

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Implementation of Section 224 of the Act) WC Docket No. 07-245
)
A National Broadband Plan for Our) GN Docket No. 09-51
Future)

To: The Commission

**RESPONSE OF FIBERTECH NETWORKS
TO THE
PETITION FOR RECONSIDERATION
OF THE COALITION OF CONCERNED UTILITIES**

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Fibertech Networks, LLC, on behalf of itself and its subsidiary Fiber Technologies Networks, L.L.C. (jointly referred to herein as “Fibertech”), submits the following comments (“Comments”) regarding the Petition for Reconsideration (“Petition”) of the Coalition of Concerned Utilities (“Coalition”) that was filed in the above-referenced proceeding on September 2, 2010.

These Comments, addressing each of the Coalition’s three points in the order presented in the Petition, will demonstrate that, despite the Coalition’s suggestions to the contrary, accepting its requested changes and clarifications would result in discrimination that is unwarranted and would stall the deployment of competitive broadband facilities. Moreover, contrary to the Coalition’s intent, the Petition helps demonstrate that, if the Commission provides any clarification regarding the use of boxing and extension arms, it

should be to further secure the ability of competitive broadband providers to deploy facilities using these techniques.

A. Electric Utilities’ Desire to Use Boxing and Extension Arms to Install Secondary Electric Lines Underscores the Importance of Protecting the Rights of Communications Companies to Employ the Same Techniques.

1. The Coalition’s attempt to distinguish between electric and communications lines depends on ignoring the presence of electrical facilities substantially below the pole top.

The Coalition seeks the ability to continue to use boxing and extension brackets to attach electric facilities to poles while prohibiting the ability of competitive providers to install their communications lines using the same techniques. Its practical argument¹ for why electric companies should be permitted to bar competitive broadband providers from using these techniques while continuing to use them, themselves, is essentially two-fold: (1) boxing² and extension brackets associated with electric facilities are fundamentally different from boxing and brackets used with respect to communications lines;³ and (2) installing communications lines through boxing or extension brackets creates safety hazards and threatens damage to communications lines. These assertions are either false or critically misleading.

¹ The Petition also presents a legal argument for why they should be entitled to box and use extension arms while denying equal rights to pole licensees. The Commission need not reach this argument, however, because, as shown herein, electric utilities may not reasonably deny licensees the right to use these construction techniques if they, themselves, use the techniques.

² The Petition notes that “one could argue” that “cross arms used in the electric space” “is similar to boxing”. Petition at 4.

³ The Coalition suggests that the boxing and brackets employed by electric utilities is limited to the use of “cross arms and fiberglass brackets to support electric conductors located near the top of the poles”. Id.

In comparing the effects of installing electric lines by using boxing or brackets with the effects of installing communications lines through boxing or brackets, the Petition refers, among electric lines, only to “electric conductors located near the top of poles”.⁴ Having thus defined the universe of electric facilities to be considered by the Commission, the Petition proceeds to allege two properties of electric installations that purportedly support permitting electric utilities to both continue using boxing and extension arms and also prohibit competitive telecommunications companies from using such techniques:

1) cross arms and extension arms supporting electric facilities do not obstruct workers, because the workers do not need to climb past the top of the pole;⁵ and

2) the use of cross arms and extension brackets supporting electrical conductors does not complicate pole replacement, because the supported lines can be easily moved over the pole top to either side of the pole.⁶

The fundamental flaw in the Petition’s argument is its failure to acknowledge and address the fact that electric utilities install facilities not only at the pole tops but also well below the tops.

When a pole supports both an electric primary line and an electric secondary line, the primary line may be attached near the pole top, but the National Electric Safety Code requires that the secondary line be placed below the primary line with a clearance zone separating the two. The result is that installing the secondary line by boxing the pole or using an extension bracket is functionally equivalent to installing a communications line through boxing or an extension bracket. The photograph attached as Exhibit “1” to these

⁴ Id. (emphasis added).

⁵ Id.

⁶ Id.

Comments illustrates the point. It shows a pole, labeled as National Grid No. “43” and Verizon No. “1117”, located in front of 1124 Military Road, Niagara Falls, New York. The photograph shows a cable, tagged as a Verizon cable, attached below the rest of the cables. Immediately above the Verizon cable is a cable that is tagged as belonging to Time Warner Cable. Immediately above the Time Warner Cable cable is a guy wire, which can be seen proceeding from the pole in a direction different from that taken by the other lines. The cable immediately above the guy wire is a National Grid secondary line. As is readily observable, this secondary line – which boxes the pole -- is attached many feet below the cross arms, primary lines, and pole top. This secondary line cannot be moved over the top of the pole any more than the Verizon or Time Warner Cable lines can. Similarly, a worker unable or unwilling to use a bucket truck or ladder to access the electric primary facilities on the pole would need to climb past the secondary line that boxes the pole just as he would need to climb past a communications line that has boxed a pole (although with greater care, to avoid electrocution).

