

**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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**APPLICATION FOR REHEARING AND REQUEST FOR CLARIFICATION  
OF FIBER TECHNOLOGIES NETWORKS, L.L.C.**

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Pursuant to Section 4903.10, Revised Code, and Rule 4901:1-35, Ohio Administrative Code (O.A.C.), Fiber Technologies Networks, L.L.C. (Fibertech) hereby applies for rehearing of the Finding and Order issued by the Public Utilities Commission of Ohio (PUCO or the Commission) on July 30, 2014 in the above-captioned proceeding (July 30 Order).

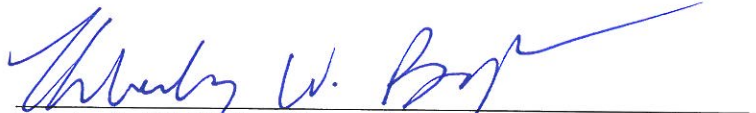
Fibertech submits this Application for Rehearing and Request for Clarification of the July 30 Order, on the grounds that it is unlawful and unreasonable in the following respects:

1. The July 30 Order is unlawful and unreasonable in that it establishes timelines for access to public utility poles for survey, estimate, and make-ready under Rules 4901:1-3-03(B)(1) through (3), O.A.C., which are too lengthy to encourage the continued success of competitive facilities-based telecommunications providers in Ohio and the rapid deployment of high-capacity broadband services in violation of Sections 4905.71 and 4927.02, Revised Code.
2. 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 4905.71 and 4927.02, Revised Code.
3. The July 30 Order is unlawful and unreasonable in that it permits a utility-approved contractor to complete make-ready only in the "communications space" in violation of Sections 4905.51, 4905.71 and 4927.02, Revised Code.

4. The July 30 Order is unlawful and unreasonable because it fails to establish timeframes for access to conduit, despite adopting definitions, assumptions, and methodologies for the calculation of conduit occupancy rates in Rule 4901:1-3-04, O.A.C., in violation of Sections 4905.71 and 4927.02, Revised Code.
5. The July 30 Order is unlawful and unreasonable because it adopts a timeframe for the resolution of pole attachment complaints in Rule 4901:1-3-05, O.A.C., which is not reasonably calculated to provide complainants with swift resolution of their complaints and is unnecessarily lengthy, given the other timelines adopted in Chapter 4901:1-3, O.A.C., in violation of Sections 4905.51, 4905.71 and 4927.02, Revised Code.

Further, Fibertech requests clarification of the requirements in Rule 4901:1-3-03(A)(4), O.A.C., associated with a public utility's denial of a request for access to its poles, ducts, conduit, or rights-of-way based upon engineering standards or purposes, and clarification of the definition of "communications space" in Rule 4901:1-3-01(F), O.A.C. The reasons for granting this Application for Rehearing are more fully set forth in the attached Memorandum in Support.

Respectfully submitted,



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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

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

On May 15, 2013, the Commission issued proposed rules and established deadlines, which were subsequently amended, for comments and reply comments on the proposed rules. Fibertech submitted its initial comments on the proposed rules for Chapter 4901:1-3, O.A.C., on July 12, 2013, and its reply comments on August 29, 2013.

The Commission issued its July 30 Order, which revised a number of the proposed rules and adopted Chapter 4901:1-3, O.A.C., as set forth in the Appendix to the July 30 Order.

## II. ARGUMENT

### A. Request for Clarification

Fibertech requests clarification from the Commission regarding the level of specificity required under Rule 4901:1-3-03(A)(4), O.A.C., when a public utility denies access to its poles, ducts, conduit, or rights-of-way based upon engineering purposes or standards. As adopted by the Commission in the July 30 Order, Rule 4901:1-3-03(A)(4), O.A.C., provides, in pertinent part:

If access is not granted within forty-five days of the request for access, the public utility must confirm the denial in writing by the forty-fifth day (or by the sixtieth day in the case of larger orders as described in paragraph (B)(6) of this section). *The public utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability, or engineering standards.* (Emphasis added).

