COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

FIBER TECHNOLOGIES NETWORKS, LLC, f/k/a FIBER SYSTEMS, LLC,	)	
v.	)	
VERIZON NEW ENGLAND, f/k/a NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY	)	Docket No. 02-47
And	)	
NORTHEAST UTILITIES SERVICE COMPANY, d/b/a WESTERN MASSACHUSETTS ELECTRIC COMPANY	)	

OPPOSITION OF VERIZON MASSACHUSETTS TO MOTION OF FIBERTECH FOR RECONSIDERATION OF ORDER OF DISMISSAL WITHOUT PREJUDICE

The Department should deny Fibertech's Motion for Clarification and Reconsideration of the Department's December 24, 2002, Order dismissing Fibertech's Complaint in this proceeding without prejudice ("the Order"). The Motion is a frivolous attempt to reverse a well-reasoned decision of the Department that is fully supported on the merits. Fibertech has offered no new or previously unknown facts that might justify a second look at its Complaint. Indeed, the vast bulk of the Motion is devoted to arguing the alleged merits of Fibertech's case and the relative safety of Fibertech's unlawful pole attachments - issues that are in no way relevant to the decision embodied in the Order. Only the final three (of 16) pages of the Motion address, in cursory fashion, any of the fatal infirmities of the Complaint on which the Order rests. Finally,

Fibertech's objections to the Department's discussion of the "45 day rule," 220 C.M.R. §45.03, are without merit and should be ignored.

I. ARGUMENT

A. The Department's Standard of Review on Reconsideration.

The well-established standard of review for reconsideration of a Department decision is that the motion "should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered." *Boston Edison Company*, D.P.U. 90-270-A, at 2-3 (1991); *Western Massachusetts Electric Company*, D.P.U. 85-270-C, at 12-13 (1987). It should not attempt to reargue issues considered and decided in the main case. *Commonwealth Electric Company*, D.P.U. 92-3C-1A, at 3-6 (1995); *Boston Edison Company*, D.P.U. 90-270-A, at 3 (1991). Rather,

> [r]econsideration of previously decided issues is granted only when extraordinary circumstances dictate that the Department take a fresh look at the record for the express purpose of substantively modifying a decision made after review and deliberation. *Id.*

Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. *Massachusetts Electric Company*, D.P.U. 90-261-B, at 7 (1991); *New England Telephone and Telegraph Company*, D.P.U. 86-33-J, at 2 (1989); *Boston Edison Company*, D.P.U. 1350-A, at 5 (1983). It is also appropriate where parties have not been "given notice of the issues involved and accorded a reasonable opportunity to prepare and present evidence and argument" on an issue decided by the Department. *Re: Petition of CTC Communications Corp.*, D.T.E. 98-18-A, at 2, 9 (1998).

B. Fibertech's Motion Must Be Denied Because It Does Not Satisfy the Applicable Standard for Reconsideration.

The Order states three reasons for dismissing the Complaint. First, the Department found that the Complaint fails to meet the pleading requirements of 220 C.M.R. 45.02. That rule

mandates that a complaint "identify specific poles to which access had been denied or effectively denied, or must identify specific attachment rates, terms, or conditions claimed not to be just and reasonable." Order at 4. Fibertech's Complaint and supporting documents, however, fail to "form a clear and concise statement of *which* poles are in dispute, or *which* rates, terms, or conditions [of attachment] are being challenged." *Id*. at 5 (emphasis in original). Second, the Department held that under any statement of facts, it cannot grant the generalized requests for relief contained in the Complaint. Finally, the Department found that the injunction entered by the Hampden County Superior Court on August 19, 2002, renders moot Fibertech's requests for injunctive relief. *Id*. at 6.

The Motion offers no grounds for reconsidering any of these rulings. Nowhere does the Motion point to any "previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered," nor does Fibertech describe any "extraordinary circumstances" that would dictate a fresh look at the record. Instead, Fibertech's chief argument for reconsideration seems to be that the Order "appears premised, in significant part" on the Superior Court's finding that Fibertech's pole attachments pose a safety hazard to the public, a finding which is alleged to "infuse the entire Order." Motion at 2. Fibertech devotes eight pages of the Motion to contesting the court's decision. *Id*. at 2-9.

Fibertech's claims are clearly wrong. The Department's findings that the Complaint fails to state a claim with sufficient particularity and fails to seek appropriate relief do not depend in any way on whether Fibertech's unlawful attachments are safe. A finding that Fibertech's unlawful attachments were made in a safe manner would do nothing to rectify the failure of the Complaint to identify a single pole to which Fibertech was denied access or identify an alleged unjust attachment rate or term. Not surprisingly, Fibertech makes no attempt to explain its

fanciful connection between the safety of its unlawful attachments and the pleading flaws of its Complaint.[1]

