

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DOCKET DRM 08-004

COMMENTS OF FIBERTECH NETWORKS, LLC

Fibertech Networks, LLC ("Fibertech") headquartered in Rochester, New York, builds and operates "open access" fiber-optic networks providing local broadband connectivity for use by other CLEC's, IXC's, ISP's, wireless providers, other businesses (such as banks and health care institutions), schools, universities, and governmental entities. Fibertech commends the New Hampshire Public Utilities Commission ("PUC") for taking jurisdiction over pole attachment regulation under 47 U.S.C. § 224 via its filing with the Federal Communications Commission in January, 2008. The success of competitive network providers like Fibertech and the cost savings and competition they bring to New Hampshire is largely dependent upon the results of this proceeding.

I. FIBERTECH IS A SUCCESSFUL BUILDER OF NETWORKS

Since initial funding in mid-2000, Fibertech, through its subsidiary Fiber Technologies Networks, L.L.C., has completed approximately 4,600 route miles of local fiber-optic network in 12 states.¹ Among the markets Fibertech serves are Springfield and Worcester, Massachusetts, Buffalo, Rochester, Syracuse, and Albany, New York, Providence, Rhode Island, and virtually all of Connecticut. Fibertech's network facilities in these markets connect ILEC central offices, CLEC points of presence, major office buildings and office parks, as well as hospitals and educational buildings.

¹ More information on Fibertech's networks and activities is available at: <http://www.fibertech.com>.

By providing state-of-the-art broadband facilities to other competitive telecommunications companies as an alternative to use of ILEC facilities, Fibertech allows competitors to save money while offering consumers new services. By offering a broadband platform to non-telecom businesses, schools, and government, Fibertech's facilities directly promote economic development and budgetary relief by providing needed high-speed connectivity at substantial cost savings.

II. TERMS FOR ACCESS TO POLES CRITICAL TO SUCCESSFUL COMPETITIVE NETWORKS

Despite what may be viewed as relative success in building competitive network facilities, Fibertech has struggled hard since its inception, and in virtually all states in which it does business, to gain utility approvals to install its fiber-optic cables on poles and in conduits in a timely and reasonably priced manner. Control of poles and conduits, the facilities essential to deployment of new network, allows utilities -- unless constrained -- to dictate these factors and, thereby, the fates of competitive providers like Fibertech. The *State of New Hampshire Broadband Action Plan* recognized the importance of such access and specifically recommended addressing terms for make-ready work and the related fees². This Commission's decision to conduct the instant proceeding holds out the possibility that reasonable and nondiscriminatory access to poles and conduits may become available in New Hampshire.

III. SPECIFIC PROVISIONS IN PROPOSED RULES NEED REVISION

Fibertech offers for the PUC's consideration several revisions, discussed below, to the PUC's Initial Proposal for rulemaking at Chapter Puc 1300 UTILITY POLE ATTACHMENTS. Fibertech appreciates the opportunity to submit specific comments

² *State of New Hampshire Broadband Action Plan*, by Department of Resources and Economic Development and Telecommunications Advisory Board, p.39 (June 30, 2008).

and its proposed revisions below. As generally supported by its comments in Sections I and II above, Fibertech seeks to have the PUC adopt utility pole attachment rules that:

- Establish reasonable but firm time frames for completion of premake-ready surveys (including make-ready estimates) and make-ready work;
- Provide for the ability to undertake temporary pole attachments pending completion of make-ready work and utilize mutually acceptable third-party contractors so that established time frames for make-ready can be accomplished;
- Provide for reasonable, non-recurring costs and cost information associated with premake-ready surveys, estimates, and make-ready work;
- Provide generally for boxing of utility poles; and
- Provide non-discriminatory provisions for all telecommunications carriers.

A. Timeframes

Fibertech urges the PUC to establish a maximum 90-day schedule, from the submittal of a complete pole attachment application to the completion of any required make-ready work, subject to extra time for applications involving the need to replace one or more poles. A number of states have adopted schedules consistent therewith.³

³ See NY PSC Case 03-M-0432 – *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement On Pole Attachments (August 6, 2004) (requires preconstruction surveys be done 45 days after application has been filed with the pole owner, make-ready estimates provided within 14 days of the survey, and make-ready work completed within 45 days of receiving make-ready payment); Utah Admin. R. 746-345.3(C) (requires utility pre-make-ready work survey and estimate completion ranging from 45 to 90 days depending on number of poles, and 120 to 180 days for completion of make-ready work, again depending on the number of poles involved, subject to negotiated time frames for a very large number of poles); OR PUC Order No. 07-137, *Re Amend and Adopt Rules in OAR 860*, AR 506 and AR 510, 2007 WL 1198592 (April 10, 2007) (requires utility response to application within 45 days and 45 days to complete make-ready work, subject to negotiated schedule extensions for applications exceeding a defined “threshold” number of poles); and ME PUC Docket No. 2005-486, *In re Oxford Valley Networks*, Order on Reconsideration (February 28, 2007), *affirming in part*

