COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

FIBER TECHNOLOGIES NETWORKS, L.L.C. f/k/a FIBER SYSTEMS, LLC 140 Allens Creek Road Rochester, New York 14618 Complainant, v. VERIZON NEW ENGLAND, f/k/a NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY 185 Franklin Street, Room 1403 Boston, Massachusetts 02110 and NORTHEAST UTILITIES SERVICE COMPANY d/b/a WESTERN MASSACHUSETTS ELECTRIC CO. 107 Selden Street Berlin, Connecticut 06037 and MASSACHUSETTS ELECTRIC COMPANY 55 Bearfoot Road Northborough, Massachusetts 01532 Respondents.	**HEARING REQUESTED** D.T.E. 02-47

AMENDED COMPLAINT
AND
PETITION FOR DECLARATORY RELIEF
(Interim Relief Requested)

Fiber Technologies Networks, L.L.C., f/k/a Fiber Systems, LLC ("Fibertech") makes this Complaint against Verizon New England, f/k/a New England Telephone and Telegraph Company ("Verizon"), Northeast Utilities Service Company d/b/a Western Massachusetts Electric Co.

("WMECO"), and Massachusetts Electric Company ("MECO") pursuant to G.L. c. 166, § 25A, and 220 C.M.R. §§ 45.03 and 45.04, seeking temporary and permanent relief from Respondents' discriminatory, anti-competitive and otherwise illegal actions as described below:

I. SUMMARY

1. Verizon, Western Massachusetts Electric Company ("WMECO"), and Massachusetts Electric Company ("MECO") (collectively "the utilities" or "Respondents") own and control poles and conduits that are essential facilities for the construction of competitive telecommunications networks. Regulations of the Department of Telecommunications and Energy ("DTE" or "Department") require the utilities to make these facilities available for use by competitive telecommunications companies.

2. Instead, Verizon, WMECO, and MECO -- acting at times in apparent concert -- have engaged in a nearly three-year process of obstructing Fibertech's efforts to deploy a broadband, fiber-optic network via the Respondents' poles and conduits in and around Springfield, Massachusetts, through a series of delays, unreasonable and discriminatory terms and conditions, and tactical litigation. This is classic anticompetitive conduct calculated to raise a competitor's costs and exclude competition. In fact, this conduct has delayed and diminished construction of facilities for use by competitive telecommunications providers or Internet service providers that seek an alternative to the facilities of Verizon and the WMECO and MECO telecommunications affiliates[1] from which to provide service in the local market. It is surely no coincidence that, while Verizon has been lobbying aggressively and successfully the Federal Communications Commission to require that competitors obtain access to any new broadband facilities from a source other than the incumbent LEC, it simultaneously has been

[1] Upon information and belief, MECO is affiliated with NeesCom, a telecommunications provider. Upon information and belief, WMECO's parent, Northeast Utilities System, is a major shareholder of Northeast Optical Networks

seeking to drive Fibertech's open-access broadband facilities from the marketplace. Verizon's two-pronged campaign to take broadband facilities out of the unbundled network elements available to competitors, on the one hand, and to obstruct deployment of broadband facilities by competitors in Massachusetts, on the other, constitutes a sure strategy -- if tolerated -- to protect the utilities' joint monopoly over the local telecommunications marketplace.

3. Fibertech sought to gain access to utility poles and conduit in the Springfield marketplace by following the utilities' process for licensing such facilities for nearly two years. During that time the utilities subjected Fibertech to unlawful delays in responding to Fibertech's license applications. Although the Department's regulations require such responses within 45 days of submission of a license application, Verizon's responses to Fibertech's initial pole applications were provided between 169 and 360 days after submission of the applications. MECO's responses to Fibertech's initial pole applications were rendered between 185 and 542 days after submission of the applications. WMECO did not respond to Fibertech's initial pole applications for 389 days.

4. The utilities' responses to Fibertech's pole license applications, when received, included numerous unreasonable and discriminatory charges, terms, and conditions. The "make-ready estimates", through which the utilities set forth the make-ready work required to be performed as a pre-condition of attaching and identify who will be required to pay for such work, identified much unnecessary and expensive work and required that Fibertech pay for all, or virtually all, of it. For example, they required that Fibertech pay to replace many poles that would be able to accommodate Fibertech's cable simply through the lowering of existing communications lines (as make-ready paid for

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("NEON"), which is a telecommunications provider. Both NeesCom and NEON compete against Fibertech.

by Fibertech). They also required that work that was necessary to correct pre-existing conditions on the poles and therefore was lawfully chargeable to the owners of the non-compliant facilities instead be paid for by Fibertech. In addition, they unlawfully imposed highly burdensome costs on Fibertech by holding it to more stringent construction standards than they applied to themselves or other attachers. For example, they prohibited Fibertech from "boxing" poles,[2] even though Verizon, the power companies, and other attachers have used this significant cost-saving measure for years. They also required that the clearance guidelines provided by the National Electric Safety Code ("NESC") and other relevant construction codes be satisfied exactly by Fibertech's installation, even though they did not adhere to the same guidelines when installing their own equipment or directing the installation of other attachers' equipment. Such discriminatory enforcement of stricter construction rules against a competitor violated the Department's December 28, 2001, ruling in D.P.U./D.T.E. 97-95, wherein the Department held:

> The NESC … remains a voluntary standard in Massachusetts. If adopted by a utility, the NESC must be applied in a non-discriminatory manner.[3]

5. The utilities' responses to Fibertech's license applications, although replete with unreasonable and discriminatory make-ready demands, did not include explicit licenses for those poles for which Fibertech had applied and for which no make-ready work was required.

6. As a result of the unlawful make-ready demands and charges, the make-ready costs demanded from Fibertech for access to poles in the Springfield area averaged over $25,000 per mile of pole plant. This figure compares unfavorably to the make-ready cost experienced by Fibertech as it

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[2] Boxing entails attaching a cable to the opposite side of the pole from that to which the majority of other cables are attached. This technique permits a company to attach even though inadequate space exists on the pole side where the majority of attachments are located and thereby enables the company to avoid the burdensome cost of replacing the pole and paying for the transfer of all other facilities to the new pole.

[3] *Investigation by the Department of Telecommunications and Energy, on its own motion, into Boston Edison Company's compliance with the Department's Order in D.P.U. 93-37,* D.P.U./D.T.E. 97-95, p. 113.

built its aerial backbone network in Connecticut, which averaged less than $3,600 per mile. In Connecticut the pole owners apply the same construction and cost-allocation standards to Fibertech as they do to themselves and other attachers.

7. The utilities' delays in responding to Fibertech's initial pole license applications made it unavoidable that Fibertech would not be able to complete its Springfield network within the planned timeframe and thereby ensured that Fibertech would fail to meet its revenue projections. Due to the resulting revenue shortfalls and the unexpectedly high per-mile cost of construction stemming from excessive make-ready bills, Fibertech was forced to reduce the size of its planned network. It therefore had to cancel numerous pole applications and submit new applications for new, shorter route segments.

8. By forcing Fibertech to downsize its network through delay and excessive make-ready charges, the utilities prevented Fibertech from extending broadband connectivity to numerous Massachusetts communities, including Ludlow, Palmer, Ware, Belchertown, and Amherst, that were on Fibertech's originally planned network route. Attached to this Complaint as Exhibit A is a map showing Fibertech's existing facilities in western Massachusetts and Connecticut and its originally planned western Massachusetts network. As is apparent from the map, this intended network was significantly larger than the network that Fibertech currently is attempting to complete. The map also underscores the difference in magnitude of the networks Fibertech has been able to build in Connecticut and in western Massachusetts. Fibertech has deployed approximately 400 route-miles of aerial fiber-optic plant in Connecticut during the same period of time it has been unsuccessfully attempting to complete 20 route-miles of aerial plant attached to utility poles in the Springfield area. These differences are the

product of nondiscriminatory pole access in Connecticut compared to exclusionary practices in Massachusetts.

