of the statute, which identifies entities regulated by the PaPUC.[35] Section 102 states, in pertinent part, that a "Public Utility" is "(1) Any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for: … (vi) Conveying or transmitting messages or communications … by telephone or telegraph or domestic public land mobile radio service … for the

[30] 47 C.F.R. § 1.1409(b).

[31] Certificate A-311101 and Certificate A-311101 F0003, attached to Fibertech October 25 Letter; Certificate A-311101 F0004, attached to Fibertech Aug. 15 Letter.

[32] IXC Reseller Tariff; CAP Tariff; IXC Tariff; Switched Access Tariff, attached to Fibertech October 25 Letter; Complaint at 3, ¶ 10; Fibertech April 11 Letter at 1; Fibertech Nov. 30 Letter attaching Fibertech's PaPUC Tariffs.

[33] *See* Letter dated December 15, 2005 from John Alzamora, Counsel for NPTC, to Barbara Esbin, Market Disputes Resolution Division, Enforcement Bureau, File No. EB-05-MD-014 ("NPTC Dec. 15 Letter") at 4-6 (citing 66 P.C.S.A. § 3012).

[34] 66 P.C.S.A. § 3012. *Compare with* 47 U.S.C. §§ 153(44) (defining "telecommunications carrier," in pertinent part, as "any provider of telecommunications services … ") and 153(46) (defining "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of facilities used").

[35] *See* NPTC Dec. 15 Letter at 4-6 (citing 66 P.C.S.A. § 102). *See also* 66 P.C.S.A. §§ 1101, 1102.

public for compensation."[36] NPTC argues, based on this statutory language, that Pennsylvania law is broader than the Act "in that it concerns not only the transmitting of communications, but also the conveying of communications (as well as 'messages')," and it is "narrower in that it applies only to entities which own or operate equipment or facilities."[37]

14. NPTC has not shown, however, that these alleged distinctions constitute material differences between the definitions of "telecommunications carrier" and "telecommunications service" provided under Pennsylvania and federal law; and we discern none. Moreover, NPTC provides no reason to conclude, based on these alleged definitional distinctions, that Fibertech does not qualify as a "telecommunications carrier" under the Act, even though Fibertech qualifies as a "telecommunications carrier" and "public utility" authorized to provide "telecommunications services" under Pennsylvania law. For these reasons, we reject NPTC's suggestion that Fibertech is not entitled to rely on the decisions of the PaPUC to make a *prima facie* showing that Fibertech is a "telecommunications carrier" with pole attachment rights under section 224(f) under the Act.[38]

15. Our reliance on the PaPUC's decisions in assessing whether Fibertech has made a *prima facie* showing of its status as a "telecommunications carrier" finds support in cases addressing the prerequisites for the analogous process of establishing an entity's status as a "cable television system" with pole attachment rights under section 224(f). In *Paragon Cable Television Inc. v. FCC,* the D.C. Circuit upheld a Commission ruling that possession of a valid cable franchise is a reasonable precondition for establishing pole attachment rights. In so holding, the D.C. Circuit found that the Commission could apply a "presumption of validity" to decisions by the local franchising authority concerning the attacher's status as an approved franchisee.[39] Similarly, in *Texas Util. Elec. Co v. FCC*, the D.C. Circuit upheld a Commission ruling that section 224 of the Act confers jurisdiction over those pole attachments within the franchise service area defined by the local franchise authority.[40] These cases suggest that attachers are entitled to rely on decisions by responsible regulatory agencies, such as franchise authorities in the case of cable system attachers, and public utility commissions in the case of telecommunications carriers, in establishing their status as entities entitled to pole access under section 224(f) of the Act.[41]

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[36] *See* 66 P.C.S.A. § 102.

[37] NPTC Dec. 15 Letter at 4-5.

[38] We leave open the possibility that a state may define either "telecommunications carrier" or "telecommunications service" in a manner flatly inconsistent with the definitions contained in the Act, such that an entity could obtain state certification and file state tariffs, yet not meet the definitions contained in sections 153(44) and 153(46) of the Act. Similarly, there may be instances where an entity could be certificated to provide telecommunications services only in some, but not all, portions of a state, such that additional evidence of its status would be required to demonstrate a right of attachment in those non-certificated portions of the state. Neither situation, however, is presented here.

