

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

In the Matter of)	
)	
Schools and Libraries Universal Service)	
Support Mechanism)	CC Docket No. 02-6
)	
)	

REPLY COMMENTS OF SUNESYS, INC.

I. INTRODUCTION

Sunesys, Inc.’s (“Sunesys”) Reply Comments set forth the legal and policy bases to justify the Commission’s continuation of deeming dark fiber to be eligible for discounts under the Universal Service Support Mechanism for Schools and Libraries (commonly known as “E-Rate”). As Sunesys explained in its Initial Comments, as a competitive local exchange carrier (“CLEC”), Sunesys has leased end-to-end dark fiber service to numerous school E-rate beneficiaries for telecommunications and Internet access, in accordance with program rules. It is patently unfair, from procedural and substantive legal standpoints, and it violates the technical neutrality cornerstone of universal service policy, to suddenly reverse course, and deem dark fiber to be ineligible for E-rate discounts.

Sunesys has been the successful bidder of telecommunications and Internet access services for numerous E-rate beneficiaries. In numerous instances, the E-rate applicant has signed multi-year agreements to lease lit or unlit fiber service, in order to obtain telecommunications and/or Internet access service. Consequently, the Commission’s decision in the Further Notice of Proposed Rulemaking to solicit comments on the issue of whether dark

fiber service should be eligible for E-rate discounts unnecessarily has injected a level of uncertainty where none previously existed, and where none need exist.

More immediately, the Commission imposed a great deal of uncertainty by requiring the Fund Administrator to itemize dark fiber as ineligible for discounts for Fund Years 2004 and beyond since, according to the SLD, the FCC has not yet determined whether unlit dark fiber is a telecommunications service.¹ This determination completely fails to take into account that dark fiber is used not only for telecommunications transmission, but also serves as a means of providing Internet access. At a minimum, therefore, dark fiber should have remained eligible under the Internet access basket of services.

II. END-TO-END LEASED DARK FIBER SERVICE CONSTITUTES TELECOMMUNICATIONS SERVICE UNDER THE TELECOMMUNICATIONS ACT OF 1996 WHEN THE SERVICE IS PROVIDED ON A COMMON CARRIAGE BASIS.

The provision of dark fiber, end to end service, which enables a school or library to transmit communications and/or to obtain access to the Internet, constitutes a telecommunications service under the Telecommunications Act of 1996 (“the Act” or “TA-96”) when the service is provided by a common carriage basis.

The first step of this analysis is to define what is meant by dark fiber service. Borrowing from Newton’s Telecomm Dictionary, and in the context of evaluating unbundled network elements, the FCC has defined dark fiber in the following manner:

Dark fiber is optical fiber through which no light is transmitted and no signal is carried. It is unactivated deployed fiber that is left dark, *i.e.*, with no necessary equipment, *i.e.*, “opto-electronics” or “optronics” attached to light the fiber to carry a signal to serve customers. *See* NEWTON’S TELECOM DICTIONARY 201 (18th ed. 2002) (definition of Dark Fiber); *see also* *UNE Remand Order*, 15 FCC Rcd at 3771, para. 162 n.292. Once the optronics are attached to the fiber to make signal transmission

¹ SLD’s Eligible Services List, <http://www.sl.universalservice.org/data/pdf/EligibleServicesList101003.pdf>

possible the dark fiber becomes “lit.” See NEWTON’S TELECOM DICTIONARY 538-39 (18th ed. 2002) (definition of Opto-Electronics and Optronics).

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, FCC 03-36 (released August 21, 2003) at ¶201 n. 628 (“*Triennial Review Order*”).

The way in which Sunesys provides leased dark fiber service to E-rate beneficiaries is through an end-to-end service. Sunesys installs and operates all of the fiber transmission facilities, and the applicant installing and operating the electronic component(s) that are attached to the fiber in order to light the fiber. The sole difference between Sunesys’s dark and lit fiber service is determined by whether Sunesys or the end user provides the electronics that are used to light the fiber facilities.

The second step in the analysis is to determine whether leased dark fiber service meets the definition of “telecommunications” under TA-96. The definition of telecommunications under the Act is “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.” 47 U.S.C. §153.

The FCC already has found that dark fiber constitutes a communication service provided over wires:

We find that the BOCs’ provision of dark fiber service is ‘wire communication’ as defined by the Act. The Act’s definition of “wire communication” is “far-reaching” and clearly encompasses any carrier offering which permits the transmission of information between two or more points by means of electronic communications facilities, including all instrumentalities, facilities, apparatus, and services incidental to such transmission. Dark fiber service permits the transmission of information, by other like connection, between two or more customer premises (using customer-provided electronics). Accordingly, we find that dark fiber service clearly fits within the category of “transmission . . . by wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission,” and thus constitutes ‘wire communication’ under the Act.

In re Southwestern Bell Telephone Company; US West Communications; Bell Atlantic Telephone Companies; BellSouth Telephone Companies, Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service, Memorandum Opinion and Order, 8 FCC Rcd 2589, 2600, File No. W-P-C 6670 *et seq.*, FCC 93-165 (March 29, 1993).²

The operative part of the definition of wire communication, upon which the FCC relied in 1993 to rule that dark fiber is a communications service, and the definition of “telecommunications” under TA-96 is the same: the transmission of information of the user’s information between different points. The FCC’s finding that dark fiber service is a form of wire communications service governs the conclusion that dark fiber is a form of telecommunication service.

