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April 16, 2009

**Ex Parte**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> 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; Report on Rural Broadband Strategy, GN Docket No. 09-29***

Dear Ms. Dortch:

Yesterday, April 15, 2009, the undersigned, along with John T. Nakahata of this firm, on behalf of Fibertech Networks, LLC ("Fibertech") and Kentucky Data Link, Inc. ("KDL"), met with Julie Veach, Acting Chief of the Wireline Competition Bureau, Marcus Maher, Associate Bureau Chief, and Randy Clarke, Legal Counsel to the Bureau Chief.

Fibertech and KDL explained that timely pole access is essential to the wider deployment of broadband in all settings, and that meaningful reform can ensure that broadband providers have access to cost-effective backhaul facilities necessary to wired and wireless broadband services. In addition, Fibertech reiterated points it has made in previous filings in these proceedings and made the points summarized in the attached materials.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "BDS", written over a horizontal line.

Brita D. Strandberg  
*Counsel to Fibertech Networks, LLC and  
Kentucky Data Link, Inc.*

cc: Julie Veach, Marcus Maher, Randy Clarke

## **POLE ACCESS REFORM IMMEDIATE ACTION = IMMEDIATE BENEFITS**

Immediate reform of pole attachment access rules is a simple, concrete step that the Commission can take right now to increase broadband deployment.

### **The current regime allows pole owners to delay or prevent broadband deployment, including deployment in rural areas.**

- A KDL customer cannot provide requested Gigabyte Ethernet WAN networks to three Kentucky school districts because KDL has been unable to get the pole access necessary to complete construction of the necessary fiber network. The relevant pole owners have typically taken *six months* to provide estimates for make ready work, and have delayed the start of make ready work for months after payment of make ready costs.
- In Virginia, KDL has been working since February 2008 to build the network necessary to provide a WAN network for a school district, and is still waiting for the pole owner to complete make ready work. As a result of this delay, the school district has not been able to conduct standardized testing online as it had hoped and planned to do.
- Another KDL customer planned to provide broadband to eleven rural communities in Indiana by 2007, and secured a loan from the United States Department of Agriculture Rural Utility Service to fund this deployment. As a result of make ready delays, only three of those eleven communities' networks have been built (a fourth is currently underway). As soon as the make ready work is completed in the remaining eight communities, KDL will coordinate the fiber installation for its customer. Until then, these rural communities will continue to be deprived of the 21<sup>st</sup> century technology and advanced services that they deserve and for which funds have already been allocated.
- It is not uncommon for a KDL or customer project to be delayed by *one or two years* simply because of make ready issues.

### **Reforms will make a measurable difference.**

- Connecticut illustrates the dramatic effect of reasonable pole access rules. Connecticut permits boxing of poles, limiting the need for costly and time-consuming make ready work, and recently adopted firm deadlines for completing the pole licensing process. As a result, Fibertech has been able to deploy many more miles of fiber in its Connecticut markets – and has deployed fiber deep into rural areas of Connecticut.

- Over the past nine years, Fibertech has deployed 1,353 route miles of fiber in Hartford and New Haven. In two demographically similar markets outside of Connecticut that are subject to the FCC's pole rules (Providence, RI and Indianapolis, IN) Fibertech has deployed only 374 route miles of fiber.
- New York adopted pole access reforms in 2004 that set licensing deadlines and permit use of boxing and extension arms. Since those reforms were adopted, Fibertech's customer volume has skyrocketed.
  - From 2000-2004, Fibertech signed an average of 26 new customer contracts per year in New York. From 2005-2008, Fibertech has signed an average of 185 new customer contracts per year.
- New York and Connecticut make ready is completed more quickly than in other states.
  - On average, it has taken pole owners 89 days in Connecticut and 100 days in New York to issue licenses for Fibertech applications filed since March 1, 2008.
  - In Montgomery County, Maryland, where pole access is regulated under FCC rules, Fibertech has had to wait an average of **270 days** to complete the pole licensing process, and only three of Fibertech's seventeen applications filed since March 1, 2008 have resulted in a license.
- New York and Connecticut reforms enable deployment in rural areas.
  - Fibertech's extensive Connecticut network reaches deep into rural western and central Connecticut.
  - Fibertech is currently implementing plans to add 231 route miles of fiber to connect five rural counties south of Rochester to Fibertech's existing Rochester network. Those five counties have an average population density of 105 persons per square mile.

