

**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.                                        )

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

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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 issued proposed rules for comment and established deadlines for comments and reply comments, which were subsequently amended. Fibertech submitted its initial comments on the proposed rules for Chapter 4901:1-3, O.A.C., on July 12, 2013. Fibertech hereby submits its reply comments to the initial comments filed by other interested parties in this matter.

## **I. INTRODUCTION**

Broadband serves as an economic gatekeeper. Those areas with the benefit of adequate broadband services enjoy a distinct economic advantage over underserved areas. The importance of broadband availability has been recognized and such recognition warrants repetition:<sup>1</sup>

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.

By promoting broadband expansion, the Commission can influence the economic prospects of the State, particularly in underserved areas. By reducing the timelines between pole application and licensing, and by allowing providers to complete work by using contractors or by use of temporary attachments, the Commission can encourage providers to invest in Ohio and its communities.

## **II. POLE AND CONDUIT ACCESS TIMEFRAMES ARE NECESSARY TO PROMOTE THE EXPANSION OF BROADBAND.**

Through this rulemaking, the Commission has the opportunity to encourage the deployment of competitive broadband networks in the state by adopting rules that distinguish it favorably from the FCC-regulated jurisdictions. While Fibertech recognizes the Commission's efforts to balance the interests of pole and conduit owners with the interests of competitive telecommunications providers, proper regulatory oversight of those who control the poles,

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<sup>1</sup> See Federal Communications Commission's (FCC) *Connecting America: The National Broadband Plan* at 283 (March 16, 2010) (<http://download.broadband.gov/plan/national-broadband-plan-chapter-11-education.pdf>); ibertech Initial Comments at 4.

conduits, and processes associated therewith is imperative. Other commentors have also recognized the importance of regulatory oversight to advance the deployment of competitive broadband networks throughout Ohio. PCIA—The Wireless Infrastructure Association and the HetNet Forum (PICA) stated: “The current pole attachment system in Ohio discourages wireless broadband deployment. Irregular access to pole infrastructure, unpredictable make-ready timelines, and variable and high attachment rates in Ohio have stymied the buildout of advanced wireless broadband services.”<sup>2</sup> Frontier explained that “in a market where carriers are offering the same services and competing for the same customers, disparate treatment of different types of carriers...has significant competitive implications.”<sup>3</sup> While Frontier makes this statement in support of the proposition that incumbent local exchange carriers’ (ILEC) attachments should have a regulated rate for pole rent charges, the statement has broader application.

ILECs have an advantage, not merely because of the size of their network, but more significantly because of their role as a gatekeeper for access to poles and conduit. If an ILEC wishes to introduce new services, it merely deploys its network without being subject to any externally imposed delay. Conversely, a competitive provider must wait until the pole or conduit owner, often its ILEC competitor, licenses access to the pole or conduit. As many customers have time-sensitive needs, the delay caused by this process eliminates the possibility of numerous competitive offerings before a contract may be signed. The effect of delay is the reduction of competition, to the benefit of the ILEC and/or its competitors and to the detriment of the customer. This effect is felt whether or not the delays involved in the licensing process are caused by the ILEC or the electric company, and it is independent of the motivations for or causes of the delays.

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<sup>2</sup> Initial Comments of PCIA at 7.

<sup>3</sup> Comments of Frontier North, Inc. at 7 (quoting *Developing a Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking*, 20 FCC Rcd 4685, 4696, ¶ 121 (2005)).

In Fibertech's experience, where no regulatory timeframes for pole attachment exist, and no immediate remedies for missed deadlines are available, it is impossible to predict when service may be provided to potential customers. Additionally, under these circumstances, service to signed customers may be delayed, sometimes for a year or more, with no remedy other than making a complaint to the relevant regulatory agency. The result is an environment characterized by mistrust between the parties, unreasonable delay in serving customers, missed opportunities for growth, for not only competitive providers but also their customers, and possible contract breaches or penalties for failure to serve signed customers in a timely fashion.

Delayed access to poles and conduit creates a significant problem for broadband customers. Customers who order service because they have a need for higher bandwidth than they currently receive must have confidence that such services can be provided. For example, a health care provider may wish to implement a new diagnostic technique that requires the transmission of high-definition images from one location to another. Similarly, a business may seek to preserve critical information and improve efficiency by establishing an off-site data center requiring an extremely high bandwidth connection. An educational institution may wish to connect far-flung classrooms with broadband facilities to optimize the impact and value of teachers or, through fiber-optic connections, to enable the instantaneous sharing of research data among distant laboratories. In these instances, the operational improvements anticipated by such customers cannot be achieved until the provider is able to establish certain necessary connections. For Fibertech, many customers are not simply substituting a service from Fibertech for a like-kind service provided by the ILEC or other provider. Rather, Fibertech's service is, in many cases, qualitatively different, opening new opportunities to the customer. Accordingly, the delays caused when owners unduly prolong pole and conduit licensing can create significant



operational disruptions among Fibertech's customers while denying them and others opportunities to establish and achieve higher goals.

