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July 17, 2020

VIA EFILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

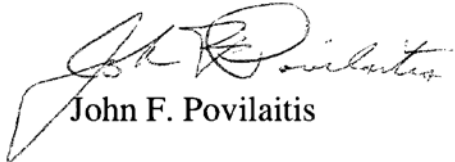
Re: *NetSpeed LLC v. Duquesne Light Company*;
Docket No. C-2020-3020212

Dear Secretary Chiavetta:

Enclosed please find the Reply of NetSpeed LLC to the New Matter of Duquesne Light Company in the above-captioned proceeding.

Copies are being served as indicated in the attached Certificate of Service.

Very truly yours,


John F. Povilaitis

JFP/tlg
Enclosure
cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

NetSpeed LLC	:	
	:	
v.	:	Docket No. C-2020-3020212
	:	
Duquesne Light Company	:	

**REPLY OF NETSPEED LLC TO
NEW MATTER OF DUQUESNE LIGHT COMPANY**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

I. INTRODUCTION

NetSpeed LLC (“NetSpeed” or the “Company”), through its counsel John F. Povilaitis, Alan M. Seltzer and Buchanan Ingersoll & Rooney PC, pursuant to Section 5.63 of the Pennsylvania Public Utility Commission (“PUC” or “Commission”) regulations, 52 Pa. Code § 5.63, hereby submits the following Reply to the New Matter of Duquesne Light Company (“Duquesne” or “DLC”) as follows:

140. This paragraph incorporates by reference Paragraphs 1-139 of Duquesne’s Answer to NetSpeed’s Complaint. The incorporation by reference does not distinguish between factual averments relevant to NetSpeed’s claims in its Complaint and any material factual averments Duquesne deems relevant to any affirmative defenses it raises in its New Matter. Therefore, to the extent DLC claims the allegations in these incorporated paragraphs raise factual matters for the purposes of any affirmative defenses, they are denied.

141. NetSpeed admits that it is a Party to a Pole Attachment Agreement with Duquesne dated July 17, 2017 (“Pole Attachment Agreement”) and that the Pole Attachment Agreement incorporates items by reference. NetSpeed neither admits nor denies Duquesne’s characterizations of the Pole Attachment Agreement as it speaks for itself.

142. Admitted in part and denied in part. NetSpeed admits that Duquesne claims NetSpeed has been in breach of the Pole Attachment Agreement. The Company is without knowledge or information sufficient to form a belief regarding the precise number of violations Duquesne claims and demands proof thereof, if relevant, at hearing. Duquesne's statements that NetSpeed has breached the Pole Attachment Agreement constitute legal conclusions that requires no response.

143. Admitted in part and denied in part. NetSpeed admits that it received a certificate of public convenience ("CPC") from the PUC as a public utility telecommunications competitive access provider ("CAP") in April 2019. By way of further response, the PUC's issuance of a CPC to NetSpeed confirms that it is a "telecommunications carrier" entitled to pole attachment rights in Pennsylvania. The Federal Communications Commission ("FCC") has failed to discern that there are any material differences between the definitions of "telecommunications carrier" and "telecommunications services" in the Pennsylvania Public Utility Code and Section 224 of the Communications Act of 1934.¹ The FCC does not require a carrier to show that it is actually supplying telecommunications service to a customer to qualify as a "telecommunications carrier" with a right of pole attachment.² Moreover, the FCC has found the underlying transmission service inherent in internet access service by a state-certificated CAP to be a telecommunications service offered by a telecommunications carrier.³ NetSpeed denies that it has misrepresented its status at any time to DLC. The Company is without information as to why Duquesne may have entered a pole attachment agreement with a party (i.e., NetSpeed) that it now considers to be ineligible for that type of agreement. To the extent the remainder of the allegations in this paragraph constitute legal conclusions, no response is required.

¹ *In the Matter of Fiber Technologies Networks, L.L.C. v. North Pittsburgh Telephone Company*, 22 FCC Rcd 3392 (February 23, 2007) ("*Fibertech*"); 66 Pa.C.S. §§ 101 et. seq. ("Code"); 47 U.S.C. § 224.

² *Id.* at 3398.

³ *Id.* at 3398, 3401-3402.

144. The allegations in this paragraph constitute legal representations and conclusions to which no response is required.

145. The allegations in this paragraph constitute legal representations and conclusions to which no response is required.

146. To the extent the allegations in this paragraph constitute legal representations and conclusions, no response is required. By way of further answer, the FCC classification of services as “information” services or telecommunications” service has fluctuated for decades. It is admitted that the FCC’s most recent shift to classifying broadband access services as “information” services occurred in 2018 in the *Restoring Internet Freedom Order*.⁴ While noting that this latest interpretation by the FCC was “confirmed by the D.C. Circuit in *Mozilla*,” DLC in its New Matter fails to mention that the D.C. Circuit in *Mozilla* remanded the issue of pole attachments to the FCC “[b]ecause the Commission [FCC] did not adequately address how the reclassification of broadband would affect the regulation of pole attachments...”.⁵ Specifically, the *Mozilla* Court noted that the FCC was required to consider and evaluate the impact on its new policy stance pole attachment safeguards and that “it failed to do so.”⁶ The *Mozilla* Order did not end PUC jurisdiction over pole attachment issues brought forward by certificated CAP carriers in Pennsylvania. Indeed, the FCC stated in the *Restoring Internet Freedom Order* that “in the twenty states and the District of Columbia that have reverse-preempted Commission jurisdiction over pole attachments, those states rather than the Commission are empowered to regulate the pole attachment process.”⁷ In that same *Internet Freedom Order* the FCC further cautioned pole owners such as public utilities “not to use this

⁴ *In the Matter of Restoring Internet Freedom*, 33 FCC Rcd 311, FCC 17-166 (January 4, 2018), (“*Restoring Internet Freedom Order*”), remanded without vacatur, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019)(“*Mozilla*”).