Only in the last three pages of the Motion does Fibertech finally address the Department's finding that the Complaint fails to identify the specific poles, rates and/or terms for which Fibertech seeks relief.[2] Fibertech, however, does not point out any allegations of the Complaint that satisfy this requirement. Amazingly, Fibertech does not even identify any such particular poles, rates or terms in the Motion itself. Fibertech argues only that the poles at issue are identified in pole attachment applications (Motion at 14), which were allegedly included in what the Department properly characterized as "a hodge-podge of un-indexed correspondences, application forms, payment invoices and other documents." Order at 5. In effect, Fibertech is saying that it doesn't want to put forth the effort necessary to glean the required information from its mass of documents and would like the Department to do that work for it. Fibertech takes a similar approach to the requirement that it identify specific unjust or unreasonable rates and terms, claiming that it would be too difficult to identify even a single such rate or term because the "Respondents' entire process" is objectionable (Motion at 14), and because the Respondents' conduct allegedly "prevents a detailed recounting of each situation in the Complaint." *Id*. at 15. The Department should reject Fibertech's specious attempts to foist off on the Department or the Respondents the responsibility to identify the specific factual support for its Complaint. Under the Department's rules, that responsibility rested squarely on Fibertech. In short, Fibertech points to no mistake that the Department made or new evidence it should look

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[1] As to the merits of Fibertech's attack on the court's decision, Verizon MA points out that Fibertech raised similar arguments in its Motion for Modification and Clarification and/or Reconsideration of Preliminary Injunction dated August 29, 2002, which the court denied. Fibertech obviously knows that the court, not the Department, is the proper forum in which to contest the court's decision.

[2] The Motion does not address, respond to or even mention the Department's findings that it cannot grant the relief sought in the Complaint, and for that reason alone must be denied.

at that would warrant reconsideration of the Order, but simply disagrees with the Department's determination. This is not a ground for reconsideration.

C. The Department's ruling that a pole attachment request is not "deemed granted" if a written denial is not issued after 45 days is correct and appropriate, and Fibertech has offered no proper grounds for reconsidering that ruling.

On page 7 of the Order, the Department noted that "there is nothing in our Pole Attachment Regulations to suggest that a pole attachment request is 'deemed granted' if a written denial is not issued after 45 days pursuant to 220 C.M.R. §45.03." Fibertech takes exception to this ruling, arguing that it is contrary to an FCC interpretation of a similar federal rule, would make bad policy, and is not appropriate in this proceeding. *See* Motion at 9-12. Fibertech's arguments are completely meritless, and afford no grounds for withdrawing the Department's decision.

To begin with, Fibertech's position that a pole attachment request is deemed granted if not denied by the pole owner within 45 days simply has no basis in the wording of 220 C.M.R. 45.03(2). That regulation states, in relevant part, that "If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day." Clearly, nothing in this language purports to grant requests for pole attachments by operation of law, under any circumstances. Contrary to Fibertech's suggestion, the Department did not err in interpreting its own rules.

Moreover, Fibertech's reliance on the FCC regulation at 47 C.F.R. §1.1403(b) and on *Cavalier Telephone, LLC v. Virginia Electric & Power Co.*, 15 F.C.C.R. 9563 (2000), Motion at 9-10, is misplaced. Fibertech's argument is simply a rehashing of its Complaint, ¶20, and thus is not an appropriate basis for reconsideration. *See Commonwealth Electric Company*, D.P.U. 92-3C-1A, at 3-6 (1995). In addition, the Superior Court has already rejected this argument. In

finding that Fibertech attached its facilities to Verizon MA's poles "without right to do so," the Court held that "Nothing in *Cavalier* supports Fibertech's conclusion that a licensor's failure to comply with the forty-five day rule entitles a licensee to enter upon property of the licensor and to make attachments to the licensor's poles ...." Memorandum of Decision on Plaintiffs' Motions for Preliminary Injunction, Exhibit 3 to Answer of Verizon Massachusetts, at 4-5.

Equally frivolous is Fibertech's argument that unless pole attachment requests are deemed granted after 45 days, utilities will intentionally delay license applications in order to "maintain market power," thereby threatening the continued deployment of competitive facilities. *See* Motion at 10. Fibertech has offered no evidence in support of its speculation, and Verizon MA submits that the dearth of proceedings before the Department alleging bad faith delay in granting pole applications shows that it is unwarranted. More importantly, Fibertech's own conduct in this case demonstrates that the best way to create chaos on the state's utility poles is to allow pole license applicants to decide for themselves when their applications have become stale and then attach their facilities wherever and in whatever manner they see fit. The Department's ruling against self-help in such situations is the only proper and responsible one, and should not be disturbed.

Finally, the Department's statement on the "45 day rule" is appropriately included in the Order. Fibertech's Complaint rests on the suppositions that failure to grant a pole attachment request in timely fashion does indeed result in the request being "deemed granted," and that Verizon MA's alleged delays in granting Fibertech's requests authorized Fibertech to attach its fiber to 700 of Verizon MA's poles without prior written permission. *See* Complaint ¶¶20-24. Because the dismissal of Fibertech's Complaint is without prejudice, the Department furthers the interests of administrative efficiency by narrowing the issues in dispute as much as reasonably

possible, in this case by providing guidance on the meaning of 220 C.M.R. §45.03. Withdrawing that guidance now, as Fibertech proposes, will only encourage needless further proceedings.

II. CONCLUSION

Fibertech's Motion for Clarification and Reconsideration – indeed Fibertech's entire case – is nothing more than a desperate attempt to evade the consequences of its own illegal conduct and breach of contract. The Department should not assist Fibertech in that effort and should deny its Motion for the reasons states above.

VERISON NEW ENGLAND INC.
d/b/a VERIZON MASSACHUSETTS

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