Fibertech particularly notes that pole attachments in Connecticut have been undertaken successfully and, in general, expeditiously pursuant to a schedule mandated by the Connecticut Department of Public Utility Control (DPUC), which provides for a maximum 45-day period for premake-ready work survey (and make-ready estimate) completion and a maximum 45-day period for make-ready work completion, subject to a 35-day extension if a pole replacement is involved.⁴ The reasoning and support for this schedule is well-stated by the CT DPUC:

The Department believes that a time interval objective of not more than 90 days is reasonable and expects collaborative effort from all participants to streamline the pole attachment process to meet that objective. In the opinion of the Department, the past custodian pole attachment performance has been too long and not reflective of today's customer-driven telecommunications market. Connecticut customers (regardless of the provider) deserve the most efficient delivery of services and thus, the process to get the necessary facilities to the customers to deliver those services must be streamlined to install them safely and efficiently.⁵

The Initial Proposal, at Puc 1303.04, proposes a 45 day period from submittal of a completed application and fee payment to the completion of the "survey" for applications involving not more than 200 poles. This rule proposal is reasonable and consistent with the above-cited rules adopted by the Connecticut DPUC and other states.

The proposed rule, however, does not provide a deadline for when the applicant would be furnished with a make-ready cost estimate. Payment on such an estimate is the starting point for the deadline for make ready work in the

and modifying in part, 2006 WL 4091227 (October 26, 2006) (requires make-ready work to be done within 90 days, and within 180 days if a pole replacement is involved).

⁴ *Re The State's Public Service Company Utility Pole Make-Ready Procedures* - Phase I Docket No. 07-02-13 CT DPUC, 2008 WL 1943985 (April 30, 2008).

⁵ *Id.*, at 13.

proposal (as well as well as most such deadlines in other state rules). Since there is no clear deadline for providing the make-ready estimate in the proposal, there is no limit in the proposal on the overall time period from application filing to make-ready completion. This lack of overall time limit in the proposal is not reasonable. Fibertech proposes that the make-ready estimate be provided simultaneous with the survey, as in CT and other states.⁶

The proposed rule also fails to provide for the ability of mutually agreeable, third party contractor to complete the premake-ready work survey should the pole owner experience delays in performing the work itself, which other states permit.⁷ Fibertech submits that this would be a reasonable solution to mitigating delays due to a heavy volume of application requests or other reasons, which delays would hinder applicants such as Fibertech in provisioning competitive telecommunications services in the State.

Accordingly, Fibertech proposes that Initial Proposal Puc 1303.04 be revised on final adoption to state the following:

Puc 1303.04 Request for Access and Response Requirements.

(a) Requests made under these rules and pursuant to a pole attachment agreement for access to a utility's poles shall be in writing. Absent extraordinary circumstances, a premake-ready work survey and make-ready work cost estimate for an application not exceeding 200 poles shall be completed and the results communicated to the applicant seeking to attach within 45 calendar days of receiving a completed application and survey fee. If permission for access is not granted within 45 calendar days of receiving a complete request for access, the owner must confirm the denial in writing by the 45th calendar day. The owner'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 the grounds in Puc 1303.01 for such denial.

⁶ *Id.*, at 17; Or. Admin. R. 860-028-0100 (4)(c) Utah Admin. Code r746-345-3

⁷ See Oregon OAR 860-028-0100(4)(e)(6); NY PSC Case 03-M-0432, *supra*, p. 3 (August 6, 2004).

(b) If the pole owner cannot meet the time frames established by this rule for completing the premake-ready survey, such survey may be performed by a mutually acceptable third party.

With respect to completion of the make-ready work, the Initial Proposal provides for a 180 period to complete such work, at Puc 1303.12. Fibertech cannot overemphasize that this amount of time will have a chilling effect on the provision of competitive telecommunications services in the State, and is entirely unnecessary in all circumstances as has been determined by other states.⁸ Moreover, in order to mitigate delays in completing make-ready work, Fibertech requests that the PUC adopt rules permitting the use of temporary attachments, including the use of temporary extension arms, and permitting the use of mutually agreeable third party contractors, both of which mitigation measures have been adopted in other states.⁹

Accordingly, Fibertech proposes that Initial Proposal Puc 1303.04 be revised on final adoption to state the following:

Puc 1303.12 Make-Ready Timeframes.