Therefore, regardless of whether Section 224(f)(1) of the Pole Attachment Act enables the Commission legally to permit electric utilities to use boxing and extension arms while they deny competitive broadband providers the same rights, the Commission should determine that any such prohibition would be unreasonable if imposed by an electric utility that has used boxing or arms in installing its secondary electric facilities.

2. By seeking to secure electric utilities’ right to continue to box poles and use extension arms, the Petition underscores the safety and acceptability of these techniques.

The desire by electric utilities to continue boxing poles and attaching their facilities by means of extension arms is strong evidence that neither boxing nor using arms presents

risks to safety, reliability, or other areas of potential concern. In this way, the Petition confirms the lessons that history teaches. As Fibertech has noted in previous submissions in this proceeding, over many decades electric companies, ILEC's, and cable television companies have avoided unnecessary make-ready work by using boxing or extension arms to install their facilities. Whatever concerns electric utilities may have today that prompts them to oppose competitive providers' enjoying the same benefits, they were insufficient, over these many years, to deter them from using these techniques themselves or to cause them to prohibit ILEC's or cable television companies from using the techniques.⁷

History also teaches that electric utilities are willing to exaggerate the alleged risks entailed in competitors' use of the traditionally accepted construction techniques of boxing and extension arms. In 2002, for example, Western Massachusetts Electric Company submitted to a state court judge presumably unfamiliar with pole attachment matters sworn testimony that boxing and extension arms used by a competitive broadband provider "present an immediate threat of death or severe bodily injury" to utility workers.

As the Commission rules on the Petition and, subsequently, as it considers future disputes involving electric utilities seeking to deny competitive providers the right to box poles and use extension arms, it should accord significant weight to the Coalition's desire to continue to use these techniques, the long history of incumbent providers' use of the techniques, and the historical willingness of utilities to present testimony regarding these techniques crafted with the apparently singular purpose of achieving their immediate goals.

⁷ The Petition's claim that replacing a boxed pole "is more costly and time consuming, creates additional safety hazards, and risks damaging the communications facilities that are currently attached" (Petition at 4) should be considered in light of the fact that AT&T has directed, as a general principle, that Fibertech attach its facilities in Connecticut by boxing. Having installed over 2,000 route miles of aerial plant in Connecticut, Fibertech has boxed approximately 70,000 poles in that State, at the direction of the ILEC, and has become aware of no harm or damage or other unusual problem arising from even a single installation.

B. Pole Owners Should Not Be Entitled to Raise the Drawbridge to Wireline Deployment by Changing their Policies Regarding the Use of Boxing and Extension Arms.

The Commission should deny the Petition's request that pole owners be free to change their policies so as to limit or prohibit the use of boxing and extension arms. As shown below, granting the request would almost assuredly close the doors to facilities-based competition.

1. The premise that utilities will evenly apply policies limiting or prohibiting the use of boxing or extension arms is false and should be rejected.

The Petition seeks clarification "that a utility pole owner retains a right to modify its standards and policy with respect to attachment techniques provided the policy is applied in a nondiscriminatory manner going forward". As noted in section B.2., below, such a clarification is inherently discriminatory in the sense that it would deny competitive providers the rights that have permitted incumbent telephone and cable television companies to build their networks. In addition, however, granting the Petition's request also would permit utility pole owners to continue to save time and money by using boxing and extension arms while denying equal rights to pole attachment license applicants.

It would be irrational for a pole owner not to box a pole or attach by means of an extension arm if the alternative were to wait, and pay, for the performance of make-ready work.⁸ Similarly, absent an exceptionally strong deterrent or sense of corporate utility morality, one cannot reasonably expect a pole owner currently engaged in, or potentially

⁸ This simple fact explains the multitude of boxed poles in almost any market. That pole owners in fact do act rationally in this regard is confirmed by the fact that Fibertech has never been asked to move its facilities on a pole or to cooperate with a pole replacement in order to accommodate a new attachment by an ILEC.

considering entering, the business of providing communications services to permit a communications service provider applying for pole licenses to benefit equally from the use of boxing and extension arms. Based on Fibertech's experience, it is common for pole owners to enforce against pole licensees a "nondiscriminatory" policy prohibiting boxing and the use of extension arms while continuing to box poles or use arms for their own purposes and permitting the utilities that are joint-owners or joint-users of the poles to also use such techniques.

