while enabling cable operators to promptly respond to service requests, have been vital to the cable industry.

A reasonable and enforceable drop-line policy also is essential for competitive fiber-based providers. In order to successfully vie for residential and small- and medium-sized commercial customers, competitive fiber-based providers must be allowed to reach customers who have ordered service by installing drop lines without waiting many months for utility approval. These providers' ability to sell services will be severely, if not fatally, constrained if prospective customers must wait months to purchase services that the ILEC can provide immediately.

Although drop-line practices have evolved somewhat informally in the cable context, a formal drop-line licensing exception is needed here. Based on Fibertech's experience, the vast majority of utility pole-attachment agreements do not recognize a drop-line exception to the general requirement of licensing prior to installation. *See id.* ¶ 21. Fibertech is concerned that the informal, practical exception to pole-owner licensing policy that has permitted the cable industry to meet customer demand may not be extended to the competitive telecommunications industry.[22] Ensuring CLECs' right to

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survey and make-ready functions seek to prevent. A fiber-optic drop line is even freer of risk than copper telephone drop lines and cable television coaxial drop lines inasmuch as a fiber-optic line does not conduct electricity and therefore could present no risk even if touched by live electric wires, lightning, or other sources of electricity. (Where conductive materials are used, of course, such risk is addressed by bonding and grounding.) Stockdale Decl. ¶ 20.

[22] In contrast to the historical relationship between cable television companies and telephone companies, CLECs and ILECs are in direct competition, and electric utilities also are showing increasing interest in providing some of the very services offered by CLECs. (As cross-platform competition develops, cable companies, too, may find in the future that utilities seek to prevent them from installing drop lines until after pole licenses have been issued.)

install drop lines to meet a customer's request for service, on the other hand, will tend to establish parity among competitors, granting CLECs the same right to provide service without awaiting a competitor's authorization.

V. The Commission Should Place Reasonable Limits on ILEC Underground Search and Survey Requirements and Fees.

To take advantage of their statutory rights to obtain access to conduit, CLECs must be able to get accurate information as to the location and status of such conduit. Stockdale Decl. ¶ 22. Generally, CLECs must depend upon utilities to search records and survey manholes to accurately determine the availability of conduit. *Id.* Unfortunately, the current system is plagued by utility errors, delays, and excessive charges.

A. Conduit Owners Should Be Required to Permit CLECs to Conduct Record Searches and Manhole Surveys.

Because conduit owners can currently bar CLECs from performing record searches and manhole surveys, or from observing searches and surveys conducted by the owner on the CLECs' behalf, CLECs have little recourse against utility inaccuracies, delays, and unreasonable search and survey fees. Incorrect reports by owners regarding conduit availability force CLECs to incur significant delays and costs. Specifically, false reports of unavailability trigger new applications (and new application fees). False reports of availability delay the search for actually available conduit while the CLEC schedules, deploys, and pays work crews to pursue fiber deployment in conduit space that does not exist. These concerns are not merely hypothetical. During Fibertech's 15-month effort to get access to Verizon's conduit in Buffalo, for example, on at least 14 occasions Verizon incorrectly reported, based on physical examinations of manholes, the

availability of conduit. *Id.* ¶ 23. Fibertech cannot know how many other times Verizon was wrong and incorrectly reported unavailable conduit. *Id.*

Moreover, as with aerial license applications, utilities often cause unnecessary delays and increase costs by requiring that their own personnel perform conduit record searches and manhole surveys, and then claiming that manpower shortages prevent timely completion of those searches and surveys. *Id.* ¶ 24. When deploying their own facilities, however, ILECs typically are not subject to equivalent delays.[23] Conduit owners, therefore, should be required to allow CLECs to review conduit records and to conduct manhole surveys to confirm the correctness of the written records.[24] Utilities' arguments against CLEC participation in searches and surveys are unpersuasive. Verizon, for example, claims that Fibertech may not look at its conduit records and that Fibertech's Verizon-approved contractors may not physically survey its manholes because doing so would reveal the identity of other conduit occupants. But such information is not secret when facilities are aerial, and Fibertech is aware of no reason that underground facilities should be treated differently. Moreover, when Fibertech's

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[23] Fibertech believes that Verizon has completed these steps for its own FiOS deployment more quickly than it has in response to Fibertech requests. Generally, ILECs are capable of timely completion of records searches and manhole surveys when they seek to install new facilities as part of a competitive bid. *Id.*

[24] The delays that ensue when CLECs ask utilities to perform field surveys to enable the deployment of competitive facilities are common to both aerial and underground facilities. The provision of incorrect information regarding the availability of space in such facilities to accommodate a CLEC's cable is a problem unique to underground facilities, however, because, in contrast to pole space, which is patently observable and subject to easy check by a CLEC, the availability or unavailability of conduit space cannot be determined or confirmed without access to the relevant records and manholes. It is for this reason that Fibertech requests a rule specifically applicable to conduit that not merely entitles a CLEC to perform the survey if the ILEC fails to do so in a timely manner but gives it the right, *ab initio*, to perform the record search and physical survey.

contractors enter the manholes to install Fibertech's cable, they are able to see which other companies have facilities in those holes.

