



Brett Kilbourne
Director of Regulatory Services/Associate
Counsel

Direct Line: 1.202.833.6807
E-Mail: brett.kilbourne@utc.org

February 1, 2006

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
455 12th Street, SW
Washington, DC 20554

RE: Petition for Rulemaking of Fibertech Networks, LLC (RM-11303)

Dear Ms. Dortch:

The attached Comments of the United Telecom Council and the Edison Electric Institute are being filed to correct formatting errors in the electronic version of the Comments that were filed on January 30, 2006. Please accept this corrected copy of the Comments for insertion into the record in the above-referenced proceeding.

Thank you for your help in this matter. If you have any questions, please do not hesitate to contact the undersigned.

Respectfully,

Brett Kilbourne

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**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Petition for Rulemaking of Fibertech)
Networks, LLC) RM – 11303
)
_____)

**COMMENTS OF THE UNITED TELECOM COUNCIL AND THE EDISON
ELECTRIC INSTITUTE**

United Telecom Council

Brett Kilbourne
Director of Regulatory Services and
Associate Counsel

1901 Pennsylvania Avenue, N.W.
Fifth Floor
Washington, D.C. 20006

(202) 872-0030

Edison Electric Institute

Laurence W. Brown
Director, Legal Affairs, Retail Energy
Services

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

(202) 508-5000

January 30, 2006

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SUMMARY

The Commission should dismiss or deny the Fibertech Petition, because the issues that it raises should be addressed through a complaint proceeding, if at all. The proposals are also unnecessary and unsafe, because the issues raised by Fibertech appear anecdotal and isolated and the proposed rules could compromise critical infrastructure reliability.

The Commission should not require utilities to provide boxing and extension arms, but should review the reasonableness of the terms and conditions for these practices on a case-by-case basis. The Commission should not impose shorter deadlines and/or third party workers for surveys and make ready, which would undermine critical infrastructure reliability and would contradict Section 224(f)(2). The Commission should not impose unrestricted access to records and to manholes for surveys, because it would compromise confidentiality, Homeland Security, and public safety as well as worker safety. Finally, the Commission should refrain from exempting drop poles from licensing and should consider access to utility building conduit on a case-by-case basis, as necessary.

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

In the Matter of)	
)	
Petition for Rulemaking of Fibertech)	
Networks, LLC)	RM – 11303
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_____)	

COMMENTS OF UTC AND EEI

Pursuant to Section 1.405, the United Telecom Council and the Edison Electric Institute (“UTC/EEI”) hereby file comments in opposition to the petition for rulemaking in the above-captioned proceeding.¹ There is no need, nor would it be appropriate to conduct a rulemaking in response to the petition for rulemaking by Fibertech Networks, LLC.² First, the current pole attachment rules cover many of the issues that are raised; thus, relief is available through a pole attachment complaint. Second, Fibertech’s complaints are directed primarily against a few ILECs, and there is no indication that a widespread problem exists that would require a rulemaking. Third, UTC/EEI opposes Fibertech’s proposals: such measures do not provide the flexibility that the Commission sought to establish when it implemented the access provisions of the 1996 amendments to the Pole Attachment Act. Moreover, if these were adopted as rules, they would

¹ *Pleading Cycle Established for Petition for Rulemaking of Fibertech Networks, LLC*, Public Notice, DA 05-3182 (rel. Dec. 14, 2005).

² Petition for Rulemaking of Fibertech Networks, LLC, RM 11303 (filed Dec. 7, 2005)(“Fibertech Petition”).

contradict Section 224(f)(2) and would otherwise exceed the Commission's authority.

I. Introduction and General Statement

UTC is the international trade association for the telecommunications and information technology interests of electric, gas, and water utilities, pipeline companies and other critical infrastructure industries (CII). Its members include large investor-owned utilities that serve millions of customers, and relatively small municipal and cooperatively organized utilities that may serve only a few thousand customers. It has advocated positions on matters affecting pole attachment regulations before the Commission, the Federal appellate courts and the United States Supreme Court. Some of its members are subject to pole attachment regulation at the state or federal level, while some are specifically exempt from such regulations.³ As such, many of the members of UTC would be directly affected by the relief sought by the Fibertech Petition. Therefore, UTC is an interested party in opposing the Fibertech Petition.

