

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**INITIAL COMMENTS OF
FIBER TECHNOLOGIES NETWORKS, L.L.C.**

I. INTRODUCTION

On April 3, 2013, the Public Utilities Commission of Ohio (“Commission”) opened a rulemaking proceeding to consider adopting a new chapter of rules, Chapter 4901:1-3 of the Ohio Administrative Code (O.A.C.), dedicated to the regulation of access to poles, ducts, conduits, and rights-of-way provided by public utilities. At a workshop on the new Chapter of rules held on April 17, 2013, several stakeholders (including Fiber Technologies Networks, L.L.C. (Fibertech)) offered comments on the proposed rulemaking and suggested content for inclusion in the rules.

On May 15, 2013, the Commission summarized the comments offered at the workshop, issued proposed rules for comment, and established deadlines for comments and reply comments. Subsequently, the comment and reply comment deadlines were extended to July 12, 2013, and July 30, 2013, respectively. Pursuant to the May 15, 2013 Entry, Fibertech submits its initial comments on the proposed rules for Chapter 4901:1-3, O.A.C., for the Commission’s consideration.

Fibertech operates one of the fastest growing metro fiber optic infrastructures in the Northeastern United States, and is a leading provider of open-access bandwidth infrastructure in Tier II and III cities and their surrounding areas. The Company has built more than 9,500 route miles of network in 28 markets across the Northeast and Mid-Atlantic. In addition to providing its own telecommunications services, Fibertech also leases its facilities to other telecommunications service providers. Fibertech offers reliable, secure, and affordable broadband networks and connections to businesses, educational institutions, healthcare providers, and governmental entities. In June 2013, the industry-recognized customer survey conducted by ACM Atlantic rated Fibertech the best telecommunications company in the nation in all seven categories relevant to Fibertech's services, including network performance, provisioning, customer service, and broadband value (Fibertech does not directly provide voice service).

Fibertech depends upon public utilities that maintain poles and conduit space to process its applications for pole attachments and conduit access in a timely, lawful, and reasonable manner. Fibertech's experience across its many markets indicates that, without adequate oversight, the response of owners to pole applications will be characterized by inordinate delays and the imposition of unduly high costs. Absent assurance that owners will in fact provide appropriate access, Fibertech and similar companies will be unable either to offer potential customers acceptable contract terms or, if it does make commitments necessary to secure contracts, to meet those commitments.

Further, without adequate regulatory oversight, the response of some owners to applications for wireless attachments has been unduly negative. Today, wireless pole attachments are a critical part of high-speed broadband networks with approximately 10,000

wireless attachments on public utility poles around the nation supporting increased wireless voice and broadband coverage. Historically, pole owners have often opposed permitting wireless attachments on their poles. In light of persistent denials of access and unreasonable attachment terms, the Federal Communications Commission (FCC) made key changes to federal law governing wireless pole attachments in FCC-regulated states. *In the Matter of Implementation of Section 224 of the Act, Report and Order and Order on Reconsideration*, 26 FCC Rcd. 5240 (April 7, 2011) (“FCC Order”). The FCC Order has advanced wireless broadband in three areas: (1) clarifying that wireless attachments be subject to a just and reasonable cost-recovery rate; (2) prohibiting blanket pole top antenna bans; and (3) setting make-ready timelines for wireless attachments in the communication space and on the pole top.

Growing acceptance and a proven safety record of wireless attachments in FCC-regulated states and some certified states, together with timeframes allowing expeditions and orderly roll-out, have permitted providers to offer the latest technology and improved service. The proposed rules, if properly applied, will dramatically alter the availability of advanced wireless services to the consumers and businesses of Ohio.

Fibertech appreciates the opportunity to submit comments, and hereby offers the following comments and/or suggested modifications regarding proposed Chapter 4901:1-3, O.A.C.

II. COMMENTS

Access to broadband is a critical factor in economic growth and opportunity in the current era. Such access, whether by wireline or wireless technology,¹ allows the rapid transfer of information critical to today's economy. Regions that are underserved will be placed at a disadvantage for economic and educational growth. The FCC recognized the importance of broadband availability in presenting its Broadband Plan in 2010:²

Broadband and the Internet make it possible for small businesses to reach new markets and improve their business processes. They have also become a critical pathway for individuals to gain skills and access careers. And it is a core infrastructure component for local communities seeking to attract new industries and skilled work forces. As a result, small businesses, workers, and communities must have the broadband infrastructure, training and tools to participate and compete in a changing economy. Broadband can help every community.