Competitive providers themselves also suffer from pole and conduit owner delays. Where a provider has signed a customer but is unable to commence service when expected because of delays caused by the pole or conduit owner, it is forced to advance service without the revenue on which it had been relying. This deficiency may thereby further delay or prevent network expansion and the provision of service to other prospective customers. Moreover, pole and conduit access delays significantly affect a competitive provider's ability to market to potential customers. Smaller customers often are not receptive to sales efforts until the termination of their contract with their existing provider is near. By that time, if they plan to change service providers, they often need to do so within only a few months (or they will suffer increased and unbudgeted expenses by triggering significantly increased month-to-month rates from their existing provider). When a provider is unable to commit to commencing service within the customer's intended timeframe, it is extremely difficult to make a sale. In such a circumstance, not only the provider, but also the end-user customers, suffer, as they lose the opportunity to reduce costs and improve the services they receive by switching to a new, fiber-based provider. Providers also suffer harm in connection with the degradation of business reputation that results when the ILEC or electric company prevents it from providing timely service to its customers. Customers of all sizes will naturally look for service from another provider if the competitive provider is shown to be unable to deliver service in a timely and predictable manner.

The arguments proffered by the pole and conduit owners in this proceeding against establishing/accelerating timeframes for pole and conduit licensing are not new.<sup>4</sup> Pole and conduit owners have made substantially identical arguments against timeframes in virtually every proceeding on this topic in which Fibertech has participated. For states that have established enforceable timeframes over the pole and conduit owners' objections, the results are remarkable. For example, in Connecticut, the Department of Public Utility Control (now called the Public Utility Regulatory Authority (PURA)), established timeframes for pole licensing in 2008. In addition, PURA convened a working group to address issues such as remedies for missed deadlines. Before the PURA proceeding, many pole applications took over a year to process. It was impossible to predict which applications would be processed within a reasonable time, and which would languish. Now, in most instances, pole applications are processed within the regulatory timeframe. Where deadlines for completing make-ready work and issuing licenses are missed, competitive providers are permitted to use NESC-compliant, safe, pre-make-ready attachments to render service to the customer in a timely manner. The Connecticut rules permit facilities-based competitive providers to construct state of the art networks in a predictable, timely manner. Additionally, if the facilities-based competitive providers are also "open access" providers (as Fibertech is), the Connecticut model allows other competitive providers using such facilities-based providers' networks to be presented with new opportunities to serve customers across Connecticut while differentiating their service from that provided by the ILEC.

Obviously, such improved access is of enormous benefit to companies such as Fibertech. But the services offered by Fibertech also benefit its customers, as well as the economy in the

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<sup>4</sup> See generally, Joint Comments of 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, electric utilities); see also Initial Comments of the AT&T Entities.

areas it serves. For example, Fibertech's high capacity fiber-based services have allowed businesses to engage in real-time video editing to support ESPN in Bristol, Connecticut. Further, healthcare providers have been enabled to transfer important medical information with confidence that it will remain secure and be delivered in an instant. Fibertech provides these services with industry-leading reliability metrics.

Fibertech's experience in Connecticut, where pole and conduit owners are obligated to comply with make-ready and licensing timeframes, decidedly contrasts with its experience in Ohio. For example, in the Akron market, Fibertech has applied for pole and/or conduit access with two competitors and neither company has responded in a timely manner to any of the applications submitted by Fibertech in the past year. In late March 2013, Fibertech submitted eight applications to a pole owner for a total of 180 poles. To date, none of these poles have been licensed. To date, no make-ready estimates had even been received. Similarly, Fibertech submitted to another pole owner 45 applications for a total of 703 poles between January 2013 and April 2013. Again, to date, none of the poles have been licensed.