9. Fibertech's efforts to build a competitive network in the Springfield area was obstructed not only by the utilities' pole attachment licensing practices but also by Verizon's policies and procedures relating to licensing of conduit. These policies are inexplicable on any basis other than Verizon's incentive to prevent, or delay and burden, the construction of competitive facilities. Verizon failed on numerous occasions to respond to Fibertech's conduit license applications within the 45 allowed by the Department's rules. More significantly, it completely eviscerated the 45-day rule by combining: (1) a requirement that when Fibertech wished to lease conduit connecting two locations, Fibertech specify the precise conduit route it wished to occupy; and (2) a refusal to provide Fibertech with information regarding which conduit routes had capacity available for licensing. Verizon thereby forced Fibertech to engage in a serial guessing game as to where the available conduit might be, with each wrong guess triggering new applications, together with the fees and prolonged delays involved in each application. (AT&T previously has termed this process Verizon's game of "Go Fish".)[4] Verizon also has made its process for responding to competitors' requests for conduit access unduly expensive and time-consuming by canceling applications if make-ready cost estimates are not paid within specified periods even when it is withholding information as to whether an adjoining conduit section that the applicant needs is available. As unavailability of the adjoining section renders the first section useless, the

[4] The FCC has ruled that, where the FCC governs access to conduit, owners may not withhold information as to the availability of conduit. *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, Paragraph 1223 (rel. Aug. 8, 1996) ("Local Competition Order"); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Order on Reconsideration, FCC 99-266, CC Docket No. 95-185, Paragraph 107 (rel. Oct. 26, 1999) ("Reconsideration Order"). *See also Application of Bellsouth Corporation*, FCC 98-271 (rel. October 13, 1998) at Paragraph 180 (stating that "Access to maps and similar records is crucial for competitors who wish to utilize [ILEC] facilities and need information about the location and functionalities of such facilities").

competitor is forced to choose between potentially throwing away its money for possibly valueless make-ready work on the first section or accepting cancellation of that application and starting the dilatory and expensive application process again from scratch if the adjoining segment turns out to be available. When a competitor that has had its conduit application cancelled due to its unwillingness to bet money that the adjoining conduit section will be available learns that the adjoining section is available and therefore re-applies to license the first conduit section, Verizon requires that it again pay the fee for searching to determine whether that first conduit is available. The fee is demanded even when the previous search occurred only months before, there have been no other conduit applications submitted in the area since then, and, consequently, there is no possibility that the conduit is not still available. Based on Fibertech's experience, Verizon's fee for searching the availability of conduit averages approximately $2.30 per foot, or approximately $12,000 per mile. Like the "Go Fish" guessing game to which Verizon subjects competitors, this imposition of heavy, unnecessary costs underscores the anticompetitive motivation underlying Verizon's pole and conduit licensing practices generally.

10. After approximately two years of the utilities' roadblocks, Fibertech had paid the utilities $918,912 for pole and conduit surveys and make-ready work associated with its intended Springfield-area network and was not expressly authorized to attach to any poles. This sum included over $155,000 paid to Verizon for pole make-ready work. The utilities refused to issue pole licenses unless Fibertech agreed to pay additionally approximately $74,000 to Verizon for pole make-ready work, approximately $231,000 to WMECO for such work, and approximately $85,000 to MECO.

11. As a result of the utilities' delays and unreasonable terms and conditions, Fibertech faced the loss of a critical customer due to Fibertech's inability to deliver connectivity over a Springfield-area

network by the contractual deadline and therefore also faced the potential loss of its funding. On June 20 and 21, 2002, in order to deliver service to its customer and preserve its funding, Fibertech installed facilities on poles owned by the Respondents. Fibertech did so in a safe manner consistent with industry practice. In order to maintain sufficient clearance between facilities, Fibertech used extension arms on many poles. It attached these arms using lag bolts, which typically are employed to accommodate the performance of additional make-ready work. Both the New York State Department of Public Service and Verizon managers administering the company's pole plant in New York State have approved the use of such lag-bolted extension arms in order to attach facilities prior to the performance of make-ready work. Fibertech used lag-bolted extension arms in the Springfield area in order to meet its contractual commitment and preserve its funding while, at the same time, leaving open the questions of make-ready work and cost allocations for resolution by the parties or the Department.[5]

12. On June 22, 2002, Fibertech informed Verizon that it had installed its fiber-optic cable in the Springfield area and suggested that the parties either attempt to address their differences informally or request intervention by the DTE to determine appropriate make-ready charges and to resolve other issues. Verizon agreed to discuss respective concerns informally but then reneged on that offer and avoided the DTE's scrutiny by filing a complaint in state court in Springfield. There, Verizon and WMECO sought to exploit the court's unfamiliarity with pole attachment issues by seeking an order directing Fibertech to dismantle its network, relying on sworn testimony revealed to Fibertech only

[5] The FCC has ruled, based on the same 45-day rule as the Department has adopted, that a license will be "deemed granted" when no response to a license application has been received within the 45-day period. *See*, Cavalier Telephone, LLC v. Virginia Electric and Power Co., 15 F.C.C.R. 9563, Paragraph 15 (rel. June 7, 2000) ("Cavalier"). The Department has not adopted a similar interpretation of the 45-day rule. In Cavalier, the utility was required, upon the license having been deemed granted, to allow the license applicant to attach "permanently or temporarily, without causing a safety hazard". The means of attaching safely prior to the performance of make-ready work is to employ a lag-bolted extension arm, as Fibertech did in Springfield, to achieve the twin goals of safe installation, with adequate clearances, and accommodation of future performance of make-ready work. The combination of a "deemed granted" rule and the ability to use lag-bolted extension arms affords a competitor an opportunity to avoid the "squeeze" that the utilities otherwise exert, whereby they confront the competitor with the practical choice of succumbing to their

hours before the "emergency" court hearing which claimed that each instance of several sorts of conditions allegedly created on the poles by Fibertech's installation "**present[s] an immediate threat of death or severe bodily injury** to employees of WMECO and other companies coming in proximity to such lines to service their equipment, and present[s] safety issues to the public at large" (emphasis supplied). These utilities stridently and successfully argued that, due to the purported immediate threat of death and severe bodily injury, the judge should not act on his stated inclination to give Fibertech time to answer the charges. As a result, Fibertech was ordered to remove its network or pay Verizon $400,000 to correct certain allegedly threatening conditions supposedly created by Fibertech on poles owned in whole or part by WMECO and Verizon. Fibertech later agreed, as a condition of withdrawal of MECO's court petition seeking the immediate dismantling of Fibertech's facilities in Northampton, to pay MECO $59,000 for correction of certain conditions.

13. The "life-threatening" conditions claimed by WMECO and Verizon were of four fundamental types: (1) location of the fiber line closer than 40 vertical inches from electric facilities at the pole; (2) location of the fiber line closer than 30 vertical inches from the secondary electric line at mid-span; (3) the use of extension arms; and (4) the use of boxing (even on poles that had already been boxed by Verizon, WMECO, or another attacher). The vast majority of the instances in which the Fibertech line and electric facilities were alleged to be separated by less than 40-inches were imaginary in that Fibertech's line was not actually closer than 40 vertical inches from the electric facilities but simply could have been closer if Fibertech had not used an extension arm. WMECO and Verizon prohibited Fibertech from increasing the mid-span separation between its cable and the electric secondary line, even though Fibertech's contractor that had installed the cable had agreed to perform this simple task (using extra cable contained in expansion loops) without additional charge.

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unlawful make-ready demands or failing to install facilities for a prolonged and possibly fatal period of time.