[39] *Paragon Cable Television Inc. v. FCC*, 822 F.2d 152, 153-54 (D.C. Cir. 1987) (holding that the Commission properly refused to address the attacher's arguments challenging the legality of the franchise authority's decision to revoke the attacher's franchise, noting that it was appropriate for the Commission to employ a "presumption of validity with respect to the franchising authority's actions *vis-à-vis* the franchise"). *See id*. at 154 & n.2 (citing *Tele-Communications, Inc. v. South Carolina Elec. & Gas Co.*, File No. PA-83-0027 (Com. Car. Bur. Apr. 19, 1985) as holding that the utility could not substitute its judgment for the franchising authority by removing pole attachments before such time as the franchising authority's revocation actually took effect).

[40] *Texas Util. Elec. Co v. FCC*, 997 F.2d 925, 934-35 (D.C. Cir. 1993).

[41] Moreover, NPTC has adequate recourse at the state level if it believes the PaPUC erred either in issuing Fibertech its Certificates, or in accepting Fibertech's various Tariffs for filing. *See* Fibertech Oct. 25 Letter, attaching *PaPUC Fibertech Order* at 3 ("The Applicant complied with Section 5.14 of our regulations, 52 Pa. Code § 5.14, relating to applications requiring notice. No Protests were filed and no hearings were held."); 52 Pa. Code § 54.36 (procedure for protests to applications); 52 Pa. Code § 5.572 (procedures for petitions for relief following a final decision).

16. Based on the foregoing, we conclude that Fibertech's possession of valid state authorizations to provide telecommunications services, together with its associated state Tariffs, constitute presumptive evidence of its status as a "telecommunications carrier" within the meaning of the Act. Therefore, in our view, Fibertech has made a *prima facie* showing that it is a "telecommunications carrier" entitled to nondiscriminatory access to NPTC's poles under section 224(f)(1) of the Act.

B. NPTC Has Failed to Show That Its Denial of Access Was Lawful

17. Because Fibertech has established a *prima facie* case, the burden shifts to NPTC to demonstrate that its denial of access was lawful.[42] NPTC cites several factors that purportedly show that Fibertech does not qualify as a "telecommunications carrier" with a right to attach to NPTC's poles under section 224 of the Act.[43] We have examined each of the factors offered by NPTC and conclude, for the reasons set forth below, that NPTC has failed to show that Fibertech is not a "telecommunications carrier" under the Act, and thus it cannot justify its denial of access on that basis.

1. Pursuant to its intrastate CAP and IXC Tariffs, Fibertech holds itself out directly to the public to provide telecommunications for a fee in NPTC's service territory

18. NPTC defends its denial of access on the ground that mere possession of authorizations to provide telecommunications service, and the filing of tariffs pursuant thereto, do not establish that Fibertech is *acting* as a "telecommunications carrier" in NPTC's service territory.[44] NPTC seems to suggest that Fibertech cannot qualify as a "telecommunications carrier" unless and until it is actually supplying telecommunications service to at least one customer in NPTC's territory. NPTC also contends that provision of dark fiber is not a "telecommunications service," so Fibertech cannot rely on its provision of dark fiber to qualify as a "telecommunications carrier."[45] We reject both of these assertions.

19. First, we reject NPTC's contention that Fibertech must show that it is actually supplying telecommunications service to a customer in NPTC's territory to qualify as a "telecommunications carrier" with a right of attachment under section 224 of the Act. The Act defines "telecommunications carrier" as any "*provider* of telecommunications services," and defines "telecommunications service" as the indiscriminate "*offering* of telecommunications."[46] These two definitions, read together, indicate that a "telecommunications carrier" is a carrier that *offers to provide* telecommunications on a common carrier basis, regardless of whether the carrier has actually supplied such service to a customer in the past. To hold otherwise would lead to the anomalous, Catch-22 result that an entity could not establish its identity as a "telecommunications carrier" for purposes of obtaining access to poles under section 224(f)(1) unless it was already supplying telecommunications service to the public, which might not even be possible without first obtaining access to poles.[47]

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[42] 47 C.F.R. § 1.1409(b).