In other markets in Ohio, a large pole and conduit owner has impeded Fibertech's roll-out of facilities. In these markets, Fibertech has submitted 36 applications, for a total of 419 poles, which have been pending for longer than 160 days, which is the timeframe allocated in the proposed rules for large applications. Further exacerbating the situation, the pole and conduit owner has used the absence of explicit rules to attempt to dramatically raise the cost of make-ready work required on applications. For example, one pole owner refuses to allow installation of facilities on the field side of a pole, also known as boxing, *even where that same pole owner has previously allowed boxing on the same pole*. Moreover, the pole owner attempts to require twelve inches of vertical separation at the pole between adjoining communications cables owned

by different companies, even where an extension arm is used. The National Electrical Safety Code (NESC) permits four inches of vertical separation, while recommending that 12 inches of separation (whether achieved vertically, horizontally, or diagonally) be maintained between adjoining cables. Thus, under the NESC, extension arms enable new attachers to fit on poles where less than 12 inches of vertical separation can be achieved, by extending the new cable 12 *diagonal* inches from existing cables.<sup>5</sup>

This anti-competitive behavior is interesting given that this Commission previously mandated that pole owners treat competitors equally and permit competitors to also use extension arms to reduce the cost and necessity of make-ready work, much as it had used when building its own network for delivery of video services.<sup>6</sup> A pole owner's disparate treatment of competitors and anti-competitive requirement that 12 vertical inches separate adjoining communications cables violates the Commission's order, fully defeating the intended purpose of requiring non-discriminatory access to poles. It is these real-life, anti-competitive examples that demonstrate the need for the Commission to adopt rules that (1) require non-discriminatory behavior on behalf of pole and conduit owners, and (2) require meaningful timeframes that will grant competitive providers timely access to poles and conduits to provide services to their customers. The rules should be designed to prohibit unnecessary delay in the processing of applications for access licensing. To this end, and more specifically, Fibertech offers the following comments and suggestions in response to other stakeholders' comments on the proposed rules.

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<sup>5</sup> See Section 235(h) of the NESC.

<sup>6</sup> See *Ohio Cable Telecommunications Association, et al. v. Ameritech Ohio*, Case No. 96-1027-TP-CSS, Opinion and Order (April 17, 1997) and subsequent Entries on Rehearing (June 5, 1997 and July 31, 1997).

### **III. THE CHANGES TO THE PROPOSED RULES SUGGESTED BY THE ELECTRIC UTILITIES ARE UNNECESSARY AND HARMFUL TO THE EXPANSION OF BROADBAND IN OHIO.**

In their Joint Comments, the electric utilities urge the Commission to modify the proposed rules to the point of ineffectiveness. If adopted, the electric utilities' proposed changes would harm Ohio's economy by hampering the expansion of broadband. With proper staffing and planning by the electric utilities (or other pole and conduit owners), such changes would be unnecessary.

#### **A. The proposed timeframes should not be extended, and application volume numbers should not be altered.**

In their Joint Comments, the electric utilities urge the Commission to lower the guaranty thresholds for "large applications" and to extend licensing time periods.<sup>7</sup> They suggest lowering the limit for standard applications from 300 to 100 poles, and reducing the upper limit from 3,000 to 500 poles.<sup>8</sup> Citing reasons of unpredictability in application volume, the electric utilities state they cannot properly staff and address increases in application volume.<sup>9</sup> This objection, however, does not seem to accurately reflect the realities in the industry or the practices of most electric utilities, because even when the volume of applications is forecasted to the electric utilities, the electric utilities do not adequately prepare for the increase in the number of pole applications expected.

For example, when Fibertech decided to drastically expand its broadband offerings in Ohio by building five new markets and doubling its network in a sixth market, it notified the electric utilities of its intentions. Months before it submitted a single application, Fibertech met with or attempted to meet with each investor-owned utility in Ohio in order to describe intended projects, project scopes, and the expected timeframes. Upon submitting applications, it became

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<sup>7</sup> See generally Joint Comments of Electric Utilities at 25-28.

<sup>8</sup> Id. at 27.

<sup>9</sup> Id. at 26.

apparent to Fibertech that the electric utilities and other pole owners did not prepare or implement procedures in order to accommodate Fibertech's plans. Thus, in this instance, contrary to the electric utilities assertions,<sup>10</sup> it did not matter whether the volume of applications were known or forecasted to the utility companies, as their behavior was not affected. Presumably, the lack of behavior modification is a direct result of the utilities' lack of incentive to prepare for the increased volume or to allow access to the poles in a timely manner.

Responsible attachers provide advance notice of large projects to the pole owners and are incentivized to do so, as no attacher wishes to see the pole owner fail to meet its obligations. To the extent practicable, attachers work with pole owners to provide the information necessary to allow them to prepare for a large project. This task is difficult, however, if the utility is not similarly incentivized or, at least, deterred by the fear of violating a Commission rule if it does not cooperate. It is important for the Commission to adopt rules to provide the proper incentives and require pole owners to meet established standards and timeframes. This will encourage pole owners in Ohio to prepare for changes in volume when advised well in advance in order to meet the established timeframes.