Through this rulemaking, the Commission can promote the economic interests of Ohio by adopting rules that distinguish it favorably from the FCC-regulated jurisdictions by encouraging the deployment of competitive broadband networks in the state while protecting the interests of pole and conduit owners. Fibertech recognizes the Commission's efforts to balance the interests of owners and competitive telecommunications providers in the important area of pole and conduit access. With some modifications, the ability of the rules to achieve the Commission's desired ends may be strengthened. To this end, Fibertech's comments generally fall into three categories: the proposed timeframes for access to poles and conduit; the absence of rules approving temporary attachments; and the potential abuse of timeframes and processes to hinder competition. Fibertech has also included its recommendations for miscellaneous modifications

¹ As currently provided, wireless service depends on wireline connections for backhaul purposes.

² See the FCC's *Connecting America: The National Broadband Plan* at 283 (March 16, 2010), <http://www.broadband.gov/download-plan/>.

to the proposed rules that would provide greater continuity throughout the Chapter and clarify certain rule provisions.

In making its recommendations, Fibertech adopts the fundamental premise that today's system, whereby pole and conduit owners control access to poles and conduits and competitors apply to said owners for permission to serve their customers, will continue. Nevertheless, it may be useful to at least recognize other access approaches in order to place into a proper context the issues discussed below. Two basic approaches to pole and conduit access are available that would achieve a truly level competitive playing field.

First, rather than owners controlling access, an independent entity could be tasked with that responsibility. Under such an arrangement, all attaching entities or occupants could be treated equally. For example, although incumbent local telephone carriers (ILECs) maintain the inherent advantage of already-ubiquitous networks, they would be required to undergo the same licensing process as competitors whenever they wished to make a new pole attachment. Such an approach to pole access would promote competition not only because ILECs would be treated equally to competitors, but also because, in contrast to ILECs and electric utilities that provide or are considering providing communications services, the entity controlling access would not be motivated to slow the deployment of competitive providers' facilities or to impose excessive costs on such providers. Connecticut's Public Utility Regulatory Authority (PURA) is currently considering this approach to regulating pole access. See *DPUC Investigation into the Appointment of a Third Party Statewide Utility Telephone Pole Administrator for the State of Connecticut*, PURA Docket No. 11-03-07.

A second approach to level the playing field would be to require owners to treat competitive providers in the same manner as public utilities currently treat each other. For

example, if an electric utility permits an ILEC to attach to its poles without first pursuing a licensing process, said electric utility and the ILEC would be required to permit competitive telecommunications companies to gain access to their poles in the same manner (presumably with requirements such as compliance with safety codes and timely notification of making any attachment). Fibertech asks that, as the Commission proceeds to the issuance of final rules, it considers the inequalities inherent in an owner-controlled licensing system and seek ways to eliminate those inequalities to the greatest extent possible. Fibertech also encourages the Commission to monitor the success of its rules, once established, and, if appropriate, consider adopting more fundamental changes to ensure that users of telecommunications service in Ohio benefit from competition among facilities-based providers.

A. Timeframes for Access

Fibertech strongly supports the Commission's decision to look beyond pole access and to incorporate time frames for conduit access into its proposed rules. Such time frames have not been adopted by the FCC to date. The Commission's initiative and forethought in proposing the same timelines for conduit access as pole access in Proposed Rule 4901:1-3-03(H) are appreciated and welcomed.

It is important, however, for the Commission to take that same progressive approach to timelines for access generally. The current licensing system in Ohio, for both poles and conduit, is unduly slow, creates the potential for unpredictable and extraordinarily long delays, and permits the utility to control whether and when Fibertech may serve its customers.³ In order to

³ For example, see Attachment A. Attachment A illustrates how much longer it takes for the same owner to make conduit available for Fibertech's use in Ohio compared to Indiana. The difference stems from the respective processes that the owner follows in the two states. In Indiana, it permits Fibertech to perform most of the work involved in gaining access to the conduit, whereas in Ohio it has insisted that it do the work, and its performance in Ohio has been slow. As a result, Fibertech's customers in Ohio have been required to wait for prolonged and unpredictable periods of time before receiving service.

be able to commit to reasonable service delivery dates when speaking with prospective customers, competitive facilities-based telecommunications providers such as Fibertech must be assured that they will have access to the necessary utility right-of-way facilities, both aerial (poles) and underground (conduit), within reasonable prescribed time frames. To this end, it is imperative that the Commission adopt shorter access timelines in order to ensure the continued success of competitive facilities-based telecommunications providers in the Ohio market and to prevent right-of-way owners from unlawfully utilizing delay tactics to stall and potentially halt the public's access to high-capacity broadband services.