The Edison Electric Institute is the association of the United States investor-owned electric utilities and industry associates worldwide. Its U.S. members serve almost 95 percent of all customers served by the shareholder segment of the U.S. industry, about 70 percent of all electricity customers, and generate about 70 percent of the electricity delivered in the U.S. It frequently represents its U.S. members before Federal agencies, courts, and Congress in

³ See *e.g.* 47 U.S.C. §224(a) (exempting Federal, state or municipal utilities and cooperatively organized utilities).

matters of common concern, and has filed joint comments with UTC before the Commission in various proceedings affecting the pole attachment interests of its members, who are subject to FCC and state pole attachment jurisdiction.

Therefore, EEI is also an interested party and is pleased to join UTC in opposing the Fibertech petition.

A. A rulemaking would be unnecessary and inappropriate.

The measures sought by FiberTech are both unnecessary and contrary to existing pole attachment policy. When the Commission implemented the 1996 amendments to the Pole Attachment Act, it eschewed a “comprehensive regime of specific rules” and opted instead for a “few rules supplemented by certain guidelines and presumptions.”⁴ In so doing, it recognized that “the reasonableness of particular conditions for access imposed by a utility should be resolved on a case-by-case basis.”⁵ The Commission decided to “adopt a flexible regulatory approach to pole attachment disputes that ensures consideration of local conditions and circumstances.”⁶ It also acknowledged that with reference to the relevant national industry codes, “no single set of rules can take into account all the issues that can arise in the context of a single installation or attachment.”⁷

⁴ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499, 16068 ¶¶ 1143 (1996) (“*Pole Attachment First Report and Order*”).

⁵ *Id.*

⁶ *Id.* at ¶¶ 1144, 1149 (including both the size and geographic service territory of the utility, as well as ice, wind and weather conditions).

⁷ *Id.* (noting that with respect to overhead wires, the NESC contains 64 pages of rules dictating minimum clearances, and adding that a wholly separate and equally extensive array of rules apply to underground lines.)

The Commission also was sensitive to the fact that utilities often adopt requirements more stringent than the NESC, which may also be dictated by federal, state or local law.⁸ These individual standards reflect engineering concerns that continue to evolve along with the evolution of energy delivery. Hence, even though carriers and cable companies wanted specific rules, the Commission realized that “the best safeguard is not the adoption of a comprehensive set of substantive engineering standards, but the establishment of procedures that will require utilities to justify any conditions that they place on access.”⁹

Specifically, the Commission adopted five rules of general applicability and five guidelines. The rules make clear that 1) a utility may rely on engineering codes; 2) federal requirements that affect pole attachments continue to apply; 3) state requirements also apply, even if a state has not reverse-preempted the FCC’s jurisdiction; 4) rates, terms, and conditions must uniformly be applied to telecommunications carriers and cable operators seeking access; and 5) a utility may not favor itself over others in the provision of telecommunications or video programming services. The guidelines supplement the rules by establishing the ground rules for arms-length negotiations. These pertain to 1) capacity expansions; 2) reservations of space by a utility; 3) the definition of a utility; 4) the application of Section 224(f)(2) to non-utilities; 4) third-property owners; and 5) other matters. Subsequently, these rules and guidelines have been expanded

⁸ *Id.* at ¶ 1147.