In addition to the proposal to decrease the volume associated with "large applications," the electric utilities urge a dramatic increase in all of the timeframes.<sup>11</sup> Specifically, the electric utilities seek to double the timeframes set forth in the proposed rules, which would include doubling the widely-adopted standard of forty-five (45) days to survey poles for standard applications, as well as double the survey period for large applications to one hundred twenty (120) days.<sup>12</sup> Additionally, the electric utilities seek to more than double the proposed time

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<sup>10</sup> Id.

<sup>11</sup> Id. at 26.

<sup>12</sup> Id. at 27.



period to generate an estimate, from fourteen (14) days to thirty (30) days.<sup>13</sup> The electric utilities further seek a dramatic increase in the proposed rules' timeframe to complete make-ready work. For standard applications, the electric utilities seek one-hundred fifty (150) days to complete the work.<sup>14</sup> For larger orders, they seek one-hundred ninety (190) days.<sup>15</sup>

To put these numbers into perspective, there are between 40 and 50 poles in a linear mile of network. With the proposed reduction in the number of poles allowed for a standard application, and the proposed significant increase in timeframes to complete the work, the electric utilities' proposed changes create a near total barrier to entry for new pole applicants (attachers). Under the electric utilities' proposal, a pole applicant would have to wait 270 days to obtain licenses for up to two miles of poles, which amounts to *nine months* before a single span of network could be deployed. The customer, of course, would need to wait even longer, because the ten months does not include the actual time required to construct and test the network prior to service being offered.

It is important to note that not every pole requires make-ready work. Furthermore, with the use of techniques such as boxing or extension arms, the number of poles requiring make-ready work can be further reduced. Accordingly, it is not reasonable to require a pole applicant to wait 270 days to license ten poles, only a fraction of which may even require make-ready work, and fewer still that may require any electric make-ready work.

Moreover, the reduction in application volume would create such uncertainty for even modest projects of over ten miles (500 poles) that many projects would likely be abandoned before commencement. Given this uncertainty, many applicants would likely (of necessity) be forced to negotiated timeframes with pole owners, and no predictability at all would exist. Given

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<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id.

the inequity in bargaining positions between the pole owner and the applicant, the resulting negotiated timeframe would favor the utility's preferences, with the only recourse being redress from the Commission. Fibertech does not wish to, and pole applicants should not be forced to, litigate every sizeable network expansion.

**B. Time frames should apply regardless of who owns existing facilities on the poles.**

The electric utilities suggest eliminating timeframes for any pole requiring make-ready work that involves a government-owned attachment.<sup>16</sup> Such a modification would create undue uncertainty in the licensing process. Significantly, such a change would also have the undesirable effect of discouraging deployment of networks in towns and urban centers, where municipal and other government-owned attachments are more prevalent. Rather than eliminate the deadlines, pole owners and attachers can jointly work with government entities to complete any necessary work, including the use of approved contractors. In addition, with boxing and extension arms, make-ready work may be obviated.

**C. No explicit rule is necessary for tolling deadlines for weather emergencies, governmental permitting, or private property easements.**

The electric utilities seek several explicit exemptions from the timeframes, notably when a weather emergency affects operations or where local government permitting or private easements are required.<sup>17</sup> The proposed rules provide that a public utility may deviate from the time frames "for good and sufficient cause that renders it infeasible for the public utility to complete make-ready work within the prescribed time frame." (See proposed Rule 4901:1-3-03(B)(6)(b)). This provision protects pole owners from unexpected events or circumstances beyond their control. Clearly, a major storm which significantly disrupts electric

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<sup>16</sup> Id. at 28.

<sup>17</sup> Id. at 30.



utility operations is such an event. Similarly, a municipality that unreasonably delays issuing a permit would amount to such an event, as would a private land owner who refused to grant an easement.

The electric utilities seek more than protection from these circumstances, however. They seek to stop the clock whenever weather events occur that require service restoration.<sup>18</sup> Fibertech concedes that weather events are difficult to predict. That being said, such events will occur, and must be planned for. Most such events are of short duration, and restoration efforts, which should take a matter of days at most, should not impact the third-party attachment process. For extreme weather events, of course, the pole owners may avail themselves of the protections of Proposed Rule 4901:1-3-03(B)(6)(b).

Connecticut's rules have a similar protection excusing access delays caused by force majeure situations. Those rules, however, do not specifically toll the timeframes whenever weather related restoration efforts are required. Between October 2012 and February 2013, Connecticut was hit by two storms of extraordinary magnitude, Hurricane Sandy and the winter storm of 2013. As this Commission is aware, these storms caused massive disruptions for electric utilities. Nonetheless, to Fibertech's knowledge, no complaints were filed against any pole owner in Connecticut for delays caused by restoration efforts. Competitive providers understand that restoration efforts from such an event are of critical importance. Fibertech itself participated in the restoration, as it needed to repair some of its facilities. But not every storm is of such magnitude that restoration efforts require suspension of other activities, including third-party access.