14. The utilities' actions before the state court constitute another instance of discriminatory application of construction codes, in direct contravention of the Department's ruling in D.P.U./D.T.E. 97-95. An independent expert retained by Fibertech recently completed a survey of 2,324 poles to which Fibertech is not attached in the Springfield area. The survey, which is attached to this Complaint as Exhibit M reveals that 1,149 or **49.4 % of these poles contain conditions of the very sort that the utilities informed the court "present an immediate threat of death or severe bodily injury".** Therefore, if the sworn court testimony on which the utilities relied in their effort to dismantle Fibertech's competitive broadband facilities is true, this survey of nearly 60 miles of pole plant demonstrates that the utilities themselves are threatening workers and the public in western Massachusetts with immediate death or bodily injury on virtually every block on which they have installed aerial facilities. Given that Verizon, WMECO, and MECO own and control poles through much of Massachusetts, Fibertech believes that such conditions exist widely throughout the Commonwealth.

15. That nearly half of the pole plant in the Springfield area reflects conditions identified to the court as a basis for immediately dismantling Fibertech's network and that the utilities took over six months to correct what they claimed were immediate threats demonstrates that the utilities' claims of danger were false and served as a pretext for their actual, anticompetitive aims. To conclude otherwise would mean that the utilities and the Department are faced with a safety problem requiring immediate correction at a cost that likely would amount to billions of dollars.

16. Despite the fact that the $400,000 paid by Fibertech to Verizon to correct the allegedly

life-threatening conditions created by Fibertech on Verizon and WMECO poles exceeded the $305,000 cost of the additional make-ready work earlier identified by these utilities as necessary to fully accommodate Fibertech's attachment (based on the utilities' discriminatory and excessive make-ready demands and unlawful allocations of the cost of that work), Verizon and WMECO have reported to Fibertech that they spent all of the $400,000 paid pursuant to the court order, simply to correct the purportedly serious safety violations. Because Fibertech used lag-bolted extension arms that permit the performance of make-ready work without additional cost (other than for the removal of the 233 arms used, at a total cost of $6,990, based on the rates charged by WMECO's contractor), there was no legitimate reason for spending more than the already excessive $305,000 previously identified plus the $6,990 for arm removal. The unnecessary expenditure of an additional $88,000 above and beyond the unreasonable and discriminatory sums already charged underscores Verizon's and WMECO's apparent continuing purpose of using the litigation to burden and obstruct Fibertech's attempted market entry. In contrast to Verizon's and WMECO's decision to spend all of the money Fibertech paid to Verizon pursuant to court order, MECO has returned to Fibertech $58,719.00 of the $59,000 paid by Fibertech for the correction of alleged safety hazards on MECO poles, having spent only $281.00.

17. Each Respondent has purported to terminate or expressed an intention to terminate the pole attachment agreement entered into between it and Fibertech. Because such agreements establish the contractual right of Fibertech to occupy poles throughout the utilities' service territories in Massachusetts, the termination of the agreements threatens the ability of Fibertech to maintain and operate its open-access fiber-optic networks in both the Springfield and Worcester markets and would prevent Fibertech from deploying broadband facilities elsewhere in the Commonwealth.

18. As indicated by this Complaint, the utilities have erected significant barriers to the deployment of competitive telecommunications facilities through their practices that delay installation of such facilities on poles and in conduits and impose unnecessary costs. The threat to competition presented by these barriers will increase dramatically when Verizon is freed from the obligation to make available to competitors the broadband facilities that Verizon deploys. By using its control over the pole and conduit facilities essential to deployment of wireline facilities, Verizon will be able to control the speed, cost, and overall success of the fiber installation efforts of itself and its competitors. Without strict enforcement of rules pertaining to pole and conduit licensing practices, including the fundamental principle of nondiscrimination, the winner of the impending race to reach customers with new, broadband facilities will be predetermined, and competition will wither.

II. PARTIES

19. Complainant Fibertech is a New York limited liability company with a principal place of business at 140 Allens Creek Road, Rochester, New York. Fibertech is a telecommunications service provider and has filed with the DTE a Statement of Business Operations. The DTE has approved Fibertech's tariff. Fibertech has completed "backbone" fiber-optic networks connecting incumbent local exchange company ("ILEC") central offices and points of presence of competitive local exchange companies ("CLEC's"), interexchange carriers ("IXC's"), Internet service providers ("ISP's"), and wireless telecommunications providers in 10 markets outside of Massachusetts and is expanding those networks to reach numerous end-user customers that desire direct broadband connectivity with virtually unlimited capacity at low cost. Fibertech is seeking to complete similar backbone networks in and around Springfield and Worcester, Massachusetts. It is offering, initially, dark fiber for use by

communications carriers (CLECs, ISPs, IXCs, ILECs, and wireless providers), educational and governmental institutions, and businesses. As market conditions and economics dictate, Fibertech intends to supplement these offerings with additional services including local exchange voice and data services throughout the service territory of Verizon and long distance services throughout the Commonwealth of Massachusetts. Access to poles and conduits owned by Verizon and electric companies is essential to allow Fibertech to develop its network, because it is impractical to attempt to obtain governmental authority to install duplicative lines of poles. Utility poles and conduits are essential facilities to Fibertech's successful deployment of competitive broadband telecommunications networks. Successful deployment of competitive broadband telecommunications networks is an essential element of a competitive telecommunications marketplace in Massachusetts, especially in light of the stated intention of the FCC to permit ILEC's to withhold from competitors access to new broadband facilities they may construct.

20. Upon information and belief, Respondent Verizon is the ILEC in the Springfield, Massachusetts, metropolitan area with a principal place of business at 185 Franklin Street, Boston, Massachusetts. Verizon provides communications and Internet access service.

21. Upon information and belief, Respondent WMECO is an electric utility company providing electricity to certain portions of Massachusetts (including all or part of the Springfield, Massachusetts metropolitan area) with a principal place of business at 107 Selden Street, Berlin, Connecticut.

22. Upon information and belief, Respondent MECO is an electric utility company providing electricity to certain portions of Massachusetts (including all or part of the Springfield, Massachusetts

metropolitan area) with a principal place of business at 55 Bearfoot Road, Northborough, Massachusetts.

23. Upon information and belief, WMECO is a subsidiary of Northeast Utility System, which is a major shareholder of Northeast Optical Networks ("NEON"). NEON and Fibertech compete against each other.

24. Upon information and belief, MECO is affiliated with NeesCom, a telecommunications provider. NeesCom and Fibertech compete against each other.

III. JURISDICTION

25. Respondents are utilities regulated by G.L. c. 166, § 25A, and 220 C.M.R. 45.00, *et seq*.

26. Respondents use and/or control, in whole or in part, poles or conduits which are used or designated for attachments where Fibertech has sought to install its fiber.

27. As a telecommunications provider within the meaning of 47 U.S.C. § 224, and a common carrier within the meaning of G.L. c. 159 § 12, Fibertech is a person, firm or corporation authorized to construct lines along, under and across public ways and, as such, constitutes a "licensee" within the meaning of G.L. c. 166, § 25A, and 220 C.M.R. 45.02. Accordingly, Fibertech is entitled

to nondiscriminatory access to Respondents' poles and conduits.

28. Fibertech has requested access to Respondents' poles and conduits for the installation of its Fiber.

29. The Department has jurisdiction over this Complaint and over Respondents pursuant to G.L. c. 166, § 25A and the regulations promulgated thereunder by the DTE at 220 C.M.R. § 45.00, *et seq*. (the "DTE Regulations").

IV. STATEMENT OF FACTS

A. Pole Agreements

30. Fibertech entered into a pole attachment agreement with Verizon on or about March 7, 2000, a true and accurate copy of which is attached hereto as Exhibit B, and entered into a conduit agreement with Verizon on or about June 6, 2000, a true and accurate copy of which is attached hereto as Exhibit C. Fibertech began requesting to install Fiber on and in Verizon's Bottleneck Facilities in 2000.