⁹ *Id.* at ¶ 1150.

to include access into defined pathways in buildings that are owned or controlled by a utility.¹⁰ The courts have also revised guidelines that pertain to access to transmission facilities and capacity expansions.¹¹

Turning to the “best practices” proposed by Fibertech, all of these can be addressed under the basic rules and guidelines established by the Commission.¹² Specifically, Fibertech’s issues with regard to boxing and extension arms can be addressed by the rules and guidelines pertaining to capacity expansions, uniformity and preferential treatment. Similarly, its issues with drop poles, surveys and make-ready timelines, contractors, access to records, manholes, and buildings also are addressed under the existing guidelines and rules pertaining to engineering standards; federal, state and local law; and other matters. As such, a rulemaking to address these issues would lead to precisely the comprehensive regime of rules that the Commission sought to avoid when it decided to adopt simple guidelines and rules.

To the extent that Fibertech is unable to resolve its issues through negotiations under the basic rules and guidelines established by the Commission, it may resolve them through the pole attachment complaint process. In fact, many of the issues raised by Fibertech have been addressed

¹⁰ *Promotion of Competitive Networks*, WT Docket No. 99-217, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 22983 (2000).

¹¹ *Southern Company v. FCC*, 293 F. 3d 1338-1347 (11th Cir. 2002)(holding that FCC jurisdiction does not extend to interstate transmission facilities, and that utilities are not required to expand capacity to accommodate a request for pole attachment access).

¹² *See generally, Id.* at ¶¶1143-1186.

through the pole attachment complaint process.¹³ Moreover, most if not all of Fibertech's issues are with ILECs, particularly Verizon. Fibertech has not shown that its issues are widespread such that a rulemaking is necessary or appropriate. In addition, the issues raised involve detailed factual allegations and various matters of law that defy their resolution through a rulemaking proceeding. Far from providing clarity and certainty for the industry or avoiding litigation, a rulemaking would likely lead to conflicts in standards and law.¹⁴

B. Fibertech's proposals are unnecessary and unsafe.

Utilities understand the importance of pole attachments to promote competition and access in the telecommunications and video marketplace, and are working to provide timely and efficient access to poles, ducts, conduit and rights-of-way in compliance with Section 224. There is no indication that pole attachments are impeding competition or access, either nationwide or specifically with regard to Fibertech. According to the latest statistics from the FCC, total CLEC end-user switched lines increased by 3% during the second half of 2004, which represents 18.5% of total number of end-user lines in the country.¹⁵

¹³ See e.g. *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, File No. PA 99-005, Order and Request for Information, 15 FCC Rcd. 9563 (2000)(addressing alleged delays in the permitting process, access by third-party workers, boxing and extension arms, etc.)

¹⁴ *But see* Fibertech Petition at 5 (claiming that the requested rules would provide clarity and certainty for the industry and avoid redundant litigation.)

¹⁵ See Federal Communications Commission releases Data on Local Telephone Competition at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0705.pdf (rel. July 8, 2005).

Similarly, Fibertech just reported its second consecutive year of profitability and announced a 44% increase in recurring revenue.¹⁶

Meanwhile, utilities have experienced unprecedented challenges during the past year. Hurricanes and other natural disasters have wiped out poles and flooded conduit in certain parts of the country. The Gulf Coast is still rebuilding. At the same time, new reliability standards are going into effect, which is expected to consume manpower and other resources.¹⁷ This would be the worst time for the Commission to impose tougher pole attachment requirements or to compromise safety and reliability by restricting utility oversight and control over the pole attachment process.

Maintaining the safe and reliable delivery of electric, gas, water and other utility services is and must remain the primary concern of utilities and this Commission. The Commission itself has recognized that utilities provide services that are essential to the public at large; and has respected the inherently dangerous nature of pole attachments, particularly in proximity to power lines.¹⁸ In some cases it may be possible to accommodate Fibertech's demands, but an across the board rule in all cases would likely threaten the safety and reliability of critical infrastructures systems and the public at large that relies on the services provided by those systems. That was the implicit reason behind the

¹⁶ In actual figures, Fibertech added \$8.5 million revenue in 2005, bringing the total to \$28 million for the year. See *Fibertech Networks Announces 2005 Results; Reports 44% Growth in Recurring Revenue and Record Profitability*, at <http://www.fibertech.com/pressArchive.cfm?ID=66>.

