

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Chapter )  
4901:1-3, Ohio Administrative Code, ) Case No. 13-579-AU-ORD  
Concerning Access to Poles, Ducts, Conduits, )  
And Rights-of-Way by Public Utilities )

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MEMORANDUM CONTRA FIBER TECHNOLOGIES NETWORKS, L.L.C.'S  
APPLICATION FOR REHEARING

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Pursuant to Ohio Admin. Code 4901-1-35, Ohio Power Company, Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, The Dayton Power and Light Company and Duke Energy Ohio, Inc. (collectively, the “Electric Utilities”) respectfully submit this Memorandum Contra Fiber Technologies Networks, L.L.C.’s (“Fibertech”) Application for Rehearing and Request for Clarification (“AFR”). The Electric Utilities oppose each of the grounds upon which Fibertech asserts that the Commission’s July 30, 2014 Finding and Order (the “Order”) is unlawful and unreasonable. This Memorandum Contra, though, focuses on four specific issues raised in Fibertech’s AFR: (1) temporary attachments; (2) the definition of “communications space;” (3) the use of utility-approved contractors to perform make-ready work in the power space; and (4) unrealistically aggressive timelines. With regard to the other issues raised by the AFR, the Electric Utilities have already set forth their positions in their Application for Rehearing and in their initial and reply Comments in this docket, and the Electric Utilities hereby adopt and incorporate those filings as if fully set forth herein.

**I. THE COMMISSION SHOULD REJECT FIBERTECH’S REQUEST TO ESTABLISH A RULE PERMITTING ATTACHING ENTITIES TO USE TEMPORARY ATTACHMENTS.**

Fibertech alleges that: “The July 30 Order is unlawful and unreasonable in that it fails to establish a rule permitting competitive telecommunications providers to utilize temporary attachments to utility poles prior to the completion of make-ready work in violation of Sections 2905.71 and 4927.02.” Fibertech AFR at 1. However, Fibertech’s proposal is not supported by the record in this proceeding, is unnecessary in light of the private contractual rights and Commission-authorized remedies already available to attachers, and would endanger the safety and reliability of the electric distribution system.

First, as noted by the Commission in its explanation of its decision to deny Fibertech's original proposal to allow temporary attachments, "pole owners and attaching entities may voluntarily agree to the use of temporary attachments and negotiate reasonable terms and conditions on a case-by-case basis." Order at ¶ 37. In fact, such private agreements have previously been reached between electric utilities and attachers in Ohio. *See* Electric Utilities' Reply Comments at 20.

Second, as the Commission also noted in its Order, even the Federal Communications Commission's ("FCC") rules do not require pole owners to allow temporary attachments, and "there are a number of administrative and technical issues related to temporary attachments that must be dealt with before such a rule could be adopted, none of which have been vetted in this docket." Order at 37. For example, Fibertech's proposal fails to identify: (1) the specific circumstances where installation of a temporary attachment would be justified; (2) the circumstances where a temporary attachment could not be permitted, *e.g.*, where a pole is already overloaded or the attachment would otherwise create a safety violation; (3) how quickly an attacher would be required to return and make a permanent attachment and the penalty for failing to do so; or (4) the types of equipment or attachment techniques that would be permitted for temporary attachments. *See* Electric Utilities' Reply Comments at 21-22.

Third, Fibertech's proposal to permit attachers to "utilize temporary attachments to utility poles prior to the completion of make-ready work" threatens the reliability and safety of the electric grid. *See* Fibertech AFR at 8. In some situations, the very make-ready that Fibertech proposes to avoid through authorization of temporary attachments is necessary in order to achieve compliance with the National Electric Safety Code ("NESC") or other safety or engineering standards. A temporary attachment does not alleviate the need to satisfy NESC requirements. The "install-it-

now, bring-it-up-to-code-later” approach has several inherent problems including, without limitation, changes in staff who agreed to the approach, changes in project priorities that cause the required correction of the violation to be excessively delayed or never addressed at all, and budgeting issues that delay or postpone the required corrections. *See* Electric Utilities’ Reply Comments at 20. The FCC previously rejected a similar request by Time Warner Cable to attach first and clean-up later.<sup>1</sup>

Fourth, Fibertech’s proposal that the Commission allow temporary attachments so that attachers may avoid filing complaints with the Commission where public utilities have failed to comply with make-ready timelines makes little sense in light of the fact that the Commission has already provided attachers with a remedy in that situation. Rule 4901:1-3-03(B)(4) provides that if a public utility fails to timely respond to a request for access, fails to provide a timely estimate, or does not complete make-ready within the specified deadlines, “...the attaching entity requesting attachment in the communications space may...hire a contractor at its own expense to complete the make-ready.” Because attaching entities already have the remedy of hiring a contractor to perform surveys, estimates, and make-ready in the communications space where the Commission’s timelines are not met, the use of temporary attachments is unnecessary.