(a) Unless otherwise agreed by parties to a pole attachment agreement, pole owners shall complete make-ready work within 45 days if the make ready work involves no pole replacements, and within 80 days if the make-ready work involves one or more pole replacements, after any required pre-payments of any make-ready estimates provided to the attaching entity by the pole owner or owners. Unless otherwise agreed by the parties to a pole attachment agreement, make-ready work shall be deemed to include all work, including but not limited to rearrangement and/or transfer of existing facilities, replacement of a pole or any other changes required to accommodate the attachment of the facilities of the party requesting attachment to the pole.

(b) Temporary attachments, which may include temporary extension arms, may be utilized for the installation of facilities to compensate for delays in make-ready work and other impediments to access poles. The methodology used for temporary attachments must be cognizant of all relevant safety requirements and equipment used

⁸ See footnote 3, *supra*.

⁹ See e.g. NY PSC Case 03-M-0432, *supra*, Appendix pp. 7, 12 (August 6, 2004)

must be manufactured and intended for the application. If temporary attachments are used, pole attachers are still required to pay for all make-ready work necessary for the permanent attachment. Make-ready work on poles with temporary attachments shall be completed within a reasonable time. When make-ready work is completed, the temporary attachments shall be replaced with standard attachments within 30 days of the attaching entity's receipt of notice that the make-ready work has been completed.

(c) If the pole owner cannot meet the time frame established by this rule for completing make-ready, such work may be performed by a mutually acceptable third party.

B. Premake-Ready and Make-Ready Cost Estimates and Billing

Fibertech requests that the PUC establish standards for posting charges for premake-ready surveys, and for the level of cost detail a pole owner must provide to an applicant with respect to furnishing make-ready cost estimates and bills for actual, incurred amounts for completing make-ready work. Absent such cost detail, it is difficult if not impossible for the pole attacher to determine the reasonableness of the costs. Failure to require such information could result in the bringing of what might otherwise be avoidable complaints before the PUC to resolve make-ready cost disputes.

Other states have addressed the issue of transparency of such charges and cost detail. The NY PSC requires pole owners to: (1) post preconstruction survey charges and make-ready charges in the pole attachment agreement on their websites, subject to furnishment of supporting workpapers at the request of a pole attacher, and to obtain prior agreement of the pole attacher for any overtime charges, (2) provide make-ready estimates that are “detailed and subject to discussion as to the reasonableness of what make-ready work is necessary,” and (3) provide make-ready invoices that include, at a minimum: date of work, description of work, location of work, unit cost or labor cost per hour, cost of itemized materials and any miscellaneous charges.”¹⁰ The New Jersey

¹⁰ NY PSC, Case 03-M-0432, *supra*, Appendix A, at 3, 4.

Board of Public Utilities adopted the recommendations of hearing examiners providing for eleven specific items of detail to be supplied in make-ready work bills.¹¹

In light of the foregoing, Fibertech requests that the PUC add a new section, Puc 1303.13 in a final rule adoption which incorporates the above described elements and also explicitly addresses dispute resolution of complaints regarding make-ready costs, as provided below:

Puc 1303.13 Survey, Make-Ready Estimates and Make-Ready Charges

(a) Pole owners shall, at a minimum, provide attaching entities with the following information concerning estimated and actual charges for each pole in connection with cost reimbursement for make-ready work: (1) location of work (including specific poles involved); (2) type or types of work, (3) labor cost(s) per hour, type of personnel involved and number of hours involved; (4) type(s) of material(s) used, quantities and per unit cost for materials, and (5) for work that is done, the dates of the work and the identity of the employees involved should also be included.

(b) A pole attacher may seek the Commission's resolution of a dispute it may have with any charges identified in this rule pursuant to the procedures under Part Puc 1304. A pole attacher shall pay the pole owner all undisputed charges for work that is completed or to be completed and the pole owner shall not cease or otherwise delay prosecution of the work pending resolution of the dispute. The Commission may require the applicant to pay part or all of the disputed charges related to work that is completed or to be completed into escrow pending resolution.