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<sup>18</sup> Id.

Similarly, permitting requirements should not ordinarily allow a pole owner to stop the clock.<sup>19</sup> Normally, acquiring a permit takes a matter of days at most. It is a task that should be planned for in scheduling any required work. “Stopping the clock” to wait for a permit is unnecessary where the permit could have been applied for well in advance. Of course, where a municipality unreasonably delays issuance of a permit for reasons beyond the pole owner’s control, the pole owner again would have good and sufficient cause to deviate from the timeframes established pursuant to Proposed Rule 4901:1-3-03(B)(6)(b). The proposed rule provides the appropriate amount of protection to pole owners and no changes are warranted.

**D. Pre-existing safety violations should be corrected immediately.**

Surprisingly, the electric utilities seek to toll the proposed time frames where pre-existing safety violations on the poles must be corrected.<sup>20</sup> The electric utilities suggest waiting to determine the cause of the safety violation before correcting the violations.<sup>21</sup> Not only would this approach delay deployment of new networks, in essence punishing the new entrant (attacher) who is not at fault for the violation, but it could possibly continue to endanger the public and communications and electric workers performing work on the pole. A better solution would be to correct the violation as soon as possible, together with performing any required make-ready work on the pole, and to bill the offending party for such work. By utilizing such a practice, the safety of all parties involved will be better protected, and new attachers will not be penalized for the non-compliant and unsafe practices of other attachers.

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<sup>19</sup> Id. at 31 (wherein electric utilities propose that make-ready deadlines should be tolled for projects requiring local government permitting or obtaining easements over private property).

<sup>20</sup> Id. at 32.

<sup>21</sup> Id.

Second, it is fundamentally unfair to impose delays on a clearly innocent party when a violation was caused by other parties. Such a practice would reward unsafe parties by stifling competition in delaying access to the poles. Such a perverse incentive is clearly not warranted.

Finally, if the electric utilities are truly concerned about the unsafe conditions existing on their poles, they should conduct an audit to locate the unsafe conditions, correct the conditions, and bill the offending party. They should not leave it up to new entrants to locate such dangerous conditions when applying for attachments.

**E. Electric utilities' tariffs are insufficient to allow new attachers access to poles, as well as conduit.**

The electric utilities assert that existing tariffs and joint use agreements, rather than regulations, are a better manner in which to govern third-party attachment rights.<sup>22</sup> Such a system is currently in place, and the results are less than satisfactory.<sup>23</sup> In fact, an entire category of potential attachers (those parties who are public utilities and do not own poles or conduit) is excluded from any benefits under this model.

Not one of the tariffs filed by the electric utilities commits to any timeframe whatsoever for access to poles or conduit by a third-party attacher. As a result, new entrants, or even existing providers, have no way of predicting when they will be able to provide service. Under the tariffs, the electric utilities have no incentive to provide timely access to poles or conduit, and new services are therefore delayed or denied. A provider is left with the unsatisfactory solution of challenging the tariff to gain faster access.

Contrary to the suggestions of the electric utilities, challenging tariffs does not offer a meaningful and timely remedy for the harms caused by delayed access. Such a process occurs at a time after substantial delays have already occurred, takes several months even at its fastest

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<sup>22</sup> Id. at 3-4.

<sup>23</sup> See Initial Comments of PCIA at 8.

pace, and is too costly to enable timely service to new customers on a routine basis. Further, the tariff system creates a patchwork of access rights, where the ability to build, or even predict timeframes, is dependent on the tariff in place for the local utility. For communications networks serving more than one utility's territory where multiple pole owners exist, the result is uncertainty and inconsistency.

#### **IV. TIMEFRAMES ARE REQUIRED FOR FAIR AND TIMELY CONDUIT ACCESS.**

Conduit access is vital to the deployment of network, especially in urban and town centers where utility poles are far less prevalent. The work required to allow access to conduit is less burdensome than that required for pole access. AT&T argues in its comments that conduit access should not be governed by the proposed rules.<sup>24</sup> AT&T states that Fibertech has offered no evidence that the proposed rules should include timeframes for conduit access.<sup>25</sup>

As Fibertech has noted previously, conduit access timeframes are necessary because of unreasonable restrictions placed by conduit owners upon competitive providers who are trying to gain conduit access. These unreasonable restrictions and practices are also inconsistently applied among utility companies across Ohio and by the same utilities operating in different states. Accordingly, in response to AT&T,<sup>26</sup> Fibertech offers the following example: AT&T's practices in Ohio with regard to conduit access differ from its practices in other states. In Indiana, conduit applicants are permitted to perform survey of the conduits themselves, thereby saving time in the process of gaining conduit access. Attached hereto as Attachment A is the Structure Access Request required by AT&T for access to its conduit. Notably, and without explanation, conduit

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<sup>24</sup> See Initial Comments of the AT&T Entities at 9-10.