Allowing CLECs to conduct record and manhole surveys would address an additional problem – excessive utility charges for this work. Even where availability reports are accurate, utility charges for conduit record searches and manhole surveys are commonly excessive. Verizon's practices, for example, demonstrate that it charges fees that it cannot justify. In all its service territories in which Fibertech operates, Verizon issues an estimated charge for a record search and manhole survey that Fibertech must pay before Verizon will perform the search and survey, and Verizon reserves the right to adjust this estimated charge based on actual costs. Stockdale Decl. ¶ 25. In response to Fibertech's most recent application for access to conduit in the Springfield, Massachusetts, market, for example, Verizon issued Fibertech an estimated charge of **$65,725.77** for a record search and manhole inspections for a conduit route involving 20 manholes (an estimated fee of **$3,286.28 per manhole**).[25] *Id.* After an unsuccessful protest, and needing Verizon to begin work, Fibertech paid this amount on August 26, 2004. *Id.*

Concerned about Verizon's $65,725.77 cost estimate, Fibertech tested the reasonableness of Verizon's estimate charge by assigning an employee to follow the Verizon crew and openly observe the work and time required. *Id.* ¶ 26. With Fibertech observing, a single Verizon crew completed the 20 manhole surveys in a single day,

[25] The relevant factor in determining cost is the number of manholes rather than the conduit footage, because the availability of the conduit is determined from within the manhole by inspecting the point where the conduit emerges from the manhole wall. *Id.* ¶ 25 n.7.

September 15, 2004. *Id.* On January 20, 2005, Verizon informed Fibertech that the actual cost of the record search and manhole surveys was **$3,778.67**, or **$188.93 per manhole**. *Id.* Verizon returned the $61,947.10 balance on April 27, 2005 (eight months after Fibertech's payment). *Id.* The final, actual $3,778.67 charge included the costs of traffic control by police, aerating manholes, and pumping out manholes, as well as nine hours of engineering time in searching records. *Id.*

There is no way for CLECs to effectively resist utility payment demands for these services. CLECs typically have little choice other than to pay a utility invoice, no matter how high, because the utility will not process the CLECs application until payment is received. *Id.* ¶ 27. Although, in the example above (and after Fibertech monitored Verizon's work), Verizon identified a lower actual cost and eventually returned Fibertech's overpayment, Verizon more often follows an unreasonably high estimate with an invoice for even higher "actual" costs. *Id.* Fibertech has repeatedly asked for explanation and documentation of these additional charges, but Verizon rarely provides the requested support for its charges. *Id.* In the former Bell Atlantic territory, Verizon makes resisting these charges even more difficult by requiring payment of the additional charges before processing unrelated pole and conduit license applications. *Id.*

Further, as these amounts accumulate, CLECs become vulnerable to harsh collection actions. When Verizon refuses to explain or document unreasonable discrepancies between actual and estimated cost outside the former Bell Atlantic territory, Fibertech has withheld payment. *Id.* ¶ 28. Outside of the former Bell Atlantic territory, Verizon has continued processing Fibertech's applications and large balances have accumulated. *Id.* In the former NYNEX territory, for example, Fibertech has a balance

of over $700,000 representing the difference between estimated costs and alleged higher but undocumented actual costs. *Id.* Although Verizon has not yet taken action (beyond invoicing) to collect these sums, the mere existence of this purported "debt" puts Fibertech at risk.[26]

To avoid (1) errors (or misrepresentations) by utility personnel, (2) unreasonable charges, and (3) delays inherent in waiting for conduit owners to schedule workers, the Commission should require utilities to allow CLECs to conduct conduit searches and surveys. CLECs should be guaranteed the right independently to examine utility conduit records (at the locations where they are maintained) and to conduct manhole inspections to confirm the accuracy of conduit records.

