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August 18, 2004

VIA ELECTRONIC COMMENT FILING SYSTEM

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, DC 20554

Re: ***Ex Parte Notice***; CC Docket No. 02-6
Schools and Libraries Universal Service Support Mechanism

Dear Secretary Dortch:

Pursuant to section 1.1206(b) of the Federal Communications Commission's ("Commission's") rules, 47 C.F.R. § 1.1206(b), this letter provides notice that on August 16, 2004, John Purcell, President and Chief Executive Officer of Fibertech Networks, LLC ("Fibertech" or "Company"), Michael Hurley, Vice President, Sales and Marketing, of Fibertech, and Kathy Cooper and Wendy Creeden of Swidler Berlin Shereff Friedman, LLP, met with Narda Jones, Jennifer Schneider and Mark Nadel of the Telecommunications Access Policy Division of the Wireline Competition Bureau, to discuss the Commission's above-referenced pending rulemaking proceeding on E-rate issues.

At this meeting, Fibertech presented a general overview of the Company's business and its ongoing participation in the E-rate program. The participants also discussed the following points regarding the reinstatement of dark fiber as an eligible service:

➤ Public Interest Benefits

- Dark fiber services have enabled schools to link online resources and databases, provide distance learning and shared applications, and obtain high-speed Internet connections, among other capabilities.
- One of the important technological benefits of dark fiber is that it provides schools with flexible bandwidth capacity that can expand to satisfy their future communications needs.
- Many schools prefer to use dark fiber instead of lit fiber services because dark fiber provides schools with more control over their telecommunications and Internet access services.
- With dark fiber services, schools also have more flexibility in terms of network leasing arrangements.
- Many schools have determined that dark fiber is a more cost-effective solution for obtaining telecommunications and Internet access services than lit fiber services.

➤ Cost Benefits

- Dark fiber services are usually priced well below similar lit fiber services offered by traditional telephone carriers, and, thus, schools and library applicants, as well as the E-rate Program, benefit from these cost savings.
- By way of example, for the upcoming funding year, the Buffalo School District, like many of Fibertech's other school district customers, was interested in leasing a dark fiber wide area network ("WAN") to meet its communications needs; however, because of the recent change in the eligibility status for dark fiber services, it instead sought bids for the leasing of a lit fiber WAN. Fibertech's proposed pricing for the requested lit fiber services amounted to almost half of the pricing offered by the incumbent local exchange carrier for the same service. The pricing for a dark fiber WAN would have been even less.
- Capital construction costs for broadband fiber networks to school and library applicants are typically similar in nature, regardless of whether provided as a dark fiber or a lit fiber service.

➤ Policy Support and Considerations

- A policy that provides E-rate funding for lit fiber services but excludes funding for dark fiber services favor one technology over another, and, thus, is contrary to the overall principle of competitive neutrality included in Section 254 of the Act.

- The exclusion of dark fiber services is inconsistent with the FCC's long-standing policy that schools and libraries are in the best position, and, therefore, should be allowed the flexibility to make their own decisions regarding which technologies would best accommodate their needs, how to deploy those technologies, and how best to integrate these new opportunities in their curriculum.
- The reinstatement of dark fiber services in the E-rate Program serves the goals of the program by providing schools and libraries with a cost-effective, efficient solution to obtain access to affordable telecommunications services.
- The exclusion of dark fiber services will, in some cases, require schools to seek funding for more services than they actually need where schools may already have certain equipment, such as routers.

➤ Statutory Authority

- Nothing in the Communications Act of 1934, as amended, ("Act") prohibits the reinstatement of dark fiber as an eligible service, nor does it require the Commission to determine the regulatory classification of dark fiber before doing so.
- Pursuant to its expansive authority for "additional services" under sections 254(c)(3) and (h)(1)(B) of the Act, the Commission has the authority to include dark fiber in the E-rate program, just as it found Internet access and internal connections to be eligible for E-rate funding.
- In deciding to provide funding for Internet access and internal connections, the Commission did not require the services to be provided by a telecommunications carrier or on a common carrier basis. Nor did the Commission require that eligible service providers must be direct contributors to the federal universal service fund.
- Accordingly, consistent with the Act's "additional services" provisions and federal precedent, the Commission has the authority to reinstate dark fiber as service eligible for E-rate funding.

