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

APR 27 2001

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| In the Matter of<br><br>Application Of Sections 251(b)(4) And 224(f)(1) Of the Communications Act Of 1934, As Amended, To Central Office Facilities Of Incumbent Local Exchange Carriers | CC Docket No. 01-77 |

**COMMENTS OF UTILITY INFRASTRUCTURE OWNERS ON**

**PETITION FOR DECLARATORY RULING**

**I.**

**INTRODUCTION**

Virginia Electric and Power Company ("Dominion Virginia Power"), Union Electric Company d/b/a AmerenUE, Atlantic City Electric Company and Delmarva Power and Light Company ("Conectiv") (collectively, "the Utility Infrastructure Owners"), in accordance with the Commission's Notice issued March 22, 2001, respectfully submit their Comments to the Petition for Declaratory Ruling filed with the Commission on March 15, 2001 by the Coalition of Competitive Fiber Providers ("Petitioners"). The Utility Infrastructure Owners are owners of

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poles, ducts, conduits and rights of way that are subject to the mandatory access requirements of section 224 of the Communications Act of 1934, as amended, 47 U.S.C. §224 ("section 224").

## II.

## SUMMARY AND STATEMENT OF POSITION

In these comments, the Utility Infrastructure Owners call the Commission's attention to an important -- and pivotal -- assumption that is integral to, and that underlies, the Petition. Specifically, the Petition incorrectly assumes -- without discussion -- that the provision of dark fiber entitles Petitioners to access rights under section 224. However, contrary to the Petition's critical premise, applicable statutory definitions, as well as judicial and administrative precedent, make clear that the provision of dark fiber is not "telecommunications," and that, as a result, dark fiber attachments are not "pole attachments" within the meaning of section 224.

The Utility Infrastructure Owners would be substantially prejudiced by any ruling of the Commission that held, or could be interpreted to hold, that dark fiber attachments are subject to section 224. Accordingly, the Utility Infrastructure Owners respectfully request that, in any ruling issued in this docket, the Commission expressly state that it is not making any finding or conclusion that could be interpreted either to assume, or hold, that dark fiber attachments are subject to section 224. ***To the extent the Petition is based on such an assumption, it should be denied.***

These comments do not otherwise address the merits of the Petition.

## III.

## ARGUMENT AND CITATION OF AUTHORITY

Petitioners urge the Commission to determine that providers of dark fiber[1] may, pursuant to Section 224(f)(1),[2] extend fiber to competitive local exchange carriers collocated in incumbent local exchange carriers' central offices and place distribution frames in central offices.[3] Further, Petitioners ask the Commission to declare that "telecommunications carriers may install dark fiber as separate attachments."[4]

The Petition is thus based on the essential assumption that the attachment of dark fiber to utility infrastructure is a "pole attachment" by a "telecommunications carrier" covered by section 224. Simply put, this assumption is wrong. Dark fiber is neither "telecommunications" nor a "pole attachment"- not as those terms are defined in section 224, not as those terms have been applied by the Commission, and not as those terms have been interpreted by the courts.

The Commission has never treated attachments composed solely of dark fiber as jurisdictional attachments under section 224. Instead, the Commission has applied section 224 to dark fiber ***only when the dark fiber is part of a host attachment that is itself either a cable or***

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[1] "Dark fiber, which exists within a fiber optic cable 'consists of...bare capacity and does not involve any of the electronics necessary to transmit or receive signals over that capacity.'" *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1278 (11th Cir. 2000) ("*Gulf Power II*") (quoting *In the Matter of Implementation of 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777, 6810 (2000) ("*1998 Report and Order*")). *See also In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 2696, 3776 (1999) ("*Third Report and Order*") ("Dark fiber is fiber that has not been activated through connection to the electronics that 'light' it, and thereby render it capable of carrying communications services."); http://www.americanfibersystems.com/services.html (last visted April 17, 2001); http://www.fibertech.com/services/index.cfm (last visited April 17, 2001); http://www.globalmetro.com/services.html (last visited April 17, 2001); http://www.telegry.net/products/wholesale; http://www.telseon.com/services.asp (last visited April 17, 2001).

[2] "A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1).

[3] Petition at i.

[4] Petition at 16.