As with Fibertech's other proposals, regulators have already endorsed this approach. The New York PSC recently declared that "[a]ttachers shall have access to conduit records, with any necessary redactions, at the Owner's office." *New York Order* at Appendix A, p.11. Similarly, in the Bell South Louisiana § 271 case, this Commission stated that: "BellSouth must give competitors nondiscriminatory access to information about its facilities. Access to maps and similar records is crucial for competitors who

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[26] The nature of this risk was revealed to Fibertech, in a different context, in 2004, when Verizon threatened, absent full payment within ten days, to disconnect Fibertech's cables from Verizon's central offices for failure to pay charges imposed under Verizon's CATT tariff. By issuing bills and ignoring Fibertech requests for clarification and itemization of the charges, Verizon had calculated an outstanding balance "owed" by Fibertech of approximately $300,000. Only when Fibertech threatened to bring a complaint to this Commission did Verizon agree not to disconnect Fibertech's facilities and to discuss the nature and amounts of the charges. As the result of those discussions, Verizon conceded that it was applying its tariffed rates incorrectly and retracted over $250,000 in charges. The possibility (which Fibertech considers very real) exists that Verizon may pick a critical juncture, such as when Fibertech seeks to secure additional funding, to pursue collection of Fibertech's "outstanding debt" of $700,000. *Id.* ¶ 29.

wish to utilize BellSouth facilities." *Application of BellSouth Corporation, BellSouth Telecommunications Inc., and BellSouth Long Distance, Inc., for Provision of In-Region InterLATA Services in Louisiana*, Memorandum Opinion and Order, 13 FCC Rcd 20599, 20710 (¶ 180) (1998). This approach is also consistent with at least one ILEC's current practice, again confirming its reasonableness. SBC Ameritech, for example, permits CLECs to perform both conduit record searches (*see* SBC Form RC-1, option "2", attached as Exhibit 5) and (except in Ohio) to perform the physical manhole inspection confirming the written records (*see* SBC Form C-1, option "2", Exhibit 5).[27]

B. Conduit Owners' Fees for Searches and Surveys Should be Capped at Reasonable Levels and CLECs Should Be Permitted to Observe such Searches and Surveys.

The Commission should also establish a firm cap on charges imposed by conduit owners for record searches and manhole surveys to protect CLECs from arbitrary and excessive charges when CLECs request that owners provide these services. SBC Ameritech uses such a standard-fee approach to charge for conduit record searches and manhole surveys. Specifically, if the CLEC elects not to conduct the records search or the manhole survey itself, SBC imposes uniform fees of: $400 for a record search of all manholes and conduit associated with a central office (a minimal per-unit charge for a CLEC that installs any significant amount of underground plant) (*see* SBC Form RC-1,

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[27] Even so, SBC requires payment of an effective rate of $40 per hour for a CLEC to view its conduit records and requires that an SBC employee be present during manhole inspections performed by the CLEC (at a rate of $95.00 per hour). As indicated *infra* at 32-36, a requirement that ILEC inspectors be present before a CLEC may perform work in ILEC facilities is unnecessary and can impose on competitors significant and unnecessary delays and – if the ILEC is allowed to impose unreasonable charges – costs. Consequently, while the SBC approach is preferable to Verizon's denial of access, the Commission should not consider it a model.

option "3", attached as Exhibit 5); and $400 per manhole for a physical survey of the manhole (SBC also charges a $200 application fee for each application – an application may cover an unlimited number of manholes) (*see* SBC Form C-1, option "1", attached as Exhibit 5). Based on Fibertech's recent experience with Verizon in Massachusetts, where Verizon's costs for record searches and manhole surveys (when monitored by Fibertech) were approximately $188 per manhole, Fibertech recommends a per manhole fee (to cover both record searches and manhole surveys) of $200 per manhole.

In addition, in order to protect CLECs from the delays and costs created by false reports regarding the availability of conduit space, if a CLEC requests that the conduit owner perform the conduit records search and manhole survey, the CLEC should be entitled to observe the search and survey.

VI. Utilities Should Be Required to Provide Support for Their Cost-Based Fees.

The Commission should require that, for any charges to competitors based on utility costs of performing surveys or make-ready work, utilities provide documentation that is sufficient to allow competitors to determine the basis for such charges. Without such documentation, CLECs must either pay invoices even when they appear excessive or withhold payment and hold risky outstanding balances in the hopes that the ILEC will either adjust the charge or provide adequate documentation. Requiring supporting documentation will allow CLECs to better monitor work done by utilities on their behalf and to hold utilities accountable for any charges that exceed reasonable industry levels.

VII. The Commission Should Permit CLECs to Use Utility-Approved Contractors to Work in Manholes Without Utility Supervision.