[43] *See, e.g.*, Response at 1-2, 4-5, 6-8, 11-13, ¶¶ 2, 11, 13, 16, 17, 36, 38-40; NPTC Dec. 15 Letter at 2, 7-8; NPTC May 25 Letter at 1-4.

[44] Response at 12-13, ¶ 39; NPTC Dec. 15 Letter at 2.

[45] *See* Response at 7, ¶ 17; 12-13, ¶¶ 39-40; NPTC May 25 Letter at 3; NPTC Dec. 15 Letter at 1-2; 7-8.

[46] 47 U.S.C. §§ 153(44) and (46) (emphases supplied).

[47] In addition, such a holding would be inconsistent with the Commission's policy of encouraging competition and infrastructure investment and deployment in broadband markets. *See*, *e.g.*, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 20293 (2004); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, *Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband*

(continued....)

20. Turning to the record before us, we find that Fibertech is, in fact, offering to provide telecommunications service in NPTC's territory within the meaning of the Act. Specifically, Fibertech's PaPUC authorizations to provide telecommunications services as a CAP and an IXC on a statewide basis, together with its Tariffs, establish that Fibertech *offers to provide* a variety of telecommunication services to the public for a fee in NPTC's territory.[48] Indeed, the very term "tariff" means an offering to provide service;[49] and the text of Fibertech's Tariffs reflects that meaning. For example, Fibertech's CAP Tariff and Switched Access Tariff each set forth "the service offerings, rates, terms and conditions applicable to the furnishing of … services for connection to communications facilities of [Fibertech] to customers."[50] Therefore, NPTC's contention that Fibertech is not a "telecommunications carrier" because Fibertech is not yet actually supplying service to any customers in NPTC's territory lacks merit.

21. NPTC also asserts, without support, that Fibertech intends to serve only a single customer in NPTC's territory, which, in NPTC's view, disqualifies Fibertech as a "telecommunications carrier."[51] NPTC's assertions are contradicted by statements from Fibertech's representatives affirming that (i) the network segment Fibertech seeks to provide to its initial customer will be part of a wider network that Fibertech plans to use to serve many future customers[52] and (ii) Fibertech intends to provide a variety of telecommunications services in NPTC's service area, including "lit" long distance and local dedicated transport service.[53] Based on this record, we find that NPTC's unsubstantiated suppositions about

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Telecommunications Services, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling, or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ("*Wireline Broadband Order*"), *appeal pending sub nom. Time Warner Telecom v. FCC*, No. 05-4769 (and consolidated cases) (3rd Cir. filed Oct. 26, 2005).

[48] As noted above, these telecommunications services include, for example, switched and dedicated long distance services for business customers; competitive access services, such as trunk-side transport termination, and local transport; and interLATA and intraLATA switched long-distance service. *See* Section II ¶ 3 *supra*. We also reject NPTC's further suggestion that providers of competitive access services do not qualify as telecommunications carriers with pole attachment rights under section 224. *See* Response at 13, ¶ 40; NPTC May 25 Letter at 3 (arguing that "Fibertech's purpose in attaching to NPTC poles is not to act as a CLEC or an IXC," and suggesting that only CLECs and IXCs have pole attachment rights). NPTC's premise is clearly erroneous, as competitive access services are, in fact, "telecommunications services" under the Act. *See, e.g.*, 47 U.S.C. § 153(16) (defining "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."); *Tariff Filing Requirements for Nondominant Common Carriers*, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6754, ¶ 13 (1993), *vacated on other grounds, Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995) (recognizing that "CAPs are nondominant carriers [*i.e.*, common carriers] because they have not been previously declared dominant").

[49] *See*, *e.g.*, *Integrated Services Digital Networks*, First Report, 98 FCC 2d 249, 278, n.77 (1984) ("A tariff for interstate service is a public offer to provide service … ."); Harry Newton, *Newton's Telecom Dictionary* 888 (22nd ed. 2006) (defining "tariff" in relevant part as a "public document [that] details services, equipment and pricing *offered by* the telephone company (a common carrier) to all potential customers") (emphasis added).

