



1200 18TH STREET, N.W.
WASHINGTON, D.C. 20036-2516
U.S.A.

TEL +1 202 730 1337
FAX +1 202 730 1301
WWW.HARRISWILTSHIRE.COM

ATTORNEYS AT LAW

August 26, 2008

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Docket No. 07-245, RM-11293 and RM-11303.*

Dear Ms. Dortch:

In this proceeding, Fibertech Networks, LLC ("Fibertech") seeks just, reasonable, and non-discriminatory access to poles and conduit – the fundamental building blocks of the nation's telecommunications and broadband network. Such access is not only statutorily required but also a necessary prerequisite to achieve the facilities-based competition and new broadband deployment that will most effectively enhance American productivity and competitiveness, and create new jobs. The Commission must address these pole access issues in addition to any rate issues in order to effectively promote broadband deployment by competitive providers and, thereby, also spur investment by incumbent local exchange carriers ("ILECs") and cable television operators.

The Commission can, and should, come closer to realizing its broadband goals by taking three modest steps: (1) the Commission should increase transparency and enforceability by codifying its existing precedents prohibiting pole owners' discriminatory bans on the use of boxing and extension arms; (2) the Commission should revise its current pole access timeline to place reasonable deadlines on pole owners to complete make-ready work and issue pole licenses, and to provide attachers with reasonable alternatives to simply waiting for the pole owner to complete work on whatever timetable they desire; and (3) the Commission should not disturb its existing holdings that attachers are entitled to make service drops on reasonable notice, without pre-licensing. As described below, by taking these three steps as a part of any decision

Marlene H. Dortch
August 26, 2008
Page 2

addressing pole attachment rates or access, the Commission can enable companies like Fibertech to build technically superior networks to compete in commercial and residential marketplaces and thereby improve generally the availability, quality, and pricing of broadband services.

I. Predictable and Timely Access to Poles and Conduit is Required for Broadband Deployment and Facilities-Based Competition.

Without predictable and timely access to poles, competitive providers of fiber-based networks and services cannot succeed in bringing facilities-based, high capacity, competitive broadband to consumers.¹ Demand for fiber is growing, but new entrants like Fibertech are unreasonably shackled by utility pole owners as they seek to meet this demand through the deployment of state-of-the-art fiber-optic network facilities. New customers will not wait for the months or even years that it routinely takes for ILECs or electric companies to provide competitors with access to poles. Under the current regulatory scheme, the uncertainty and delay faced by attachers severely hinders fiber deployment and prevents competitive fiber-based providers from satisfying consumer demand and elevating the competitive efforts of incumbent providers.

Fibertech's experience demonstrates how certain practices, like the ones it has asked the Commission to approve, can make a positive difference. Fibertech, a competitive provider of dark and lit fiber services, has networks in more than twenty cities in New England, the Mid-Atlantic, and the Midwest. Because some of the states in these regions regulate pole attachments by setting their own rules, others regulate pole attachments using the FCC's rules but not its case law, and still others are regulated by the FCC, Fibertech's experience shows the benefits of regulations that assure predictable and timely access and also demonstrates that reasonable access requirements have no adverse consequences for public safety or reliability. Connecticut provides a prime example, where boxing has been permitted and where the state commission recently adopted a 90-day pole access timeline and directed the parties to identify circumstances in which a 30 to 50-day licensing timeline should apply. Under Connecticut's rules, Fibertech has deployed over 1,700 route miles of fiber providing a high speed competitive broadband alternative for Connecticut consumers. This contrasts sharply with Rhode Island, which is an FCC-regulated jurisdiction.

¹ In its recent resolution regarding pole attachment policy, the National Association of Regulatory Utility Commissioners ("NARUC") recognized the direct connection between pole attachments and the deployment of advanced communications services and called for a report on the status of pole attachment regulation across the country, including a "comprehensive list of appropriate 'best practices' which could be employed . . . to advance policies which would further facilitate the deployment of advanced services." See NARUC Board of Directors, Committee Resolutions TC-2, Resolution Regarding Pole Attachment Policy at 28 (July 23, 2008), <http://www.naruc.org/Resolutions/08%200723%20FINAL%20Resolutions%20PASSED%20BY%20BD.pdf>.

Marlene H. Dortch
August 26, 2008
Page 3

By taking the three steps outlined below, the Commission can help to bring more broadband to more consumers. These few modifications will enable competitors like Fibertech to bring a third source of facilities-based competition in residential markets and a second source of facilities-based competition in business markets. In addition, many competitive and wireless carriers rely on Fibertech's services as an alternative to incumbent special access offerings. Fibertech's wireless carrier customers, for example, report saving up to 90% when they use Fibertech to provide backhaul from cell sites. But only with timely and predictable access to poles and conduit can companies like Fibertech drive alternative facilities-based broadband competition.