Proposed Rule 4901:1-3-03(B)(1) provides generally that a public utility shall respond to an attaching entity within 45 days of receipt of a complete application to attach facilities to its poles, and that such response may be a notification that the public utility has completed a survey of poles for which access has been requested. Proposed Rule 4901:1-3-03(B)(2) generally provides that where a request for access is not denied by the owner, the owner must present a make-ready estimate to the attaching entity within 14 days of the owner's notification to the attaching entity that the survey is complete.

Proposed Rule 4901:1-3-03(B)(3)(a) provides that for attachments in the communications space, the public utility must set a date for completion of make-ready no later than 60 days after notification that the make-ready payment has been received from the attaching entity. The proposed rule also provides that in its notification to the attaching entity, the owner shall state that it may assert its right to 15 additional days to complete make-ready. Proposed Rule 4901:1-3-03(B)(3)(b) provides that, for wireless attachments above the communications space, the owner must set a date for completion of make-ready no later than 90 days after notification that the make-ready payment has been received from the attaching entity. As with subsection (a), the

proposed rule also provides that in its notification to the attaching entity, the owner shall state that it may assert its right to 15 additional days to complete make-ready.

The timelines set forth above apply, pursuant to Proposed Rule 4901:1-3-03(B)(5)(a), to all requests for pole attachments up to the lesser of 300 poles or one-half percent of the public utility's poles located in the state. Thus, this timeline is applicable to even the smallest applications for pole access. Under Proposed Rule 4901:1-3-03(B)(5)(b), for orders up to the lesser of 3,000 poles or five percent of the public utility's poles located in the state, a pole owner may add 15 days to the initial survey period. Further, a pole owner may add 45 days to the make-ready period for "larger orders" up to the lesser of 3,000 poles or five percent of the public utility's poles located in the state pursuant to Proposed Rule 4901:1-3-03(B)(5)(c). As proposed, the Commission's process, at a minimum, would afford the pole owners 119 days to survey, estimate, and perform the make-ready work for attachments in the communications space, and could afford the pole owners up to 194 days for larger applications. For wireless attachments, the Commission's process, at a minimum, would afford the pole owners 209 days to survey, estimate, and perform the make-ready work, and could afford the pole owners up to 224 days for larger applications.

Such a process would create unduly long delays and threatens significant harm to competitive telecommunications providers, such as Fibertech, and their customers, and would needlessly limit growth and economic development initiatives in Ohio. While Fibertech recognizes that the proposed rules mirror those timeframes set forth in the FCC rules, Fibertech believes that the FCC rules are inadequate to the task of promoting the public's access to fiber optic-based broadband services. The long time-frames adopted by the FCC, if effectively enforced, provide assurance to competitors that, given enough time, they will be able to build

their envisioned networks and to do so within predictable timeframes. Thus, they would have been adequate, had they been effectively enforceable, to ensure completion, within the allowable two-year timeframe of the broadband stimulus projects funded by the federal government in recent years.⁴ However, in the real world, there are few purchasers of telecommunications services that will wait six months, let alone two years, to receive the desired service. The timeframes are simply too long.