[50] *See* CAP Tariff Section 1, 3rd Revised page 1; Switched Access Tariff, Original Title Page. Similar language describing the carrier's undertaking to offer service in accordance with the terms of its tariffs is contained in Fibertech's IXC Tariff at Section 2.1.1, Original page 1, and its IXC Reseller Tariff at Section 2.1.1, Original page 1.

[51] *See* Response at 13, ¶ 40; NPTC May 25 Letter at 1-4.

[52] Fibertech May 5 Letter at 1.

[53] Chiaino Declaration at 2, ¶¶ 2-3.

Fibertech's intentions are insufficient to rebut Fibertech's *prima facie* showing of its status as a telecommunications carrier.

22. We also find unavailing NPTC's attempt to justify its denial of access based on Fibertech's plans to provide "dark fiber" facilities to its initial customer in NPTC's service area.[54] According to NPTC, dark fiber does not constitute a "telecommunications service" under the Act,[55] and therefore Fibertech has no right to attach to NPTC's poles for the purpose of providing dark fiber. This argument overlooks the fact that Fibertech, through its Tariffs, offers to provide a variety of "lit" services in NPTC's area that indisputably qualify as "telecommunications services" under the Act. Thus, regardless of the status of dark fiber under the Act – an issue we need not and do not address here – Fibertech has established that it qualifies as a "telecommunications carrier" with a right of access under section 224(f) based on these "lit" service offerings.

23. This conclusion is supported by the Supreme Court's decision in *NCTA v. Gulf Power*, which held, in an analogous context, that the protections of section 224 continue to apply to attachments by cable systems, even if the attachments are simultaneously used to provide both cable service and a non-cable service, such as high-speed Internet access.[56] The Court reasoned that an attachment by a cable television company providing only cable service is an "attachment by a cable television system," subject to section 224, and that the addition of another service, such as Internet access service, "does not change the character of the attaching entity – the entity the attachment is 'by.'" "And this," declared the Court, "is what matters under the statute."[57] Likewise, Fibertech, having established its status as a telecommunications carrier with a right of access under section 224(f) based on its lit service offering, would not lose that status by offering non-telecommunications services over the same attachment. As long as Fibertech is offering to provide at least one telecommunications service via its pole attachments, its additional offering of an alleged non-telecommunications service has no impact on its pole attachment rights.

2. Fibertech offers to provide "telecommunications" rather than "information" services pursuant to its intrastate Tariffs

24. NPTC also claims that denial of access to its poles is justified because Fibertech intends to provide to its initial customer "an information (or data transmission) service rather than what the FCC views as a 'telecommunications service.'"[58] In support, NPTC states that the Commission has deemed Internet access an "information service" rather than a "telecommunications service."[59] As explained

[54] *See, e.g.,* NPTC May 25 Letter at 1-4; Response at 6-8, 12-13 ¶¶ 13, 16-17, 40; NPTC Dec. 15 Letter at 1, 7-8.

[55] *See*, *e.g.,* NPTC May 25 Letter at 1-4; Response at 6-8, 12-13 ¶¶ 13, 16-17, 40; NPTC Dec. 15 Letter at 1, 7-8.

[56] *NCTA v. Gulf Power, supra* note 13.

[57] *Id.* at 333. *See generally Heritage Cablevision Assocs. of Dallas. L.P. v. Texas Util. Elec. Co*, Memorandum Opinion & Order, 6 FCC Rcd 7099, 7104 ¶ 23 (1991), *recon. dismissed,* 7 FCC Rcd 4192 (1992), *aff'd sub nom. Texas Util. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993) (holding that cable system does not lose its pole attachment rights when its attachments are used to provide video and non-video services on a commingled basis).

[58] NPTC May 25 Letter at 3, (citing *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, 15 FCC Rcd 385, 401, ¶ 34 (1999) and *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11512-14, ¶¶ 23-27 (1998) ("*Universal Service Report*")); *See* Response at 12, ¶ 38.

[59] Response at 7, ¶ 16; NPTC May 25 Letter at 3. The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

below, we reject this argument because NPTC has failed to show that Fibertech offers an information service in NPTC's territory.