¹⁷ Energy Policy Act of 2005 (Pub. Law. No. 109-58, August 8, 2005, 119 Stat 594), codified at 16 U.S.C.A. §824 *et. seq.* (2005).

¹⁸ *Implementation of Section 309(j) and 337 of the Communications Act*, 15 FCC Rcd. 22,709 at ¶15 (2000).

Commission's decision to provide pole attachment parties with flexibility, rather than a comprehensive regime of rules.¹⁹

Fibertech distorts the principle of non-discrimination beyond its understood meaning. Just because one utility ascribes to one practice does not make that practice a "best practice" for another utility. Nor does a practice by a utility on one of its poles necessitate the same practice on all poles by the same utility. There are engineering and other considerations that come into play, which is one of the reasons why surveys are conducted in the first place. Similarly, some pole attachment applications are larger than others, in which case surveys may take more time or cost more money. The proposals by Fibertech would take none of this into account.

In implementing the pole attachment access provisions of the 1996 Act, the Commission only required utilities to provide non-discriminatory access for telecommunications and cable television attachments. It did not require electric utilities to give telecommunications or cable television attachments priority over electric utility attachments.²⁰ As a practical matter though, some of the proposals would have that effect, which is yet another reason for addressing Fibertech's issues, if at all, in the context of a complaint proceeding, rather than a rulemaking proceeding. If indeed there are actually unreasonable delays or charges in conducting surveys or make-ready for example, the Commission has shown that

¹⁹ *Pole Attachment First Report and Order*, 11 FCC Rcd. at 16068, ¶ 1143.

²⁰ The only utility attachments that are subject to non-discrimination are those used to provide telecommunications or cable television services. *Pole Attachment First Report and Order*, 11 FCC Rcd. 16068, ¶ 1157 (a utility may not favor itself over other parties with respect to the provision of telecommunications or video programming services.).

it is capable of enforcing just and reasonable terms and conditions for access through the complaint process.

Congress gave the Commission the limited authority necessary to regulate pole attachments, and expressly provided that utilities may deny access for reasons of capacity, safety, reliability and generally accepted engineering practices.²¹ While the Commission has required utilities to allow qualified third-party workers to make attachments, it has not required utilities to relinquish their ability to approve or supervise the work that is performed.²² That is what Fibertech is asking the Commission to do here.

There are good reasons why utilities generally approve make-ready themselves and supervise access to underground conduit. First, utilities face legal liability for pole attachment violations. As a result, they must ensure that the attachments comply with the NESC and other requirements. Second, unfortunately many attaching entities make noncompliant attachments or unauthorized attachments. This is a documented problem,²³ and in fact Fibertech was one of the offenders.²⁴ Not surprisingly, utilities are reluctant to

²¹ 47 U.S.C. §224(f)(2).

²² *Pole Attachment First Report and Order*, 11 FCC Rcd. at ¶1174, and *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Order on Reconsideration, 18 Comm. Reg. (P&F) 376 at ¶¶81-86 (1999) (“*Pole Attachment Order on Reconsideration*”).

²³ For example, a 2001 audit by Portland General Electric found that almost 25% of all its attachments in Oregon were unauthorized. It also found that just under 60% of all attachments violated the NESC or other codes.

²⁴ See *Verizon New England v. Fibertech Networks, LLC*, 2002 WL 32156845 (finding that Fibertech made over 700 unauthorized attachments and issuing an injunction ordering Fibertech to remove the attachments or pay Verizon and Western Massachusetts Electric Company \$400,000).

delegate their responsibility to others, including contractors hired by the attaching party, as Fibertech demands in its petition.²⁵ Third, certain types of pole attachments, such as in underground electric conduit, are more dangerous than others. In those cases, it is reasonable for the utility to supervise the work to ensure that it is conducted safely and securely.