Another drawback to the FCC rules is that they are subject to being interpreted as authorizing pole owners in all cases to wait the full prescribed time period before completing make-ready work and issuing licenses. Thus, in FCC jurisdictions, a competitive provider can expect to wait 134 days to attach a cable to two poles. A business that needs service, therefore, chooses between a competitive provider that will deliver service after four months, at best, or an ILEC that will provide service virtually immediately. Even if the customer desires a high-speed connection that the ILEC cannot provide over its existing facilities and the ILEC needs to make a new attachment of a fiber optic cable to the pole, the ILEC can make that attachment within a day because it is not subject to the same licensing process. This latter drawback could have been avoided had the rules clarified that the timeframes establish absolute deadlines but that a license applicant can also assert that, given the scope of work required of the pole owner in relation to any particular application, an earlier deadline should be applied. With such clarification, for example, if an application were to involve two poles and the need to move a single cable from

⁴ The fact that many of these projects are not complete and are facing the loss of funding may be attributable to the fact that the FCC rules do not provide competitive providers the right to use utility-approved contractors to perform electrical make-ready work if the electric utility misses the applicable deadlines. Often, make-ready work is required in the electrical space to make room for attachments in the communications space. Absent prompt attention by the electric utility, or the ability to use utility-approved contractors to perform this electrical make-ready work, an attaching entity is left with no remedy save complaining to the FCC, which is exceedingly expensive and rarely produces quick results.

one location on one of the poles to another spot on the same pole, the applicant could complain to the FCC that the license should be issued after no longer than 30 days.

At the workshop, Fibertech encouraged the Commission to adopt the timeframes prescribed by the Connecticut Public Utilities Regulatory Authority (PURA), which generally require issuance of make-ready estimates within 45 days of receipt of a pole attachment application and completion of make-ready work within 45 days of receipt of payment of the estimate.⁵ PURA's process affords the pole owners 90 days to survey, estimate, and perform the make-ready work. PURA has also directed that shorter deadlines be applied for applications involving no more than four make-ready poles.⁶

PURA does not distinguish between the survey and make-ready estimate stages; both the survey and make-ready estimate must be accomplished within the 45-day period (which is the same timeframe that the FCC had enforced for decades until it added 14 days when it issued its current rules in 2011). As drafted, the Commission's proposed rules add a layer of notification for standard access applications that is unnecessary. Requiring the pole owner to notify the attaching party that the survey work has been completed is redundant. Instead, the make-ready estimate could simply be issued, which would inform the attaching entity that the survey work had been completed and the public utility is ready to move forward with the make-ready work upon payment of the make-ready estimate. Elimination of the survey completion notification stage could save 14 days in the process, as well as the time and expense of creating and sending the notification.

⁵ See *In re DPUC Review of the State's Public Service Company Utility Pole Make-Ready Procedures – Phase I*, PURA Docket No. 07-02-13, Decision at 18-19 (April 30, 2008).

⁶ The question as to what the shorter deadlines should be was deferred for discussion by an industry working group.

Fibertech proposes that the Commission implement a reasonable and practical approach that would separate applications for access to poles and/or conduit into three categories: standard applications, small applications, and large applications. Fibertech suggests that the appropriate timeline for standard applications would be that adopted by the PURA, which generally demands the issuance of the make-ready estimate by the owner to an attaching entity, and the completion of make-ready, within 90 days. After reasonably adjusting the timeline for standard applications to coincide with the facts and circumstances of other categories of applications, Fibertech proposes that the issuance of a make-ready estimate by the owner to an attaching entity, and the completion of make-ready, occur within 45 days for small applications, and 120 days for large applications. The chart below summarizes Fibertech's recommended timelines for adoption by the Commission in order to best facilitate pole and conduit access for the different categories of applications:

Type of Application	Number of days entity has to Perform Survey AND Issue Make-Ready Estimate	Number of days entity has to complete Make-Ready	Total Days for Access Timeline
Standard	45	45	90
Small	30	15	45
Large	60	60	120

In addition, the Commission should make clear that these timeframes for attachments in the communications space apply to wireless as well as wireline attachments.

The timeframes set forth in the proposed rules for wireless attachments above the communications space should, if adhered to, permit deployment of facilities within suitable timeframes, while permitting additional time (compared to attachments in the communications

space) to address additional safety and engineering concerns associated with attachments on that part of a pole that may exist. Fibertech, therefore, recommends that proposed Rule 4901:1-3-03(B)(3) should be adopted as proposed.