25. NPTC is correct that the Commission has classified as "information service" an integrated service that combines transmission with the data storage, manipulation, processing, and retrieval portion, *i.e.*, the Internet service provider ("ISP") portion of an Internet access service.[60] The ISP portion of an Internet access service typically provides end users with a comprehensive capability for manipulating information using the Internet, including applications such as web browsing, file transfers, e-mail access, Usenet newsgroups, and Domain Name System access.[61] The Commission has also recognized that the "telecommunications" component of an Internet access service can be "part and parcel"[62] of an integrated Internet access service offering, or it can be offered separately from the ISP portion of the service and consist solely of a transparent transmission path, with no changes to the form or content of the transmitted information.[63] Carriers can choose to offer this transmission component as a telecommunications service on a stand-alone, wholesale, common carrier basis to ISPs, who then use that service as an input for the wireline broadband Internet access that the ISPs, in turn, offer to their own end user customers.[64] Given the foregoing, the Commission has held that whether a service is a "telecommunications service" or an "information service" turns on the nature of the functions the purchaser is offered.[65] The determinative question, briefly put, is: does the service offering involve only a transparent transmission path, with no changes to the form or content of the transmitted information; or does it involve data storage, manipulation, processing, and retrieval?

26. Applying that standard here, we find that the services that Fibertech offers through its PaPUC Tariffs are "telecommunications services," not "information services." NPTC has not identified, and we cannot independently discern, any provision in any of Fibertech's various Tariffs that offers to provide the ISP portion of Internet access service, *i.e.*, data storage, manipulation, processing, and retrieval. Instead, in its applicable Tariffs, Fibertech offers only transparent transmission paths, with no changes to the form or content of the transmitted information in NPTC's service territory. Specifically, Fibertech offers to provide only the underlying transmission (or "telecommunications") typically used by ISPs and other information service providers in the provision of retail Internet access and other data processing services to subscribers.[66] As we found in the *Wireline Broadband Order*, "carriers may

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[60] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4821-23, ¶¶ 36-38 (2002) ("*Cable Modem Declaratory Ruling*"); *Wireline Broadband Order*, 20 FCC Rcd at 14863-64, ¶¶ 14-15.

[61] *See, e.g.*, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 125 S.Ct. 2688, 2702-12 (2005) ("*Brand X*") (affirming *Cable Modem Declaratory Ruling*); *Wireline Broadband Order*, 20 FCC Rcd at 14863-64, ¶¶ 14-15; *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4821-22, ¶¶ 36-38; *Universal Service Report to Congress*, 13 FCC Rcd at 11537-40, ¶¶ 76-78.

[62] *Wireline Broadband Order*, 20 FCC Rcd at 14910-11, ¶ 104.

[63] *See Wireline Broadband Order*, 20 FCC Rcd at 14901, 14909-10, ¶¶ 90, 103; *Cable Modem Declaratory Ruling,* 17 FCC Rcd at 4822-25, ¶¶ 38, 41-43; *Universal Service Report to Congress*, 13 FCC Rcd at 11520-21, ¶¶ 39-41.

[64] *See Wireline Broadband Order*, 20 FCC Rcd at 14909-10, ¶ 103.

[65] *See Cable Modem Declaratory Ruling,* 17 FCC Rcd at 4821, ¶ 35; *Universal Service Report to Congress*, 13 FCC Rcd at 11530, ¶ 59 (noting "Congress's direction that the classification of a provider should not depend on the type of facilities used . . . [but] rather on the nature of the service being offered to customers").

[66] *See*, *e.g.*, CAP Tariff at Section 3.4, 1st Revised Page 14, Original Page 15, 1st Revised Page 16 (offering "Dedicated High-Speed Digital Service" configured as a "point-to-point service" connecting two customer-designated premises at varying speeds, including DS-3, OC-3, OC-12, OC-48, OC-192 services); Switched Access Tariff at Section 3.1 (offering "a two-point communications path between a Customer's premises (or a collocated interconnection location) and [Fibertech's] network").

choose to offer this type of transmission as a common carrier service if they wish. In that circumstance, it is of course a telecommunications service."[67] Accordingly, Fibertech's provision of tariffed service to its initial customer provides no basis for NPTC's assertion that Fibertech is not a "telecommunications carrier" with pole access rights under section 224(f)(1) of the Act.