Therefore, UTC/EEI generally submit that Fibertech's problems are primarily with a few particular ILECs, and can be adequately addressed through a complaint proceeding, if they cannot be resolved through negotiation. The issues involved are highly fact-specific, and should be resolved on a case-by-case basis. There is no need for a rulemaking, nor should the Commission adopt Fibertech's proposals which are inflexible and contradict Section 224(f)(2). This general statement serves to preface and supplement the following specific comments with regard to each of Fibertech's proposals.

II. Boxing and Extension Arms

UTC and EEI cannot support imposing an access rule for boxing and extension arms, because these practices should be considered and approved by utilities on a case-by-case basis. In addition to the preconditions outlined by Fibertech on these issues, there are other factors that must be considered, such as the age and size of the pole. Moreover, a full pole loading analysis must be conducted when considering boxing and extension arms. In addition, boxing and extension arms should only be permitted if they comply in all respects with the

²⁵ Fibertech Petition at 19 and n. 20.

NESC. Therefore, the use of boxing and extension arms must account for a variety of factors beyond those listed by Fibertech to ensure public safety and electric reliability. As these factors will vary depending on the circumstances, boxing and extension arms should be reviewed on a case-by-case basis instead of by rule.

III. Shorter Survey and Make-ready Times

UTC and EEI oppose Fibertech's proposal to require utilities to complete surveys within 30 days of a completed application and to complete make-ready 45 days after payment.²⁶ This proposal would potentially compromise critical infrastructure by placing priority on telecommunications and cable television attachments over utility pole attachments. It would not account for any variables such as the size of the build-out or regional differences, which can dramatically affect the amount of time to conduct a survey and perform make-ready. The FCC has declined to impose 45-day deadlines for make-ready in the past.²⁷ Yet, Fibertech asserts that these deadlines are reasonable without any basis. As such, the proposed deadlines are arbitrary and reckless.

In its petition, Fibertech acknowledges that the Commissions rules require that utilities process applications within 45 days and complete make-ready within timeframes that are both reasonable and nondiscriminatory.²⁸ As such, any

²⁶ Fibertech Petition at 17-18.

²⁷ *Petition of Cavalier Telephone LLC Pursuant to Section 252(E)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration*, Memorandum Opinion & Order, WC Docket No. 02-359, 18 FCC Rcd. 25887 at ¶¶ 140-142 (2003).

²⁸ Fibertech Petition at 16.

delays that Fibertech is experiencing could be challenged through the complaint process. Moreover, the petition only makes vague claims about delays, which are anecdotal at best.²⁹ As such, no rulemaking is necessary on this issue, and the proposed deadlines would pose a serious threat to critical infrastructure reliability if they were imposed.³⁰

IV. Utility-approved Contractors to Perform Surveys and Make-ready

UTC and EEI recognize that “time is of the essence for competitive facilities-based deployment,” and are committed to supporting reasonable expectations for pole attachment access.³¹ However, utilities cannot simply delegate the responsibility for approving surveys and make-ready to attaching entities. As noted earlier, utilities are primarily liable for pole attachment violations; and they also have a larger duty to their customers to ensure the reliability of the essential services they provide. The risk is simply too great to delegate the approval of surveys and make-ready to third party contractors, nor should utilities be required to relinquish this amount of control over their own property.

²⁹ Fibertech only makes reference to a pole attachment agreement by Verizon in New England that provides 180 days for Verizon to complete make-ready. It also alleges that ILECs (not Verizon specifically) act much more quickly when installing their own facilities. *Id.* Fibertech only makes vague unsubstantiated claims that utilities often fail to complete field surveys within 45 days and that they may take as long as six months to complete make-ready. *Id.*

³⁰ Note that the Commission has previously considered pole attachment complaints involving processing delays. *See e.g. Cavalier Telephone, LLC*, Memorandum Opinion and Order, 18 FCC Rcd. 25,887 (2003). *See also Kansas City Cable Partners v. Kansas City Power & Light*, 14 FCC Rcd. 11599 (1999).

³¹ Fibertech Petition at 21.