***telecommunications attachment.***[5] In its *1998 Report and Order*, the Commission used the term "dark fiber" to refer to the lease and use of excess capacity of ***already existing*** cable and telecommunications attachments, and determined that the use and lease of excess capacity does not constitute an additional attachment warranting a separate pole attachment agreement or a separate pole attachment fee.[6] Reasoning that the lease and use of excess capacity does not place an additional burden on the pole over and above the host attachment, the Commission effectively limited the application of section 224 to dark fiber that is part of ***an existing telecommunications or cable attachment*** rather than dark fiber that comprises an entire attachment.[7]

Although it upheld the Commission's application of section 224 to the lease and use of excess capacity, the United States Court of Appeals for the Eleventh Circuit, in *Gulf Power II*, was careful to limit the breadth of the Commission's decision.[8] The court considered the issue of whether dark fiber falls under section 224 solely in the context of fiber that exists as excess capacity on an existing attachment.[9] The court deferred to the Commission's application in that context only because Congress had never explicitly addressed the issue and the Commission's approach was reasonable.[10] The court noted, however, that if it had been presented with the issue of whether the provision of dark fiber that was not part of an existing attachment fell within the scope of section 224, the court would probably have held, as it did for wireless and Internet service, that section 224 does not apply.[11] ***Gulf Power II thus confirmed that the Commission***

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[5] *See 1998 Report and Order*, 13 FCC Rcd at 6810.
[6] *See id.* ("Recent technological advances have made it possible for excess capacity with a fiber optic cable, known as 'dark fiber,' to be leased from an attaching entity by a third party").
[7] *Id.* at 6811.
[8] *Gulf Power II*, 208 F.3d at 1278.
[9] *Id.* at 1278-79.
[10] *Id.* at 1279.
[11] *See id.* at 1279 n.36 ("Our ruling on dark fiber is narrow; holding only that it was reasonable for the FCC to consider pure dark fiber and its host as one attaching entity. We are not presented with a factual scenario involving

***may apply section 224 to dark fiber only when dark fiber exists as excess capacity that is part of a host telecommunications or cable attachment.***[12] The principle that dark fiber is not, by itself, subject to section 224 is compelled by the statutory definitions set forth in section 224. Section 224(a)(4) defines "pole attachment" as "any attachment by a cable television system or provider of telecommunications service to pole, duct, conduit, or right-of-way owned or controlled by a utility."[13] Similarly, the mandatory access provisions of section 224f(1) is available only to "a cable television system or any telecommunications carrier."[14] Because Petitioners do not suggest they are cable television systems providing cable service,[15] their claim of access for dark fiber under Section 224(f)(1) necessarily must rise or fall on the assumption that dark fiber providers are telecommunications carriers. Once again, that essential assumption is wrong. A telecommunications carrier is defined as "any provider of telecommunications services."[16] "Telecommunications service" is in turn 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."[17] The provision of dark fiber,

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dark fiber that becomes lit, thus we do not address the status of such a fiber. Nor do we address dark fiber located within a cable whose attachment the FCC lacks authority to regulate under section 224(f)").

[12] "The 1996 Act says nothing about regulating bare capacity. But, these bare capacity fibers do not generally exist on their own. They are usually located within cables that also contain fibers providing cable or telecommunications services, i.e., lit fibers the FCC clearly has that authority to regulate. Dark fiber...is not a service (nor, of course, is it a type of attacher). Thus, the fact that it falls outside the definitions of 'cable service' and 'telecommunications service' tells nothing about Congress' intent to regulate dark fiber." *Id.*

[13] 47 U.S.C. § 224(a)(4).

[14] 47 U.S.C. § 224(f)(1).

[15] Any such claim would be specious. "[C]able Service" is the "one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(5). A "cable system" is "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. § 522(7). Obviously, the provision of unlit dark fiber is not a cable service, and Petitioners are not cable systems. Thus, the dark fiber attachments at issue could not meet the definition of a pole attachment as "any attachment by a cable television system." *See* 47 U.S.C. 224(a)(4).

[16] 47 U.S.C. § 153(44).

[17] 47 U.S.C. § 153(46).

however, does not involve either "telecommunications" or services "directly to the public," and therefore is not a telecommunications service.