C. Boxing of Poles

The Initial Proposal, at Puc 1303.10, permits the pole owner "to restrict the practice of boxing poles consistent with the restrictions it places on its own practice of

¹¹ NJ Board of Public Utilities, *I/M/O Office of Cable Television's Investigation into the Practices and Operations of CATV Companies and Certain Public Utilities Under Section 20 and 21 of the Cable Act*, Order (August 20, 1984), at 8. The hearing examiners recommended the following bill detail: (1) an indication of the specific poles worked on; (2) any explanation of what was done to each pole indicating the extent of an extraordinary work thereon; (3) an indication of which employees actually are being billed .. their loaded hourly rate and the actual time being billed for; (4) an indication of exactly what materials were necessary for the work and the rate they are being billed at; (5) an explanation of an extra-ordinary charges; (6) an indication, when performing make-ready work, as to what survey it is pursuant to; (7) an indication of the exact date the work was performed; (8) an indication when notice of the work was given, or why no such notice was given; (9) an indication whether subsequent work is anticipated on the pole; (10) an indication of the exact community in which the pole being worked on is located; and (11) an explanation of all billing done for another utility.

boxing poles as described in the company's written methods and procedures." Fibertech suggests that this proposed rule is unnecessarily restrictive and should be modified to permit boxing of poles when it is safe and demonstrably cost-effective.

The Maine PUC expressly rejected utility policies as the basis for its pole boxing policy. The PUC found that "the Verizon practice of prohibiting third party attachers from boxing poles except in the precise circumstances in which it boxes poles, is an unreasonable act and practice and discriminatory," and directed Verizon to allow the pole attacher to box poles consistent with the requirements of applicable codes but limited to circumstances in which the poles can be safely accessed by bucket trucks, ladders or emergency equipment.¹² This finding that utility policies limiting boxing is discriminatory recognizes that relying on individual utility policies will not bring about reasonable access to poles and tilts the competitive playing field against those attempting to build new networks.

The time and cost reductions brought about by the use of boxing is the primary reason why boxing should be allowed when it is safe. For example, the New Jersey Board of Public Utilities found that the boxing reduced the estimated costs to effectuate pole attachments in one case from \$2,100,000 to \$200,000.¹³

Fibertech suggests that the proposed rule can be read to be like the policy rejected in Maine -- a policy inextricably tied to the utilities' policies -- not one designed for a statewide policy to provide reasonable access to utility poles. Fibertech suggests the proposal should be rejected and requests that PUC adopt a rule permitting the boxing of

¹² ME PUC, *Re Oxford Networks f/k/a Oxford County Telephone*, Order On Reconsideration, Docket No. 2005-486, (February 28, 2007), *affirming, Re Oxford Networks* (October 26, 2006), *supra*.

¹³ *In the Matter of a Report on the Status of Construction by Shore Cable Company in Ventnor, Longport and Margate*, NJ BPU docket CE89050499, Order, pp. 4, 8-9 (October 4, 1991).

poles that is consistent with the policy adopted by the Maine PUC. Accordingly, Fibertech requests that the PUC, on final adoption, revised Puc 1303.10, to state:

Puc 1303.10 Boxing of Poles

Pole owners shall permit the practice of boxing poles where there is a demonstrable, substantial reduction in make-ready costs except that in no event shall the boxing of poles be permitted unless such boxing shall be safely accessible by bucket trucks, ladders or emergency equipment and otherwise consistent with the requirements of the applicable codes, including the National Electric Safety Code.

D. Breadth of Provisions & Non-discriminatory Treatment

At the public hearing on June 18, 2009 some commenters expressed concern over the breadth of Puc 1301.01. Fibertech simply suggests that the language of this section should, if revised, clearly encompass all “telecommunications carriers” and “cable television systems” as those terms are used in the Federal Pole Attachment Act, 47 U.S.C. § 224. Furthermore, in addressing the treatment of such entities, all provisions should provide for non-discriminatory treatment among them pursuant to 47 U.S.C § 224 (f).

The Initial Proposal, at Puc 1304.05 establishes different standards for determining just and reasonable rates for attachments of “competitive local exchange carriers and cable television service providers to poles owned by incumbent local exchange carriers or electric utilities,” Puc 1304.05(a), and for “all other attachments under this chapter,” Puc 1304.05(b), the difference being that for the latter, the PUC is not obligated to consider “the formulae adopted by the FCC in 47 CFR s 1.1409(c) through (f) in effect on July 16, 2007.” Puc 1304.05(a)(3). It is not clear why the FCC rate standards formulae should be considered only for attachments by CLECs and cable television companies. For example, an entity that is a telecommunications carrier under

the federal telecommunications statutes but that is not a CLEC under New Hampshire law would receive disparate treatment under this portion of the proposal. Fibertech suggests that the PUC, on final rule adoption, apply the rate review standards contained in Puc 1304.05(a) to at least all entities covered by the Federal Pole Attachment Statute.

CONCLUSION

Fibertech urges that the PUC alter the proposed rules as suggested above to provide for reasonable, non-discriminatory access to poles and conduit.

Respectfully submitted,

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June 24, 2009

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