Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FIBER TECHNOLOGIES NETWORKS, L.L.C., *Complainant*, v. DUKE ENERGY-INDIANA, INC., DUKE ENERGY CAROLINAS, LLC., and DUKE ENERGY PROGRESS, INC. *Respondents*.	Proceeding No. 14-227 File No. EB-14-MD-015

RESPONSE TO STATEMENT OF JURISDICTIONAL AUTHORITY

Fiber Technologies Networks, L.L.C. ("Fibertech") respectfully submits this Response to the Statement of Jurisdictional Authority ("Statement") filed by the Indiana Utility Regulatory Commission ("IURC") in the above-captioned proceeding.

I. The IURC Does Not Have Jurisdiction Over Fibertech's Complaint

The IURC alleges in its Statement that it has jurisdiction over pole attachments within the state of Indiana. Additionally, in the Response to Pole Attachment Complaint filed in this proceeding ("Response" or "Resp.") by Duke Energy Indiana, Inc., Duke Energy Carolinas, LLC., and Duke Energy Progress, Inc., (collectively "Duke"), Duke alleges that the Indiana Utility Regulatory Commission ("IURC") "may" have jurisdiction over Fibertech's claims, at least as to poles in Indiana.[1] The IURC does not have jurisdiction over Fibertech's claims.

[1] Resp. ¶ 1.

A. The IURC Does Not And Cannot Regulate Pole Attachments Under Federal Or Indiana Law

As a threshold matter, the IURC has already admitted that it does not have jurisdiction over pole attachments under 47 U.S.C. § 224(c). In 1978, the IURC sent the FCC a letter purporting to certify that it regulates pole attachments.[2] But in 1981, the Indiana Court of Appeal in *Illinois-Indiana Cable Television Ass'n, Inc. v. Public Svc. Comm'n*,[3] held that the IURC does not have jurisdiction over the rates, terms, and conditions of pole attachments by cable operators. Thus, on October 27, 1981, the IURC sent the FCC a letter stating that it did not challenge the decision in *Illinois-Indiana Cable* and that its attempted certification was withdrawn.[4] The IURC has never subsequently submitted a certification to the FCC under 47 U.S.C. § 224(c). The IURC appears to argue that *Illinois-Indiana Cable* and its 1981 Letter address only pole attachments by cable television providers. However, as demonstrated below, the IURC has not satisfied the requirements to regulate pole attachments, and under federal law, it never can.

Section 224 and the Commission's Rules emphasize that the IURC does not satisfy the requirements to exercise jurisdiction over pole attachments so as to deprive the Commission of jurisdiction under Section 224(c). Section 224(c) provides that:

> (2) Each State which regulates the rates, terms, and conditions for pole ***attachments shall certify*** to the Commission that—
>
> (A) it regulates such rates, terms, and conditions;
>
> (3) For purposes of this subsection, a State ***shall not be considered to regulate*** the rates, terms, and conditions for pole attachments—

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[2] *See* Attachment A to Fibertech's Reply to Response to Pole Attachment Complaint, Declaration of T. Scott Thompson, dated January 6, 2015 ("Thompson Decl."), Exh. 1.
[3] 427 N.E.2d 1100 (Ind. Ct. App. 1981).
[4] Thompson Decl., Exh. 2.

> (A) unless the State ***has issued and made effective rules and regulations*** implementing the State's regulatory authority over pole attachments.[5]

Thus, to satisfy Section 224(c), the IURC must have "issued and made effective rules and regulations" regulating pole attachment rates, terms, and conditions. Moreover, the Commission's Rules also address what the IURC must do to reverse preempt under Section 224(c). Specifically, Commission Rule 1.1414 requires the IURC to certify that it has "issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments (***including a specific methodology for such regulation which has been made publicly available in the state***). . . ."[6] Indeed, in its December 9, 2014 email in this case, the Enforcement Bureau instructed the IURC, to "explain whether the Indiana Commission regulates both the rates, terms and conditions for pole attachments and the right of access to poles, and provide any documentation supporting that position."

The IURC's submission contains no such explanation and provides no such documentation. That is because the IURC has not adopted any rules or regulations governing the rates, terms, and conditions of pole attachment, much less a specific methodology for such regulation. Indeed, the IURC's submission still does not certify that it regulates the rates, terms, and conditions of pole attachments as required by Section 224(c)(2), which states "Each state that regulates the rates, terms and conditions for pole attachments ***shall certify*** to the Commission. . . ."[7]

As the IURC has recognized, it cannot adopt such rules and regulations because it lacks any authority over pole attachments by cable television operators. Thus, under Section 224, the IURC cannot regulate "pole attachments." First, Section 224(a) defines "Pole Attachment" as

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[5] 47 U.S.C. § 224(c) (emphasis added).
[6] 47 C.F.R. § 1.1414(a)(3) (emphasis added).
[7] 47 U.S.C. § 224(c)(2) (emphasis added).

"any attachment by a cable television system or provider of telecommunications service to a pole. . . ." Thus, in order to regulate "pole attachments" the IURC would have to be able to regulate both attachment by a cable operator and telecommunications service providers. Second, Section 224(f) requires that utilities grant access on a "nondiscriminatory" basis.[8] The access requirement of Section 224(f) grants rights to cable television providers and telecommunications providers that cannot be eviscerated by the State of Indiana.[9] Because it cannot regulate access to poles by cable operators, the IURC cannot regulate or grant access on a nondiscriminatory basis.[10] Indeed, if the IURC were permitted to exercise the authority it seeks in this case, it would lead to the untenable situation of Fibertech being subject to entirely different rules than a cable television operator attaching to the exact same Duke pole.