⁵ *Mozilla* at 104-105.

⁶ *Mozilla* at 108-109.

⁷ *Internet Freedom Order* at ¶ 185.

Order as a pretext to increase pole attachment rates or inhibit broadband providers from attaching equipment-and we remind pole owners of their continuing obligation to ‘offer rates, terms, and conditions [that] are just and reasonable.’”⁸

147. Admitted in part and denied in part. To the extent this paragraph avers that NetSpeed received a CPC in April 2019, it is admitted. NetSpeed denies DLC’s characterizations of NetSpeed’s representations to DLC and strict proof thereof is demanded. The remainder of the allegations in this paragraph constitutes legal conclusions to which no response is required.

148. Admitted in part and denied in part. NetSpeed admits that it is authorized to operate as a certificated CAP by the PUC. NetSpeed denies that it has offered no proof that it lawfully provides telecommunications services in DLC’s service territory. By way of further response, in the PUC Order granting NetSpeed a CPC, the Commission noted that by seeking CAP authorization, the Company was seeking authority “to provide *telecommunications services* to the public as a Competitive Service Provider (CAP) throughout the Commonwealth of Pennsylvania.”⁹ NetSpeed has on file with the PUC an accepted tariff implementing its CAP authority that specifies the rates and rules under which it offers telecommunications services in Pennsylvania to the public. The services NetSpeed may be advertising on its website are not the only services NetSpeed may offer under its CPC and PUC-approved tariff. In fact, NetSpeed’s website links to its full PUC CAP services tariff. Moreover, Duquesne’s claim that a telecommunications carrier must be actually providing telecommunications service to a customer

⁸ *Internet Freedom Order* at ¶ 186, quoting 47 U.S.C. § 224(b)(1).

⁹ *Application of NetSpeed LLC for Approval to Offer, Render, Furnish or Supply Telecommunications Services to the Public as a Competitive Access Provider in the Commonwealth of Pennsylvania*, Docket No. A-2017-2590179 (October 25, 2018) at 1. (Emphasis added).

to qualify as a telecommunications carrier has been rejected by the FCC.¹⁰ To the extent the allegations in this paragraph constitute legal conclusions, no response is required.

149. Admitted in part and denied in part. NetSpeed admits that it does not operate a cable system in DLC's service territory. The Company denies that it cannot provide telecommunications services in DLC's service territory as a CAP provider. As a CAP utility, NetSpeed is authorized to offer non-switched telecommunications services in Pennsylvania. Duquesne has cited no authority demonstrating that either the FCC or the PUC intends for such providers to not have the protection of Section 224 or the Public Utility Code when seeking to enforce pole attachment rights.¹¹ To the extent the allegations in this paragraph constitute legal conclusions, no response is required.

150. NetSpeed incorporates by reference its Answers to paragraphs 144-149.

151. The allegations in this paragraph constitute legal representations and conclusions to which no response is required.

152. The allegations in this paragraph constitute legal representations and conclusions to which no response is required.

153. Denied. The Pole Attachment Agreement speaks for itself.

154. Duquesne's assertions that NetSpeed has breached the Pole Attachment Agreement by referencing it in its Complaint is a legal conclusion to which no response is required. In any event, NetSpeed has requested that the PUC treat the Pole Attachment Agreement attached to its Complaint as a confidential document. To the extent Duquesne's claims of breach are legal conclusions they require no response.

¹⁰ *Fibertech* at 3398.

¹¹ 47 U.S.C. § 224; Code.

155. NetSpeed denies DLC's characterizations of the Pole Attachment Agreement. NetSpeed also incorporates herein by reference its Answer to paragraph 154.

II. CONCLUSION

WHEREFORE, for the foregoing reasons, NetSpeed LLC requests that the affirmative defenses raised by Duquesne Light Company's in its New Matter be rejected and that it be granted the relief sought in its Complaint.

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY PC



By: _____

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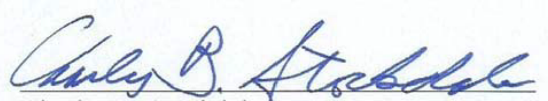
alan.seltzer@bipc.com

Dated: July 17, 2020

Counsel for NetSpeed LLC

VERIFICATION

I, Charles B. Stockdale, Vice President of Operations and Regulatory Affairs for NetSpeed LLC, hereby verify that the information in the foregoing Reply of NetSpeed LLC to New Matter of Duquesne Light Company is true and correct to the best of my information, knowledge, and belief. I understand that the statements are made subject to the penalties of 18 Pa. C.S. § 4904, relating to the unsworn falsification to authorities.

A handwritten signature in blue ink, reading "Charles B. Stockdale", is written over a horizontal line. The signature is cursive and appears to be a scan of a physical document.

Charles B. Stockdale
Vice President of Operations and
Regulatory Affairs

DATED: July 17, 2020

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

NetSpeed LLC

:
:
:
:
:

v.

Docket No. C-2020-3020212

Duquesne Light Company


CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the foregoing document upon the persons listed below in the manner indicated.

Via First Class Mail and Email:

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Date: July 17, 2020



John F. Povilaitis