Fibertech further proposes that Proposed Rule 4901:1-3-03(B)(2)(a) be modified to clarify that the pole owner may not withdraw an outstanding estimate until the time for acceptance of such estimate has expired, and in no event after the estimate has been accepted by the attaching entity. As proposed, there is an overlap of time during which the estimate could be accepted and withdrawn, which may cause confusion and process errors. As such, Fibertech proposes to revise Proposed Rule 4901:1-3-03(B)(2)(a) to state that the estimate can be withdrawn “after fourteen days” or “beginning fifteen days after the estimate is presented” or “on the fifteenth day after the estimate is presented.” The proposed rule should also clearly state that it cannot be withdrawn after an attaching entity accepts the valid estimate and makes payment within the prescribed time period. Proposed Rule 4901:1-3-03(B)(2)(a) should state:

A public utility may withdraw an outstanding estimate of charges to perform make-ready work beginning ~~fourteen~~ fifteen days after the estimate is presented, and in no event after the estimate has been accepted by the attaching entity.

Proposed Rule 4901:1-3-03(B)(2)(b) states that “[a]n attaching entity may accept a valid estimate and make payment within fourteen days from receipt of the estimate but before the estimate is withdrawn.” Fibertech believes that it is critical for the Commission to clarify in the language of the proposed rule that this 14-day period will be treated as having been tolled if, within the period, the prospective attaching entity sends the pole or conduit owner a written dispute of the estimate or request for additional information regarding the scope of proposed make-ready work or allocation of costs for that work. Accordingly, Fibertech proposes that a new rule be added to this section, Rule 4901:1-3-03(B)(2)(c):

Upon receipt of a written dispute or request for additional information regarding the scope of work or the allocation of costs of the work from the attaching entity, the fourteen-day period to accept a valid estimate and make payment will be held in abeyance, pending the resolution of the dispute or inquiry to the public utility.

Moreover, Fibertech recommends that the Commission eliminate all provisions under Proposed Rule 4901:1-3-03(B) that allow the owner to unilaterally extend timelines for access to poles and/or conduit beyond those time frames explicitly established by the rules. Allowing the owner, in its sole discretion, to add additional time for any reason is unreasonable and could be applied in a discriminatory manner. At a minimum, the Commission should require the owner to show good cause as to why a fifteen-day extension is warranted in a particular circumstance.

B. Temporary Attachments

In the early 1980's, the New Jersey Board of Public Utilities responded to the complaints of the public and municipal governments that anticipated cable television services were not available by adopting an order that stripped from pole owners their control over the timing of installation of cable television systems.⁷ A key element of this 1984 Order was its provision permitting cable television companies to install their facilities prior to the completion of make-ready work. Such "pre-make-ready," or "temporary," attachments were required to comply with the National Electrical Safety Code (NESC). In addition, if the cable company elected to use such attachments, it would be required to bear the cost of both the initial, pre-make-ready attachment and also the additional work required to place its cable at the utility-designated location once the make-ready work had been completed. The cable company would also be responsible for reimbursing pole owners for expenses they might incur inspecting the pre-make-

⁷ See *In the Matter of the Office of Cable Television's Investigation Into the Practices and Operations of CATV Companies and Certain Utilities Under the Provisions of Sections 20 and 21 of the Cable Television Act*, New Jersey Board of Public Utilities Docket No. 769C6206, Decision and Order at 7 (August 16, 1984).

ready attachments and was required to adjust its pre-make-ready attachment if directed to do so by the pole owner. The right to employ these attachments and to provide service to the public was not conditioned on the pole owners having missed licensing deadlines. In 1997, the New Jersey Board of Public Utilities applied the terms of its 1984 Order to attachments by competitive telecommunications service providers.⁸

Fibertech urges the Commission to provide competitive providers in Ohio the same option they have in New Jersey, namely, the right – if they are willing to spend the necessary money – to employ temporary attachments to serve a customer prior to the expiration of any prescribed licensing timeframes. Such a rule would be reasonable as it would not negatively affect the pole owner or the pole, when compliant with the terms and conditions established in New Jersey (NESC compliant, no physical effect on pole, adjustable at direction of pole owner, with attaching entity responsible for costs of inspections and its own extra costs), and will accommodate the fact that sometimes customers have urgent needs for service. It also recognizes that a temporary attachment is not punitive in nature and need not be reserved for instances where a pole owner has failed to meet its regulatory obligations. It should be noted that the use of temporary attachments relates only to a minority of the poles in any application, and is made only to those poles requiring make-ready work. Where the pole is already ready for attachment, the new cable is immediately attached in a permanent manner (at the end of a bolt that passes through the pole) and at the spot designated for the permanent attachment by the pole owner. A right to use a temporary attachment as permitted under New Jersey law would be an important addition to a rule that includes licensing deadlines and applicants' rights to use

⁸ *In the Matter of the Investigation Regarding Local Exchange Competition for Telecommunications Services*, New Jersey Board of Public Utilities Docket No. TX 95120631, Order Regarding Interconnection and Resale at 71-72 (December 2, 1997) (extending authorization for use of temporary attachments to competitive telecommunications companies).

contractors to perform make-ready work. It would permit competitive providers to meet the urgent needs that customers might be experiencing by spending the extra money involved in using pre-make-ready attachments. Without such an ability, the competitive provider would remain powerless to help its customer.