Finally, Fibertech made the following recommendations to the Commission:

1. Dark Fiber Service Category

- A new service category for dark fiber service could be created as part of the E-rate Program (adding to the existing "Telecommunications," "Internet Access" and "Internal Connections" service categories).
- Until the Commission makes any determination regarding the regulatory classification of dark fiber, both telecommunications and non-

telecommunications providers could be eligible to provide dark fiber services as part of the Program.

- Because dark fiber service is an integral part of providing schools and libraries with the telecommunications and Internet services they need, the new “Dark Fiber” service category should receive the same funding priority as lit fiber services included in the “Telecommunications” and “Internet Access” service categories.
- Criteria similar to that used when dark fiber was an eligible service would apply in determining whether a dark fiber funding request is eligible for funding (such as by using the FCC’s existing WAN criteria in determining whether the leasing of a particular dark fiber WAN service is eligible for funding).

2. WAN Limitations

- The Commission should adopt its proposals to (1) limit up-front WAN lease payments to 25% of an applicant’s entire funding; and (2) require up-front WAN lease payments of \$500,000 or more to be prorated over 5 years.
- Due to the investment and resources involved in WAN leasing contracts, limitations on up-front WAN lease payments should be accompanied by the establishment of a streamlined process for review of subsequent funding applications submitted during the lease term after a particular multi-year WAN lease has been approved for funding by the SLD. A streamlined review process would assist in removing some of the uncertainty from the procurement process that otherwise provides a disincentive for schools and libraries to select a WAN service, even though a WAN may be the most cost-effective solution for their communications needs.

3. Service Vendor Registration Fee

- The Commission should consider imposing a registration fee on service vendors upon award of a contract and grant of the requested funding. The service vendors would pay the fees on an annual basis as the E-rate funding is distributed.
- The registration fee could be based on a percentage of the funds awarded, *i.e.*, one half of 1% of the funding received per fiscal year. For example, this would mean that for the approximately \$765 million in E-rate funding distributed thus far this year, the Program could have collected \$3.8 million in registration fees.

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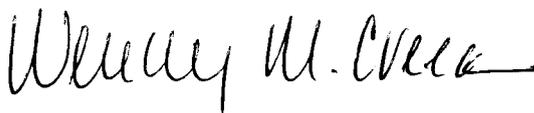
- Monies from this fee could be used to provide additional resources to assist in the processing of E-rate applications and the auditing of Program participants. More specifically, due to investment and resources involved in multi-year WAN leasing contracts, the Commission could use a portion of these monies to step-up the initial review of these applications, which could, in turn, allow for streamlining processing of applications for these services during the remaining years of contracts approved for funding.

Copies of Fibertech's Comments and Reply Comments previously filed in this proceeding were provided to Ms. Jones, Ms. Schneider and Mr. Nadel at this meeting.

Fibertech respectfully requests that the Commission accept into the record this late-filed *Ex Parte* notice that is being filed one day past the requisite filing deadline, or merely two days after the meeting was held.¹ As demonstrated herein, the issues discussed in the meeting were substantial and complex, and, thus, Fibertech needed this additional time to ensure that this Notice accurately reflected the discussions for the record.

Any questions regarding this filing should be directed to the undersigned.

Respectfully submitted,



Kathy L. Cooper
Wendy M. Creeden

Counsel for Fibertech Networks, LLC

cc: Narda Jones (FCC)
Jennifer Schneider (FCC)
Mark Nadel (FCC)
John Purcell (Fibertech)
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¹ See 47 C.F.R. § 1.1206(b).