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September 23, 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 Comments of Fibertech Networks, LLC***

Eligible Service List for Schools and Libraries Universal Service Support Mechanism; CC Docket No. 02-6

Dear Secretary Dortch:

Pursuant to Section 1.1206(b)(1) of the Commission's Rules,¹ Fibertech Networks, LLC ("Fibertech" or "Company") hereby submits these *Ex Parte* Comments in reply to the comments and reply comments filed in the above-referenced proceeding regarding the Federal Communications Commission's ("FCC's" or "Commission's") proposed E-rate Eligible Services List for Funding Year 2005.²

In its Comments filed in this proceeding, Fibertech urged the Commission to immediately reinstate dark fiber as an eligible service under the E-rate Program.³ An overwhelming majority of the commenters agree. In fact, of the ten parties that commented on this issue, all but one expressed their support for allowing applicants to once again take advantage of the benefits of

¹ 47 C.F.R. § 1.1206(b)(1).

² See 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*").

³ Eligible Service List for Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, *Comments of Fibertech Networks, LLC*, at 3-11 (filed Aug. 23, 2004) ("*Fibertech Comments*").

dark fiber service under the Program. Supporters of dark fiber include technology consultants,⁴ service providers,⁵ as well as school district consortiums.⁶ It is clear that many of these commenters have experienced the benefits of dark fiber services first-hand. In their comments, they explain how dark fiber services typically cost less than lit fiber services and, thus, serve an important role as a cost-effective option for schools and libraries to meet their communications needs.⁷ They also praise dark fiber for the flexibility that it provides in terms of capacity and bandwidth for advanced services.⁸

Notably, the sole opponent to restoring E-rate funding to dark fiber services is incumbent local exchange carrier (“ILEC”) Verizon,⁹ a carrier who would, of course, benefit from the elimination of dark fiber services from the Program. In its Reply Comments, Verizon asserts that dark fiber should not be reinstated in the Program because (1) dark fiber is not a telecommunications service;¹⁰ (2) dark fiber is a facility and thus cannot be classified as an “additional service” eligible for funding under section 254(c)(4) of the Communications Act of 1934, as amended (“Act”);¹¹ and (3) the public interest would not be served by including dark

⁴ Eligible Service List for Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, *Reply Comments of Genesee Valley / Wayne Finger Lakes Educational Technology Service*, at 1 (filed Aug. 30, 2004) (“*Genesee Valley Reply Comments*”); Eligible Service List for Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, *Reply Comments of On-Tech Consulting, Inc.*, at 5 (filed Aug. 30, 2004) (“*On-Tech Reply Comments*”); Eligible Service List for Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, *Reply Comments of Thomas Communications & Technologies, LLC*, at 1-2 (filed Aug. 30, 2004) (“*TCC Reply Comments*”); Eligible Service List for Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, *Comments of Robert Cooper*, at 1-2 (filed Aug. 23, 2004) (“*Cooper Comments*”); Eligible Service List for Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, *Comments of Stephen J. Smith, Jr.*, at 1 (filed Aug. 23, 2004) (“*Smith Comments*”).

⁵ Eligible Service List for Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, *Reply Comments of International Business Machines Corporation*, at 3-4 (filed Aug. 30, 2004) (“*IMB Reply Comments*”); *Fibertech Comments* at 3-11.

⁶ Eligible Service List for Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, *Comments of Erie 1 BOCES*, at 1-2 (filed Aug. 23, 2004) (“*Erie 1 BOCES Comments*”); Eligible Service List for Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, *Comments of Monroe 1 BOCES*, at 1 (filed Aug. 23, 2004) (“*Monroe 1 BOCES Comments*”).

⁷ *TCC Reply Comments* at 1-2; *Cooper Comments* at 1-2; *Erie 1 BOCES Comments* at 1-2; *Fibertech Comments* at 4, 8-9; *Monroe 1 BOCES Comments* at 1; *Smith Comments* at 1.

⁸ *TCC Reply Comments* at 2; *Cooper Comments* at 1; *Erie 1 BOCES Comments* at 1; *Fibertech Comments* at 4, 8-9; *Monroe 1 BOCES* at 1; *Smith Comments* at 1;

⁹ Eligible Service List for Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, *Reply Comments of Verizon*, at 1-6 (filed Aug. 30, 2004) (“*Verizon Reply Comments*”).

¹⁰ *Id.* at 2.

¹¹ *Id.* at 3-4.

fiber in the E-rate program.¹² As legal precedent and the record in this proceeding indicate, however, Verizon's claims are without merit.