Contrary to Fibertech's assurances, requiring third-party surveys and make-ready would go far beyond the Commission's rules that currently require utilities to allow qualified third-party workers to make attachments. These contractors would have much greater discretion than third-party workers making attachments and could affect critical infrastructure to a greater extent. Such a requirement would also conflict with state jurisdiction over the reliability of electric distribution facilities. As agents for attaching entities, these contractors would have an inherent conflict of interest, which could effectively negate Section 224(f)(2). Hence, the Commission should not require utilities to use third-party contractors to approve surveys and make-ready, but should allow utilities the option of doing so voluntarily.

V. Drop Lines

UTC and EEI oppose giving a license exemption for drop poles. While utilities may decide to offer such an exemption on a non-discriminatory basis, the Commission has not and should not impose such an exemption by rule. It is the prevailing industry practice to treat drop poles the same as any other poles for purposes of pole attachments. This is consistent with the NESC, which does not even define the term drop pole. Some drop poles support primary voltage conductors; and the rest in general always support secondary voltage conductors. These voltages constitute a potential danger to pole workers and the public. Therefore, UTC and EEI respectfully recommend that the Commission refrain from adopting a rule that would exempt drop poles from the licensing process.

VI. Conducting Record Searches and Manhole Surveys, and Limiting Charges

Access to records and manholes must also be just and reasonable, and a utility's conditions and billing practices may be reviewed in a complaint proceeding. More specifically, the Commission has already clarified that it would expect utilities would have a standard quote for access to poles and conduit, and that it would expect that utilities would make maps, plats and other relevant data available for inspection and copying by the requesting party, subject to reasonable conditions to protect proprietary and other sensitive information.³² Furthermore, this rule has been applied in a complaint proceeding in the analogous context of upfront fees for make-ready.³³ Finally, Fibertech's issues with regard to access to records and manholes, as well as associated fees appear isolated and anecdotal.³⁴ Thus, its issues can and should be addressed through a complaint proceeding rather than a rulemaking.

The reasonableness of access to records and for manhole surveys, as well as the billing practices of utilities should remain subject to case-by-case application and review, rather than a bright line rule or price cap. For example, underground electric conduit is a particularly hazardous environment in which to work, and it would not be reasonable to allow unrestricted access generally to

³² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Order on Reconsideration, 18 Comm. Reg. (P&F) 376 at ¶107 (1999) ("*Pole Attachment Order on Reconsideration*").

³³ *Cable Television Assoc. of Georgia v. Gulf Power*, PA 01-002, Order, 18 FCC Rcd. 16,333 at ¶ 20 (2003).

³⁴ Fibertech objects to Verizon's access restrictions with regard to records and manhole surveys. See Fibertech Petition at 24-28. It also objects to SBC's billing practices, as well as Verizon's. *Id.* at 29.

these areas by CLECs, as Fibertech proposes.³⁵ Similarly, there may be reasonable conditions for protecting proprietary records from review by CLECs.³⁶ Alternatively, some utility information may be kept confidential for reasons of homeland security.³⁷ Finally, CLECs are able to obtain receipts for costs upon request; there is no need to impose an affirmative billing requirement.³⁸ In order to consider such surrounding circumstances, the terms and conditions for access to records and for manhole surveys should remain subject to application and review on a case-by-case basis.

VII. Utility-approved Contractors Working in Manholes Without Supervision

The reasonableness of the terms and conditions for accessing manholes to make attachments is already subject to case by case review in a complaint proceeding. In fact, Fibertech won a stay from the FCC after complaining that Verizon was overcharging for make-ready and supervision of conduit attachments.³⁹ The proposed best practice seems to be arising from the same or similar set of facts as in that case. Once again, Fibertech's petition blames

³⁵ *Id.* at 28.

³⁶ *Id.* at 27. (explaining that Verizon claims confidentiality justifies its restrictions on access to records.)

³⁷ Certain "Critical Infrastructure Information" is protected under federal law, and other state and local restrictions may apply. See 6 C.F.R. §29, Pub. L. 107-296, 116 Stat. 2135 (6 U.S.C. § 1 et seq.)