At the workshop, Fibertech advocated that the Commission adopt the remedies for licensing delays established by the New York Public Service Commission (NY PSC), which state that in the event of a licensing delay, a pole license applicant may either employ a contractor selected from a list of utility-approved contractors to complete the applicable make-ready work, or the applicant may attach to poles in a temporary way on poles where make-ready work remains unfinished (i.e., in a manner that neither affects the physical condition of the pole (avoiding drilling through the pole) nor creates any NESC violations), so long as the applicant converts such attachments to permanent form at owner-assigned locations upon completion of the make-ready work.

Proposed Rule 4901:1-3-03(B)(7) provides for employment by an applicant of an approved contractor for the completion survey and make-ready work in the event that a the owner fails to respond to an applicant under Proposed Rules 4901:1-3-03(B)(1) and (B)(3)(a)(ii) in such a way that creates a licensing delay. Fibertech appreciates the Commission's consideration of its comments and incorporation of this remedy into the proposed rules, especially with regard to the ability of an applicant to hire an approved contractor, not only for work on facilities belonging to ILECs, but also for work on facilities belonging to electric utilities. Fibertech, however, urges the Commission to take a further step, if it is unwilling to adopt the New Jersey approach to temporary attachments,⁹ and include in its proposed rules a

⁹ See *supra* n.5 and n.6.

provision for temporary attachments such as those adopted by the NY PSC.¹⁰ The option of using a temporary attachment, rather than performing the unfinished make-ready work, is critical when a dispute exists over whether owner-prescribed make-ready work is actually necessary. An applicant should be free to argue that certain make-ready work is not necessary. Without the ability to use a temporary attachment to service its customer, however, it would be unfairly forced to choose between paying for the allegedly unnecessary work or sacrificing its customer's interests.

C. Anti-Competitive Acts That May Emerge from Proposed Rules or Continue Unhindered

At the workshop, Fibertech implored the Commission to ensure that any timeframes it adopts for pole and conduit licensing are meaningful. Missed deadlines run the risk of causing competitive providers, like Fibertech, to lose customers, become subject to contractual penalties, and be unable to commit to basics, such as service delivery dates. Lengthy timelines create an atmosphere that disfavors competitive providers. The strong potential that pole and conduit owners may unilaterally inform applicants, without a demonstration of cause, of their inability to comply with these lengthy timelines at the end of the applicable periods compounds the strain put upon competitive providers to capture contracts, retain customers, and fairly compete with other service providers. This is particularly true with regard to small customers who usually seek alternative providers between 30 to 60 days prior to their existing service contract expiring. Those customers are not willing or able to wait months for an alternative service.

By unreasonably delaying the processing of applications for pole and conduit access, owners may unlawfully exclude competitors from occupying space on their poles and in their

¹⁰ See *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, New York Public Service Commission Case 03-M-0432, Order Adopting Policy Statement on Pole Attachments at 5 (August 6, 2004).

conduit. This anti-competitive behavior contravenes the policy of the state to: promote diversity and options in the supply of telecommunications services and equipment; incent competing providers to provide advanced, high-quality telecommunications service to citizens; encourage innovation in the telecommunications industry and the deployment of advanced telecommunication services; recognize the continuing emergence of a competitive telecommunications environment through flexible regulatory treatment where appropriate; provide for equivalent regulation of all telephone companies and services to the extent practicable; and, not unduly favor or advantage any provider or unduly disadvantage providers of competing and functionally equivalent services.¹¹ Inhibiting open access to the communications space provides owners with an unfair advantage over competing telecommunications entities and providers. By adopting shorter survey and make-ready timelines, as discussed herein, and permitting temporary attachments, in the face of unwarranted licensing delays by owners, the Commission can successfully discourage owners from engaging in such anticompetitive practices and promote a competitive, robust market for telecommunications service in Ohio.