Currently, when it comes to the job of actually installing fiber in conduit and performing other tasks in the manhole, utilities typically require that CLEC contractors working in manholes be supervised by utility personnel at the CLEC's expense. Stockdale Decl. ¶ 30. This supervision requirement constrains competition by unnecessarily delaying competitive network deployment and pointlessly driving up CLEC costs. For example, a CLEC may wish to work 12 hours a day or even through the night to deploy its facilities, but an ILEC requirement that a supervisor be present typically reduces the workday to between 5 and 7 hours. Moreover, conditioning work in a manhole on the presence of a supervisor allows utilities to shut down or delay work on CLEC facilities simply by making the supervisor unavailable. Late notice of unavailability imposes additional costs by forcing CLECs to pay their crews for downtime.

Strategically timed delays can impose severe competitive harm. Verizon once nearly delayed by two months Fibertech's receipt of revenue from its 110-mile Albany, New York, backbone network by pulling its supervisor at noon on the last day before Saratoga Springs' eight-week racing-season moratorium on work in city streets. *Id.* ¶ 35. When Verizon pulled its supervisor, Fibertech had only a few hours of work left to perform in a single manhole to complete its network, which would, in turn, enable Fibertech to offer service in the entire Albany, New York metropolitan area and collect associated revenue. *Id.* Only after heated objections by Fibertech did Verizon allow Fibertech to complete its work. *Id.* As this example demonstrates, forcing CLECs to rely

[illegible] promptly to complete their networks, offer service, and compete necessarily

on utility personnel to complete their networks, offer service, and compete necessarily generates opportunities for anticompetitive conduct.

In addition, by charging for the required utility inspector supervision, a utility imposes significant financial costs on a competitor. One day after Fibertech completed its backbone network in Buffalo, New York, Verizon billed Fibertech more than $269,000 for supervising Fibertech's work. *Id.* ¶ 36. Verizon has charged Fibertech for underground supervisors in all its markets since that time.

To put these costs in perspective, a single Verizon supervisor typically costs Fibertech substantially more than the entire Fibertech crew being supervised (including vehicle and equipment costs). *Id.* In upstate New York, for example, Verizon charges $142 per hour for an inspector. Fibertech's hourly costs of a splicing crew, including two employees, their vehicle, and all required equipment, is $84 per hour. *Id.*

Moreover, Verizon's own practice demonstrates that costly ILEC supervision is unnecessary. Historically, in New York (and perhaps elsewhere) Verizon permitted licensees to use approved contractors to install innerduct and cable without requiring that the licensee pay for inspectors to supervise the work. Licensees were charged only for an inspection.[28] *Id.* ¶ 31. Verizon has since altered this practice, however, to prohibit contractors hired by Fibertech from working in its manholes without supervision by a Verizon "inspector" for which Fibertech must pay.[29] *Id.* Although Verizon prohibits the

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[28] The inspection simply ensured that the facilities were placed in the assigned locations (the underground equivalent of standard post-construction inspections of aerial installations). *Id.* ¶ 31 n.8.

[29] The requirement that a supervisor be present does not apply to work *on* a manhole itself, such as drilling the wall to install additional conduit, because that work is done by the ILEC, and ILECs, not surprisingly, do not require a superfluous supervisor for their

performance of work outside the "presence" of an inspector, that supervisor is often employed inspecting multiple sites, and the entire cost of the inspector is charged to each site. *Id.* ¶ 30. This double (or more) charging for supervisory time is itself unreasonable, and demonstrates that there is no need for on-site supervision rather than spot inspections.

Verizon has explained its new supervisor requirement by citing a need to protect its own and other companies' facilities from damage caused by contractors. To Fibertech's knowledge, however, there is no history of damage to underground facilities caused by CLEC contractors, and Verizon has cited no specific examples in adopting its new policy. *Id.* ¶ 32. Moreover, through its standard conduit occupancy agreements, Verizon protects itself against risk relating to any potential damage that could be caused by a contractor hired by a competitor. *Id.* Before Fibertech is entitled to install facilities in Verizon conduit or manholes, it must agree to indemnify Verizon from any and all damages or costs it might suffer as the result of the presence of Fibertech's facilities or any actions by Fibertech or its agents or contractors. *Id.* To enforce the indemnification obligation, Verizon requires Fibertech to procure and maintain insurance in the amount of at least $1 million per occurrence protecting Verizon from liability for any such damage. *Id.*

Further, despite the alleged risk of damage, other facility owners have employed approaches that differ from Verizon's. As recently as 2004, Consolidated Edison allowed (and may still allow) qualified CLEC-hired contractors to work in its telecommunications manholes without the presence of a supervisor. *Id.* ¶ 33. Until 2001, Frontier Telephone

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own work. The supervisor requirement applies only to work within the manhole necessary to install CLEC facilities in the manhole and in conduit accessible from the manhole. *Id.* n.9.