"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."[18] ***A dark fiber provider does not transmit anything***. As the Commission has stated, "dark fiber consists of bare capacity and does not involve any of the electronics necessary to transmit or receive signals over that capacity."[19] Similarly, in *Gulf Power II*, the Eleventh Circuit was careful to observe that "dark fiber is bare capacity, it technically is neither a telecommunications service nor a cable service. In fact, it is not a service at all; it is simply inactive fiber."[20] Recent decisions by state public utility commissions are consistent with this position.[21] For example, in interpreting substantially similar statutory definitions, the Nebraska Public Service Commission held that "the leasing of dark fiber alone, without more, is not a telecommunications service as defined by statute."[22]

Providing dark fiber is in fact no different from providing any other piece of equipment, such as rail cars, automobiles, airplanes, or telephone switching equipment, that may be used in turn to provide a regulated service.[23] Just as a lease of tractor trailers to a motor carrier or rail

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[18] 47 U.S.C.§ 153(43).

[19] *1998 Report and Order*, 13 FCC Rcd at 6810.

[20] *Gulf Power II*, 208 F.3d at 1278. *See also AT&T Communications of Virginia v. Bell Atlantic-Virginia*, 197 F.3d 663, 673 (4th Cir. 1999) (recognizing that dark fiber is "transmission cable that has been laid out but is not attached to the electronics required to 'light' it").

[21] *See In the Matter of Application of Economic Development Alliance of Lincoln County for a Certificate of Authority to Provide Telecommunications Service in Oregon and Classification as a Competitive Provider*, 1998 Ore. PUC LEXIS 155 (Aug. 19, 1998) (holding that owner of dark fiber is not a telecommunications service provider because the owner's equipment will not be used to light the fiber).

[22] *In the Matter of the Commission, its own motion, to conduct an investigation for determination of the requirements for the implementation of the contract carrier provisions contained in Legislative Bill 150 (1999)*, 2000 Neb. PUC LEXIS 11 (Jan. 11, 2000).

[23] *See Ellis v. Interstate Commerce Comm'n*, 237 U.S. 434, 444 (1915) (company leasing instrumentalities of commerce like rail cars, including refrigerator, tank and box cars, to shippers does not qualify as a common carrier under the Act to Regulate Commerce); *Mecham Pontiac Corp. V. Williams*, 94 Ariz. 144, 382 P.2d 558 (1963)

cars to a railroad would not constitute motor carriage or rail service by the lessor, neither does leasing fiber to a third party constitute "telecommunications" or "telecommunications service."

Dark fiber also fails to meet the definition of "telecommunications service" because it is not offered "directly to the public." The phrase directly "to the public" means acting as a common carrier; [24] offering service on a nondiscriminatory basis to all comers under similar, if not identical, terms and conditions.

The Commission has adopted a two part test to determine whether an entity is, in fact, a common carrier offering service to the public.[25] A common carrier is an entity that has either (1) a legal obligation to make its services available to all potential users on standardized terms, or (2) by nature of the services provided, it is expected that the services will be available to all potential users on standardized terms.[26]

When there is no legal obligation, as is the case with dark fiber providers, determining whether services or facilities are in fact available "to the public" depends on several factors, including the "type, nature, and scope of users for whom the service is intended."[27] For example, applying these factors, the Commission held that a submarine cable system was not a common carrier because the operator of the cable system was planning to make the capacity of the system

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(company that rented and leased vehicles held not to be a "motor carrier" subject to regulation by the Corporation Commission).

[24] The Commission has held that "the legislative history of the 1996 Act indicates that the definition of telecommunications services is intended to clarify that telecommunications services are common carrier services." *Cable & Wireless*, 12 FCC Rcd 8516, 8521 (1997).

[25] *Id.* at 8522.

[26] *Id.* The Commission has held that the provision of dark fiber is a "network element" under section 251 of the Telecommunications Act of 1996. *Third Report and Order*, 15 FCC Rcd at 3776. However, the fact that dark fiber might qualify as a network element has no bearing on whether it is probably not constitutes a common carrier or a telecommunications service under section 224.