II. Three Steps to Timely and Predictable Access to Poles and Conduit.

The Commission has been unanimous in its commitment to encourage greater broadband deployment. Non-ILECs are an important part of that deployment, both in providing alternatives to the ILECs and in motivating the ILECs to continue to invest and innovate. This proceeding provides a straightforward way to further that goal. No groundbreaking new theories or determinations are required. To the contrary, the FCC can help by codifying existing precedents and revising its existing access timeline. Fibertech urges the Commission to take the following three steps:

First, the Commission should codify its *existing* holdings that pole owners may not adopt discriminatory bans on use of boxing or extension arms by attachers.² Fibertech is not asking the Commission to adopt new law – simply to improve transparency by updating its rules to reflect what the case law already makes clear. Attachers should be permitted to employ boxing and extension arms so long as they are in compliance with applicable safety codes and state regulations, unless the pole owner can show such practices are unsafe for particular poles.³ Pole owners have repeatedly complained that such a codification would impair safety and reliability.⁴ But no pole owner offers any example or evidence to support the bald assertion that boxing or extension arms are unsafe. To the contrary, as AT&T has recognized, boxing and

² *Salsgiver Communications, Inc. v. North Pittsburgh Telephone Co.*, Memorandum Opinion and Order, 22 FCC Rcd 20536, 20543-44 (2007) ("*Salsgiver*"); *Cavalier Telephone, LLC v. Virginia Electric and Power Co.*, Order and Request for Information, 15 FCC Rcd 9563, 9572 (2000).

³ It may be appropriate to allocate any additional costs created by the use of boxing or an extension arm on the pole to the entity or entities that have used that method of attachment.

⁴ *See, e.g.*, Initial Comments of Florida Power & Light, Tampa Electric and Progress Energy Florida Regarding Safety and Reliability at 18-19, WC Docket No. 07-245 (filed Mar. 7, 2008); Comments of the Edison Electric Institute and the Utilities Telecom Council at 84-86, WC Docket No. 07-245 (filed Mar. 7, 2008); Comments of the Coalition of Concerned Utilities at 81-84, WC Docket No. 07-245 (filed Mar. 7, 2008).

Marlene H. Dortch
August 26, 2008
Page 4

extension arms can *increase* pole stability through load balancing.⁵ And some states, like Connecticut, New York, and Maine, have conclusively ruled that boxing and extension arms are not only safe but common industry practice and thus presumptively permissible.⁶

Importantly, Fibertech's proposed rule is structured as nothing more than a rebuttable presumption that would always allow pole owners to bring particular safety or reliability concerns to the regulator, should they have a basis to do so and real proof. Placing the burden on pole owners is both consistent with the statutory structure and best serves the Commission's goals for broadband deployment. Section 224(f)(1) mandates nondiscriminatory access: "A utility *shall* provide" a carrier with nondiscriminatory access to poles and conduit.⁷ Fibertech asks simply that this statutorily required access be the default. Specifically, Fibertech asks that safety-code compliant boxing and extension arms be presumed reasonable. Section 224(f)(2), provides that "a utility providing electric service *may* deny . . . access . . . on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."⁸ Under Fibertech's proposal, this second subsection is given full effect. Pole owners can rebut the presumption by demonstrating that the use of boxing or an extension arm on a pole falls within one of Section 224(f)(2)'s enumerated categories.⁹ Given the evidence in the record of pole owners' discriminatory practices and the Commission's goals for broadband deployment, placing the burden of proof on pole owners rather than attachers is consistent with the statute and the Commission's policy goals.¹⁰

⁵ Reply Comments of AT&T at 40 n. 113, WC Docket No. 07-245 (filed Apr. 22, 2008) ("AT&T Reply Comments").

⁶ See Petition for Rulemaking of Fibertech Networks at Exhibit 2 (Connecticut Regulations) and Exhibit 3 (New York Order), RM-11303 (filed Dec. 7, 2005); *Oxford Networks f/k/a Oxford County Telephone Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles*, Order, Docket No. 2005-486, 14-15 (Maine PUC Oct. 26, 2006), *aff'd in part and modified in part Oxford Networks f/k/a Oxford County Telephone Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles*, Order on Reconsideration, Docket No. 2005-486 (Maine PUC Feb. 28, 2007).

⁷ 47 U.S.C. 224(f)(1) (emphasis added).

⁸ *Id.* § 224(f)(2).