of Rochester allowed CLEC's to work in its manholes without supervisors. *Id.* Empire City Subway historically permitted communications workers for all competitors in New York City to work in its manholes without supervision, and Fibertech has no reason to believe that Empire City's practice has changed.[30] *Id.* Also, Rochester Gas & Electric allows qualified Fibertech employees to work in its manholes without supervision. *Id.*

In fact, contractors used by CLECs typically perform work for ILECs and CLECs alike. Nevertheless, it is Fibertech's understanding that only when a contractor's work is performed at a CLEC's behest is it subject to additional and costly supervision.[31] *Id.* ¶ 34. The Commission should therefore adopt a requirement that utilities must permit utility-approved contractors to work in manholes without utility supervision even if the contractor's customer is a CLEC.[32]

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[30] During the period of initial construction of the cable television plant in New York City, cable television workers were permitted to open and work in Empire City Subway manholes without outside supervision and subject to standard work rules. Work could be shut down if an Empire City Subway inspector came upon the site and discovered work rule violations. Fibertech is unaware that this policy has changed. *Id.* ¶ 33 n.10.

[31] Notably, Verizon does not reciprocally permit CLECs to supervise (or charge for supervision of) Verizon's employees or contractors working in the presence of the CLECs' facilities, although these workers are presumably at least as likely to cause damage to others' facilities as CLEC contractors. (An ILEC employee or contractor may feel less pressure to avoid damaging another company's facilities due to the fact that his presence in the manhole will be known to no company but the ILEC.) *Id.* ¶ 34 n.11.

[32] To be clear, the problem under the current system is not ILEC supervision per se, but rather that CLEC contractors' work must now depend on ILEC supervisors' schedules and charges. Thus, under the proposed rule, ILECs, at their discretion, could choose to observe CLEC contractors' work, but only so long as the ILEC bears any costs and the CLEC work is in no way contingent upon the presence of the ILEC employee. Indeed, Fibertech would not object to a requirement that the ILEC be notified of where and when CLEC contractors would be working.

VIII. The Commission Should Require ILECs to Provide CLECs with Reasonable Access to Building-Entry Conduit.

ILECs frequently use strategic deployment of fiber to effectively block CLEC access to limited building entry space, delaying or precluding deployment of competitive facilities. Entry points into commercial buildings typically are limited to several conduits placed through the foundation wall of the building. Stockdale Decl. ¶ 37. Because landlords are extremely reluctant to permit the drilling of additional holes in building foundations to accommodate new conduit, access to the existing conduit is critical to a competitor's ability to serve the building occupants. *Id.*

ILECs often populate building-entry conduit with cables but no innerduct and then assert that no CLEC cable may occupy the same, undifferentiated space with an ILEC cable. *Id.* ¶ 38. For instance, it is not uncommon for an ILEC – without using innerducts – to place one or a few cables in each of several conduits entering a building, claim that the conduits are therefore occupied, and effectively deny CLECs access to the substantial remaining conduit space. *Id.* Similarly, where an entry conduit contains innerduct and the innerduct is fully occupied, ILECs regularly reject CLEC requests for permission to pull their fiber cable through the interstices of the innerducts.[33] *Id.* These ILEC practices prevent competitors from reaching customers in many buildings. *Id.* Even if a CLEC can persuade a landlord to allow drilling for new conduit through the building foundation, this process, at best, substantially and unnecessarily delays deployment and, in many cases, may render such deployment financially unviable. *Id.*

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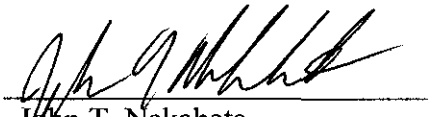
[33] The center space between three innerducts, for example, is ideal. Placement between innerducts does not endanger existing fiber cables within a conduit, of course, because those cables are safely within innerduct. *Id.* ¶ 38 n.12.

The placing of ILEC cables in building-entry conduit without innerduct and the exclusion of CLEC cables from those conduits where sufficient space remains in the conduit to accommodate the CLEC facilities should be declared an unlawful reservation of space. ILECs should be required, where space is available, either to: (1) permit a CLEC to install its own cable next to ILEC cable in a building-entry conduit; or (2) install one or more innerducts in the conduit and allow the CLEC to place its cable within such innerduct. Where the ILEC conduit into a building contains innerducts and all the innerducts are occupied, the ILEC should be required to allow a competitor to install its fiber cable into the building by pulling it in between the innerducts. These practices are already at work in the field – Verizon's outside plant managers in Albany, New York, have permitted Fibertech to install significant amounts of fiber using these techniques. *Id.* ¶ 39. Because current practice demonstrates the reasonableness of Fibertech's proposed rule, the Commission should therefore endorse this nondiscriminatory best practice by adopting Fibertech's proposal.

