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

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

REPLY COMMENTS OF UTC AND EEI

Pursuant to Section 1.405, the United Telecom Council and the Edison Electric Institute ("UTC/EEI") hereby file reply comments in opposition to the petition for rulemaking in the above-captioned proceeding.[1] Comments in opposition on the record are consistent with UTC/EEI's comments.[2] The Commission should not adopt a rulemaking because it is inappropriate, unnecessary, and unsafe. The issues raised by Fibertech and others are more appropriately addressed, if at all, in a complaint proceeding. Some comments even concede that many of the issues are already covered under existing rules. Moreover, adopting the specific rules proposed by Fibertech and others would be contrary to the statute and would threaten the safety, reliability and security of critical infrastructure. As such, the Commission should dismiss or deny the Fibertech Petition without further consideration.

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

[2] Comments of the United Telecom Council and the Edison Electric Institute in RM-11303 (filed Jan. 30, 2006). Unless otherwise indicated, all comments referred to herein are filed in RM-11303.

I. A rulemaking would be unnecessary and inappropriate.

As UTC/EEI noted at the outset in their comments, Fibertech proposes the kind of "comprehensive regime of specific rules" that the Commission fundamentally rejected when it implemented the pole attachment access provisions of the Telecommunications Act of 1996.[3] At that time, the Commission recognized that "there are simply too many variables to permit any other approach with respect to access to the millions of utility poles and untold miles of conduit in the nation."[4] Comments in opposition echo the wisdom of Commission's fundamentally basic approach to pole attachments. The "one-size-fits-all" rules that Fibertech supports are dangerous and are contrary to the statute.[5] The Commission must ensure that pole attachments do not compromise the safety, reliability and security of critical infrastructure systems. To do otherwise would contradict Section 224(f)(2) and intrude on state jurisdiction.[6] As such, "the reasonableness of particular conditions for access

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[3] *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") See also Comments of UTC and EEI at 3 (filed Jan. 30, 2006).

[4] Id. at ¶1143.

[5] See Comments of the United States Telecom Association at 2 (filed Jan. 30, 2006); and Comments of Verizon at 1 (filed Jan. 30, 2006).

[6] See Comments of American Electric Power Service Corporation, Duke Energy Corporation and Wisconsin Electric Power Company WPS Resources Corporation, and Xcel Energy at 5-7 (filed Jan. 30, 2006)(hereinafter "Comments of American Electric Power, *et. al.*")(explaining that Congress gave the FCC narrow authority and should not intrude on state jurisdiction over electric reliability); and Comments of Ameren Corporation, Florida Power and Light Company, Pacificorp, Public Service Electric & Gas Company, Southern California Edison Company, Tampa Electric Company and Virginia Electric and Power Company at 10-13 (filed Jan. 30, 2006)(hereinafter "Comments of Ameren, *et al.*")(stating that State jurisdiction applies to electric safety, reliability and engineering and that the Commission should refrain from creating potential conflicts with standards and jurisdiction by regulating in these areas).

imposed by a utility should [continue to] be resolved on a case-by-case basis," rather than imposing arbitrary rules that ignore engineering, capacity, safety, and reliability concerns. [7]

Indeed, the issues raised by Fibertech are already covered under the existing rules and should be addressed, if at all, in a complaint proceeding. Even comments in support concede as much.[8] The Commission has already addressed the issues raised by Fibertech with regard to extension arms and boxing; timeframes for make-ready; non-discriminatory access for third-party workers; the reasonableness of non-recurring costs; and access to conduit.[9] Similarly, many of the additional issues raised in comments do not require new rules.[10] As such, a rulemaking is unnecessary to address the issues raised by Fibertech and others.

II. Fibertech's proposals are unnecessary and unsafe.

Fibertech's proposals would compromise the safety, reliability and security of critical infrastructure systems if adopted as rules. For example, Western

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[7] *Id.*

[8] Comments of McLeodUSA Telecommunications Services, Inc. at 2 (filed Jan. 30, 2006) (stating that it is "remarkable [] that so many of Fibertech's proposals have already been endorsed by the Commission in its prior rulemakings and in the published records of its enforcement actions."); and Comments of segTEL, Inc. at 2 (filed Jan. 30, 2006) (stating that Fibertech's proposals "have already been implemented by a significant number of utilities, and some have been endorsed by the Commission in prior rules and adjudications.")

[9] See Comments of Ameren, *et al.* at 16-17 (citing cases in which the Commission has addressed these issues in complaint proceedings).

[10] See e.g. Comments of NextG Networks, Inc. at 7-10 (filed Jan. 30, 2006) (insisting that the Commission codify the rights of wireless attachments and require cost-based rates for wireless attachments). It is settled law that wireless attachments by telecommunications carriers are pole attachments, and rental rates must be cost-based. *National Cable Telecomm's Ass'n v. Gulf Power Co.,* 354 U.S. 327, 340-41(2002).