⁹ The Commission undoubtedly has the legal authority to adopt rules, including rebuttable presumptions, necessary to fulfill its statutory obligation to ensure nondiscriminatory access. See Reply Comments of Fibertech and Kentucky Data Link at 18-19, WC Docket No. 07-245 (filed Apr. 22, 2008); see also *SEC v. Chenery Corp.*, 332 U.S. 194, 207 (1947).

¹⁰ As the Supreme Court has explained, "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, 'is merely a question of policy and fairness based on experience in the different situations.'" *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 209 (1973) (quoting 9 John H. Wigmore, *Evidence* § 2486, at 275 (3d ed. 1940));

Second, the Commission should adopt appropriate deadlines for pole owners to complete make-ready work and issue pole licenses. The FCC's current rules recognize the need for firm deadlines by specifying that a utility must either grant access to poles and conduit or state why access has been denied within 45 days of a request for access,¹¹ a regulation that is typically understood to require the pole owner to provide a make-ready estimate within 45 days of the license application. Unfortunately, experience has demonstrated that this initial deadline is not enough, as pole owners face no deadline for the *performance* of make-ready work and often take months to complete even relatively minor make-ready work. This makes it very difficult for attachers to satisfy customer demand, as customers understandably expect providers to make (and meet) commitments to provide service quickly and by a date certain. When attachers face unreasonable delays, they have no recourse other than filing full-scale, costly, and time-consuming complaints, a process that, even if successful, defeats the attachers' true goal of getting on the pole as quickly, efficiently, and safely as possible. If the Commission is committed to encouraging providers to offer facilities-based broadband alternatives, it must provide them with a predictable and commercially reasonable timeframe for pole access.

Specifically, the Commission should revise its existing access timeline to include a deadline for completing make-ready work, unless a pole owner can show that the deadline is unreasonable for a given application. Fibertech has proposed that the existing 45-day window for providing the make-ready estimate generally be followed by 45 days to complete make-ready work and issue the license. In those limited cases where less make-ready work is required (where the make-ready work to be performed by the pole owner (a) involves four or fewer poles; (b) involves no pole replacements; and (c) stems from an application that does not represent the segmentation of a longer route), pole owners would have 25 days to complete make-ready work and issue the license. Because enforcement through the complaint process takes too long and is too costly to provide a real remedy, the Commission should require pole owners to permit self-executing remedies. If pole owners fail to comply with the proposed deadlines, the Commission should allow attachers to either (1) hire pole-owner-approved contractors to complete the make-ready work¹² or (2) use a temporary attachment,¹³ to be converted to a permanent attachment once make-ready work is completed.

See also Basic Inc. v. Levinson, 485 U.S. 224, 245 (1988) (Upholding rebuttable presumption of reliance in securities action and stating that “[a]rising out of considerations of fairness, public policy, and probability, as well as judicial economy, presumptions are also useful devices for allocating the burdens of proof between parties.” (citing E. Cleary, McCormick on Evidence 968-969 (3rd ed. 1984)).

¹¹ 47 C.F.R. § 1.1403.

¹² The Commission already approved of this practice in the *Local Competition Order*. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First

Marlene H. Dortch
August 26, 2008
Page 6

Third, the Commission should reaffirm – or at least not modify – its holdings that attachers are entitled to make service drops on reasonable notice, without prelicensing.¹⁴ The FCC’s existing decisions recognize that time is of the essence and the ability to install service drops rapidly is critical for new entrants to be able to deliver broadband facilities and services within a competitively reasonable period of time.

Taking these three steps will increase the transparency of the existing pole attachment regime, making it easier for small providers and new entrants to enjoy protections the FCC has already granted. And, more importantly, taking these three steps will encourage facilities-based competition and increase the availability and speed of broadband services, goals the Commission has repeatedly endorsed.

Respectfully submitted,



John T. Nakahata
Brita D. Strandberg
Stephanie S. Weiner

Counsel to Fibertech Networks, LLC

Report and Order, 11 FCC Rcd 15499, 16083 (¶ 1182) (1996) (establishing that a “utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility’s own workers, but the party seeking access will be able to use any individual workers who meet these criteria”). Moreover, as AT&T points out, some pole owners already permit this practice, allowing the attacher to use utility-approved contractors for survey and make-ready work. AT&T Reply Comments at 39. But this proves that pole owners’ objections to such rules have little merit, not, as AT&T suggests, that the rules are not necessary. *Id.* The Commission should codify its prior rulings and adopt rules that standardize the best practices already followed by fair-minded pole owners.

¹³ Any temporary attachment would, of course, have to comply with the National Electrical Safety Code and other applicable safety codes.

¹⁴ *Salsgiver*, 22 FCC Rcd at 20544; *Mile Hi Cable Partners v. Public Service Co. of Colorado*, Order, 15 FCC Rcd 11450, 11460-61 (2000).