

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

In the Matter of)
)
Eligible Services List for)
Schools and Libraries Universal Service) **CC Docket No. 02-6**
Support Mechanism)
)

COMMENTS OF FIBERTECH NETWORKS, LLC

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Fibertech Networks, LLC, (“Fibertech”), by its undersigned counsel, hereby submits these comments in response to the Federal Communications Commission’s (“Commission’s” or “FCC’s”) Public Notice regarding its proposed E-rate Eligible Services List for Funding Year 2005 issued in the above-referenced proceeding.¹

I. INTRODUCTION AND SUMMARY

Fibertech is a facilities-based telecommunications service provider that builds, leases and operates dark fiber networks in leading second and third-tier markets throughout the Northeast, Midwest and Mid-Atlantic States. Fibertech has designed and constructed high-capacity metro area networks, including fiber rings, to meet the advanced communications and broadband needs of telecommunications carriers, other business entities, and educational and governmental institutions. The company has posted significant sales, operations and financial results, including building more than \$90 million in network assets, selling over \$250 million in total

¹ Pleading Cycle Established for Eligible Service List for Universal Service Mechanism for Schools and Libraries, CC Docket No. 02-6, *Public Notice*, FCC 04-200 (rel. Aug. 13, 2004) (“2005 Eligible Services List Public Notice”).

sales contracts, achieving a cash positive status in 2002 and 2003, and completion of the core network in its original 16 cities.

Fibertech's growth stems from a diversified customer base. Approximately 65% of 2003 sales were to enterprise customers, the company's business, government and educational accounts. The remaining 35% were sales to telecommunications carriers and wireless customers. In total, Fibertech serves the eight largest national long distance carriers, many competitive local exchange carriers ("CLECs"), wireless providers, and more than 60 enterprise customers.

Fibertech has been a participant as a service provider in the E-rate program since 1999 and is an eligible vendor with an active Service Provider Identification Number ("SPIN"). Fibertech has agreements with 29 school districts and 3 education aggregation networks, most of which are currently in operation. Fibertech also is the winning bidder in 16 other districts, many of which are awaiting E-rate funding decisions. As the winning bidder for multiple contracts, Fibertech has had the opportunity to provide schools with the telecommunications services and Internet access they need to upgrade their communications facilities and provide their students with the advanced communications services that are critical to our educational institutions today.

Although representing less than 20% of its overall business, educational institutions are an important part of Fibertech's customer base and business plan. As such, Fibertech has a vested interest in the efficiency and viability of the E-rate program. Fibertech is pleased to have the opportunity to participate in a program that is aimed at providing schools and libraries with affordable advanced communications services and looks forward to continuing to provide its services to these entities.

For these reasons, Fibertech has been an active participant in the ongoing E-rate proceedings pending before the Commission. Fibertech has met with FCC Staff, and previously

submitted comments and reply comments regarding dark fiber E-rate issues under consideration by the Commission.² Fibertech submits the instant comments to once again stress the importance of reinstating of dark fiber as a service eligible for funding under the E-rate Program.

Prior to Funding Year 2004, the leasing of dark fiber services was included on the Eligible Services List as a service eligible for E-rate funding. For Funding Year 2004, the Eligible Services List was abruptly changed to indicate that dark fiber services were no longer eligible for E-rate funding because the “FCC has not resolved whether unlit dark fiber is a telecommunications service.”³ The proposed Eligible Services List for Funding Year 2005 also excludes dark fiber from E-rate funding, again indicating that dark fiber will be ineligible for funding until the Commission resolves the issue of whether dark fiber is a telecommunications service.⁴

Fibertech submits that the Commission should immediately reinstate dark fiber as an eligible service. In reinstating dark fiber as an eligible service, the Commission need not determine the regulatory classification of dark fiber before doing so. Instead, pursuant to its expanded authority under sections 254(c)(3) and (h)(1)(B) of Communications Act of 1934, as

² Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, *Comments of Fibertech Networks, LLC* (filed July 21, 2003); Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, *Comments of Fibertech Networks, LLC* (filed Mar. 21, 2004); Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, *Reply Comments of Fibertech Networks, LLC* (filed Apr. 12, 2004); Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, *Ex Parte Notice of Fibertech Networks, LLC* (filed May 12, 2004); Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, *Ex Parte Notice of Fibertech Networks, LLC* (filed Aug. 18, 2004).

³ Eligible Services List for Schools and Libraries Support Mechanism, p. 30, dated Oct. 10, 2003, available at www.sl.universalservice.org/reference/eligible.asp.

amended, (“Act”), the Commission has the authority to include dark fiber in the E-rate program, just as it previously found Internet access and internal connections to be eligible for funding under the Program. A new “Dark Fiber” services category could be created, using the criteria similar to that used when dark fiber was an eligible service in determining whether a specific dark fiber funding request is eligible for funding.