Conclusion

Fibertech's experience illustrates that the current rules are insufficient to ensure the nondiscriminatory access to poles and conduit required by statute and essential to promoting facilities-based competition. As described above, utilities have employed unreasonable practices and imposed unnecessary requirements that cause delays and increase costs for their rivals. Even where such practices are facially neutral, they are anticompetitive in effect, hindering both investment in and deployment of facilities that compete with the ILEC loop. Accordingly, Fibertech calls upon the Commission to adopt the attached proposed rules, which establish that the anticompetitive practices described above are unreasonable and unlawfully discriminatory. By codifying this set of "best practices" for the industry, the Commission can decrease industry confusion, reduce the need for regulatory oversight, remove barriers to facilities-based entry, and foster competition. For the above reasons, Fibertech respectfully requests that the Commission grant this petition for rulemaking.

Respectfully submitted,



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APPENDIX A

Proposed Rule Change

PART 1 – PRACTICE AND PROCEDURE

SUBPART J – POLE ATTACHMENT COMPLAINT PROCEDURES

1. Section 1.1403 is amended by adding paragraph (f) as follows:

§ 1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.

* * * * *

(f) It shall be unreasonable and unlawfully discriminatory for a utility to engage in the following practices:

(1) Prohibit the use of boxing or extension arms where (i) such techniques would render unnecessary a pole replacement or rearrangement of electric facilities; (ii) facilities on the pole are accessible by ladder or bucket truck; and (iii) the pole owner has previously allowed such techniques.

(2) Fail to complete (or to allow cable television system operator- or telecommunications carrier-hired contractors to complete) field surveys within 30 days of receipt of a complete application, or fail to complete (or to allow cable television system operator- or telecommunications carrier-hired contractors to complete) make-ready work within 45 days of receiving payment for that work.

(3) Prohibit a cable television system operator or telecommunications carrier from hiring utility-approved contractors to perform field surveys and make-ready work.

(4) Require that utility approval be obtained prior to a cable television system operator's or telecommunications carrier's installation of an NESC-compliant line to satisfy a customer service order unless the installation would involve use of a through-bolt or support strand.

(5) (a) Prevent a cable television operator or telecommunications carrier from undertaking conduit records searches and manhole surveys necessary to determine the availability of conduit.

(b) Charge fees in excess of $200 per manhole for its employees to complete conduit records searches and manhole surveys.

(c) Prevent a cable television operator or telecommunications carrier from observing the performance of a conduit record search or a manhole survey performed on behalf of such operator or carrier.

(6) Fail to provide supporting documentation for any fee computed based on utility costs for any utility-performed surveys, make-ready work, or other functions except conduit records searches and manhole surveys. To satisfy this requirement, supporting documentation must be sufficient to allow the cable television system operator or telecommunications carrier to determine the basis for the fee.

(7) Require that utility employees supervise work performed in manholes for or by cable television system operators or telecommunications carriers using utility-approved contractors.

(8) Deny access to building-entry conduit where (i) the ILEC has placed cables in the building-entry conduit without innerduct or (ii) the conduit contains occupied innerducts but the interstices of the innerducts are not occupied.

- Utilities have blamed various pole and conduit access delays on manpower shortages, but have not permitted Fibertech to use approved contractors to perform necessary surveys and make-ready work.

- Pole owners do not officially permit pre-licensing extension of drop lines, forcing Fibertech to choose between deploying facilities in advance of demand and risking delay in providing service that has been ordered.

- ILEC record searches and manhole surveys are often inaccurate, take an unreasonably long time to complete, and give rise to exorbitant fees.

- ILECs require ILEC supervision (at Fibertech cost) of ILEC-approved contractors performing work in manholes when the contractors are working for Fibertech.

- ILECs deploy fiber in building-entry conduit without using innerduct, thereby precluding Fibertech from using the conduit.

All of these practices impose unnecessary delays and unwarranted costs on Fibertech.

14. These delays have significant competitive consequences. For example, when competing to provide service to a new enterprise customer, Fibertech must commit to a date by which facilities will be available. Given the substantial uncertainties surrounding whether and when access to poles and conduit will be provided, however, it is difficult for Fibertech to make the necessary commitment. These delays give ILECs a significant advantage when bidding for enterprise customers. Moreover, charges for access to poles and conduit are difficult to resist, as pole owners often will not perform necessary survey or make-ready work without advance payment, and Fibertech cannot offer services until after the work is completed.