C. NPTC's Request to Dismiss the Complaint on Procedural Grounds Lacks Merit

27. Finally, NPTC argues that the Complaint, filed on July 8, 2005, should be dismissed as defective because it "fails to overcome the reasons given for dismissal" of the original complaint that Fibertech's filed on the June 24, 2005.[68] Staff had dismissed the original complaint without prejudice on procedural grounds, citing Fibertech's failure to comply fully with the Commission's pleading rules.[69] When Fibertech filed its revised Complaint on July 8, 2005, staff found it to be adequate and accepted it for filing. Staff subsequently allowed Fibertech to supplement its pleadings with further documentation, and directed both parties to provide additional briefing of certain legal issues.[70]

28. We find that dismissal of the re-filed complaint is unwarranted here. Although Fibertech should have included with its Complaint *all* of the additional documentation it reasonably believed was necessary to support its factual allegations, NPTC has shown absolutely no prejudice by Fibertech's later inclusion of these materials in the record. We therefore deny NPTC's request to dismiss the Complaint for failure to comply with the Commission's rules.

IV. CONCLUSION

29. For the reasons stated above, we find that (i) Fibertech has carried its burden to establish a *prima facie* case demonstrating its entitlement to attach to poles, ducts, conduits and rights-of-way owned or controlled by NPTC, and (ii) NPTC has failed to carry its burden of proof that denial of access was lawful on the alleged ground that Fibertech is not a "telecommunications carrier" offering to provide "telecommunications services," as those terms are defined in the Act. We therefore find that Fibertech is a "telecommunications carrier" entitled to pole attachments under section 224(f), and grant the relief requested in the Complaint.

V. ORDERING CLAUSES

30. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 224, and sections 0.111 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.111 and §§ 1.1401-1.1418, that the Complaint IS GRANTED.

31. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 224, and sections 0.111

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[67] *Wireline Broadband Order*, 20 FCC Rcd at 14910, ¶ 103.

[68] Response at 13-14, ¶¶ 41-45.

[69] Letter Ruling dated July 6, 2005 from Alexander P. Starr, Chief, Market Disputes Resolution Division, Enforcement Bureau, to J.D. Thomas, Genevieve D. Sapir, Counsel for Complainant, and John A. Alzamora, Counsel for Respondent, File No. EB-05-MD-012 at 2, (citing 47 C.F.R. § 1.1404(m) & (l)).

[70] *See* Letter Ruling dated November 15, 2005 from Barbara Esbin, Market Disputes Resolution Division, Enforcement Bureau, to J.D. Thomas, Genevieve D. Sapir, Counsel for Complainant, and Kenneth E. Hardman and John A. Alzamora, Counsel for Respondent, File No. EB-05-MD-014 (directing both parties to provide additional briefing of certain legal issues; directing Fibertech to provide all tariff filings referenced in the Complaint; and granting Fibertech's request to file a declaration in support of its Reply, its four Certificates, and the *PaPUC Fibertech Order*).

and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.111 and 1.1401-1.1418, that, to the extent that Fibertech continues to seek access to NPTC's facilities, Fibertech and NPTC SHALL PROMPTLY NEGOTIATE IN GOOD FAITH nondiscriminatory terms and conditions of access and maximum just and reasonable rates for pole attachments in accordance with 47 U.S.C. § 224 and the Commission's rules.

32. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 224, and sections 0.111 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.111 and 1.1401-1.1418, that, to the extent that Fibertech continues to seek access to NPTC's facilities, NPTC SHALL: (i) immediately commence survey and engineering work on the poles in NPTC's service area to which Fibertech seeks to attach; (ii) grant access to NPTC's poles without a formal agreement in the event NPTC fails to complete a just and reasonable pole attachment agreement within 60 days from the date of this Order; and (iii) commence make-ready/facilities arrangements no later than 15 days from the date of this Order.[71]

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau

[71] The relief granted extends to all poles, ducts, conduits and rights-of-way over which NPTC is responsible for acting on third-party requests for access, including facilities NTPC manages or controls under joint use or sharing agreements. *See* Complaint at 8-9, ¶ 34.