D. Recommendations for Miscellaneous Changes to the Proposed Rules

1. Proposed Rule 4901:1-3-03(A)

Proposed Rule 4901:1-3-03(A)(1) states that a public utility “shall provide an attaching entity with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.” Although the term “attaching entity” is defined in Proposed Rule 4901:1-3-01 to include ILECs, Fibertech requests that the Commission clarify in Proposed Rule 4901:1-3-03(A)(1) that all attaching entities, including ILECs, will be provided with equal,

¹¹ See Section 4927.02, Revised Code.

nondiscriminatory access, i.e., all such attaching entities will be subject to the same access and attachment procedures and timelines.

Further, the words “generally applicable engineering purposes” in Proposed Rule 4901:1-3-03(A)(1) and “engineering standards” in Proposed Rule 4901:1-3-03(A)(2) are overly broad, not based in Ohio law, and can be easily interpreted and/or used to include any reason for denial of access to poles or conduit. Therefore, Fibertech recommends that the Commission strike both phrases from their respective proposed rules, and end both Proposed Rules 4901:1-3-03(A)(1) and 4901:1-3-03(A)(2) with the words “or reliability.”

In addition, with regard to Proposed Rule 4901:1-3-03(A)(2), the Commission should confirm in its order that any owner denying access, whether for wireless or wireline attachments, must *specifically* set forth the reasons for doing so, with regard to the particular attachment type requested on the particular pole requested. As the FCC stated in its April 7, 2011 Report and Order, “It is not sufficient for a utility to dismiss a request with a written description of its blanket concerns about a type of attachment or technology.... [A] utility must explain in writing its precise concerns – and how they relate to a lack of capacity, safety, reliability, or engineering purposes – in a way that is specific with regard to both the particular attachment(s) and the particular pole(s) at issue.”¹²

¹² See *In the Matter of Implementation of Section 224 of the Act: A National Broadband Plan for our Future*, FCC 11-50, WC Docket No. 07-245, GN Docket 09-51, Report and Order and Order on Reconsideration at ¶ 76 (April 7, 2011).

2. Proposed Rule 4901:1-3-03(C)

Fibertech further suggests, for the same reasons as those cited above, that the Commission strike “and generally applicable engineering purposes,” ending the sentence with the words “or reliability” in Proposed Rule 4901:1-3-03(C)(4).

In Proposed Rule 4901:1-3-03(C)(3) the Commission provides owners with a “reasonable opportunity for a public utility representative to accompany and consult with” an authorized contractor that has been hired by an attaching entity to perform survey or make-ready work. While Fibertech understands the importance of the observation opportunity afforded by accompaniment under the proposed rule, an attaching entity would not need to hire the authorized contractor but for unjust delay on the owner’s behalf earlier in the access process. Therefore, Fibertech recommends that the Commission strike the words “and consult with” from Proposed Rule 4901:1-3-03(C)(3) and further, urges the Commission to insert the phrase “without undue delay” after the word “accompany.” This language will emphasize that no further delay on the part of the owner will be tolerated, and will protect against potential abuse of the proposed rule for anti-competitive purposes.

3. Proposed Rule 4901:1-3-04

The initial sentence of Proposed Rule 4901:1-3-04(A) refers to “access to poles, ducts, conduits, and *right-of way*” of a telephone company or electric light company. (Emphasis added). It appears that “right-of-way” should appear in its plural form in the proposed rule, much as “poles, ducts, [and] conduits” appear. Therefore, Fibertech recommends that the Commission change “right-of-way” in Proposed Rule 4901:1-3-04(A), O.A.C, to “rights-of-way.”

Proposed Rule 4901:1-3-04(G) states that the costs of modifying a facility “shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification.” In contrast, a party with a pre-existing attachment is not required to bear any of the costs of “rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party.” It is unclear as to the distinction in this proposed rule between “modification” and “rearranging or replacing.”

Moreover, Fibertech is concerned that the language included in this proposed rule, as written, will not effectively protect it from financial responsibility in situations in which existing NESC violations are being corrected. This is not only a critical concern for entities applying to attach to poles that the pole owners have allowed to be out of compliance, but also for other entities that may have attachments but have not contributed to or caused an existing NESC violation. Accordingly, Fibertech urges the Commission to adopt additional language in Proposed Rule 4901:1-3-04(G) to protect non-contributing entities against financial responsibility for corrective measures taken to correct existing NESC violations.