In making its first assertion that dark fiber should not be reinstated as an eligible service because it has not been classified as a telecommunications service, Verizon completely disregards the statutes and legal precedent applicable to determining eligible services for purposes of the E-rate program. As Fibertech explained in its Comments, nothing in the Act requires the FCC to make a determination regarding the regulatory status of dark fiber services before reinstating it as an eligible service under the E-rate Program.¹³ Contrary to Verizon's belief, the Act does not mandate that the Commission classify dark fiber as a telecommunications service as a prerequisite to including dark fiber in the E-rate Program.¹⁴ Indeed, the FCC has explicitly stated that the "Act permits [E-rate] support for an expanded range of services beyond telecommunications services."¹⁵ Thus, as the FCC did in the case of Internet access and internal connections, the Commission may include dark fiber as an eligible service pursuant to its expanded authority for "additional services" (*i.e.*, non-telecommunications services) under sections 254(c)(3) and (h)(1)(B) of the Act.¹⁶ Like Internet access and internal

¹² *Id.* at 4-5. Verizon also asserts that, as a procedural matter, the Commission may not reinstate dark fiber as an eligible service in this proceeding through a modification to the proposed Eligible Services List for Funding Year 2005. *Id.* at 5. If the Commission determines that it cannot procedurally modify the proposed 2005 Eligible Services List to include dark fiber as an eligible service, then Fibertech respectfully requests that it consider all comments filed in this proceeding regarding the dark fiber reinstatement issue in the context of its pending E-rate rulemaking. See Schools and Libraries Universal Service Support Mechanism, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, CC Docket No. 02-6, FCC 03-323 (rel. Dec. 23, 2003).

¹³ *Fibertech Comments* at 5-6.

¹⁴ See Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd. 8776, ¶¶438-439 (1997), subsequent history omitted ("*USF Report and Order*") (rejecting incumbent local exchange carrier arguments that only telecommunications services may be eligible for funding under the E-rate program).

¹⁵ *Id.* at ¶451.

¹⁶ *Fibertech Comments* at 5 (citing to *USF Report and Order*, 12 FCC Rcd. at ¶¶436-442, 450-457). Fibertech believes that dark fiber services should be classified as telecommunications services and that there is sufficient federal case law precedent for the FCC to do so. See *Southwestern Bell Telephone Company, US West Communications, Bell Atlantic Telephone Companies Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Services, Memorandum Opinion and Order*, 8 FCC Rcd. 2589, ¶¶17-18 (1993), *remanded on other grounds, Southwestern Bell Telephone Company v. F.C.C.*, 19 F.3d 1475 (D.C. Cir. 1994); see also *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended, Second Order on Reconsideration*, 12 F.C.C.R. 8653, n.110 (1997); *Global Naps, Inc. v. New England Telephone and Telegraph Co.*, 156 F.Supp.2d 72 (D. Mass. 2001). As explained herein, however, such a regulatory classification is unnecessary for the FCC to reinstate dark fiber as an eligible service.

connections, the Commission could create a new “Dark Fiber” category of services eligible for E-rate funding.¹⁷

With respect to Verizon’s second assertion that dark fiber is a “facility” and thus not eligible for funding as an “additional service” under section 254(c)(3) of the Act, Verizon makes this claim without providing any support as to why dark fiber may not be classified as a service for which funding may be provided.¹⁸ In fact, the Commission itself has recognized that dark fiber may be considered a service, defining a “dark fiber service” as the “provision and maintenance of fiber optic transmission capacity between customers premises where the electronics and other equipment necessary to power to ‘light’ the fiber are provided by the customer, not the local exchange carrier.”¹⁹ This is consistent with the FCC’s finding that the installation and maintenance of internal connections is a “service” for which E-rate funding could be provided.²⁰ Thus, it would be difficult to justify a result that would exclude from the Program the provision and maintenance of dark fiber as a “facility” rather than a “service.”

With respect to Verizon’s third assertion that the public interest would not be served by the inclusion of dark fiber service in the E-rate program, Verizon attempts to support this claim by stating that dark fiber services are “capital intensive” and, thus, would be a “drain” on the fund in contravention of the public interest.²¹ As Fibertech explained in its Comments, the 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.²² If the capital construction costs for dark fiber services exceeded those of lit fiber services as Verizon claims, then dark fiber services should cost more than lit fiber services. However, as demonstrated by the comments in this proceeding, that it typically not the case. Rather, as a majority of commenters have noted, dark fiber services, in fact, usually cost *less* than similar lit fiber services.²³

¹⁷ *Fibertech Comments* at 6.