Massachusetts Electric Company opposes extension arms because extension arms do not comply with the NESC requirement of 40 inch vertical separation between communications and electric lines, and because they create climbing hazards for utility linemen.[11] WMECO also notes that,

> attachers have used lag bolts to attach extension arms rather than through bolts. These lag bolts do not go 'through' the pole and do not provide the mechanical strength that a through bolt does. Cable tension,as well as wind and ice loading, can easily cause extension arms secured with lag bolts to fall down, thereby posing a hazard to utility workers and the general public.[12]

Similarly, extension arms and boxing are the exception rather than the rule for Verizon. Boxing "greatly complicates pole replacements, removals, and the cable transfers required when performing pole replacements."[13] Extension arms "make it more difficult for a technician to access and work on the attachment immediately above and below the bracket," such that Verizon "does not permit extension arms to be used merely to increase the capacity on the pole."[14]

Yet Fibertech and others fail to realize or simply disregard the safety and practical concerns of pole owners with regard to boxing and extension arms. As such, Fibertech proposes a formulaic approach that would require boxing and extension arms 1) would render unnecessary a pole replacement or rearrangement of electric facilities; 2) facilities on the pole are accessible by ladder or bucket truck; and 3) the pole owner has previously allowed such techniques. Interestingly, some comments in support of Fibertech actually

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[11] Comments of Western Massachusetts Electric Company (WMECO) at 2 (filed Jan. 30, 2006).

[12] *Id.* at 3.

[13] Comments of Verizon at 3 (filed Jan. 30, 2006).

[14] *Id.*

oppose the last condition for this access requirement.[15] This formulaic approach does not consider the larger engineering complexities or safety considerations associated with boxing and extension arms. As such, this approach recklessly contradicts Section 224(f)(2) and should not be adopted by the Commission.[16]

Similarly, Fibertech and others fail to recognize the safety issues associated with drop poles. Fibertech's self-appointed expert, Charles Stockdale, states that "The installation of drop lines without prior licensing is permitted because the absence of either steel support-strand (which places stress on a pole) or through-bolts (which can affect the structural integrity of a pole) renders NESC-compliant drop line installations free of the risks that pole-owner survey and make-ready functions seek to prevent."[17] That is not entirely true; an additional consideration is electrocution from conductors that are located on drop poles as well. Verizon also notes that licensing of drop poles ensures that attachers "do not install drop lines in a pole space already licensed to another attacher," and it also "ensures that the pole attachments do not exceed the maximum permissible load."[18] Thus, it is not common practice as Fibertech

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[15] Comments of McLeodUSA Telecommunications at 3; Comments of segTEL at 3; *and* Comments of Sigecom at 3.

[16] *See* Comments of American Electric Power, *et al.* at 17-18, *citing Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002)(explaining that Fibertech's proposals with respect to boxing and extension arms would effectively require utilities to expand capacity to accommodate pole attachments, contrary to the decision by the 11th Circuit Court of Appeals in *Southern Co. v. FCC*).

[17] Fibertech Petition, Stockdale Declaration at 10, n. 5.

[18] Comments of Verizon at 7.

claims for utilities to exempt drop lines from licensing.[19] Nor has the Commission granted a blanket exemption from licensing drop poles, as others have claimed.[20]

These are just but some of the examples of the misstatements and erroneous conclusions in Fibertech's petition and supporting comments regarding pole attachment practices by utilities. Understandably, utilities are reluctant to allow attachers to make attachments to drop poles without prior licensing, hire their own contractors for surveys and make ready, enter manholes without supervision or inspect records themselves. As UTC/EEI noted in their comments, there is a documented problem with unauthorized attachments and attachments in violation of the NESC.[21] Similarly, American Electric Power and Duke reported that they found 318,000 unauthorized attachments on their systems, and Duke found that 29% of attachments in a random sample were in violation of code.[22] "It has [also] been WMECO's experience that applicants have failed to take seriously potential safety and NESC violations. CLECs can be more concerned with cost rather than a facilities' compliance with the NESC."[23]

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[19] Fibertech Petition at 22 (stating that cable television companies traditionally have been permitted to attach drop lines to utility poles without first obtaining a license.) *But see* Comments of Verizon at 7 (stating that contrary to Fibertech's suggestion Verizon requires all attachers – including cable television companies, CLECs, and any other attachers – to obtain licenses prior to attaching drop lines.)

[20] Comments of McLeodUSA Telecommunications at 8; Comments of segTEL at 8; and Comments of SigeCom at 8. In the *Mile Hi* case, the Commission found that it was reasonable for utilities to require licensing of drop poles for inspection and to recover rent. *See Mile Hi Cable Partners v. Public Service Co.*, PA 98-003, Order, 15 FCC Rcd. 11450 ¶ 20 (2000).

[21] Comments of UTC/EEE at 9, n. 23 (reporting that a 2001 audit by Portland General Electric found that almost 25% of all its attachments in Oregon were unauthorized; and it found that just under 60% of all attachments violated the NESC or other codes).

[22] Comments of American Electric Power, *et al.* at 14.

[23] Comments of WMECO at 4.

Thus, the record in this proceeding and the record of unauthorized attachments/code violations dictate that the Commission should continue to review the reasonableness of the terms and conditions of pole attachment access on a case by case basis, rather than consider one-size-fits-all rules proposed by Fibertech that disregard the safety, reliability and security of critical infrastructure systems.

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,

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