15. Disputing utility delays and charges through the complaint process, either at the FCC or, in those states that regulate access to poles and conduit, before the state PUC, is itself a costly and time-consuming process. Moreover, because the results of these individual adjudications are neither centrally available nor codified, rulings on pole

Exhibit 1
Declaration of Charles Stockdale

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	RM- _____
Petition for Rulemaking of Fibertech Networks, LLC	)	WCB- _____
	)	

Declaration of Charles Stockdale

1. My name is Charles Stockdale. Since September 2000, I have served as General Counsel of Fibertech Networks, LLC ("Fibertech"). Before joining Fibertech, I served as Deputy General Counsel for Operations for Adelphia Communications Corporation, where I dealt with various pole attachment matters. Prior to that, I served as counsel to the Cable Television and Telecommunications Association of New York, where I represented the cable television industry on matters relating to access to utility poles and conduit. As General Counsel of Fibertech, I am familiar with Fibertech's efforts to deploy its network using utility-owned and controlled facilities such as poles and conduit. Among other things, I have negotiated pole attachment agreements for Fibertech and coordinated Fibertech's response to certain utility charges and practices, by both ILECs and power companies, that Fibertech believes are unreasonable.

2. Founded in June 2000, Fibertech is a leader in designing, installing and operating high capacity metro fiber-optic networks in the Eastern and Central United States. Fibertech has already established local networks covering more than 3,300 route-miles and serving 18 U.S. metropolitan areas. Serving competitive local exchange carriers (CLECs), long distance carriers, and a growing list of enterprise customers,

Fibertech employs an open-access, redundant network architecture to connect communications centers, businesses, schools, and government agencies. Fibertech's current and future operations – like those of any competitive provider of facilities-based communications services – are dependent upon non-discriminatory access to utility poles and conduit.

Background

3. *Poles.* Poles can be jointly owned by the ILEC and power company or solely owned by one of these two entities. When one owns the pole, the other generally is accorded special treatment as a "joint-user" that may collect fees from third parties for surveys, may attach facilities without prior survey or even notice to the owner, and may impose on third parties seeking to attach to the pole construction standards (such as clearance requirements in excess of NESC requirements) applicable to its "space" on the pole (*i.e.* the power, or "supply," space for the power company and the communications space for the ILEC).

4. To obtain a pole attachment, a CLEC like Fibertech must first submit an application to the pole owner (along with an application fee). When a pole owner receives the CLEC's application, a survey must be conducted to see if any "make ready" work is necessary to accommodate the attachment. Pole owners often require that their own employees or contractors conduct the survey, and often require 45 days or more to complete the survey. Sometimes pole owners will wait many months before completing a pole survey unless aggressively pursued. The CLEC must pay the pole owner's and any joint user's estimated survey costs up front before the survey will be conducted, and, in most jurisdictions, the CLEC can still be billed for any cost overruns. In some states,

however, the CLEC is permitted to do the survey itself, at its own cost and using utility-approved contractors, if the utility takes longer than a specified time. In addition, a few jurisdictions, such as New York, prohibit pole owners from seeking payment in excess of the amounts originally estimated and collected.

5. Boxing is a pole attachment technique that involves attaching wires on opposite sides of a pole in order to achieve the 12-inch separation between adjoining communications lines that is required by the National Electric Safety Code (NESC).[1] For example, if a pole lacks the full 12 inches of excess vertical space necessary to permit installation of a new cable on the side of the pole holding existing lines, boxing allows the new cable to be installed in compliance with the NESC requirements – without replacing the pole with a larger pole. Instead, the new cable is installed on the opposite side of the pole between two existing communications lines or at least four inches above the highest existing communications line (assuming the new line thereby would also satisfy the required clearance from any electric facilities on the pole).

6. Extension arms, or brackets, are devices that extend horizontally from a pole to support communications lines away from the pole face. Like boxing, they thereby permit the required 12-inch separation between communications lines to be achieved diagonally when insufficient pole space exists to allow it to be achieved vertically.

7. If make-ready work is necessary in order for the pole to accommodate a CLEC's proposed attachment, the CLEC generally is required to pay the utility's

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[1] Because of the NESC standard requiring at least four inches between bolt holes drilled through a pole, a cable that is placed on the opposite side of a pole from existing cables and that is not attached to the back of a through-bolt holding one of those existing cables must be at least four inches (measured vertically) from any adjoining line. Due to competitive considerations, only entities that already have attachments on a pole generally are able to box the pole using the back of an existing through-bolt.

estimated costs before the utility will actually do the work. Although ILECs often complete such work quickly in deploying their own facilities, they regularly take six months or more to complete the make-ready work required for CLEC attachments if they are permitted to do so. Some states, however, allow CLECs to use utility-approved contractors if the utility is unable to complete the work in a given timeframe. If boxing or extension arms may be used, make-ready work is either reduced or becomes unnecessary.