31. Fibertech entered into a pole attachment agreement with Verizon and WMECO on or about March 31, 2000, a true and accurate copy of which is attached hereto as Exhibit D. Fibertech initially requested to install Fiber on WMECO's poles in 2000.

32. Fibertech entered into a pole attachment agreement with MECO on or about March 17, 2000, a true and accurate copy of which is attached hereto as Exhibit E. Fibertech initially requested to install Fiber on MECO's poles in 2000.

B. Delays in Processing License Applications

33. Pursuant to the DTE Regulations, Respondents were required to either allow Fibertech access to their bottleneck facilities within forty-five (45) days after Fibertech's requests or provide a written denial of access to Fibertech by the 45th day specifying all relevant information supporting its denial and explaining how such information relates to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards. *See* 220 C.M.R. § 45.03(2) (the "45-day rule"). Additionally, in Verizon's testimony in support of its Section 271 Application in Massachusetts, Verizon committed to either issue licenses or provide make-ready estimates within 45 days after receiving pole applications. *See Supplemental Comments of Bell Atlantic-Massachusetts to Mass. DTE Evaluation of Verizon-Massachusetts Section 271 Application* (May 26, 2000) at Pages 39 and 41, fn. 22 (referencing *Application of Bellsouth Corporation*, FCC 98-271 (rel. October 13, 1998) at Paragraph 177).

34. Among the 21 applications submitted to Verizon on July 17, 2000, Verizon responded to 2, with make-ready estimates, after 169 days[6]; responded to responded to one after 178 days;

[6] In contrast to practice in other states, the utilities in Massachusetts have created an additional step in the licensing process by first responding to a pole or conduit application with an invoice informing the applicant of estimated survey costs. They will not perform the survey until they receive the amount cited. In New York State and elsewhere, the survey charge is a flat fee and is paid with the initial application, thereby rendering the process more efficient. (Although the survey costs vary slightly, Verizon's charges in Massachusetts typically average approximately $28 per pole; in New York, Verizon charges $7.50 per pole.) The utilities' response times set forth in this complaint are calculated by counting the days from submission of the license application to receipt of the make-ready estimate and then subtracting from that total the number of days from Fibertech's receipt of the survey cost

responded to 2 after 217 days; and responded to 3 others after 276, 280, and 360 days, respectively. The other 13 applications submitted to Verizon on July 17, 2000, were canceled by Fibertech on February 8, 2001, March 7, 2001, March 28, 2001, and May 23, 2001, before Verizon responded. Of the 21 applications submitted to Verizon on July 17, 2000, Fibertech eventually canceled 18 because licensing delays had reduced the revenue projections for the Springfield network and the make-ready estimates that had been received were extraordinarily high. Among the 4 applications for pole licenses submitted to WMECO on July 17, 2000, WMECO responded to 2, after 389 days. Fibertech canceled the other 2 on March 7, 2001, and May 23, 2001, before WMECO submitted a response. Of the 18 pole applications submitted to MECO on July 17, 2000, MECO responded to 2 within 185 days, responded to 2 others within 207 days, and responded to 3 applications within 325 days. It had not responded to the other 11 applications by the time Fibertech cancelled them due to expected revenue shortfalls and higher than expected make-ready costs, on February 8, 2001, March 7, 2001, March 28, 2001, May 23, 2001. Fibertech had paid $84,043.28 to Verizon, WMECO, and MECO for pole surveys relating to the applications filed on July 17, 2000, and subsequently canceled due to higher-than-expected make-ready costs and anticipated revenue shortfalls resulting from licensing delays.

35. Attached as Exhibit F is a list of the poles to which Fibertech attached its facilities in the Springfield area.[7] The poles are grouped according to application, and the dates of the application and the time it took the utility to respond are shown. The average period of time it took the utilities to respond to all applications to which a response was made before the application was canceled was 162 days. Exhibit G contains copies of Fibertech's applications and the utilities' responses relating to these

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estimate and its payment of that estimate.

[7] 772 poles are listed. The difference between this number and the number of 767 poles generally used stems from

poles.

36. As detailed below, the utilities' responses to Fibertech's pole applications that imposed as a condition of licensure that Fibertech pay for make-ready work that Fibertech could not legally be required to pay did not include express licenses for any poles identified as requiring no work.

37. Verizon's policies and procedures relating to licensing of conduit also obstructed Fibertech's efforts to deploy its Springfield network. Verizon failed on numerous occasions to respond to Fibertech's conduit license applications within the 45 allowed by the Department's rules. More significantly, it completely eviscerated the 45-day rule by combining: (1) a requirement that when Fibertech wished to lease conduit connecting two locations, Fibertech specify the precise conduit route it wished to occupy; and (2) a refusal to provide Fibertech with information regarding which conduit routes had capacity available for licensing. Verizon thereby forced Fibertech to engage in a serial guessing game as to where the available conduit might be, with each wrong guess triggering new applications, together with the fees and prolonged delays involved in each application. (AT&T previously has termed this process Verizon's game of "Go Fish".)[8]

38. Verizon also has enforced against Fibertech a policy whereby it cancels conduit applications if make-ready cost estimates are not paid within specified periods even when it is withholding information as to whether an adjoining conduit section that the applicant needs is available.

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the fact that the 772 poles includes guy poles as well as poles holding Fibertech's cable.

[8] The FCC has ruled that, where the FCC governs access to conduit, owners may not withhold information as to the availability of conduit. *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, Paragraph 1223 (rel. Aug. 8, 1996) ("~~Local Competition Order~~"); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Order

As unavailability of the adjoining section renders the first section useless, the competitor is forced to choose between potentially throwing away its money for possibly valueless make-ready work on the first section or accepting cancellation of that application and starting the dilatory and expensive application process again from scratch if the adjoining segment turns out to be available. When a competitor that has had its conduit application cancelled due to its unwillingness to bet money that the adjoining conduit section will be available learns that the adjoining section is available and therefore re-applies to license the first conduit section, Verizon requires that it again pay the fee for searching to determine whether that first conduit is available. The fee is demanded even when the previous search occurred only months before, there have been no other conduit applications submitted in the area since then, and, consequently, there is no possibility that the conduit is not still available. Based on Fibertech's experience, Verizon's fee for searching the availability of conduit averages approximately $2.30 per foot, or approximately $12,000 per mile.

C. Utilities' unreasonable and discriminatory make-ready demands

39. Once Respondents finally responded to Fibertech's requests for access to poles, Respondents issued egregiously expensive make-ready estimates that were discriminatory and unreasonable. The utilities demanded that Fibertech pay for the performance of make-ready work that was not necessitated by Fibertech's proposed attachments. Much of the work for which the utilities demanded that Fibertech pay was entirely unnecessary, and therefore could not lawfully be required. *See generally* Cavalier at Paragraphs 16 and 23. Other work for which they demanded payment from Fibertech was necessitated not by Fibertech's attachment but by the pre-existing conditions on the poles, the correction of which could not lawfully be charged to Fibertech. *See* Cavalier at Paragraph

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on Reconsideration, FCC 99-266, CC Docket No. 95-185, Paragraph 107 (rel. Oct. 26, 1999) ("Reconsideration Order").