¹⁸ *Verizon Reply Comments* at 3.

¹⁹ 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, 2589 (1993), *vacated on other grounds, Southwestern Bell Telephone Company v. F.C.C.*, 19 F.3d 1475 (D.C. Cir. 1994).

²⁰ *USF Report and Order*, 12 FCC Rcd. at ¶¶452.

²¹ *Verizon Reply Comments* at 4.

²² *Fibertech Comments* at 8.

²³ *TCC Reply Comments* at 1-2; *Cooper Comments* at 1-2; *Erie 1 BOCES Comments* at 1-2; *Fibertech Comments* at 4, 8-9; *Monroe 1 BOCES Comments* at 1; *Smith Comments* at 1.

Verizon also claims that including dark fiber as an eligible service “would aggravate the risk of waste, fraud and abuse” because schools and libraries could use the dark fiber for an ineligible purpose.²⁴ This risk is the same whether the school utilizes a dark fiber service or lit fiber service, or any service, for that matter. For every E-rate project, there is always the possibility that an applicant could use the services for an ineligible purpose. As such, the FCC requires all E-rate applicants, regardless of the specific services involved, to certify that they will use the discounted services for an eligible purpose.²⁵ If the applicant uses the services for an ineligible purpose, then the FCC and Universal Service Administrative Company (“USAC”) can pursue the applicant for violation of the program rules. Additionally, through the application and audit processes, the FCC and USAC also make efforts at monitoring applicants for ineligible use violations. Verizon offers no reason why these same protections could not be applied in the case of dark fiber services, nor why they are not sufficient in the case of dark fiber services.

Moreover, the reinstatement of dark fiber as an eligible service would not disserve the public interest as Verizon would like the Commission to believe. Rather, as Fibertech and other E-rate participants have explained in their comments, the inclusion of dark fiber services in the Program clearly serves the public interest and is consistent with the important public policy goals of the E-rate program. Not only do dark fiber services provide E-rate applicants with a cost-effective solution to access telecommunications and Internet services, the services also provide beneficial flexibility to applicants in terms of bandwidth, network facilities, and long-term costs. Likewise, as a facilities-based alternative to the incumbent’s services, dark fiber increases the long-term competition for school services, which serves to decrease the applicants’ (and hence the Program’s) long-term costs. A policy that excludes dark fiber services but includes lit fiber services in the E-rate program only serves to skew the choices of schools and libraries in favor of lit fiber services, even when dark fiber services would be the more economically efficient choice.²⁶ Such a policy is clearly contrary to the competitive neutrality requirements of the Act, as well as the Commission’s long-standing policy that schools and libraries are in the best position to determine which technologies would best accommodate their needs, how to deploy those technologies, and how best to integrate these new opportunities into their curriculum.²⁷

²⁴ *Verizon Reply Comments* at 5.

²⁵ *See* FCC Form 471, Block 6 (Certifications and Signature).

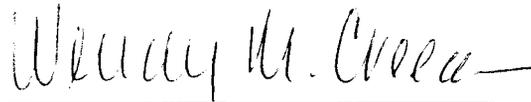
²⁶ *See IBM Reply Comments* at 4; *TCC Reply Comments* at 1-3; *Cooper Comments* at 1; *Erie 1 BOCES Comments* at 1-2; *Fibertech Comments* at 9; *Monroe 1 BOCES Comments* at 1; *Smith Comments* at 1.

²⁷ *See Fibertech Comments* at 10.

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In sum, it would be a public disservice to E-rate participants, their communities, as well as the E-Rate Program itself, if schools and libraries are not allowed to utilize the significant technological and cost benefits that dark fiber service offers to them in providing access to telecommunications and Internet access services as contemplated under section 254 of the Act. Accordingly, Fibertech, like a majority of commenters in this proceeding, strongly urge the Commission to change its proposed 2005 Eligible Services List to include dark fiber as a service eligible for E-rate funding.

Respectfully submitted,



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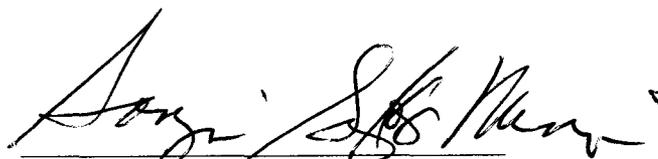
CERTIFICATE OF SERVICE

I, Sonja L. Sykes-Minor, hereby certify that on this 23rd day of September, 2004, a true and correct copy of the foregoing *Ex Parte Comments of Fibertech Networks, LLC* was served on the following parties:

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