The IURC relies on Indiana Code § 8-1-2-5. However, Indiana Code § 8-1-2-5 fails to comply with the federally-guaranteed access granted by Section 224(f). Section 224(f) provides that "[a] utility *shall* provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole" with the sole exception being that an electric utility may deny access on a nondiscriminatory basis "where there is insufficient capacity and for reasons of

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[8] 47 U.S.C. § 224(f).

[9] After Congress created the Section 224(f) right of access in the Telecommunications Act of 1996, the Commission recognized that states must also meet the Section 224(f) standard in order to "reverse preempt" under Section 224(c). The Commission explained that "A party seeking to show that a state regulates access issues should cite to state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum. Especially probative will be a requirement that the relevant state authority resolve an access complaint within a set period of time following the filing of the complaint." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report & Order, 11 FCC Rcd 15499, ¶1240 (1996) ("*Local Competition Order*").

[10] In the 1996 "Local Competition Order," the Commission concluded that "where access is mandated, the rates, terms, and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access." *Local Competition Order*, 11 FCC Rcd 15499 at ¶1156.

safety, reliability and generally applicable engineering purposes."[11] Section 8-1-2-5, however, appears to contemplate denial of access on grounds beyond "safety, reliability and generally applicable engineering purposes." For example, Section 8-1-2-5 appears to contemplate a right of access only if the "public convenience and necessity require such use or such physical connections-5."[12] Congress has already determined that the public interest is served by requiring pole owners to grant access to telecommunications providers, with the sole grounds for denial being by an electric utility based on safety, reliability or generally applicable engineering purposes.[13] Section 224(f) does not require Fibertech first to demonstrate that the "public convenience and necessity require" that it be permitted to attach to a particular Duke pole or poles. The Indiana Code is seeking to impose an entirely different standard for access, one that could deny attachment based entirely on subjective evaluations of what the "public convenience and necessity" "require."

B. At Most, Indiana Code § 8-1-2-5 Gives Fibertech The Choice Whether To File At The IURC

Even if we assume that the IURC has satisfied the requirements to certify and take jurisdiction under Section 224(c), Indiana Code § 8-1-2-5 at most gives Fibertech the option to file its complaint at the IURC. It does not require Fibertech to do so. Section 8-1-2-5(b) states that a public utility "***may*** apply to the commission. . . ."[14] The statute makes IURC jurisdiction permissive, not mandatory, and places the choice in the hands of the complainant. In *Louisville & Ind. RR Co. v. Indiana Gas Co.*,[15] the railroad filed its claims in district court and the gas company moved to dismiss on the grounds that Section 8-1-2-5 required the claims to be filed at

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[11] 47 U.S.C. § 224(f) (emphasis added).
[12] Ind. Code § 8-1-2 (b).
[13] 47 U.S.C. § 224(f).
[14] Ind. Code § 8-1-2-5(b) (emphasis added).
[15] 792 N.E.2d 885, 892 (Ind. Ct. App. 2003).

the IURC. The Indiana Court of Appeals rejected the gas company's defense, holding that Section 8-1-2-5 "does not *require* that parties submit their dispute to the IURC. The statute only gives the parties the option to submit their disagreement to the IURC."[16]

Thus, even if the IURC had satisfied the statutory requirements for jurisdiction by making effective rules and regulations governing the rates, terms, and conditions of pole attachment by all cable and telecommunications providers, Section 8-1-2-5(b) still gives Fibertech the option of filing its complaint at the FCC. Accordingly, Fibertech's complaint in this proceeding is properly before and heard by the Commission.

The IURC cites *Kankakee Valley Rural Elec. Membership Corp. v. United Tel. Co. of Ind., Inc.*,[17] as allegedly supporting its authority. *Kankakee* addressed only whether the IURC could hear a pole attachment complaint against a rural cooperative that had otherwise opted out of IURC regulation. The court held that the IURC did have authority to hear that complaint. Of course, IURC jurisdiction over attachment to poles owned by a rural cooperative would not be inconsistent with Section 224, which excludes from FCC authority "any person who is cooperatively organized."[18] However, *Kankakee* is not applicable in this case. The case does not hold that the IURC can or has exercised regulatory authority under 47 U.S.C. § 224(c); nor does it hold that resort to the IURC is mandatory.

II. Conclusion

For the foregoing reasons, Fibertech's Complaint in this proceeding was properly filed before the FCC, and the IURC cannot exercise jurisdiction over Fibertech's Complaint.

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[16] *Id.* (emphasis in original). The Indiana Supreme Court subsequently rejected the claims on the ground that Section 8-1-2-5 did not apply to the use of property. *Louisville & Ind. RR Co. v. Indiana Gas Co.*, 829 N.E.2d 7 (Ind. 2005).
[17] 843 N.E.2d 987 (Ind. Ct. App. 2006).
[18] 47 U.S.C. § 224(a)(1).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2014, I caused a copy of the foregoing Response to Statement of Jurisdictional Authority be served on the following (service method indicated):

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