

July 27, 2009

**Ex Parte**

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

Re: *A National Broadband Plan for Our Future*, GN Docket No. 09-51;  
*Report on Rural Broadband Strategy*, GN Docket No. 09-29;  
*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:

Fibertech Networks, LLC ("Fibertech") and Kentucky Data Link, Inc. ("KDL") submit this letter in response to the filings of April 13, 2009 on behalf of Tampa Electric Company, Florida Power & Light Company, Progress Energy Florida and Oncor Electric Delivery Company (the "Electric Utilities"),<sup>1</sup> April 16, 2009 on behalf of the Edison Electric Institute ("EEI"),<sup>2</sup> May 1, 2009 on behalf of the Coalition of Concerned Utilities,<sup>3</sup> and May 12, 2009 on behalf of the Utilities Telecom Council and EEI,<sup>4</sup> and the Reply Comments of the Utilities Telecom Council and EEI in response to the Commission's National Broadband Plan proceeding.<sup>5</sup>

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<sup>1</sup> See letter from Eric B. Langley and J. Russell Campbell, counsel to the Electric Utilities, to Marlene H. Dortch, Federal Communications Commission, WC Docket No. 07-245 (April 13, 2009) ("Electric Utilities ex parte").

<sup>2</sup> See letter from Edison Electric Institute to Marlene H. Dortch, Federal Communications Commission, WC Docket No. 07-245, RM- 11293 and RM-11303 (April 16, 2009) ("EEI ex parte").

<sup>3</sup> See letter from Thomas Magee and Jack Richards, counsel to the Coalition of Concerned Utilities, to Acting Chairman Copps, Commissioner Adelstein and Commissioner McDowell, Federal Communications Commission, WC Docket No. 07-245, GN Docket No. 09-29, at 5 (May 1, 2009) ("CCU ex parte").

<sup>4</sup> See letter from Brett Kilbourne, Utilities Telecom Council, to Marlene H. Dortch, Federal Communications Commission, WC Docket No. 07-245 (May 12, 2009).

<sup>5</sup> Reply Comments of Utilities Telecom Council and Edison Electric Institute, GN Docket No. 09-51 and WC Docket No. 07-245 (filed July 21, 2009).

Fiber broadband networks cannot be built without access to rights of way – the most commonly available of which are utility poles and conduits. Fibertech and KDL build and operate world-class fiber-optic networks that deliver traditional and enhanced broadband services. Fibertech and KDL have large numbers of customers and potential customers, including customers in unserved and underserved rural communities, who have asked Fibertech and KDL to build fiber networks to provide advanced broadband services. Too often, however, Fibertech and KDL cannot deploy requested fiber networks because they cannot promise their customers the ability to build their networks within a reasonable time, if at all, because they cannot get timely access to poles.

This is a problem that the Commission must solve. If left unresolved, the current rules will mean *less broadband* at a time when the Obama Administration, Congress and the Commission have made it clear that *more broadband* is a national priority. The American Recovery and Reinvestment Act of 2009 (“ARRA”) recognizes the critical need for broadband capability for economic growth and job creation for Americans, and the particular need for broadband to provide consumers in rural America with access to advanced medical, educational and community services.<sup>6</sup> Moreover, the ARRA sets as a priority constructing new broadband networks, especially fiber networks, by September 2011. Without reform, pole owners can frustrate the ARRA’s critical timetable for middle and last-mile fiber builds.

The current imbalance between pole owners and attachers inhibits broadband deployment. It is time to remedy that imbalance to meet the new administration’s goals of swift and ubiquitous deployment of broadband facilities. “Simply put,” Susan Crawford, Special Assistant to the President for Science, Technology, and Innovation Policy, has explained, “a digital economy requires fiber.”<sup>7</sup> Special Assistant Crawford also has stated that “lack of reasonably priced backhaul,” including fiber, stands in the way of job creation.<sup>8</sup> The Commission has also recognized in its Rural Broadband Plan that “[t]imely and reasonably priced access to poles and rights of way is critical to the

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<sup>6</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

<sup>7</sup> David Hatch, Obama Advisor Eyes Government-built Broadband System, Congress Daily (May 26, 2009).