Prior to the abrupt change in eligibility for dark fiber services, many schools came to rely on dark fiber services as an efficient, cost-effective solution for their communications needs. Among other things, schools benefit from the flexibility provided by dark fiber services in terms of bandwidth capacity and network leasing arrangements, as well as the additional control provided by dark fiber services over their telecommunications and Internet access services. Dark fiber also provides schools with significant cost benefits because it is often priced well below similar lit fiber services offered by traditional telephone carriers. These public interest and cost benefits weigh soundly in favor of reinstating dark fiber as an eligible service.

Importantly, a policy that excludes dark fiber services from the E-rate program would not be competitively neutral, nor would it be consistent with the Program’s long-standing goals of providing schools with both flexibility and choice in satisfying their communications needs. Rather, 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 and Internet access services.

⁴ *2005 Eligible Services List Public Notice*, Eligible Services List, Schools and Libraries Support Mechanism for Fund Year 2005, p. 56.

Moreover, given that dark fiber is an efficient and cost-effective means by which schools and libraries can obtain access to affordable telecommunications and Internet services, the funding of such services is clearly consistent with the public policy goals and purpose of the Act. In fact, dark fiber plays a significant role in the fundamental goals of the 1996 Act by providing a competitive alternative to facilities-based services. It is Fibertech's view that without policies that encourage, or at least do not discourage, the development of a competitive infrastructure, telecommunications competition and its inherent benefits to consumers, including school districts and libraries, has little chance for long-term success.

II. THE FCC HAS THE AUTHORITY TO REINSTATE DARK FIBER AS AN ELIGIBLE SERVICE BEFORE DETERMINING ITS REGULATORY CLASSIFICATION

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. Rather, 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.⁵ Indeed, it is under this expansive authority that the Commission decided to include Internet access and internal connections as services eligible for E-rate funding.⁶ The Commission, thus, has the authority to do the same for dark fiber services.

Notably, in deciding to provide E-rate funding for Internet access and internal connections, the Commission did not require the services to be provided by a

⁵ 47 U.S.C. §§ 254(c)(3) & (h)(1)(B).

⁶ Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd. 8776, ¶¶436-442, 450-457 (1997), subsequent history omitted ("*USF Report and Order*").

telecommunications carrier or on a common carrier basis.⁷ Nor did the Commission require that eligible service providers must be direct contributors to the federal universal service fund.⁸ Accordingly, the Commission should not consider such issues as a barrier to the inclusion of dark fiber in the E-rate program, nor should the Commission impose any such restrictions on dark fiber services. To do otherwise would run afoul of the principle of competitive neutrality principle found in section 254 of the Act.

Significantly, contrary to the language contained in the proposed Eligible Services List, the FCC does not need to determine the regulatory classification for dark fiber before it can reinstate dark fiber it as an eligible service. Rather, like the Commission did in the case of Internet access and internal connections, 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). 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.

⁷ *Id.* at ¶595-600. “Moreover, interpreting section 254(e) to deny schools and libraries access to discounted offerings from Internet service providers and providers of internal connections that are not telecommunications carriers would be inconsistent with the purpose of section 254(h)(2)(A). Limiting support to telecommunications carriers would reduce the sources from which schools and libraries could obtain discounted Internet access and internal connections, which would reduce competitive pressures on providers to cut their costs and prices and thus could lead to unnecessarily high pre-discount prices. We conclude that Congress intended that schools and libraries secure the most cost-effective, readily available Internet access and internal connections through vigorous competition among all service providers.” *Id.* at ¶595.

⁸ *See id.* at ¶595-600.

In sum, there is no legal or logical reason why dark fiber should not be reinstated as eligible for E-rate funding on the same terms and conditions that applied previously. Dark fiber would be eligible for funding if (a) it is leased to obtain telecommunications or internet access services, (b) the applicant lights the fiber and its electronics to light the fiber are located solely at the eligible school or library, and (c) the applicant shows a direct and immediate use for transmission capability of the subject capital expenses. If the dark fiber is used as part of a Wide Area Network (“WAN”) to obtain telecommunications or internet access services, the availability of funding would be subject to the requirements of section 54.518 of the Commission’s rules, as was the case when dark fiber was an eligible service.⁹ Thus, the Schools and Libraries Division (“SLD”) of the Universal Service Administrative Company (“USAC”) would continue to evaluate the dark fiber funding request, as it did before, to ensure that the schools were not purchasing or building WANs in contravention of section 54.518. Under this former process, schools and libraries benefited tremendously from the availability of dark fiber under the E-rate program. They, their students and their communities should be able to realize these benefits in the future as well.

