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

In the Matter of	)	
	)	
American Fiber Systems, Inc.,	)	
	)	
Complainant,	)	
	)	File No. EB-04-MD-003
v.	)	
	)	
Kansas City Power & Light Company,	)	
	)	
Respondent.	)	

ORDER

Adopted: April 6, 2004 **Released: April 7, 2004**

By the Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau:

1. On February 12, 2004, American Fiber Systems, Inc. ("AFS") filed a complaint[1] against Kansas City Power and Light Company ("KCPL") pursuant to section 224 of the Communications Act of 1934, as amended ("Act"),[2] and sections 1.1403 and 1.1404 of the Commission's rules.[3] AFS initiated the Complaint in response to a primary jurisdiction referral by the United States District Court for the District of Kansas.[4]

2. KCPL is an electric utility operating in, among other places, the Kansas City, Missouri area, where AFS seeks to attach to KCPL's poles for the purpose of offering telecommunications services to the public. AFS's Complaint seeks, *inter alia,* a determination by the Commission that AFS is a telecommunications carrier entitled to pole attachment rights, as well as an order requiring KCPL promptly to engage in good faith negotiations with AFS for a

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[1] Complaint, File No. EB-04-MD-003 (filed Feb. 12, 2004) ("Complaint").

[2] 47 U.S.C. § 224.

[3] 47 C.F.R. §§ 1.1403, 1.1404.

[4] Memorandum Order, *Kansas City Power & Light Co. v. American Fiber Systems, Inc.*, Civil Action No. 03-2330-GTV (D. Kan. Nov. 5, 2003).

nondiscriminatory pole attachment agreement in accordance with the Commission's rules.[5]

3. On March 8, 2004, the Enforcement Bureau granted KCPL's request for extension of time, from March 12 to March 26, 2004, to file its Response to the Complaint. On March 26, 2004, KCPL filed a motion to stay this proceeding, pending the parties' attempt to negotiate a pole attachment agreement.[6] Also on March 26, 2004, pursuant to settlement discussions between the parties, KCPL provided AFS with a draft of its standard form pole attachment agreement. On March 29, 2004, the Enforcement Bureau denied the Stay Motion, and ordered KCPL to file its Response as soon as possible, but in no event later than Friday, April 2, 2004.[7]

4. KCPL did not file a Response. Instead, on April 1, 2004, the parties filed a Joint Motion for Consent Order with a proposed Consent Order attached.[8] The Joint Motion characterizes the Consent Order as an "efficient, fair and reasonable means by which to resolve the parties' pending dispute before the Commission, without further expenditure of resources by either the parties or the Commission."[9] The Joint Motion further asserts that the Consent Order is "fully consistent" with the Act and with the Commission's pole attachment rules and regulations.[10]

5. The proposed Consent Order consists of two provisions. First, the Consent Order asks the Commission to conclude that, based on the factual evidence presented in the Complaint, AFS is operating as a "telecommunications carrier," as that term is used in the Act, and therefore is entitled to attach to KCPL's poles.[11] The parties specifically cite the following evidence in support of this conclusion:

a. AFS obtained a certificate from the Kansas Corporation Commission ("KCC") authorizing AFS to "transact the business of a telephone public utility to provide local exchange and exchange access services…" The certificate is currently in effect.

b. AFS obtained a certificate from the Missouri Public Service Commission ("MPSC") authorizing AFS "to provide intrastate interexchange

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[5] Complaint at 15, ¶ 45.

[6] Motion to Stay Proceedings and Motion for Leave to File Motion for Stay, File No. EB-04-MD-003 (filed Mar. 26, 2004) (collectively, "Stay Motion").

[7] *See* Letter Order, File No. EB-04-MD-003 (dated Mar. 30, 2004).

[8] Joint Motion for Leave, Joint Motion for Consent Order (collectively, "Joint Motion"), and proposed Consent Order ("Consent Order"), File No. EB-04-MD-003 (filed Apr. 1, 2004).

[9] Joint Motion at 1.

[10] Joint Motion at 1 (citing 47 U.S.C. § 224, 47 C.F.R. §§ 1.1401-1.1418).

[11] Consent Order at 2-3.

telecommunications services in the State of Missouri…" The certificate is currently in effect.

c. AFS filed tariffs with the KCC and the MPSC offering DS-1 and DS-3 service to any customer requesting these services.

d. AFS has offered to multiple parties, among other services, Ethernet Virtual Private Line Service and Ethernet Internet Access Service, as more fully described on AFS' website.

e. AFS has recently entered into contracts under which Customers may purchase Ethernet Service, Ethernet Virtual Private Line Service, Ethernet Virtual Private LAN Service, and Ethernet Internet Access Services, which services are more fully described on AFS' website.

f. AFS has received Section 214 (47 U.S.C. Section 214) authority from the Commission.

g. AFS has a Price Guide for interstate telecommunications services posted on its Internet website.

h. Eight other utility companies have entered into pole attachment agreements with AFS in accordance with the Commission's pole attachment rules.[12]

6. Second, the Consent Order asks the Commission to require KCPL to "immediately engage in good faith negotiations with AFS for a nondiscriminatory pole attachment agreement in conformance with the applicable Commission rules," and it states that "both parties hav[e] the intention of consummating the execution of such an agreement by April 30, 2004."[13]

7. We are satisfied that granting the Joint Motion will serve the public interest by promoting the private resolution of disputes and by eliminating the need for further litigation and the expenditure of further time and resources of the parties and this Commission.

8. Based upon the assertions contained in the Complaint and supporting attachments, the fact that KCPL has not filed a Response to the Complaint denying these assertions, and the fact that AFS and KCPL together filed the Joint Motion, we find that, for purposes of this proceeding, AFS is a "telecommunications carrier," as that term is defined by section 3 of the Act,[14] and therefore is entitled to attach to KCPL's poles pursuant to section 224

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[12] Consent Order at 3-4.

[13] Consent Order at 4.

[14] 47 U.S.C. § 153(44).

of the Act[15] and the Commission's rules regarding pole attachments.[16]

9. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), and 224 of the Act, as amended, 47 U.S.C. §§ 154(i), 154(j), 224, and sections 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 1.1401-1.1418, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the Joint Motion for Consent Order IS GRANTED.

10. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 224 of the Act, as amended, 47 U.S.C. §§ 154(i), 154(j), 224, and sections 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 1.1401-1.1418, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that AFS's Complaint against KCPL IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Lisa B. Griffin
Deputy Chief, Market Disputes Resolution Division
Enforcement Bureau

[15] 47 U.S.C. § 224.

[16] 47 C.F.R. §§ 1.1401-1.1418.