**Pole access is crucial to backhaul and middle mile broadband deployment.**

- Cellular companies that use Fibertech for backhaul from cell sites *save up to 90%* over ILEC special access offerings.

## FIVE EASY WAYS TO INCREASE BROADBAND DEPLOYMENT

**1. Adopt Enforceable Deadlines:** Pole access enables wired and wireless broadband deployment. Delayed pole access delays or prevents deployment, and we, as a nation, cannot afford to permit unreasonable barriers to broadband deployment to continue. Providers must be able to promise their customers that they will have service by a date certain, and must have a way to ensure they can deliver on their promises. States like Connecticut and New York demonstrate that pole owners can safely accommodate reasonable pole access deadlines. The Commission should adopt enforceable deadlines modeled on these states' successful approaches. Specifically:

- 45 days to complete the make-ready estimate, as the FCC already requires.
- 45 days to complete make-ready work and issue the requested license.
- Shorter time periods for smaller applications.
- Permit attachers to use utility-approved contractors to perform make-ready work or to use NESC-compliant temporary attachments when pole owners cannot meet the FCC's deadlines.<sup>1</sup>

**2. Codify Key Precedents:** The Commission should increase transparency and discourage relitigation of settled issues by incorporating existing precedents into its rules.

- Codify the holding of *Salsgiver* and *Cavalier Telephone* that prohibitions on the use of techniques that have been used or allowed by the pole owner (including boxing, extension arms, pole improvement or replacement, where consistent with generally applicable safety standards) are unreasonable.<sup>2</sup>
- Codify the Supreme Court's holding that the protections of Section 224 extend to pole attachments used to provide wireless telecommunications service.<sup>3</sup>
- Codify the holding of *Knology* that it is an unjust and unreasonable condition of attachment for a utility pole owner to hold an attacher responsible for costs arising from the correction of other attachers' safety violations.<sup>4</sup>

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<sup>1</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 ("Local Competition Order")*, First Report and Order, 11 FCC Rcd 15499, 16083 (1996) (holding that utilities must allow an attacher to use any trained workers who meet the utilities' requirements for training).

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

<sup>3</sup> *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002).

<sup>4</sup> *Knology Inc., v. Georgia Power Company*, Memorandum Opinion and Order, 18 FCC Rcd 24615, (2003).

**3. Require Compliance with Objective Safety Standards:** To ensure the safety of attachments and prevent pole owners from invoking subjective standards to unreasonably limit access to poles, the Commission should adopt a presumption that attachments are safe if they comply with the NESC, the Bellcore Bluebook, FCC and OSHA rules governing exposure to RF emissions, and any other objective and publicly available safety standards.

**4. Require Pole Owners to Identify Pole Locations and to Post Agreements, Fee Schedules, and Lists of Approved Contractors:** To reduce delays and make the negotiation process more transparent, the Commission should follow the example of several states and require pole owners to post on their Web sites a complete pole attachment application and standard agreement that complies with all applicable federal and state laws and contains all of the general terms, conditions, and procedures applicable to pole attachments. Pole owners should be required to include maps identifying the specific locations of all facilities allocated, in whole or in part, to local distribution. In addition, pole owners should be required to post fee-schedules and a list of approved contractors.

**5. Prohibit States from Conditioning Access on State Certification:** The Commission should affirm that states that have established their own pole attachment regimes are prohibited by section 332(c)(3) of the Act from requiring wireless carriers to submit to state certification requirements as a precondition for access to poles.