16. These unlawful charges amounted to hundreds of thousands of dollars.[9]

1. Requirement that Fibertech pay for unnecessary work

40. Make-ready work is unnecessary if, using accepted construction practices, the attachment in question can be made without the performance of the work. If the generally accepted means of gaining access to a pole are prohibited to an applicant, however, the quantity of required work increases. As an extreme example, if the construction practice of allowing more than one communications line to be attached to a pole were denied to a licensee, that licensee could not achieve pole attachments until it had paid for the placement of an entire new network of poles. Under the principle of nondiscrimination, each license applicant must be allowed to use the same construction practices that others benefit from. The Respondents, however, denied Fibertech the benefit of the construction practices generally accepted and employed by others in the area.

a. Boxing of poles

41. As demonstrated by the condition of the pole plant in western Massachusetts and in Massachusetts generally, the electric companies, Verizon, and other communications companies frequently have avoided unnecessary and expensive make-ready work by "boxing" poles. Boxing entails attaching a cable to the opposite side of the pole from that to which the majority of other cables are attached. Attached as Exhibit H is a diagram from the BellCore Manual of Construction Procedures that, at Figure 3-1, demonstrates this technique. This technique permits a company to

[9] The precise dollar amount unlawfully charged for unnecessary make-ready work or for work whose costs are attributable to other parties is difficult for Fibertech to identify, because the make-ready "estimates" by which the

attach even though inadequate space exists on the pole side where the majority of attachments are located and thereby enables the company to avoid the burdensome cost of replacing the pole and paying for the transfer of all other facilities to the new pole. By boxing poles where inadequate space existed for their new attachment on one side of the pole, the utilities and others have avoided unnecessary make-ready work and benefited from efficient deployment of new facilities. By refusing to permit Fibertech to box poles that otherwise would require replacement, the utilities imposed on Fibertech highly burdensome and discriminatory make-ready costs in violation of 220 CMR § 45.03.

42. Upon information and belief, Verizon previously has asserted that its prohibition against boxing (which Fibertech believes was adopted after the Telecommunications Act of 1996 created the prospect of competitors seeking room on the poles) is nondiscriminatory because it purportedly has now also prohibited itself from boxing. Despite such assertions, however, the policy banning boxing discriminates severely against Fibertech and other new market entrants. The prohibition will rarely affect Verizon, because Verizon already has facilities on its poles (if it did not need to install facilities, it would not have erected a pole) and, therefore, typically can add new facilities it may wish to install either by overlashing its new facilities onto the existing support strands or by retiring old facilities and replacing them, at the same location on the pole, with the new facilities. A new entrant, however, must find a new open space on the pole. Denying it the opportunity to find this space by attaching on the side of the pole opposite the majority of existing lines forces it to pay for expensive make-ready work, including pole replacements, that Verizon, the electric companies, and others avoided each of the many times over the years they boxed a pole. Verizon could render its prohibition against boxing nondiscriminatory if it were to eliminate all existing boxing, thereby paying for whatever pole

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utilities impose the charges are not itemized but instead specify the nature and amount of work on a pole-by-pole basis and then identify an all-inclusive cost covering numerous poles.

replacements are necessary to allow its boxed facilities to be placed on what it now says is the proper side of the pole. Fibertech has seen no evidence, however, that Verizon is willing to take its own medicine. Under the circumstances, Verizon's prohibition is simply raising the drawbridge for new competitors.

43. The utilities' refusal to allow Fibertech to avoid pole replacements by boxing a pole led to numerous demands that Fibertech pay for unnecessary pole replacements, as is detailed in Section IV.C.1.d., infra.

b. Flexibility in enforcement of construction guidelines

44. As is apparent from the pole plant on Fibertech's network route in the Springfield area and from pole plant throughout western Massachusetts, the utilities generally exercise practicality, common sense, and efficiency in their application of construction codes. For example, if they face the choice between replacing a pole and allowing two communications lines to be attached ten or eleven inches from each other (although the codes recommend 12 inches of separation) or between replacing a pole and allowing a secondary electric line and a communications line to be attached within 38 or 39 inches from each other (although the codes

recommend 40 inches of separation), they will show flexibility and allow less-than-exact adherence to the codes.[10]

45. The utilities denied Fibertech the benefit of flexible enforcement of the construction codes. As a result, make-ready work that is not normally performed became required when the applicant was Fibertech. [11] Indeed, in their testimony before the court, the utilities stated that wherever Fibertech's attachment did not precisely adhere to the guidelines of the construction codes, that attachment presented "an immediate threat of death or severe bodily injury".[12]

c. Efficient use of space, given applicable standards

46. Once applicable standards are established (for example, under what circumstances boxing is to be allowed and whether a 39-inch electric/communications clearance is acceptable as an alternative to replacing a pole), the next step in determining what make-ready work is necessary to accommodate a proposed attachment is to determine the most efficient means of attachment. If the pole is tall enough to hold another communications line, the question should be what is the method of attaching the new line that will be consistent with the applicable standards and that will entail the least expenditure. Thus, if

[10] This fact is apparent from the various pole analyses attached to this Complaint, including the survey of poles in the Springfield region to which Fibertech is not attached. The analyses also show some much greater variances from the recommended guidelines than suggested here.

[11] Circumstances suggest that the strict enforcement of construction guidelines against Fibertech, like the recent prohibition against boxing, is motivated not by genuine concern over engineering or safety issues, which have not changed in recent years, but by a desire to impede competition, which only became a real threat in the late 1990's.

[12] Other than the use of boxing and extension arms and the creation of less-than-recommended mid-span clearances through insufficient sagging that Fibertech's contractor was willing to correct without charge but that the utilities prohibited, Fibertech's installation entailed only 24 variances from the recommended 40-inch at-pole separation between communications lines and electric facilities. In contrast, the utilities had created on the same poles 162 uncorrected mid-span conditions with less than 30 inches of clearance and 76 situations where less than 40 inches separated a communications line and an electric facility.

construction guidelines are to be strictly applied, the highest existing communications line is 40 inches from the electrical secondary line, and there is room to move that line down 12 inches to accommodate the new line, the make-ready work that is "necessary" and should be required would be to lower the existing line rather than to replace the pole.

47. The utilities, however, repeatedly demanded that Fibertech pay to replace poles and perform other expensive make-ready work when much more efficient, less expensive means of accommodating Fibertech's proposed attachments were available.

48. The utilities' refusal to use space efficiently when prescribing pole make-ready work chargeable to Fibertech led to numerous demands that Fibertech pay for unnecessary pole replacements, as is detailed in Section IV.C.1.d., infra.

d. Instances is which Fibertech was required to pay for unnecessary make-ready work

49. In many cases the unnecessary work the utilities demanded that Fibertech pay for was the replacement of the pole with a larger pole. A pole replacement represents the ultimate in costly make-ready work, because each replacement requires not only removal of the old pole and installation of a new pole but also the transfer of all cables, transformers, drop lines, terminals, and guy wires from the old pole to the new pole. As a result, each pole replacement typically costs between $2,500 and $5,000.

50. Exhibit I identifies 60 poles, among the 767 on Fibertech's current route, that the utilities

demanded Fibertech pay to replace but which did not actually require replacement. These 60 poles did not need to be replaced even assuming the utilities could somehow justify their discriminatory requirement that Fibertech's installation satisfy strictly all construction guidelines recommended by relevant codes. Exhibit I contains, for each pole listed: (1) the survey sheet identifying the facilities on the pole and their locations; (2) the make-ready estimate reflecting the utilities' demand that Fibertech pay for replacement and transfer of all facilities; and (3) a description of one or more obvious, efficient means of achieving the strict adherence to all relevant construction codes. Fibertech reserves the right to identify additional poles among the 767 on its Springfield route that did not need to be replaced to achieve strict adherence to relevant construction guidelines and also to identify additional poles among the 767 that would not have needed to be replaced had the utilities applied construction codes to Fibertech in a nondiscriminatory way.