When Fibertech was seeking to build its initial networks, in New York State in 2000, both Niagara Mohawk Power Company and Verizon stated that their policies prohibited boxing, and, in fact, neither company permitted Fibertech to box poles. Subsequently, during litigation that was spurred by Niagara Mohawk's efforts to impose unwarranted costs on Fibertech in response to Fibertech's having complained to the New York State Public Service Commission about Verizon's failure to process Fibertech's pole license applications, Fibertech learned that Niagara Mohawk was encouraging its telecommunications affiliate – and Fibertech's competitor -- Telergy, Inc., to box poles at the same time it was barring Fibertech from boxing. Fibertech discovered a March 31, 2000, letter from Niagara Mohawk to Telergy that stated, in relevant part:

During our phone conversation on March 23, 2000, we suggested as a first alternative using the opposite side of the pole (where practicable) for your attachment. ... Niagara Mohawk suggests that Telergy attach their cable in accordance with section 3.07 of the Bellcore – Manual for Construction Procedures (Blue Book) as shown in Figure 3-1.

This letter and its attachment, showing Figure 3-1, are attached to these Comments as Exhibit "2". Figure 3-1 is a diagram showing how to box a pole. After discovering this correspondence, Fibertech sought and gained access to numerous make-ready forms

prepared by Niagara Mohawk that directed Telergy to box many poles. It was not until Fibertech discovered these documents that it became aware that Niagara Mohawk had imposed on it a severe competitive disadvantage by permitting only Telergy to box poles.

Another instance, experienced by Fibertech, of the discriminatory application of a supposedly nondiscriminatory policy is recounted in a declaration prepared by James Pellegrini, Regional Director for Fibertech, which is attached to these Comments as Exhibit "3". Mr. Pellegrini's declaration relates that as Verizon's Third Party Attachment Group in Maryland was enforcing a prohibition against boxing during a 2009 field meeting with him and representatives of the electric utility to consider Fibertech's pole applications, construction crews came down the road installing fiber-optic cables for Verizon's FiOS project by boxing every pole along the very road where Fibertech's requests to box were being denied. As Mr. Pellegrini reports, the representatives of Verizon's Third Party Attachment Group appeared uncomfortable, but they did not relent from enforcing against Fibertech Verizon's allegedly nondiscriminatory prohibition against boxing.

2. Any new policy that prospectively prohibits boxing or use of extension arms, even if applied equally, will be inherently discriminatory to the disadvantage of new market entrants.

Even a prohibition against boxing or the use of extension arms that is genuinely enforced equally against all pole occupants prospectively will relatively rarely negatively affect incumbent cable television companies and even more rarely negatively affect incumbent local telephone companies, because such companies already have facilities on most poles within their service areas. Where such companies already have pole

attachments, they typically can add new cables either by overlashing the new facilities onto the existing support strands or by retiring old facilities and replacing them with the new facilities at the same location on the pole. In contrast, a new entrant must find a new, open space on the pole. Denying new entrants the opportunity to find this space by boxing or using extension arms forces them to pay for expensive make-ready work, including pole replacements, that the utilities and cable companies avoided each of the many times over the years they boxed a pole or used an arm. It may put this issue in a useful perspective to recognize that the only way pole owners could render a prohibition against boxing or the use of extension arms truly nondiscriminatory would be to eliminate all existing boxing and extension arms and to pay for whatever pole replacements or other make-ready work are necessary to allow their boxed facilities and facilities attached by means of extension arms to be placed directly against the street side of every pole.

3. Before being allowed to make any change in policy regarding boxing or the use of extension arms, pole owners should be required to prove convincingly that a change in circumstances has altered the effects that boxing or extension arms have on safety, reliability, or other engineering considerations so as to require the policy change.

As noted above, a utility policy that imposes new limitations on boxing or the use of extension arms will inevitably create a discriminatory and anticompetitive effect, which will suppress the deployment of broadband facilities. Therefore, pole owners' ability to establish new policies regarding boxing or extension arms should be strictly limited. The Commission should prohibit any such policy that is not premised upon convincing proof that circumstances have changed in such a way that boxing or use of extension arms now has a significant, new, adverse effect on safety, reliability, or other engineering purposes. Fibertech strongly recommends that no utility be permitted to restrict the use of boxing or

extension arms without prior approval from the Commission. The alternative is apt to be that hundreds of utilities (virtually all, potentially) will announce policies prohibiting boxing and arms, overwhelming the ability of competitors to assess and potentially challenge each new prohibition.