Despite the ability of a public utility to deny an applicant's request for access to its poles, ducts, conduit, or rights of way based upon engineering purposes or standards, and the Commission's directive that any such denial be specific in nature, the Commission does not specifically require utilities to identify the engineering standards applied when determining that the request should be denied. As Fibertech has experienced, there may be several engineering standards at play when a public utility is reviewing an applicant's request for access. Although utilities are bound to consider the requirements set forth in the National Electrical Safety Code (NESC), the utilities apparently also consider internal standards that may be more restrictive, which may not be readily known by or apparent to applicants. Some standards may improperly purport to shift costs for system upgrades to new entrants instead of properly allocating them among beneficiaries of the upgrades. For example, a utility may require new attachers to raise all facilities on a pole to accommodate an internal standard setting minimum facility heights higher

than that required by the NESC, in order to accommodate possible future development and driveways passing under the wires. While the utility may wish to have such upgraded facilities in place for the future, the cost for such an upgrade should not be borne by a new entrant/attacher. Therefore, in the interest of full disclosure and in light of the apparent intent of the Commission to require specific information in connection with denial of any access application, a public utility should be obligated to specifically identify the engineering standards it applied to a request for access that has been denied based on engineering considerations. Fibertech accordingly requests that the Commission clarify that such identification is required pursuant to the language of Rule 4901:1-3-03(A)(4), O.A.C.

Further, to render the Commission's authorization of pole-top access for wireless attachments consistent with its remaining access rules, the Commission should 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. The Commission clarified in the July 30 Order that "wireless attachments, including those on pole tops, are permitted."<sup>1</sup> By including the pole top in the definition of "communications space," the Commission will confirm that attaching entities are authorized to access the pole top when utilizing and attaching wireless facilities.

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<sup>1</sup> July 30 Order at 24.

## **B. Request for Rehearing**

Fibertech respectfully requests rehearing in connection with the issues discussed herein:

- 1. The July 30 Order is unlawful and unreasonable in that it establishes timelines for access to public utility poles for survey, estimate, and make-ready under Rules 4901:1-3-03(B)(1) through (3), O.A.C., which are too lengthy to encourage the continued success of competitive facilities-based telecommunications providers in Ohio and the rapid deployment of high-capacity broadband services in violation of Sections 4905.71 and 4927.02, Revised Code.**

The Commission should grant rehearing of the July 30 Order in order to establish timelines for access to public utility poles for survey, estimate, and make-ready under Rules 4901:1-3-03(B)(1) through (3), O.A.C., which encourage the continued success of competitive facilities-based telecommunications providers in Ohio and the rapid deployment of high-capacity broadband services. Under Rules 4901:1-3-03(B)(1) through (3), O.A.C., the Commission has established the following general time frames: 45 days for completion of a survey by a public utility after receipt of a complete application to attach facilities to its poles;<sup>2</sup> presentation by a public utility of an estimate of charges to perform all make-ready work to a potential attacher within 14 days of completion of a survey;<sup>3</sup> 60 days for completion of make-ready for attachments in the communications space;<sup>4</sup> and 90 days for completion of make-ready for wireless attachments above the communications space.<sup>5</sup> Fibertech contends that these time frames are unreasonably lengthy and, for purposes of competition and business development in Ohio, should be condensed by the Commission.

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<sup>2</sup> July 30 Order at 17.

<sup>3</sup> Id.

<sup>4</sup> Id. at 21.

<sup>5</sup> Id. at 22.

Fibertech has stressed throughout the course of this proceeding that pole and conduit access delays significantly affect a competitive provider's ability to market to potential customers and provide the services they desire within the timeframes they expect. Numerous customers wait until the termination of their contract with their existing provider is near before making arrangements for a new provider and/or new service. They expect that competitive forces will be able to accommodate their needs. If, at the end of their contracts, they plan to change service providers, they often must do so within a very short window of time, or they will encounter significantly increased expenses. When a provider is prevented from offering a firm start date for service because of outside forces, including unduly long access timeframes, it is extremely difficult to sell its services to customers. The result of this scenario is that both the provider and the end-user customers suffer the consequences of diminished competition because of unwieldy access timeframes. Additionally, economic development opportunities may be missed because of a customer's inability to reduce costs and reinvest those funds into its business or the local community. Unreasonably lengthy access timelines restrict economic and growth opportunities. The prospect of this outcome continuing in Ohio, despite new pole attachment and access rules, is troubling and should be remedied. The administrative burden occasioned by such change is minimal.