Fifth, if the Commission compels public utilities to allow temporary attachments, there will be an increased risk of litigation with respect to make-ready costs. *See* Electric Utilities’ Reply Comments at 21. Pole owners only recover the actual make-ready costs they incur on behalf of an

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<sup>1</sup> *See In the Matter of Kansas City Power & Light Company v. Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City*, 14 FCC Rcd. 11599 (1999) (“IT IS FURTHER ORDERED that Time Warner Cable of Kansas City SHALL NOT overlash its own lines or make new attachments to poles which have been identified as not meeting the requirements of the National Electric Safety Code, or which have been determined would be in violation of the National Electric Safety Code upon overlash or attachment by Time Warner Cable of Kansas City, until the necessary pole change-out and/or make-ready work for that pole is completed”) (capitalization in original).

attacher. Utilities do not profit from make-ready work and have no incentive to impose unnecessary make-ready costs on attaching entities. On the other hand, attaching entities have strong economic incentives to avoid make-ready charges. If an attaching entity is permitted to make a temporary attachment, it has no motivation to pay necessary make-ready costs, particularly when there are no detailed rules governing such temporary attachments as noted above. It could simply make its temporary attachment and then refuse to pay for the make-ready work, thus increasing the likelihood of litigation to force payment of make-ready costs.

## **II. THE COMMISSION SHOULD REJECT FIBERTECH'S REQUEST TO CLARIFY THAT THE "COMMUNICATIONS SPACE" INCLUDES THE POLE TOP.**

Fibertech requests that the Commission "clarify and/or expand the definition of 'communications space' in Rule 4901:1-3-01(F), O.A.C., to include the pole top to accommodate wireless facilities" in order to confirm that "wireless attachments, including those on pole tops, are permitted." Fibertech AFR at 5; Order at ¶ 33. The Rules define the "communications space" as "that portion of the pole typically used for the placement of communications conductors beginning below the bottom point of the communications workers safety zone and ending at the lowest point on the pole to which horizontal conductors may be safely attached." Rule 4901:1-3-01(F). That definition dovetails with the description of the supply (power) space, communications space, and communication worker safety zone described in the NESC. *See* NESC Rules 235C-238. Including the pole top within the definition of "communications space" in Rule 4901:1-3-01(F) would be at odds with the NESC, industry practice and standards, and the meaning of that term as utilized by the FCC.

In addition, it is unnecessary for the Commission to clarify in the definition of "communications space" that pole top attachments are permitted, because the Rules already indicate that such attachments are allowed when consistent with the pole owner's engineering and

construction standards and where access is not otherwise denied for insufficient capacity or for reasons of safety, reliability, or generally applicable engineering purposes. *See* Rules 4901:1-3-03(B)(3)(b)(v) and 4901:1-3-03(B)(3)(c).

Further, as noted by the Commission, the term “communications space” is used widely throughout the Rules (Order at ¶ 12) and in a manner that is intended to distinguish that space on the pole from the electric supply or power space. For example, Rules 4901:1-3-03(b)(4) and (5) and 4901:1-3-03(C) provide that, when a public utility fails to meet the deadlines set forth in the Rules to perform survey, estimate, and make-ready work, an attaching entity may utilize a contractor to perform that work “in the communications space.” In the Order, the Commission wrote, “The Electric Utilities also urge the Commission to be clear that attaching entities do not have the right to perform work in the power space...The Commission agrees that the entity requesting attachment may hire a contractor to complete the make-ready in the ‘communications space’ consistent with the rules adopted in this proceeding.” Order at ¶ 38. Thus, revising the definition of “communications space” to include the pole top (which is within the power space), as proposed by Fibertech, would undermine the Commission’s intent.

### **III. THE COMMISSION SHOULD REJECT FIBERTECH’S REQUEST TO AUTHORIZE THE USE OF UTILITY-APPROVED CONTRACTORS TO COMPLETE MAKE-READY WORK IN THE POWER SPACE.**

Fibertech argues that “The Commission should grant rehearing in order to authorize the use of utility-approved contractors to complete make-ready for all attachments which are permitted under Chapter 4901:1-3, O.A.C., not just make-ready that can be performed in the ‘communications space,’ as provided in Rules 4901:1-3-03(b)(4) and (5) and 4901:1-3-03(C), O.A.C.” Fibertech AFR at 10. Fibertech argues that attaching entities should be permitted to hire contractors to perform make-ready work in the power space because, absent that ability, an

attaching entities' only remedy where a public utility fails to perform make-ready in the power space is to file a complaint with the Commission. *Id.* at 10. Fibertech also asserts that allowing for a contractor self-help remedy in the power space "...would be an efficient method by which attaching parties could expedite the make-ready process and best serve the needs of their customers." *Id.* at 10-11. Fibertech further alleges that, given that utility-approved contractors would perform the work in the power space, the Electric Utilities' safety concerns should be "largely alleviated." *Id.* at 11.