Furthermore, the Commission should be cognizant of the likelihood, in the event that a pole owner does adopt a new, more restrictive policy regarding boxing or the use of extension arms, that it will enforce the restrictions in a discriminatory manner. To protect against this likelihood, Fibertech would urge that, if the Commission permits a utility to further limit the use of boxing and extension arms, that it also establish a deterrent against discriminatory application of the new policy strong enough to clearly outweigh the expected value to the utility of using such discrimination to achieve market advantage over its competitors.

C. The Commission Should Prohibit Electric Utilities from Controlling Attachments in the Communications Space of Poles with respect to which an ILEC Has Custodial Authority.

Joint pole ownership and joint use agreements between electric companies and ILEC's present a subject that is both exceptionally murky⁹ and problematic. When both utilities prescribe their own, typically uncoordinated, licensing procedures and construction standards, the licensing process inevitably becomes unduly complex and difficult. In addition, by establishing and enforcing independent rules and standards, joint pole owners wishing to slow or defeat a new entrant can "double team" the entrant in ways that would

⁹ Pole owners have frequently attempted to justify to Fibertech their obstructive behavior as being required by their joint ownership or joint use agreements. Despite the fact that in such cases Fibertech typically asks to see the cited agreement or at least the relevant provisions of the agreement, no utility has ever shown Fibertech either the full ownership or use agreement or excerpted provisions.

be impossible if a single company were solely responsible for the licensing process. For example, one utility may step forward initially to demand compliance with one or more rules that impose unnecessary delays or costs. After the license applicant has spent many months confronting that utility and seeking to overturn its problematic policies and believes it has removed the obstacle, the joint owner or joint user is apt to step forward and impose its own version of delay- and cost-inducing policy.¹⁰ Fundamentally, the ability of both utilities (whether joint owners or joint users of the poles) to establish and enforce their own, disparate standards and procedures for pole licensing and construction creates an unnecessarily difficult environment for competitive providers attempting to attach broadband facilities to poles. The problems inherent generally in the enforcement of two separate sets of licensing and construction standards will arise, specifically, with respect to the use of boxing and extension arms if both joint owners or joint users are permitted to establish individual policies regarding the subject.

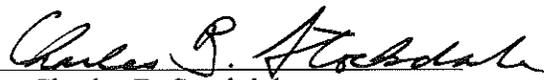
Fibertech believes that the legitimate interest of an electric utility in the methods of construction employed in the communications space of a pole is less than that of the companies that occupy the communications space, including the ILEC, cable television company, and other competitive providers. Therefore, Fibertech urges the Commission to prohibit electric companies from enforcing their own construction standards in relation to poles where the ILEC has custodial rights.

¹⁰ In some cases, such as Fibertech encountered with Niagara Mohawk Power Company and Verizon when striving to build its first networks, the utilities coordinate their efforts to obstruct competitive deployment. In other cases, coordination is not readily apparent. All too often, however, both utilities exhibit a shared desire to obstruct competitive deployment or at least to withhold cooperation with such deployment. In addition, it is not uncommon, as suggested above, that one utility will initially deploy obstacles to a proposed installation of competitive facilities while the other remains quiescent, acting only after the initial obstacles have been cleared. In all cases, the utilities' ability to establish and enforce separate procedures and standards doubles the challenge faced by a new entrant.

Based on the foregoing, Fibertech asks that the Commission: (1) recognize the fundamental similarity of installing electrical and communications lines below pole-top by boxing and using extension arms and thereupon affirm that electrical municipalities may not continue to use boxing and arms below the pole top region while denying equivalent rights to pole licensees; (2) consider the Coalition's desire to continue using boxing and extension arms as evidence of the risk-free nature of these techniques; (3) generally prohibit pole owners from adopting new policies limiting the use of boxing and extension arms; (4) impose forceful deterrents against discrimination in the event that a pole owner is able to persuade the Commission that a change in circumstances requires that it adopt a new policy limiting the use of boxing and extension arms; and (5) prohibit electric utilities from imposing standards regarding boxing and the use of extension arms in relation to poles for which the ILEC has custodial responsibilities.

Respectfully submitted,

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