8. A CLEC must also obtain licensing approval prior to attaching. On occasion CLEC's are permitted the privilege, which has traditionally been accorded cable television companies, of attaching a drop line to reach a customer location in order to satisfy a service order and applying for pole licenses for that line after installation. Typically, however, a CLEC's right to install such a drop line without first obtaining pole licenses is not formally recognized by the pole owners.

9. *Conduit.* To obtain access to conduit, CLECs must first determine whether and where space is available. Conduit owners typically make this determination by searching conduit records to locate empty and available conduit space that will satisfy the applicant's need and then entering manholes along the apparently available conduit route to visually confirm the availability of the space. CLECs trigger this process by filing an application and paying a fee to the relevant utility. The fee is often based on estimated search and survey costs and can be adjusted upward after the search and survey have been completed. Some utilities, however, do charge fixed fees for this work.

10. Assuming the record search and physical survey locate available conduit space, the conduit is "rodded and roped." Through this step, each section of conduit (the

conduit between any two manholes on the route) is probed to determine whether it is clear or blocked. If the conduit is blocked, it is "slugged," a process whereby workers attempt to pull a stiff brush or other object though the conduit to dislodge any obstruction. If slugging does not clear the conduit, the ILEC will typically provide the applicant with an estimated cost of excavating to determine the cause of the blockage and of fixing the problem. The CLEC then can choose to pay the estimate (and commit to pay any additional costs in excess of the estimate) or apply for conduit along another route. If the conduit is clear, or after any obstruction is removed, the next step is the installation of innerduct to divide the conduit space into several smaller, protected channels. Three innerducts typically are installed in a four-inch-diameter conduit. Generally, the rodding and roping, the slugging, the diagnosis and repair of blockages, as well as the installation of innerduct are all considered elements of make-ready work for underground installations. Once innerduct has been installed, the CLEC applicant is assigned an innerduct, and it may then install its cable.

11. Utilties typically insist on using their own employees or contractors to perform underground make-ready work. ILECs will allow CLECs to employ ILEC-approved contractors to pull the CLEC cable through the assigned innerduct, but they often prohibit CLEC-hired contractors from doing even this work unless they are supervised by ILEC personnel.[2] It is highly preferable, from the CLEC's perspective, to be the entity that hires the contractor. When it - rather than the utility - hires the

[2] Among power companies with which Fibertech has dealt, only Rochester Gas & Electric has allowed Fibertech or Fibertech's contractors to perform work in its electric manholes. Fibertech employees who have been trained by RG&E are allowed to work in RG&E's manholes to install both innerduct and fiber-optic cable. The ability of Fibertech employees to perform such work in RG&E manholes is not conditioned on the presence of any representative of the utility.

contractor, the CLEC can negotiate the price for the work and, unless encumbered by a rule preventing work outside the presence of utility supervisors, can dictate the scheduling and pace of the work. ILEC's generally charge the CLEC for supervising the work of the CLEC-hired (and ILEC-approved) contractor.[3] Where every innerduct within a conduit is occupied, a cable can be pulled through the interstices of the innerducts, which will not endanger the existing cables contained within the innerducts.

12. *Current Regulatory Regime and Practice*. Absent Commission or state standards affirmatively addressing an issue, the terms and conditions for how a competitor can obtain pole and conduit access are set through contracts imposed by the pole owner. Any disputes that arise as to whether practices are just, reasonable, and non-discriminatory must be resolved through a time-consuming and resource-intensive post-hoc complaint process.[4]

13. Fibertech has encountered a number of practices by pole and conduit owners that it believes are unreasonable. For example:

- Pole owners have prohibited Fibertech use of boxing and extension arms to eliminate make-ready work and enable faster attachment at lower cost.
- Utilities have not granted Fibertech access to poles or conduit (or specified the prerequisite make-ready work) within the 45 days required by the Commission's rules. *See* 47 C.F.R. § 1.1403(a) &(b).

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[3] It is Fibertech's understanding that, although an ILEC may require that an ILEC supervisor be present whenever contractors perform underground work for CLECs and will charge the CLEC for that supervision, ILEC's do not typically assign personnel to supervise those very same contractors when they are working on behalf of the ILEC.

[4] In practice, disputes between pole owners and CLECs over access to poles and conduit often include litigation in state court, where the ILEC or power company seeks to enforce the one-sided terms of the pole attachment "agreement" signed by the CLEC, and the CLEC seeks to persuade the court to defer to the Commission's complaint process.