<sup>25</sup> Id. at 9.

<sup>26</sup> Id.

applicants are not permitted to perform such surveys in Ohio, despite allowing the practice in other states.

Furthermore, without the existence of conduit access timeframes in Ohio regulations, significant opportunity exists for conduit owners to refuse access and, therefore, hamper the ability of competitive providers to install facilities in the owners' conduit space. Fibertech has encountered this scenario recently in Ohio. One conduit owner has unreasonably denied Fibertech access by asserting that the conduit is full, even where space remains, and by unreasonably reserving conduit for its own use where such a practice is unnecessary. Despite efforts by Fibertech to alleviate any perceived congestion by offering to install additional innerducts in the conduit owner's open conduit and, further, to give the conduit owner multiple such innerducts for its own use, Fibertech's offers have been repeatedly rejected or ignored. The situation was exacerbated by the lack of communication by the conduit owner as to why Fibertech's offers were rejected or why access was denied, further adding to the delay of being able to access the necessary conduit or resolve the issue or concerns of the conduit owner. It was only after repeated efforts to contact multiple individuals was any information finally obtained as to why access was denied.

The lack of timeliness in responding to applications for conduit access stifles competition, results in a dearth of choices for consumers, impedes the installation of expanded network, and works against policies promoting the deployment of Broadband.<sup>27</sup> The Commission should, therefore, adopt the same timelines for conduit access as it has advanced for pole access in the proposed rules.

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<sup>27</sup> See generally Initial Comments of Data Recovery Services, LLC at 4.

**V. TIMEFRAMES MUST APPLY TO POLES WHICH MUST BE REPLACED.**

Several pole owners have taken the position that pole replacements should be conducted outside of the proposed timeframes. Unfortunately, such a rule would render any timeframe ineffectual. Pole replacements may be required for several reasons, including insufficient space on a pole for new facilities, or pre-existing safety violations on the pole in question. Pole owners cite reasons such as the complicated nature of some pole replacements, or the necessity of municipal approval, in some instances. However, if poles that must be replaced are exempted from the requisite timeframes, it becomes impossible to predict when service may be provided, and further impossible to complete service until those few poles are replaced. If a pole applicant cannot be certain about licensing timeframes until it is aware of the make-ready work required by the pole owners for attachment, the applicant cannot inform its customer of an expected in-service date, nor can it appropriately plan for roll-out of its services.

**VI. THE COMMISSION SHOULD NOT ADOPT REGULATIONS RESTRICTING THE DEVELOPMENT OF WIRELESS TECHNOLOGIES.**

The electric utilities request that the proposed rules be modified to permit a pole owner to prohibit pole-top attachments for wireless technologies.<sup>28</sup> While pole-top attachments are inappropriate on some poles, a blanket prohibition on such attachments is unwarranted and harmful. A denial of access to the pole top should be based on a reference to fair, established, and nondiscriminatory standards such as those established in the NESC. Where a pole-top

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<sup>28</sup> See Joint Comments of Electric Utilities at 37.

fixture can be attached consistent with such standards, it should be permitted.<sup>29</sup>

Pole-top antennae are an important aspect of emerging wireless technology. As wireless bandwidth demand increases, one way to satisfy such demand is to bring the antennae closer to the end user. As the number of antennae increases, the demand on each individual antenna decreases. A utility's blanket prohibition on pole-top antennae could leave an entire area of the state underserved. An alternative practice would be to permit such attachments where they can be safely placed, according to accepted safety and engineering standards. Denial of access should be determined on a case-by-case basis, with an explanation of why such an attachment is inappropriate.

## **VII. TEMPORARY ATTACHMENTS ALLOW TIMELY ACCESS WHILE REDUCING THE BURDEN ON POLE OWNERS.**

As Fibertech stated in its initial comments, the use of temporary attachments where make-ready work is not timely completed would allow deployment of network in a predictable manner.<sup>30</sup> Thus, even where a pole replacement is delayed for reasons outside a utility's control, such as municipal permitting, the attacher's customer could be served. This remedy obviates the need for the attacher to seek redress from the Commission. Instead, the customer is served, the pole is replaced in due course, and the temporary attachment is converted to a permanent attachment in a reasonable timeframe. All parties' interests are protected, including those of the pole owner, attacher, and, most importantly, the customer desiring service.