51. An example of what is revealed with respect to each of the 60 poles described in Exhibit I is afforded by the pole listed as number 51 of the 60. Located on North Street Extension in Agawam and carrying a WMECO tag # 62 and a Verizon tag #58, it is a 35-foot pole. At the time Fibertech applied for an attachment license, the pole held, at or below the lowest secondary electric line: (1) a secondary electric line at 24'11"; (2) a CATV line at 21'5"; and (3) a Verizon line at 20'4". The CATV line was 42 inches below the secondary electric line, and 13 inches separated the CATV and Verizon lines. Fibertech's cable could have been readily accommodated on this pole by lowering the Verizon line to 19'4", lowering the CATV line to 20'4", and allowing Fibertech to attach using the former CATV bolt hole at 21'5". The 42-inch separation between the electric and communications facilities would have been maintained, and at least the recommended 12-inch separation between communications lines would have been preserved. Nevertheless, the utilities demanded that Fibertech pay to replace the pole

with a 40-foot pole and to transfer all existing facilities to the new pole.

2. Requirement that Fibertech pay for correction of pre-existing conditions

52. As noted above, the utilities not only demanded, as a condition of licensing, that Fibertech pay for the performance of unnecessary make-ready work, but they also required that Fibertech pay for the performance of work that, while necessary, was necessary to correct a pre-existing condition and, therefore, was not properly chargeable to Fibertech. *See* Cavalier at Paragraph 16.

53. If, at the time Fibertech submitted a license application for a pole, the pole showed clearances of 36 inches between the electrical facilities and the higher of two communications line and 12 inches of clearance between the communications lines, and the communications lines each could be lowered 16 inches, the appropriate make-ready work probably would be to lower those two lines that distance. If the pole owners are strictly enforcing the recommended construction guidelines, including the 40-inch separation between electric and communications facilities and the 12-inch separation between two communications lines, this work should be chargeable to the company or companies that caused the 35-inch separation, because both communications lines need to be lowered to bring the pole into compliance with the applicable standards.[13]

54. The utilities, however, consistently required that Fibertech pay for virtually all work, regardless of whether it was necessary to bring the pole into adherence with the construction guidelines they were applying to Fibertech.

55. The pre-existing conditions whose correction was not lawfully chargeable to Fibertech included not only conditions that deviated from construction code guidelines but also included circumstances in which the existing electrical facilities were located within the space of the pole reserved for communications uses. Upon information and belief, Verizon has entered into agreements with both MECO and WMECO that define the areas of the pole that may be used for electrical facilities (including the "neutral space", i.e., any space below the secondary electric lines that is to remain unoccupied for safety reasons) and those which may be used for attachment of communications facilities, including CATV, CLEC, and Verizon lines. Upon information and belief, if MECO or WMECO has attached its facilities so that the facilities, or the space below their facilities that is to remain unoccupied, intrude into the communications portion of the pole, Verizon is entitled under its agreements with these companies to demand that they cease this intrusion by either moving their equipment up on the pole or replacing the pole with a taller pole, and, in fact, if Verizon needs more space on the pole, it will make such a demand. In such a case, the electric company is responsible for the costs associated with removing its equipment from the communications space. Under the principle of nondiscrimination, if a competitive provider needs space on a pole that does not exist because the electric company is occupying the communications space, the electric company must vacate that space at its own expense.[14] In markets outside Massachusetts, Fibertech's experience is that electric companies do move their facilities up the pole or, if necessary, replace the pole, at their own expense, if their facilities have encroached on the pole's communications space. In Massachusetts, the electric companies have refused to move their facilities at their own expense. When pushed, they have referred the question to Verizon, whose response has been, in effect, that Verizon has no objection to the location of the electric company's facilities. Attached to this Complaint as Exhibit J is a diagram

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[13] It costs no more to lower a line 16 inches than to lower it four inches.

[14] The electric company must treat the competitor as it would treat Verizon. Also, Verizon must assert its contractual

captioned, in print, "Joint Pole Space Allotment Agreement - NEES & Telco". Upon information and belief, this diagram, which also reflects hand-written notations that were not part of the original document but were added by Fibertech personnel, sets forth the allocation of pole space between use for electric purposes and use for communications purposes with respect to poles in the joint service territories of Verizon and MECO. WMECO and Verizon have refused to provide Fibertech with documents revealing the allocation of space between electric use and communications use on poles in their common service territories. Upon information and belief, however, such allocation is essentially equivalent to the allocation shown on Exhibit J.

56. One example of an improper demand made by the utilities that Fibertech pay for work necessitated by pre-existing conditions is presented by the pole located on North Street Extension in Agawam carrying a WMECO tag numbered 45M and a Verizon tag numbered 43 ½. That pole was a 40-foot pole with an electric line at 24'2", a CATV line at 21'10", and Verizon lines at 20'3", 19'6", and 18'2". Only 28 inches, rather than the recommended 40 inches, separated the electric line and the highest existing communications line. Moreover, because the pole was a 40-foot pole, upon information and belief the lowest point at which the lowest electric line could be placed consistent with the space allotment agreement between WMECO and Verizon was 27'6" above ground level, 40 inches above the actual location of WMECO's secondary line. The utilities demanded that Fibertech pay to raise the electric line 12" and lower the CATV line and the top two Verizon lines each 12". Assuming the utilities could legitimately enforce the 40-inch clearance guideline against Fibertech, as they insisted on doing, they should also have treated the existing 28-inch separation as inadequate. The cost of the work that would create the space for Fibertech's attachment, whether viewed simply as the raising of the electric lines out of the communications space or the correction of the 28-inch separation between existing

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rights on behalf of another telecommunications provider as it would assert its rights on its own behalf.

electric and communications facilities, was properly chargeable to a company or companies other than Fibertech. Nevertheless, the utilities demanded that Fibertech pay for all of the work.

57. Attached to this Complaint as Exhibit K is a list of 52 poles, among the 767 for which Fibertech had outstanding applications in the Springfield region, with respect to which the utilities demanded that Fibertech pay to move communications facilities on the existing pole when such rearrangements were already necessary to correct pre-existing conditions that did not comply with construction guidelines enforced against Fibertech or did not comply with the utilities' joint pole space allotment agreements. The listing of poles is categorized according to the nature of the work that was wrongly attributed to Fibertech. For each pole listed, Exhibit K contains the make-ready estimate that shows the work being charged to Fibertech and the survey sheet that shows the pre-existing conditions on the pole. The make-ready estimate is the document received from the utilities, with the exception that an arrow in the left-hand margin has been added by Fibertech for the purposes of this Complaint to identify the particular pole listed in this Exhibit. The pole described in the immediately preceding paragraph is among the 51 listed on Exhibit K.

58. Attached to this Complaint as Exhibit L is a list of 7 poles, not included in any other exhibit attached to this Complaint, that the utilities demanded Fibertech replace. For each pole, either replacement of the pole or rearrangement of electric facilities (but no rearrangement of communications lines) would have been required if the construction codes' guidelines were to be strictly enforced, but the work would have been required in any event in order to correct pre-existing conditions inconsistent with those guidelines or to correct noncompliance with the utilities' joint space allotment agreements. For example, the first pole listed on Exhibit L (MECO # 76/Verizon # 58 on Route 10 in Northampton)

was a 35-foot pole with a secondary electric cable attached 20'6" above ground level, a CATV line attached at 18'2", and a Verizon line attached at 16'10". The 28-inch separation between the electric and communications facilities was 12 inches less than what was consistently demanded of Fibertech. The electric line was four feet, six inches below the lowest point that, upon information and belief, was allowed by the space allocation agreement between MECO and Verizon. Because the communications lines were attached so low they presumably could not be move down sufficiently to correct the 28-inch separation on the pole, either the electric lines needed to be moved up, if possible, or the pole needed to be replaced to correct this alleged, existing deficiency. Because the 28-inch separation was less than demanded of Fibertech and because the electric lines were attached too low on the pole, the work required on the pole, whether replacement or rearrangement, was not properly billable to Fibertech.