<sup>8</sup> Susan Crawford, Remarks at the State of the Mobile Net Conference, Congressional Internet Caucus (Apr. 23, 2009), video of speech available at <http://www.netcaucus.org/conference/2009/sotmn/agenda.shtml>; see also Telecommunications Reports, TR Daily (Apr. 23, 2009).

buildout of broadband infrastructure in rural areas.”<sup>9</sup> Pole access is critical to meeting the President’s goal of “laying broadband lines to every corner of America.”<sup>10</sup>

The extensive record before the Commission demonstrates that the existing pole attachment regime delays and prevents broadband deployment.<sup>11</sup> Because “the pole attachment process is not functioning to ensure that . . . access is made available expeditiously,” it is time to “revisit this issue.”<sup>12</sup> The Commission must seize this opportunity to improve and streamline the pole access process and ensure that more Americans have access to 21<sup>st</sup> century broadband services and the jobs and economic opportunities that broadband creates. In the words of Chairman Genachowski, the Commission “must ensure that our broadband infrastructure and services advance national purposes, including job creation and economic growth – whose importance was emphasized by today’s new unemployment numbers – education, health care, energy, public safety, civic participation and many others.”<sup>13</sup> Pole access reform is essential to this comprehensive effort.

## II. Timelines are Necessary (and They Work)

Fibertech, KDL and other commenters have repeatedly detailed the months and years of delays that they and their customers face.<sup>14</sup> Schools, libraries, communities and enterprises continue to wait in vain for broadband because utilities believe broadband

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<sup>9</sup> Bringing Broadband to Rural America: Report on a Rural Broadband Strategy, ¶ 157 (May 22, 2009).

<sup>10</sup> President Barack Obama, Remarks on Cyber Security (May 29, 2009), at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-on-Securing-Our-Nations-Cyber-Infrastructure/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Securing-Our-Nations-Cyber-Infrastructure/).

<sup>11</sup> See, e.g., Reply Comments of Fibertech Networks, LLC and Kentucky Data Link, Inc., WC Docket No. 07-245, RM-11293, RM-11303, at 5-11 (filed Apr. 22, 2008) (“Fibertech/KDL Reply Comments”); Comments of Fibertech Networks, LLC and Kentucky Data Link, Inc., WC Docket No. 07-245, RM-11293, RM-11303, at 4-9, 15 (filed Mar. 7, 2008) (“Fibertech/KDL Comments”); Reply Comments of Fibertech Networks, FM-11303, at 4-7 (filed Mar. 1, 2006) (“Fibertech Reply Comments”).

<sup>12</sup> *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 and Order, 18 FCC Rcd. 25,887, 25,963-66 (¶ 143) (2003).

<sup>13</sup> Julius Genachowski, Chairman, Federal Communications Commission, Remarks on National Broadband Plan Process (July 2, 2009).

<sup>14</sup> See Fibertech/KDL Reply Comments at 5-11.

deployment timelines are “artificial” or, worse yet, assert they have no obligation to perform make-ready work.<sup>15</sup> The Commission should set firm timelines for the completion of make-ready work and issuance of pole licenses.

The experiences of New York and Connecticut demonstrate that deadlines are not only a practical and workable solution, but also that utilities can meet make-ready deadlines without compromising safety or reliability.<sup>16</sup> The New York PSC has required pole and conduit owners to complete field surveys within 45 days of receiving a complete application and to complete make-ready work within 45 days of payment for the work.<sup>17</sup> The Connecticut Department of Public Utility Control likewise adopted timelines of 45 days to complete the make-ready estimate, as the FCC requires; 45 days to complete make-ready work and issue requested licenses; and shorter time periods for smaller applications.<sup>18</sup>

To the extent pole owners are unable to meet the relevant timelines, the Commission should reaffirm that attachers have the ability to hire contractors that satisfy utility training standards to perform field surveys and make-ready work.<sup>19</sup> The utility can maintain a list of at least three contractors that an attaching party may hire for surveying and make-ready work. Moreover, attachers are responsible for correcting any non-compliant work their utility-approved contractors perform. Making clear that utilities must honor this rule – and codifying this rule – will ensure that make-ready work is done safely and reliably, and in a timely and predictable manner.

### III. Fibertech and KDL Seek Modest Changes

Fibertech and KDL are not asking for “one-size fits all” rules or fundamental changes to the existing complaint-based enforcement system. Fibertech and KDL have

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<sup>15</sup> See *CCU ex parte* at 5 (May 1, 2009); *Electric Utilities ex parte* at 2-3.

<sup>16</sup> Fibertech/KDL Comments at 21-24; Fibertech/KDL Rural Broadband Comments at 8-9.

<sup>17</sup> Petition for Rulemaking of Fibertech Networks, RM-11303, Exhibit 3, at 3 (Dec. 7, 2005) (the “New York Order”).

<sup>18</sup> Fibertech/KDL Comments at 21.