While Fibertech recognizes that the time frames in the rules generally mirror those present in the FCC rules, Fibertech submits that the time frames in the FCC rules were established largely to ensure completion of deployment within the allowable two-year timeframe of the broadband stimulus projects funded by the federal government in recent years. In promulgating its attachment and access rules, the FCC made key changes to federal law governing pole attachments in FCC-regulated states in part because of persistent denials of



access and unreasonable attachment terms.<sup>6</sup> However, the time frames in the rules were also driven by deadlines for deployment within the extended funding period. Without the long periods of time by which deployment efforts had to be accomplished in order to ensure federal dollars, the access periods adopted by the FCC would likely have been condensed. For these reasons, Fibertech requests that the Commission grant rehearing of Rules 4901:1-3-03(B)(1) through (3), O.A.C., in order to abbreviate the applicable survey, estimate, and make-ready timelines included therein.

**2. 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 4905.71 and 4927.02, Revised Code.**

The Commission should grant rehearing in order to reasonably permit competitive telecommunications providers to utilize temporary attachments to utility poles prior to the completion of make-ready work. Despite the extensive benefits of using temporary attachments prior to the completion of make-ready work, the Commission noted in its July 30 Order that it would “not issue a rule providing for the use of temporary attachments at this time.”<sup>7</sup> Fibertech encourages the Commission to grant its request for rehearing in order to reconsider authorizing the use of temporary attachments in limited circumstances.

The use of temporary attachments in situations where the utility is unwilling or unable to timely complete make-ready work would allow deployment of network in a prompt and predictable manner.<sup>8</sup> Permitting the use of temporary attachments under this scenario would, in many circumstances, eliminate the need for the attaching party to seek Commission intervention

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<sup>6</sup> See *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).

<sup>7</sup> July 30 Order at 30.

<sup>8</sup> See Initial Comments of Fibertech at 14-16.



to resolve matters of concern or non-compliance with timelines. In connection with authorizing the use of temporary attachments, the Commission would promote competitive choices for customers, allow customers to be served in a timely manner, promote economic development and expansion of businesses and the telecommunications network, prevent the Commission's administrative interests from being unduly burdened, and allow utilities to prioritize their work loads.<sup>9</sup> Assuming that the temporary attachment is converted to a permanent attachment in a reasonable timeframe, all parties' interests are protected and served. As such, temporary attachments serve as a convenient and effective method of advancing all parties' interests when make-ready has not been completed in a timely manner.

Even with the adoption of the new access timelines, it would be unduly burdensome for all parties involved (including the competitive provider, the public utility, and the Commission) to require a competitive provider to file a complaint to seek redress from the Commission of every utility-missed deadline. Temporary attachments function as 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, or other circumstances prevent the timely completion of make-ready. While, due to their expense, temporary attachments are not the preferred approach by attachers, there are any number of reasons, including delays in make-ready efforts due to unforeseen circumstances, or other important business considerations, for which the use of temporary attachments would serve as an important option for attaching parties and would relieve the pressure of access deadlines looming over public utilities. For this reason, Fibertech encourages the Commission to reconsider its previous approach and grant rehearing to adopt a rule in Chapter 4901:1-3, O.A.C., authorizing the use of temporary attachments to remedy pole owner delays.

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<sup>9</sup> See Section 4927.02, Revised Code.

**3. The July 30 Order is unlawful and unreasonable in that it permits a utility-approved contractor to complete make-ready only in the “communications space” in violation of Sections 4905.51, 4905.71 and 4927.02, Revised Code.**

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. Rule 4901:1-3-03(B)(4), O.A.C., provides for employment by an applicant of an approved contractor for the completion survey and make-ready work in the event that an owner fails to respond to an applicant under Rules 4901:1-3-03(B)(1) through (B)(3), O.A.C., 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 for make-ready work on facilities belonging to electric utilities. However, the rule permitting such use of contractors unnecessarily limits the contractors’ work to only that make-ready that can be accomplished in the communications space. Such a limitation is likely to result in the unintended consequence of restricting deployment of a competitor’s facilities and deployment of wireless technologies.