III. DARK FIBER SERVICES PROVIDE SIGNIFICANT PUBLIC INTEREST AND COST BENEFITS TO E-RATE PARTICIPANTS AND THE PROGRAM ITSELF

Over the past several years, Fibertech has provided dark fiber services to a number of school districts under the E-rate program. In many cases dark fiber services are used by school districts to connect schools within the district to the public switched telephone network or the Internet as part of a WAN. Dark fiber services have enabled schools to link online resources and databases, provide distance learning and shared applications, and obtain high-speed Internet

⁹ See 47 C.F.R. § 54.518.

connections, among other capabilities. As such, dark fiber plays a significant role in providing schools and libraries with the advanced services contemplated by Section 254 of the Act.

Dark fiber services also provide schools with flexible bandwidth capacity that can expand to satisfy their future communications needs. Additionally, 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, including their long-term costs, and also provides more flexibility in terms of network leasing arrangements. These technological advantages provide schools with an efficient means by which they can obtain immediate access to advanced services to meet the ever changing telecommunications and Internet services needs of their educational programs.

The ability to purchase dark fiber services can also provide schools with significant cost savings because dark fiber services are usually priced well below similar lit fiber services offered by traditional telephone carriers. For many cash-strapped schools, this cost savings can mean the difference between having or not having the advanced telecommunications services so essential to their districts. Furthermore, capital construction costs do not drive up the price for dark fiber service because the costs for high-capacity broadband networks to school and library applicants are typically similar in nature, regardless of whether provided as a dark fiber or a lit fiber service.

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 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 a savings of over fifty percent as compared to the pricing offered by the incumbent local exchange carrier for the

same service. Significantly, the pricing for a dark fiber WAN would have been even less, while at the same time dark fiber would have provided the District with additional technological benefits, including flexible bandwidth capacity and added network controls.

These public interest and cost benefits weigh strongly in favor of allowing funding for dark services under the E-rate program. Schools and library applicants greatly benefit from the technological advantages and cost savings offered by dark fiber services, and, thus, dark fiber services should not be excluded from the Program.

IV. REINSTATING DARK FIBER AS AN ELIGIBLE SERVICE IS CONSISTENT WITH IMPORTANT PUBLIC POLICY GOALS OF THE E-RATE PROGRAM

As previously described, prior to the recent changes to the eligibility of dark fiber services, many school districts determined that dark fiber services were the most cost-effective solution for obtaining telecommunications and Internet access services. The abrupt policy change that removed dark fiber as a service eligible for E-rate funding has been a considerable detriment to schools and libraries. Significantly, the change in eligibility status for dark fiber limits the service provider and communications service options available to schools and libraries to the detriment of program participants and the E-rate program itself. Even if schools and libraries would prefer to use dark fiber services, and those services are a more cost-effective solution for their communications needs, they must instead procure an alternative service, such as a lit fiber service, if they wish to avail themselves of the discount assistance available through the E-rate program. In some cases, the exclusion of dark fiber services will require schools to seek funding for more services than they actually need, such as in situations where schools may already have certain network equipment that could be used with a dark fiber service, such as routers.

Indeed, a policy that provides E-rate funding for lit fiber services but excludes funding for dark fiber services, essentially favors one technology over another. Such favoritism should not be a part of the E-rate program and is clearly contrary to the overall principle of competitive neutrality mandated by section 254 of the Act.¹⁰

The exclusion of dark fiber services also 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.¹¹ Instead, by excluding dark fiber services, schools and libraries are discouraged from utilizing dark fiber services, even if dark fiber services are an efficient and cost-effective solution for a school's advanced communications needs. Such a result is contrary to the goals of the E-rate program because it decreases the options available to E-rate participants, and thereby, limits the ability of schools and libraries to provide advanced communications services to their communities. Accordingly, Fibertech urges the Commission to reinstate dark fiber as an eligible service without delay so that participants in the E-rate program, and their students and communities, can continue to enjoy the efficiencies and benefits provided by dark fiber services.

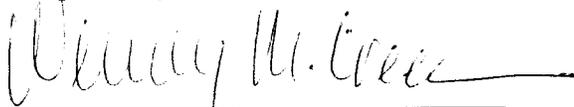
¹⁰ See 47 U.S.C. § 254.

¹¹ See *USF Report and Order* at ¶457.

V. CONCLUSION

For the forgoing reasons, Fibertech urges the Commission to change its proposed Eligible Services List for Funding Year 2005 by immediately reinstating dark fiber as a service eligible for E-rate funding. Nothing in the Act prohibits this action, nor would the FCC need to determine the regulatory classification of dark fiber before doing so. Instead, pursuant to its expansive authority for “additional services” under section 254 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. By allowing schools and libraries to receive funding for dark fiber services under the E-rate program, the Commission will serve the goals of the E-rate program by providing school and libraries with a cost-effective, efficient solution to obtaining access to affordable telecommunications and Internet services.

Respectfully submitted,



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