4. Proposed Rule 4901:1-3-05

Finally, Proposed Rule 4901:1-3-05 states that the Commission must issue a decision resolving any issues presented in a complaint proceeding filed under the same rule “within a reasonable time not to exceed three-hundred and sixty days after the filing of the complaint.” While Fibertech commends the proposed rules for the inclusion of a complaint (and mediation) process regarding access to pole and conduit, a process that takes almost a year to complete is not reasonable and will not provide the necessary incentive for owners to adhere to the time frames established by the proposed rules. Given that access to owner’s poles and conduit is a

very time-sensitive issue, and that Fibertech has strongly urged the Commission, in the interests of competition and timely, effective deployment of broadband capabilities, to abbreviate the access timelines set forth in Proposed Rule 4901:1-3-03, Fibertech believes that 360 days is far too long of a period for resolution of a complaint that is dealing with issues of delay. As such, and in conjunction with the timelines proposed herein for standard applications, Fibertech suggests that any such complaints be resolved by the Commission within 90 days of filing the complaint. This policy will prevent further delay and will aid in resolving issues that arise in a just, expeditious fashion.

III. CONCLUSION

Fibertech respectfully requests that the Commission use this rulemaking opportunity to promote the economic interests of Ohio and further the policy of the state by adopting rules that encourage the deployment of competitive broadband networks in the state, provide the citizens of Ohio with advanced, high-quality telecommunication services, and remove barriers to competition. For the foregoing reasons, Fibertech hereby submits the comments contained herein and urges the Commission to modify the proposed rules for Chapter 4901:1-3, O.A.C, as discussed herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served this 12th day of July, 2013, by electronic mail if available or by regular U.S. mail, postage prepaid, upon the persons listed below.



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ATTACHMENT A

Timelines for approval of applications to access a public utility's conduit and make-ready completion that were submitted by Fibertech to a public utility in Ohio v. comparable applications submitted to the same public utility in Indiana.

COLUMBUS, OH				
Application #	Distance	Date Submitted	Date Make-Ready Completed	# of Days
COL XXXX-XX	3460'	1/17/2011	5/24/2011	127
COL XXXX-XX	2396'	1/17/2011	8/10/2011	215
COL XXXX-XX	908'	2/8/2011	6/7/2011	119
COL XXXX-XX	130'	2/7/2011	4/8/2011	60
COL XXXX-XX	1208'	3/29/2011	6/22/2011	85
COL XXXX-XX	727'	7/20/2012	2/25/2013	220
COL XXXX-XX	184'	9/18/2012	2/27/2013	162
COL XXXX-XX	2008'	11/8/2012	2/18/2013	102
COL XXXX-XX	79'	10/19/2012	2/27/2013	131
INDIANAPOLIS, IN				
Application #	Distance	Date Submitted	Date Make-Ready Completed	# of Days
IND XXXX-XX	8449'	1/25/2011	2/10/2011	16
IND XXXX-XX	525'	2/8/2011	3/2/2011	25
IND XXXX-XX	2137'	2/8/2011	3/4/2011	27
IND XXXX-XX	793'	3/29/2011	4/5/2013	7
IND XXXX-XX	66'	8/18/2011	9/26/2011	39
IND XXXX-XX	1778'	11/8/2011	12/5/2011	58
IND XXXX-XX	850'	3/6/2012	3/27/2012	21
IND XXXX-XX	695'	11/8/2012	12/19/2012	33
IND XXXX-XX	3171'	11/15/2012	11/19/2012	4
IND XXXX-XX	1360'	12/12/2012	1/3/2013	22
IND XXXX-XX	20'	12/21/2012	1/2/2013	12
IND XXXX-XX	355'	1/7/2013	1/11/2013	4
IND XXXX-XX	12'	1/14/2013	1/17/2013	3
IND XXXX-XX	20'	1/24/2013	3/7/2013	42
IND XXXX-XX	328'	1/24/2013	2/4/2013	11
IND XXXX-XX	40'	2/7/2013	3/13/2013	34
IND XXXX-XX	217'	4/30/2013	5/29/2013	30

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