<sup>19</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd. 15,499, 16,083 (¶ 1182) (“*Local Competition Order*”); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Order on Reconsideration, 14 FCC Rcd. 18,049, 18,079 (¶ 86) (1999) (“*Local Competition Order on Reconsideration*”) (citing *Local Competition Order* at ¶ 1182); Fibertech Reply Comments at 31-32.

asked the Commission to keep the existing case-by-case approach in place, but with an allocation of the burden of proof informed by more than a decade of competitive telecommunications attachments and twenty-five years of cable attachments. Fibertech and KDL's proposed presumptions merely ask pole owners to demonstrate why utility practices or prohibitions that have been rejected by the Commission and that delay and prevent broadband deployment should be allowed in a particular case.

Fibertech and KDL seek nothing more than the statutorily required nondiscriminatory access to boxing and extension arms. The presumption that these practices are reasonable will only arise in limited circumstances where specific conditions are met; even in those circumstances, pole owners will always have the opportunity to rebut the presumption on a case-by-case basis.<sup>20</sup> The FCC will not be breaking new ground if it takes this step, but rather will be following in the footsteps of two states – New York and Maine – that have successfully adopted similar approaches.<sup>21</sup>

As Fibertech and KDL have previously shown, prospective prohibitions on these practices are discriminatory.<sup>22</sup> The record shows that: ILECs took advantage of boxing and extension arms when they were building out their networks; ILECs and cable companies can readily deploy new cables simply by overlashing them to the existing support strand, but new entrants must find new pole space; and incumbents themselves box poles where boxing will save time and reduce costs, which are the same circumstances in which attachers would use these practices.<sup>23</sup> If the Commission is serious about driving broadband deployment and availability, it must ensure that builders of new networks are free to use the same construction techniques that existing network operators have employed.

#### **IV. Pole Owners' Remaining Objections are Groundless**

Although pole owners have put forth numerous objections to Fibertech and KDL's proposed rules, those objections are groundless. The Commission should not delay action because of these objections nor entertain requests for additional comments. The record on pole access is complete, and the Commission can – and should – act now. Interested parties have had multiple opportunities to comment.<sup>24</sup> New rounds of

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<sup>20</sup> Fibertech/KDL Reply Comments at 19-21.

<sup>21</sup> See Fibertech/KDL Reply Comments at 21. In Connecticut, it is the pole owners themselves that have directed that new licensees attach their cables by boxing the poles.

<sup>22</sup> See Fibertech/KDL Comments at 19; Fibertech Reply Comments at 27-28.

<sup>23</sup> *Id.*

<sup>24</sup> *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 22 FCC Rcd.

comments will only delay long-overdue changes and impede the new administration's goal of broadband access for all Americans that is vital to job creation and economic growth.

**Commission Authority.** The Commission has authority to adopt Fibertech and KDL's proposed rules.<sup>25</sup> Section 224(b) gives the Commission authority to regulate the terms and conditions of pole attachments – which surely include the practices governing attachers' access to poles and conduit – “to provide that [they] are just and reasonable.”<sup>26</sup> And while Section 224 refers to the enforcement of complaints, that language does not mean the Commission lacks authority to adopt rules that it enforces through complaints.<sup>27</sup> Indeed, as the United States Supreme Court has held, Section 201(b) expressly gives the Commission the authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act,”<sup>28</sup> which clearly includes Section 224.

**State Authority.** Despite pole owners' insinuations to the contrary, adopting reforms will not usurp state authority.<sup>29</sup> Fibertech and KDL's proposals would apply only to states that have not adopted their own pole attachment regimes, and such states remain free to opt-out of the federal regime.<sup>30</sup> Similarly, only the FCC can adopt reforms for those states governed by the Commission's rules – there is no other way for pole access to be addressed in those states.<sup>31</sup>

**Safety and Reliability.** Fibertech and KDL's proposals will not compromise safety or reliability.<sup>32</sup> In the first instance, the proposed presumptions are rebuttable, so the Commission will always be able to adjudicate *bona fide* safety issues. In any event, Fibertech and KDL support continued application of objective safety standards. But objective – not subjective – standards are needed. Without objective standards, pole owners have unfettered discretion to block broadband deployment.<sup>33</sup> Fibertech and KDL

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20,195, WC Docket No. 07-245 (2007); Pleading Cycle Established for Petition of Fibertech Networks, LLC, Public Notice, 20 FCC Rcd. 19,865 (2005).

<sup>25</sup> See Fibertech/KDL Reply Comments at 18-19.

<sup>26</sup> See *id.*; 47 U.S.C. § 224(b).

<sup>27</sup> See Fibertech/KDL Reply Comments at 18-19.

<sup>28</sup> AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 377 (1999).

<sup>29</sup> Fibertech/KDL Reply Comments at 15; Fibertech Reply Comments at 21.