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<sup>29</sup> See Comments of The Ohio Cable Telecommunications Association at 5 (stating that access to pole tops outside of the traditional communications space should be permitted); Initial Comments of the AT&T Entities at 9 (stating that the proposed rules "should also specify that wireless attachments are permitted above the communications space and, specifically, on pole tops."); Initial Comments of PCIA at 7-10 (broadly discussing the need for reform in Ohio regulations governing access to pole tops).

<sup>30</sup> See Initial Comments of Fibertech at 14-16.

It would be unduly burdensome to require a competitive provider to file a complaint to seek redress from the Commission of every utility-missed deadline. Temporary attachments are a means by which a licensed applicant can gain access to the poles and deliver service to its customer, even if a pole owner delays the completion of make-ready work. Temporary attachments allow a cable to be installed -- pending completion of the make-ready work -- in a manner that is both NESC-compliant and also allows the cable to be moved to its assigned permanent location without any permanent effect on the pole. A J-hook suffices to make a temporary attachment where adequate vertical space exists on the pole. Where such space will not be available until the make-ready work is completed, an extension arm may be used to fix the cable away from the pole and thereby achieve (diagonally, as explained above) the NESC-prescribed separations.

Significantly, in addition to providing timely service to the customer, the pole owner may take comfort knowing that, if it does miss a deadline, the pole applicant does not need to file a complaint to assure service. While Fibertech is not encouraging or advocating for the pole owner to miss deadlines established by the proposed rules, Fibertech recognizes that in certain circumstances, as described herein, there may be a reasonable explanation for the pole owner's inability to perform during the prescribed timeframes. In those circumstances, the pole owner may choose to allocate its resources as it sees fit, and permitting the use of temporary attachments under those circumstances affords pole owners with an alternative to being penalized for violating the prescribed timeframes. To the extent a pole owner wishes to avoid or minimize temporary attachments, it may devote more resources to the application process and performing make-ready completion. While temporary attachments are not the preferred approach by attachers, as it is more expensive for the attacher to place temporary attachments



and then replace them with permanent facilities, Fibertech recognizes that there may be instances where resources are required elsewhere, either due to unforeseen circumstances or business considerations, and the use of temporary attachments will permit the pole applicant to provide service without seeking recourse from the regulatory agency.

In New York, New Jersey, and Connecticut, the use of temporary attachments has provided predictable service to customers without causing any harm to existing infrastructure. All three states, of course, are prone to weather events. Fibertech's experience with the use of temporary attachments has been overwhelmingly positive. By using industry standard attachment methods such as lag-bolted extension arms, temporary attachments provide a safe, expeditious method of assuring timely service to customers. A similar practice in Ohio will allow more options and flexibility to complete broadband expansion projects in the state in a timely fashion.

#### **VIII. THE COMMISSION SHOULD CONVENE A WORKING GROUP TO FACILITATE COOPERATION AND MAXIMIZE THE IMPACT OF NEW REGULATIONS.**

To maximize the benefits of new regulations and to facilitate compliance and cooperation among the stakeholders, Fibertech recommends creating and convening a working group of interested stakeholders (such as those who filed comments in this proceeding) that meet regularly to address best practices, standardized agreements, and any concerns that may arise. Such an approach was successfully implemented after the Connecticut PURA issued its pole attachment ruling. The interested stakeholders in Connecticut, including pole owners, competitive providers, cable companies, and municipalities met to discuss coordination of make-ready work, create standard pole attachment agreements, best practices, and remedies for missed deadlines.

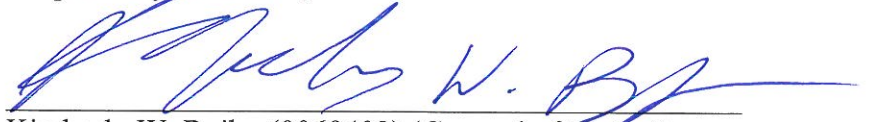
The working group met periodically for over two years. Critically, the stakeholders agreed to best practices for sequencing and timing of make-ready work. As municipalities were participants, the stakeholders' discussions also included such items as performance of municipal make-ready work and preservation of municipal rights to pole access. Collectively, the stakeholders agreed to utilize such practices which have resulted in compliance with the timeframes set forth in the Connecticut order in an orderly, predictable, and safe manner.

In addition, by meeting regularly through the working group, the stakeholders and their legal and engineering representatives fostered working relationships that have extended beyond the stated purpose of the working group. These relationships have been valuable in enhancing cooperation in areas such as improved storm response protocols and large expansion projects.