The FCC also reached a similar conclusion in its Order addressing the collocation requirements applicable to cross-connections. In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Fourth Report and Order*, CC Docket No. 98-147, 16 FCC Rcd 15435, FCC 01-204 (released August 8, 2001), ¶75. There, the FCC found that dark fiber service with respect to cross-connects constitutes a telecommunications service subject to Title II common carrier regulation. *Id.* at n.189. The cross-connection service under review was “ ‘[a] connection scheme between cabling runs, subsystems, and equipment using patch cords or jumpers that attach to connecting hardware on each end.’ ” *Id.*, quoting Newton’s Telecom Dictionary. In other words, the connection of various dark fiber facilities was viewed as a communications service, and the FCC also applied common carriage requirements to deem the service a form of telecommunications service.

The third step of this analysis is to determine whether dark fiber service constitutes a telecommunication service. The key precept of a telecommunications service is

² The Court’s remand of the Commission’s Declaratory Ruling focused NOT on whether dark fiber was a communications service, but rather whether the service was offered on a common carriage basis. The Commission’s conclusion, that dark fiber is a wire communications service, therefore remains intact.

that the service is offered on a common carriage basis, *i.e.*, the provision of telecommunications is undertaken “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.” 47 U.S.C. §153 (46). *See also* Federal-State Joint Board on Universal Service, *Report & Order*, 12 FCC Rcd 8776, 9177 P 785 (1997). The Court of Appeals for the District of Columbia Circuit has ruled that the critical aspect of common carriage is that a carrier must hold itself out indiscriminately to serve all users, or all users within a class of users. *Iowa v. FCC*, 218 F.3d 756, 759 (D.C. Cir. 2000). In *Iowa*, the Circuit Court confirmed that the FCC’s interpretation of the term “telecommunications carrier” to be synonymous with “common carrier” is a “reasonable construction of an ambiguous statutory term.” *Id.* at 757-58. The D.C. Circuit remanded the FCC’s declaratory order which found that the Iowa Communications Network was not a common carrier, in order for the Commission to address the Network’s claim that it provided service to end users that it was statutorily authorized to serve.

On remand, the FCC concluded that ICN was a common carrier, because ICN offers to serve all end users within the class of users that it is statutorily restricted to serve, and provides service that allows users to transmit information of their own choosing. Federal-State Joint Board on Universal Service, *Order on Remand*, 16 F.C.C.R. 571, 574 (2000). On appeal brought by the United States Telecom Association, the D.C. Circuit affirmed the FCC’s decision. *United States Telecom Ass’n v. FCC*, 295 F.3d 1326 (D.C. Cir. 2002).

The provision of end-to-end leased dark fiber service on a common carriage basis satisfies the definitional prerequisites of a telecommunications service. When leased dark fiber service is offered by a CLEC, such as Sunesys, on a tariffed basis that is available indiscriminately to the public, the service constitutes the provision of telecommunications by a common carrier, and therefore, should be eligible for discounts under the E-rate program.

Concomitantly, the provision of dark fiber service by a company that does not operate on a common carriage basis should not be classified as an eligible telecommunications service under the E-rate program.

III. PUBLIC POLICY CONSIDERATIONS FURTHER SUPPORT THE CLASSIFICATION OF END-TO-END LEASED DARK FIBER SERVICE AS AN ELIGIBLE SERVICE FOR E-RATE DISCOUNTS.

As Sunesys described in its Initial Comments, it is extremely unfair and disruptive for the FCC to reverse course and no longer deem dark fiber service as an eligible telecommunications service. Fibertech Networks, LLC's Comments cogently describe the detrimental effects of the Commission's recent decision to no longer provide discounts on dark fiber service:

Many schools have come to rely on dark fiber services as an efficient, cost-effective solution for their communications needs. Choice, flexibility, and certainty are important aspects of the E-rate program. The decision to eliminate dark fiber as an eligible service has undermined these key components of the E-rate program. Without dark fiber as an eligible service, schools and libraries have fewer choices in service providers, less flexibility in product offerings for both current and future advanced communications needs, and face debilitating uncertainty with respect to existing and future service arrangements.

Fibertech Comments at 3.

Schools and libraries should have the continued flexibility to choose among various technologies to obtain access to telecommunications services and to the Internet. Dark fiber service may constitute the lowest cost option that should remain available to applicants. Certainly under section 254(h), the Commission has the authority to deem dark fiber service as an adjunct to Internet access or high speed telecommunications services, and classify the service as eligible for discounts under the priority one category of services.

Just like lit fiber or copper facilities, dark fiber is a conduit used for transmission of telecommunications or for Internet access. There is no reason to discriminate against dark fiber in favor of lit fiber or other technologies that are used as a means of providing telecommunications service and Internet access.

IV. CONCLUSION

End-to-end leased dark fiber service that is provided by a common carrier indiscriminately to users should be designated as a telecommunications service that is eligible for E-rate discounts. Alternatively, end-to-end leased dark fiber service may be classified as an Internet access service that is eligible for priority one services.

Respectfully submitted,

By:

David Channing
Vice-President
Sunesys, Inc.
202 Titus Avenue
Warrington, PA 19876
(215) 343-1340

Dated: April 12, 2004