<sup>30</sup> *Id.*

<sup>31</sup> Cf. EEI *ex parte* (arguing the problem of pole attachment delays “is best addressed by the states”); Fibertech Reply Comments at 21.

<sup>32</sup> Fibertech/KDL Comments at 11-13.

<sup>33</sup> Fibertech/KDL Reply Comments at 15-16.

agree that objective standards include state and local health and safety regulations.<sup>34</sup> Moreover, Fibertech and KDL agree that utilities may apply their own additional safety and design standards if (1) those standards are made available to attachers; (2) the standards are applied in a consistent and nondiscriminatory manner; and (3) the costs of complying with standards that exceed objective safety standards are borne by pole owners, not attachers.<sup>35</sup>

**Boxing and Extension Arms.** Fibertech and KDL's proposal for boxing and extension arms is consistent with the National Electrical Safety Code ("NESC").<sup>36</sup> "Neither the NESC nor the Blue Book prohibit or restrict boxing. On the contrary, the Blue Book contains information illustrating how to properly box a pole."<sup>37</sup> Likewise, the NESC does not prohibit boxing where, as proposed by Fibertech and KDL, the right to box is premised upon the pole being accessible by ladder or bucket truck.<sup>38</sup>

**Use of Utility-Approved Contractors.** Fibertech and KDL do not ask for permission to use unqualified contractors, and their proposals will not reduce the availability of qualified contractors. Fibertech and KDL propose using utility-approved contractors, the very contractors pole owners themselves use and a practice the Commission has specifically endorsed.<sup>39</sup> Nothing prevents the utilities from requiring an attacher to correct or be responsible for the costs of correcting work that does not meet objective safety codes. Electric utilities are certainly not being asked to "delegate [] responsibility . . . without respect to [third party contractors'] qualifications."<sup>40</sup> And although the Electric Utilities express concern about increased demand on utility-approved contractors,<sup>41</sup> they fail to recognize that the market will respond by providing more utility-approved contractors. The resulting job creation and expansion of qualified contractors will benefit all parties and assist government efforts to stimulate the economy. In any event, qualified electrical contractors will invariably continue to prioritize storm restoration and other critical electrical-grid work required by electric utilities.

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<sup>34</sup> Fibertech/KDL Reply Comments at 14.

<sup>35</sup> Fibertech/KDL Reply Comments at 16-17.

<sup>36</sup> Fibertech/KDL Reply Comments at 20.

<sup>37</sup> *Id.* quoting *Oxford Networks f/k/a Oxford County Telephone Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles*, Order at 15, Docket No. 2005-486 (Maine PUC Oct. 26, 2006), *aff'd in part and modified in part* Order on Reconsideration (Maine PUC Feb. 28, 2007).

<sup>38</sup> Fibertech/KDL Reply Comments at 20-21.

<sup>39</sup> *Local Competition Order*, 11 FCC Rcd. 15,499, 16,083 (¶ 1182); *Local Competition Order on Reconsideration* 14 FCC Rcd. 18,049, 18,079 (¶ 86) (citing *Local Competition Order* at ¶ 1182); Fibertech Reply Comments at 31-32.

<sup>40</sup> EEI *ex parte* at 5.

<sup>41</sup> Electric Utilities *ex parte* at 5.

**Make-Ready Timelines.** Fibertech and KDL's proposed timelines can accommodate other licensees and required notice periods. Pole agreements typically require licensees to move their facilities within a certain period of time after receiving notice. The agreements reserve to pole owners the right to move a licensee's equipment if the licensee fails to satisfy that deadline. Pole agreements also often reserve the pole owner's right to move a licensee's equipment if necessary to provide service to a customer. Similarly, the 60 day notice rule does not provide a basis preventing reform. Fibertech has never received such a notice. Indeed, no pole owner has ever provided Fibertech with evidence that such notices were sent out when the pole owner uses this notice period to justify delays. Moreover, both New York and Connecticut demonstrate that such notice obligations need not and should not prevent pole reasonable access timeframes. In practice, the purpose of notifying licensees of the possibility that make-ready work may be done is achieved when pole owners notify the licensees that a pole survey is about to be undertaken.

### **Conclusion**

The Commission has before it a complete record on which it can act – a record that demonstrates that the current pole access regime has impeded the deployment of broadband and that Fibertech and KDL's proposed regulations will safely assist the rapid deployment of broadband to all corners of the nation. Fibertech and KDL urge the Commission to immediately enact Fibertech and KDL's proposed pole access reforms. These reforms are essential to realizing the Commission's vision of bringing all Americans the high-quality, innovative broadband and telecommunications services that are critical to economic growth and job creation.

Respectfully submitted,



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