D. Reduction and re-routing of Fibertech's network necessitated by utilities' delays, unlawful make-ready demands, and obstructive conduit licensing practices

59. The utilities' delays in responding to Fibertech's initial pole license applications made it unavoidable that Fibertech would not be able to complete its Springfield network within the planned timeframe and thereby ensured that Fibertech would fail to meet its revenue projections. Due to the resulting revenue shortfalls and the unexpectedly high per-mile cost of construction stemming from excessive make-ready bills, Fibertech was forced to reduce the size of its planned network. It therefore cancelled numerous pole applications and submitted new applications for new, shorter route segments.

60. By forcing Fibertech to downsize its network through delay and excessive make-ready charges, the utilities prevented Fibertech from extending broadband connectivity to numerous Massachusetts communities, including Ludlow, Palmer, Ware, Belchertown, and Amherst, that were on

Fibertech's originally planned network route. Attached to this Complaint as Exhibit A is a map showing Fibertech's existing facilities in western Massachusetts and Connecticut and its originally planned western Massachusetts network. As is apparent from the map, this intended network was significantly larger than the network that Fibertech currently is attempting to complete

61. During Fibertech's effort to build a network in the Springfield area, Fibertech was forced to re-route its aerial facilities due to delayed receipt of accurate information from Verizon regarding the availability of conduit. Because Fibertech's network needed to be contiguous, with aerial portions connecting to underground portions, in order to provide connectivity, the location of Fibertech's aerial routes depended on where Verizon's conduit was available. The difficulty Fibertech experienced in extracting from Verizon correct information as to the availability of conduit caused Fibertech, later than should have been necessary, to re-design its aerial plant and to submit applications for poles on a new routes.

E. Fibertech responds to imminent loss of a customer and possible loss of funding by installing facilities safely and in a manner to accommodate resolution of make-ready issues.

62. After approximately two years of attempting to procure pole attachment and conduit licenses, Fibertech had paid the utilities $918,912 for pole and conduit surveys and make-ready work associated with its intended Springfield-area network. This included over $155,000 paid to Verizon for pole make-ready work. The utilities refused to issue pole licenses unless Fibertech agreed to pay additionally approximately $74,000 to Verizon for pole make-ready work, approximately $231,000 to WMECO for such work, and approximately $85,000 to MECO. Fibertech was not expressly authorized to attach to any poles.

63. On June 20 and 21, 2002, relying on DTE regulations requiring utilities to license poles within 45 days of submission of the license application or indicate why the license is denied and on FCC precedent interpreting the identical 45-day rule as meaning the applicant is "deemed licensed" if the utility does not meet the 45-day deadline, Fibertech attached its fiber-optic cable to 767 poles owned by the utilities (along about 20 route miles). Fibertech took this step in order to avoid the loss of a customer to whom Fibertech had contractually committed to deliver fiber-optic connectivity by a deadline that had passed and to avoid the possibility that the loss of the customer would result in loss of Fibertech's funding.

64. Despite the fact that, as demonstrated in Section IV.C.1.b. of this Complaint and in Exhibits I, K, and L, industry practice permits installation of facilities that do not comply with the recommended guidelines contained in relevant construction codes, Fibertech sought to install its facilities in a manner that would both exceed the quality of standard industry practice and also allow for the subsequent performance of make-ready work that might be determined by the Department or agreed to among the parties to be appropriate. To help ensure that the codes' recommended clearances would be fully achieved, Fibertech used extension arms.[15] To allow for the future performance of make-ready work that might be found appropriate by the Department, Fibertech used lag bolts to attach the arms. These bolts are threaded, like a screw. As a result, they do not require that the pole be drilled through (as is required when a "through-bolt" is used).

This is a valuable advantage if the attachment may be moved, because through-bolts or holes created for through-bolts may not be located closer than four inches from each other in order to preserve the

[15] Extension arms allow a cable to be placed several inches away from the pole, thereby creating separation between it and adjoining communications lines. Extension arms are recognized as legitimate construction equipment by the relevant codes.

physical integrity of the pole. Use of a through-bolt, therefore, essentially uses up four inches of the pole. Because lag bolts do not require that a hole be drilled through the pole, they preserve pole integrity and ensure full flexibility in future use of pole space. Both the New York State Department of Public Service and Verizon managers administering the company's pole plant in New York State have approved the use of such lag-bolted extension arms in order to attach facilities prior to the performance of make-ready work. The use of lag-bolted extension arms as a means of permitting the installation of a competitive telecommunications network by means of temporary attachments where make-ready work may still be required also was approved by the FCC in the case Cavalier Telephone v. Virginia Electric and Power Co..[16] There the FCC ruled that the utility "shall immediately grant access to all poles to which attachment can be made permanently or **temporarily**, without causing a safety hazard, for which permit applications have been filed with [the utility] for longer than 45 days."[17] The combination of a "deemed granted" rule and the ability to use lag-bolted extension arms affords a competitor an opportunity to avoid the "squeeze" that the utilities otherwise exert, whereby they confront the competitor with the hard practical choice of succumbing to their unlawful make-ready demands or failing to install facilities for a prolonged and possibly fatal period of time.

65. On June 22, 2000, Fibertech informed Verizon that it had performed the attachments and articulated its reasons. It indicated it was ready to submit a petition to the DTE complaining about Verizon's use of its poles and underground conduit to illegally obstruct the deployment of competitive facilities and to seek a determination as to the parties' respective rights but was open to informal discussions to address the Fibertech's attachment in the Springfield area and also Fibertech's concerns regarding Verizon's policies that delay licensing and impose burdensome and illegitimate costs. Verizon

[16] Cavalier Telephone, LLC v. Virginia Electric and Power Co., 15 F.C.C.R. 9563, Paragraph 15 (Rel. June 7, 2000).
[17] Id. (emphasis added).

agreed to participate in such informal discussions.

F. The utilities seek a court order directing the dismantling of Fibertech's network, testifying that pole conditions allegedly caused by Fibertech "present an immediate threat of death or severe bodily injury".

66. Despite Verizon's agreement to attempt to resolve informally the parties' differences rather than ask the Department to intervene, before a meeting was held between the parties Verizon sent Fibertech notice of intent to terminate Fibertech's pole attachment agreement and, on Friday, August 9, 2002, served a complaint, filed with the Hampden Superior Court, alleging Fibertech's unauthorized attachment to the poles around Springfield in violation of the terms of the parties' pole attachment agreement and seeking a court order directing Fibertech to dismantle its Springfield-area network.

67. An "emergency" hearing was scheduled for Wednesday, August 14. Verizon's complaint made no specific allegations of safety violations or hazards. Then, approximately three hours before the emergency court hearing was to commence, WMECO served on Fibertech its own complaint, seeking similar remedies as Verizon's complaint but also including sworn testimony that Fibertech's attachments had created numerous immediate threats of death and other injury. It listed 493 alleged conditions, stating that the listed conditions:

> reflect only the violations that present an immediate threat of death or severe bodily injury to employees of WMECO and other companies coming in proximity to such lines to service their equipment, and present safety issues to the public at large.[18]

These conditions were of four types: (1) attaching too close to the secondary electric facilities at the pole (within 40 inches); (2) attaching too close to the secondary electric facilities at mid-span between poles (within 30 inches); (3) boxing of a pole, including where the pole had already been boxed by Verizon; and (4) use of extension arms to achieve additional clearance between Fibertech's cable and other companies' facilities.