Often, make-ready work is required in the electrical space in order to make room for attachments in the communications space or elsewhere, including the pole top, where wireless attachments are often located. Absent prompt attention by the electric utility, or the ability to use utility-approved contractors to perform this electrical make-ready work in areas outside of the communications space, an attaching entity is left with no remedy, save filing a complaint which, as discussed below, is a lengthy process. Permitting the use of utility-approved contractors to complete make-ready for any attachment authorized under Chapter 4901:1-3, O.A.C., not just the

make-ready occurring in the communications space, would be an efficient method by which attaching parties could expedite the make-ready process and best serve the needs of their customers. Further, given that **utility-approved** contractors would be the individuals performing the work, the safety concerns expressed by the utilities about work outside of the communications space would be largely alleviated, as the utility would have trained or approved the methods by which the approved contractor performs the work.

Moreover, in consideration of the Commission's clarification that "wireless attachments, including those on pole tops, are permitted[.]"<sup>10</sup> it would be reasonable and consistent to extend the possibility of using utility-approved contractors to perform make-ready necessary for wireless attachments. This necessitates the ability for utility-approved contractors to perform make-ready outside of the traditional communications space. Accordingly, Fibertech requests that the Commission grant reconsideration of this issue and permit utility-approved contractors to perform make-ready to accommodate any types of attachments authorized under Chapter 4901:1-3, O.A.C.

**4. The July 30 Order is unlawful and unreasonable because it fails to establish timeframes for access to conduit, despite adopting definitions, assumptions, and methodologies for the calculation of conduit occupancy rates in Rule 4901:1-3-04, O.A.C., in violation of Sections 4905.71 and 4927.02, Revised Code.**

Fibertech was extremely supportive of the Commission's initial proposal to look beyond pole access and to incorporate time frames for conduit access into its proposed rules. However, in its July 30 Order, the Commission declined to adopt the timeframes for conduit access which it had initially proposed.<sup>11</sup> Its decision to do so is unlawful and unreasonable, given that it specifically adopted other rules pertaining to conduit occupancy, such as definitions and

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<sup>10</sup> July 30 Order at 24.

<sup>11</sup> Id. at 37.

assumptions pertaining directly to conduit, as well as methodologies for the calculation of conduit occupancy rates, in its proposed rules.<sup>12</sup>

As Fibertech has previously noted, it is extremely important for the Commission to adopt a progressive approach to timelines for access generally. The adoption of timelines for access to conduit is equally as important as the establishment and adoption of timelines for access to poles. In order to 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 access timelines for conduit.

Conduit access is crucial to the deployment of the network, especially in urban areas, town centers, and large public venues, such as sporting facilities and arenas, where utility poles are far less prevalent and conduit access is required. Further, the work required to confirm conduit availability is less burdensome than the work that is required for pole access. To that end, the Commission's failure to adopt timeframes for access to conduit is unreasonable and unlawful, as it unreasonably discriminates against the timely deployment of network in densely populated areas where competitive technology offerings are especially desirable and vitally important.<sup>13</sup>

Additionally, 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.

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<sup>12</sup> See Sections 4905.71 and 4927.02, Revised Code.

<sup>13</sup> See Sections 4905.71 and 4927.02, Revised Code.

Furthermore, without the existence of conduit access timeframes in Ohio regulations, significant opportunity exists for conduit owners to refuse access and, thereby limiting the options available to customers and impeding competition.

Lack of timeliness in responding to applications for conduit access impermissibly curbs competition, resulting in limited choices for consumers, and impedes the continued deployment of broadband and the benefits for consumers resulting from such deployment. For these reasons, the Commission should grant Fibertech's request for reconsideration of this issue and adopt the same timelines for conduit access that it ultimately adopts for pole access.

**5. The July 30 Order is unlawful and unreasonable because it adopts a timeframe for the resolution of pole attachment complaints in Rule 4901:1-3-05, O.A.C., which is not reasonably calculated to provide complainants with swift resolution of their complaints and is unnecessarily lengthy, given the other timelines adopted in Chapter 4901:1-3, O.A.C., in violation of Sections 4905.51, 4905.71 and 4927.02, Revised Code.**

Finally, the Commission should grant Fibertech's request for reconsideration of Rule 4901:1-3-05, O.A.C., which 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 Commission for instituting a complaint process dedicated to issues concerning access to poles and conduit with a resolution deadline, a process that takes almost a year to complete is not reasonable, is not consistent with the policy of the state, and will not provide complainants with the means to have their concerns resolved with the requisite speed.