The right of an attaching entity to file a complaint with the Commission where an electric utility does not perform power space make-ready in a timely fashion is a sufficient and appropriate remedy. The fact that attaching entities have such a remedy incentivizes electric utilities to perform power space make-ready in a timely manner. In fact, under the FCC's current rules, an attacher's sole remedy where a pole owner fails to comply with survey, estimate, or make-ready deadlines regarding wireless attachments above the communications space is to file a complaint with the FCC. April 2011 Order at ¶ 23, Table 2.<sup>2</sup>

Further, the fact that providing attaching entities with a power space self-help remedy might expedite the make-ready process or help attaching entities serve their customers does not mean those goals should be prioritized over the interest of electric utilities in protecting the safety and reliability of electric distribution facilities. Because the Commission is charged with protecting the interests of both electric utility and telecommunications customers, such prioritization would be inappropriate. The current Rules, under which attaching entities may seek Commission intervention where an electric utility does not timely perform power space make-

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<sup>2</sup> Report and Order and Order on Reconsideration, *In the Matter of Implementation of the Act, A National Broadband Plan for Our Future*; WC Docket No. 07-245, GN Docket No. 09-51 (FCC 11-50) (April 7, 2011) (the "April 2011 Order").

ready, but may not utilize a contractor in the power space, strike the appropriate balance between electric and telecommunications stakeholders' respective interests.

In addition, the fact that, under Fibertech's proposal, attaching entities would be required to use utility-approved contractors to perform power space make-ready does not assuage the Electric Utilities' safety concerns. Some electric utilities, such as The Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company, generally do not allow contractors to perform *any* work in the power space. Instead, those companies generally utilize *only their own line crews* to perform power space work, because they believe that only those individuals have the requisite degree of knowledge, training, skill and experience to do so in a manner that ensures the maximum possible safety for workers and the public.

Thus, in the case of those electric utilities, there are no "utility approved contractors" to perform work in the power space. Further, it would be unreasonable to require those utilities to allow attaching entities to hire contractors to perform work on their electric facilities where those companies themselves typically do not utilize contractors to perform power space work. In addition, the fact that, under Fibertech's proposal, the contractors performing the power space work would be "utility-approved" does not alleviate the Electric Utilities' safety concerns because that contractor would still be performing the make-ready work on electric facilities *at the direction and under the control of* the attaching entity.<sup>3</sup> Given that the Commission's definition of an "attaching entity" includes virtually all entities with a physical attachment or request to attach to

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<sup>3</sup> Electric utilities that do utilize contractors to perform work on electric facilities in the power space require a direct contractual relationship with those contractors for reasons of safety, reliability, and liability, including, but not limited to, ensuring that (1) the contractor coordinates with regional distribution operations so that it follows proper construction standards and selects proper materials; (2) the project is "visible" on graphic outage systems; and (3) the contractor has proper work order documentation.



the pole, Fibertech's suggestion that such attaching entities be permitted to direct contractors to perform work on energized electric facilities is dangerous and borderline reckless. *See* Rule 4901:1-3-01(A).

**IV. THE COMMISSION SHOULD REJECT FIBERTECH'S REQUEST FOR EVEN SHORTER MAKE-READY DEADLINES AS CONTRARY AND COUNTERPRODUCTIVE TO EXISTING ELECTRIC SERVICE REGULATIONS.**

Fibertech urges the Commission to establish even shorter make-ready deadlines than those adopted in the Order. Fibertech AFR at 1, 6-8. This request further demonstrates Fibertech's disregard for electric utilities' core operations, which focus on the provision of safe, reliable, and efficient service to electric customers in Ohio. The Rules already establish stricter deadlines for electric utilities when performing pole attachment construction than when responding to a prospective electric customer's request for a line extension. *Compare* O.A.C. 4901:1-9-7 (establishing a timeline of forty-five days for the provision of a detailed cost estimate for a line extension request and containing no deadline for completion of the construction) and Rules 4901:1-3-03(B)(2) and (B)(3)(a)(ii) (requiring provision of a make-ready estimate within 14 days and completion of make-ready construction within 60 days for standard orders). The Commission's existing electric service regulations give substantial deference to the sound management judgment of Ohio's electric distribution utilities to allocate resources to best serve their customers, particularly with respect to non-emergency activities. Those regulations take into account, when creating reliability standards, the field conditions faced by electric utilities, including downed electric lines caused by routine seasonal storms, vehicle-pole accidents, and other situations beyond electric utilities' control.<sup>4</sup> The Commission should not abandon its long-

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<sup>4</sup> *See, e.g.*, O.A.C. 4901:1-10-11(B)(1) (excluding circuit performance data during major events and transmission outages from the calculation of distribution circuit performance).

standing recognition of these field conditions simply to mollify the unrealistic demands of broadband providers. This is particularly true in light of the fact that, contrary to Fibertech's unsubstantiated allegations regarding pole attachment delays, the Electric Utilities are not aware of even a single formal complaint to the Commission regarding such alleged delays.

### **CONCLUSION**

For the reasons set forth herein, the Electric Utilities respectfully request that the Commission deny Fibertech's Application for Rehearing.

Respectfully submitted this 10<sup>th</sup> day of September, 2014,

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## Certificate of Service

I hereby certify that a copy of the foregoing has been served this 10<sup>th</sup> day of September, 2014 by e-mail, as noted below, on the parties listed below.

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