³⁸ See Fibertech Petition at 30 (calling for documentation to support charges for performing surveys and make-ready). Such information must be produced in response to a request by an attaching entity under the FCC rules. See 47 C.F.R. §1404(j).

³⁹ *Fibertech Networks v. Verizon New England*, EB-03-MD-007, Order, 18 FCC Rcd 10,156 (2003).

Verizon for requiring supervised access into manholes.⁴⁰ Conversely, it cites several electric utilities as allowing unrestricted access. Thus, Fibertech's issues with supervised access seem to be isolated and anecdotal, and can be readily addressed in a complaint proceeding.

In any event, the Commission should not mandate unsupervised access to manholes by rule. Instead, the reasonableness of the terms and conditions of access to manholes should be subject to case-by-case application and review through the complaint process. There may be reasonable safety reasons for requiring supervised access in conduit, particularly given the attendant risks of flooding and electrocution. Requiring unsupervised access would ignore such considerations, and Fibertech has in fact disregarded these concerns in the past by making unauthorized attachments rather than complaining to the FCC first.⁴¹ As such, the Commission should proceed cautiously, and continue to review the terms and conditions of supervised access to manholes on a case-by-case basis.

Fibertech states that it is its "understanding that only when a contractor's work is performed at a CLEC's behest is it subject to additional and costly supervision."⁴² UTC and EEI respectfully request that the Commission clarify that attaching entities are responsible for the costs of supervised access into manholes. But for pole attachments, these costs would not be incurred by the

⁴⁰ Fibertech Petition at 32-33.

⁴¹ The FCC admonished Fibertech for taking matters into its own hands by making unauthorized attachments rather than filing a complaint to challenge Verizon's conditions for access to conduit. *Id.* at ¶ 4.

⁴² Fibertech Petition at 34.

utility. It is unreasonable to suggest that utilities absorb these costs, if they supervise such access.⁴³

VIII. Requiring ILECs to Share Building-entry Conduit with CLECs

The issue of competitive access into buildings through conduit has been addressed in several proceedings. With regard to Section 224, the Commission concluded that utilities are required to provide access to “defined pathways” that are owned and controlled by utilities.⁴⁴ Utility ownership or control of such pathways is determined by state law.⁴⁵ In addition, conduit space into building may only be reserved pursuant to a bona-fide core business plan and must be provided to attaching entities on a temporary basis until the utility actually uses it.⁴⁶ As such, Fibertech’s issues with Verizon and other ILECs appear to have been addressed by the FCC already.⁴⁷ In any event, there is no indication that this issue is so widespread that it would require a rulemaking.

⁴³ *But see* Fibertech Petition at 34, n. 32 (stating that ILECs could at their discretion choose to observe CLECs’ 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.)

⁴⁴ *Promotion of Competitive Networks*, WT Docket No. 99-217, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 22983 (2000).

⁴⁵ *Id.*

⁴⁶ *See Pole Attachment First Report and Order* at ¶¶ 1162-1163.

⁴⁷ *See* Fibertech Petition at 35-36.

WHEREFORE, the premises considered, UTC and EEI oppose the Fibertech petition, and urge the Commission to dismiss or deny it without further consideration.

Respectfully submitted,

United Telecom Council

By: ss

Brett Kilbourne

Director of Regulatory Services and
Associate Counsel

1901 Pennsylvania Avenue, N.W.
Fifth Floor
Washington, D.C. 20006

(202) 872-0030

Edison Electric Institute

By: ss

Laurence W. Brown
Director, Legal Affairs, Retail Energy
Services

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

(202) 508-5000

January 30, 2006

SERVICE LIST

Chairman Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Deborah Tate
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Sam Feder
Acting General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

John T. Nakahata
Brita D. Strandberg
Stephanie Weiner
Harris, Wiltshire & Grannis, LLP
1200 Eighteenth Street, N.W.
Washington, DC 20036

Charles Stockdale
Robert T. Witthauer
Fibertech Networks, LLC
140 Allens Creek Road
Rochester, NY 14618