The Common Sense Initiative (CSI) was established by Governor Kasich in January 2011. As evident in the docket of this proceeding and many others, since its establishment, CSI has played an important role in the Ohio agency rulemaking process. The initial paragraph of

Executive Order 2011-01K, which established CSI and is the foundation for its statutory functions, provides in part that “[t]o successfully compete in today’s economy, Ohio must work proactively to give innovative people and innovative companies reasons to be here, but must also tear down any obstacle that make it more difficult for businesses to operate in Ohio.”<sup>14</sup>

Given that access to utilities’ poles and conduit is a very time-sensitive business issue, and that a 360-day process for resolution of a complaint about pole and conduit access functions as a significant impediment to the continued success of Fibertech’s (and other telecommunications providers’) business models in Ohio, Fibertech respectfully requests that the Commission abbreviate the complaint process established in Rule 4901:1-3-05, O.A.C. As one of the many innovative companies that have targeted Ohio as an emerging marketplace, Fibertech believes that the principles set into law through CSI strongly encourage the Commission to narrow the window of time for resolution of access complaints, considering them on an expedited basis. Limiting the period of time for consideration of certain types of proceedings to under a year is not a novel concept at the Commission; in fact, under Sections 4928.143, Revised Code, when considering an electric distribution utility’s application for approval of an electric security plan, the Commission must issue an order on any initial application under the section within 150 days of filing, and on any subsequently-filed application, within 275 days of filing. As this Commission is clearly aware, the issues for its consideration under an electric security plan significantly outnumber any issues that may be brought before it when a pole or conduit access complaint is filed. The number of participating parties in a access complaint would presumably be significantly less than an electric security plan proceeding as well. Given these facts, logic dictates that the time frame for resolution of such complaints should be shorter than that required for resolution of an electric security plan.

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<sup>14</sup> See Executive Order 2011-01K, Establishing the Common Sense Initiative (January 10, 2011).

In support of the 360-day timeframe for resolution of access complaints established in Rule 4901:1-3-05, O.A.C., the Commission states that “[d]ue process demands that sufficient time be provided in order to address each phase of the complaint process.”<sup>15</sup> As discussed previously, the time for Commission consideration of electric security plans, in which the Commission must consider a multitude of issues within, at present, a 275-day window, strongly suggests that the Commission would require significantly less time to resolve access complaints while preserving all aspects of due process and administrative economy. As such, Fibertech respectfully requests that the Commission grant rehearing on this issue for the purpose of reducing the timeframe for resolution of complaints filed under Rule 4901:1-3-05, O.A.C., to 120 days.

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<sup>15</sup> See July 30 Order at 43.



### III. CONCLUSION

As explained herein, the regulatory framework established in Chapter 4901:1-3, O.A.C., and adopted by the Commission in its Finding and Order is a step in the right direction in terms of encouraging the deployment of competitive broadband networks and removal of barriers to competition. However, revisions to certain rules within that regulatory framework are necessary for deployment capabilities to be maximized, thereby benefiting all Ohio citizens. Accordingly, Fibertech respectfully requests that the Commission grant rehearing on those issues specifically identified above, adopt the modifications recommended therein, and also clarify the items discussed in Section II.A above.

Respectfully submitted,



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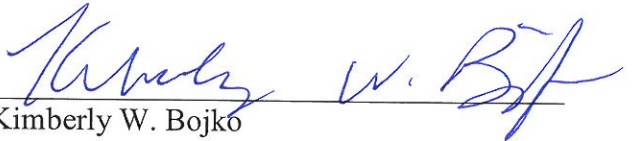
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## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on August 29, 2014.

  
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Summary: App for Rehearing Application for Rehearing and Request for Clarification of Fiber Technologies Networks, L.L.C. electronically filed by Ms. Cheryl A Smith on behalf of Fibertech