## IX. CONCLUSION

As explained herein, public policy and current practices dictate the need to establish a regulatory framework that encourages the deployment of competitive broadband networks and removal of barriers to competition. To this end, Fibertech requests that the Commission continue to focus on furthering the state policy as it evaluates the comments and reply comments submitted by all stakeholders on the proposed rules. Fibertech further requests that the Commission adopt its recommended modifications to the proposed rules for Chapter 4901:1-3, O.A.C., as discussed in its initial and reply comments.

Respectfully submitted,



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*Attorneys for Fiber Technologies Networks, L.L.C.*

## ATTACHMENT A



## Structure Access Request - Ducts and Conduit

(To be completed by Applicant)

Form C-1

10/06

To: AT&T - ☐ IL, ☐ IN, ☐ MI, ☐ OH; ☐ WI (Check one)

AT&amp;T Structure Access Center (ASAC)

220 Wisconsin Avenue

Waukesha, WI 53186

ASAC@att.com

Customer application number \_\_\_\_\_

Customer ACNA Code (Required) \_\_\_\_\_

A payment of \$200.00, for administration costs, must accompany this application form.

In accordance with the terms and conditions of the Interconnection Agreement or Structure License Agreement between (Company Name) and AT&T, application is hereby made for a Permit to occupy \_\_\_\_\_ feet of conduit facilities as indicated on the attached stick map and data sheet (Form C-2) in the municipality of \_\_\_\_\_. Also indicated on the attached data sheet (Form C-2) are the number and manufacture specifications of communication cables, outside diameters and any locations where it is desired to enter and exit manholes and/or place splices or fiber maintenance loops in AT&T's manholes.

- ☐ This authorizes AT&T to perform a make-ready survey whereby AT&T will determine the availability of conduit structure for occupancy, will estimate what make-ready work would be required to prepare the conduit structure for occupancy, and will provide an estimated cost for that make-ready work. Enclosed is a payment of \$\_\_\_\_\_ to cover the cost for AT&T to perform the make-ready survey. The cost for the make-ready survey will be:

\$ 200.00 + (\$ 400.00 X \_\_\_\_\_ Manholes = \$ \_\_\_\_\_  
 (Administration cost) (Unit cost per MH) (Number of manholes) (Total Fixed Charge)

***It is understood that this will be the total cost for the Make Ready Survey work unless extraordinary expenses are incurred or changes are requested by Applicant that increase the costs.***

- ☐ Applicant will perform the make-ready survey (not available in Ohio) and will provide a completed Form C-2 with sufficient details and conduit butterfly drawings for AT&T to perform the make-ready work. Make-ready survey must be completed within 45 days of the date of this application to keep this Request active. All AT&T costs from inspections and site visits during this work will be billed to the Applicant. Applicant will be using AT&T Approved Contractor (Name of contractor doing survey)

## MANHOLE ACCESS REQUEST FORM (M-1) MUST BE SUBMITTED WITH THIS OPTION

- ☐ Attached are the results from a completed Make Ready Survey. AT&T is requested to provide estimated costs to perform indicated make-ready work. Applicant will be charged a minimum of 2 hours for engineering time.
- ☐ To perform make-ready, based on AT&T record check. Enclosed is the A-1 form and payment of the make-ready cost estimate.

By signing this application you agree to follow either the AT&T Structure Access Guidelines and State Tariffs; ICA, or Stand Alone Agreement, whichever one is applicable.

(Company Name of Applicant (not name of Agent))

(Signed)

(Billing address for re-occurring lease bill)

(Printed)

(City, State &amp; Zip code)

(Title)

(\_\_\_\_) - \_\_\_\_ ext. \_\_\_\_

/ /

(Telephone Number)

(Date)

(Office address if different)

(To be completed by AT&amp;T Only)

(City, State &amp; Zip code)

ASAC

(\_\_\_\_) - \_\_\_\_ ext. \_\_\_\_

Application # \_\_\_\_\_

(Telephone Number)

Project # \_\_\_\_\_

(Email Address)

**NOTE:** In order to process your request, all necessary drawings and/or maps must be attached when sent via email. If they cannot be sent electronically, please contact the Structure Access Center at either [ASAC@att.com](mailto:ASAC@att.com) or 888-395-2722 for the appropriate Engineer's mailing address. Please do not send request forms directly to the Engineer as it will delay the start of your request.



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was served this 29th day of August, 2013, by electronic mail if available or by regular U.S. mail, postage prepaid, upon the persons listed below.

  
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Ms. Cheryl A Smith on behalf of Fibertech