68. Fibertech's installation was fully consistent with industry standards as practiced by the utilities in the installation of their own facilities and in the directions they give to other licensees as to where to attach their facilities. The vast majority of the alleged "violations" of the guideline regarding at-pole separation from the secondary electrical facilities were imaginary in that Fibertech's line was not actually close to the secondary facilities but only would have been close if Fibertech had not used an extension arm. Moreover, the utilities directed that Fibertech not carry out its intention to create a network superior in quality to facilities existing in the marketplace by directing a contractor to "re-sag" the Fibertech line, i.e., increase the separation between its cable and the electric lines at mid-span between poles. Boxing is not only consistent with relevant construction guidelines but has been frequently used by Verizon and other attachers throughout Massachusetts. Moreover, as mentioned above, the use of extension arms is

[18] Affidavit of John S. Tulloch, Manager of New Services for WMECO, at para. 13.

prescribed by relevant construction codes, recommended by the New York State Public Service Commission, and approved elsewhere by Verizon.

69. The judge recognized the risk that the late service of WMECO's complaint could deny Fibertech a fair hearing but also acknowledged the force of the allegations of threatened death or severe injury. He expressed an inclination to give Fibertech time to answer the allegations relating to safety but, pressed by the utilities to act immediately due to the immediate threat of death and severe injury, the court denied Fibertech's request for a continuance and an opportunity to respond to the allegations regarding safety hazards.

70. The court found that Fibertech had created a risk of safety hazards and issued a preliminary injunction requiring Fibertech either to dismantle its Springfield network or pay Verizon $400,000 for the correction of such hazards. The court directed that, if Fibertech were to pay the money, Verizon was to correct the hazards within 60 days. At the same time, MECO sued Fibertech, modeling its suit after Verizon's and WMECO's and seeking a court order directing the immediate dismantling of Fibertech's facilities in Northampton. In order to avoid the possibility that its network would be removed, Fibertech entered into a stipulation with MECO whereby Fibertech would pay MECO $59,000 for the correction of alleged safety hazards and MECO, in return, would withdraw its request for immediate dismantling of the network.

G. A survey shows that approximately 50% of poles in the Springfield area contain conditions, created by or at the direction of the utilities, that present the same "immediate threat of death or severe bodily injury" that the utilities attributed to Fibertech.

71. In order to establish with specificity and clarity the fact that the conditions that Fibertech was alleged to have created by its installation of facilities without the utilities' permission are no more dangerous than the conditions that are created by the utilities, through their installation of facilities and the directives they give to other companies regarding the location and manner of attachment of facilities to poles, Fibertech retained an independent expert to survey poles in the municipalities of Springfield, West Springfield, Agawam, Easthampton, and Northampton. He examined 2,324 poles (approximately 60 linear miles of pole plant) in the municipalities where Fibertech attached its facilities. Fibertech's facilities were attached to none of the surveyed poles. As is reflected by the documents appended to this Complaint as Exhibit M, conditions of the type that the utilities informed the court "present an immediate threat of death or severe bodily injury [to workers] and present safety issues to the public at large" are present on 1,149, or **49.4 %**, of the 2,324 poles surveyed.

72. The survey also shows that there are numerous violations on individual poles surveyed. As a result, the 1,149 poles with conditions that the utilities described as presenting an immediate threat of death or severe bodily injury actually contain at least 1,679 such allegedly hazardous conditions.

Prayer for Relief

WHEREFORE, Fibertech respectfully requests that the Department:

(a) declare unreasonable and unlawful Respondents' prohibition against Fibertech's "boxing" of poles;

(b) declare unreasonable and unlawful Respondents' discriminatory enforcement against Fibertech of the guidelines contained within codes relating to aerial construction;

(c) declare unreasonable and unlawful Respondents' refusal to use pole space efficiently when prescribing pole make-ready work chargeable to Fibertech;

(d) declare unreasonable and unlawful Respondents' demands that Fibertech pay for work necessary to correct pre-existing pole conditions caused by other companies' facilities that do not comply with the construction standards applied against Fibertech;

(e) declare unreasonable and unlawful Respondents' demands that Fibertech pay to move electric facilities out of the pole space allocated to communications uses;

(f) prohibit Respondents from imposing on Fibertech more stringent requirements than they have imposed on themselves or other entities attached to their poles;

(g) determine the extent of work that was necessary to accommodate Fibertech's cable on the

767 poles in the Springfield area owned by Verizon, WMECO, or MECO to which Fibertech attached, consistent with the principles of reasonableness and nondiscrimination inherent in G.L. c.166, § 25A, and 220 C.M.R. § 45.00, *et seq.*;

(h) determine the appropriate allocation of the costs of necessary work, on the 767 poles to which Fibertech attached, between that necessary to correct pre-existing conditions and that properly attributable to accommodation of Fibertech's attachment;

(i) direct the utilities to return to Fibertech all money collected by them from Fibertech for make-ready work in excess of the amount determined by the Department to be lawful;

(j) direct that the utilities correct, without unnecessary delay and in a nondiscriminatory manner, conditions on the poles they own in Massachusetts to the extent such conditions are of a type the Department determines present an unacceptable safety risk;

(k) prohibit the utilities from enforcing standards relating to pole or conduit licensing, as set forth in this Complaint, that the Department may determine to be contrary to law or sound public policy;

(l) require that, upon Fibertech's full payment of all make-ready charges determined by the Department herein to be appropriate, the utilities issue formal licenses for the 772 poles to which Fibertech has attached in the Springfield area;

(m) direct the Respondents to reaffirm the pole attachment agreements that they entered into

with Fibertech;

(n) enforce the Department's rule requiring pole and conduit owners to respond to license applications within 45 days and declare that a license applicant is deemed licensed if the owner fails to respond within such timeframe and is entitled to attach to the pole temporarily or permanently if it is able to do so in a safe manner;

(o) declare that the use of lag-bolted extension arms is an acceptable means of attaching to a pole temporarily in a safe manner;

(p) declare unreasonable and unlawful Verizon's practice of requiring a conduit license applicant to apply for specific route without access to information revealing whether the route is available;

(q) declare unreasonable and unlawful Verizon's practice of canceling conduit license applications for failure to pay make-ready charges when it has not reported to the applicant the availability of other conduit for which the applicant has applied and on whose availability the usefulness of the first conduit depends; and

(r) grant any other relief the Department may deem to be just and appropriate.

Hearing Requested

Fibertech requests, pursuant to 220 C.M.R. § 45.04(2)(i), that a hearing be convened pursuant to 220 C.M.R. § 1.06, and that it be permitted to submit a brief in support of its contentions.

Respectfully submitted,

FIBER TECHNOLOGIES NETWORKS, L.L.C.
By: Fibertech Networks, LLC, its sole member

By:_____
Charles B. Stockdale, V.P. & Corporate Counsel
Robert T. Witthauer, Deputy Corporate Counsel
Fibertech Networks, LLC
140 Allens Creek Road
Rochester, New York 14618
Phone: (585) 697-5100

Dated: May 13, 2003

CERTIFICATE OF SERVICE

I hereby certify that I delivered copies of the foregoing Amended Complaint to an overnight courier, for said documents to be served in-hand on May 14th, 2003 to:

Honorable Jesse Reyes
MASSACHUSETTS DEPARTMENT OF
TELECOMMUNICATIONS AND ENERGY
One South Station, 2nd Floor
Boston, MA 02110

Mary Cottrell, Secretary
MASSACHUSETTS DEPARTMENT OF
TELECOMMUNICATIONS AND ENERGY
One South Station, 2nd Floor
Boston, MA 02110

Bruce P. Beausejour, Esq.
Alexander W. Moore, Esq.
Keefe B. Clemons, Esq.
VERIZON NEW ENGLAND
185 Franklin Street
Room 1403
Boston, MA 02110

Stephen Gibelli, Esq.
Stephen Klionsky, Esq.
NORTHEAST UTILITIES
SERVICE COMPANY
107 Selden Street
Berlin, CT 06037

Amy Rabinowitz, Esq.
MASSACHUSETTS ELECTRIC CO.
25 Research Drive
Westborough, MA 01582

Matthew E. Mitchell, Esq.
KEEGAN, WERLIN & PABIAN
21 Custom House Street
Boston, MA 02110-3525