[27] *Virgin Islands Tele. Corp. v. FCC*, 198 F.3d 921, 924 (D.C. Cir. 1999) (citing *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1509 (1994)).

available to a limited class of users.[28] It was irrelevant that the class of users would in turn use the capacity to serve the public because the correct inquiry is into the services offered by the owner of the system, not the services offered by the lessee.[29]

Dark fiber providers are under no legal obligation to serve every potential customer and there is nothing implicit in the provision of dark fiber that requires dark fiber to be provided indifferently to all comers. In *Southwestern Bell Tel. Co. v. FCC*,[30] the United States Court of Appeals for the District of Columbia Circuit reviewed a determination by the Commission that dark fiber providers were in fact common carriers solely because the dark fiber providers filed their service contracts with the Commission. The court disagreed.[31] It overturned the Commission's treatment of dark fiber providers as common carriers, reasoning that (1) filing the contracts with the Commission was not enough to warrant common carrier status and (2) the Commission did not identify or refer to "any specific legal or regulatory obligation that would require...[dark fiber providers] to provide dark fiber on a common carrier basis."[32]

It is conceivable that, in addition to their dark fiber offerings, Petitioners may also offer services that do constitute "telecommunications services."[33] To that extent, Petitioners may well have rights under section 224(f)(1), but only as to attachments for such other services. Dark fiber is not transformed into "telecommunications," nor does the attachment of dark fiber to utility infrastructure become a "pole attachment" within the meaning of section 224 merely because the dark fiber owner also happens to offer other services via other attachments.

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[28] *Id.* (citing *AT&T Submarine Systems, Inc.*, 11 FCC Rcd 14885, 14892 (Int. Bur. 1996)) (*aff'd AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585 (1998)).
[29] *Id.*
[30] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1477 (D.C. Cir. 1994).
[31] *Id.* at 1484.
[32] *Id.* at 1480.

The Utility Infrastructure Owners respectfully urge the Commission to be particularly mindful of the adverse consequences and implications of any expansion of section 224 to dark fiber. The Eleventh Circuit has held that section 224 constitutes a taking of utility property under the Fifth Amendment.[34] The United States Supreme Court has denied certiorari on that issue in *Gulf Power II*.[35] Expanding section 224 to encompass dark fiber providers would exacerbate the nature and scope of the taking of utility infrastructure. As Commissioner Furchtgott-Roth warned, "When interpreting and applying a statute in a manner that is potentially inconsistent with the express language of the statute, the Commission should be especially careful when dealing with private property rights."[36]

## IV.

## CONCLUSION

For the foregoing reasons, the Utility Infrastructure Owners respectfully request that, in any ruling issued in this docket, the Commission expressly state that it is not making any finding or conclusion that could be interpreted either to assume, or hold, that dark fiber attachments are subject to section 224. ***To the extent the Petition is based on such an assumption, it should be denied.***

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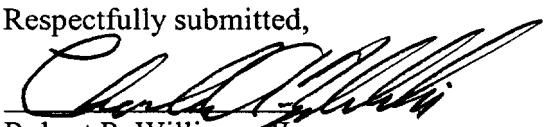
[33] *Id.* at 1481 ("The mere fact that petitioners are common carriers with respect to some forms of telecommunications does not relieve the Commission from supporting its conclusion that petitioners provide dark fiber on a common carrier basis").

[34] *Gulf Power Co. v. FCC*, 187 F.3d 1324, 1328-31 (11th Cir. 1999) (*cert. denied in part, aff'd in part*, 121 S.Ct. 879 (2000)) ("Because § 224(f) requires a utility to acquiesce to a permanent, physical occupation of its property, we conclude that the Act's mandatory access provision effects a per se taking of a utility's property under the Fifth Amendment").

[35] *National Cable Television Assoc. v. Gulf Power Co.*, 121 S. Ct. 879 (2001).

[36] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, 14 FCC Rcd 12673, 12737 (1999). *See also id* ("Where Constitutional rights are at stake, judicial precedent informs us that the courts do not favor the imposition of obligations by a federal administrative agency which relies on ancillary jurisdiction) (Comm'r Powell concurring); *Bell Atlantic Tel. Co. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) ("Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions.") (citing *Rust v. Sullivan*, 500 U.S. 173 (1991)).

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I, Charles A. Zdebski, hereby certify that the foregoing Comments in response to the Petition for Declaratory Ruling have been served by mail or hand delivery to the persons on the attached list on this 23rd of April, 2001.

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