COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

FIBER TECHNOLOGIES NETWORKS, LLC, f/k/a FIBER SYSTEMS, LLC,	)	
v.	)	
VERIZON MA NEW ENGLAND, f/k/a NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	)	D.T.E. 03-56
And	)	
NORTHEAST UTILITIES SERVICE COMPANY, d/b/a WESTERN MASSACHUSETTS ELECTRIC COMPANY,	)	
And	)	
MASSACHUSETTS ELECTRIC COMPANY.	)	

VERIZON MASSACHUSETTS' MEMORANDUM
OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon MA") hereby submits this memorandum of law in support of its Motion to Dismiss the so-called Amended Complaint and Petition for Declaratory Relief of Fiber Technologies Networks, LLC f/k/a Fiber Systems, LLC ("Fibertech"). For the reasons set forth below, the Department should dismiss Fibertech's Complaint with prejudice.

I. FACTS

On or about March 7, 2000, Verizon MA entered into an Aerial License Agreement with Fibertech's predecessor, Fiber Systems, L.L.C., that established the

terms and conditions under which Verizon MA agreed to allow Fibertech to place and maintain attachments on Verizon MA poles. *Complaint*, at ¶ 30, Exh. B. On or about March 31, 2000, Verizon MA and Western Massachusetts Electric Company ("WMECO") entered into a second Aerial License Agreement with Fibertech that established the terms and conditions under which Fibertech would be permitted to place and maintain attachments on poles owned jointly by Verizon MA and WMECO. *Id.* at ¶ 31, Exh. C. The relevant provisions of these Aerial License Agreements are substantially identical.

Pursuant to the Aerial License Agreements, Fibertech was obligated to apply for and have received a license from Verizon MA prior to attaching to any pole. *Id.*, Exhs. B and C, Articles VII(A). Before Verizon MA would issue any license to Fibertech to attach to a particular pole, the parties agreed that a joint field survey would be conducted to determine the adequacy of the pole to accommodate the proposed attachments and to determine what, if any, "make-ready work" was required to prepare the pole for the attachment and to provide the basis for estimating the cost of the work. *Id.*, Exhs. B and C, Articles I(E) and (F), VIII(A). If Verizon MA determined, as a result of the joint field survey, that make-ready work was required, it would notify Fibertech of the estimated cost of the work. *Id.*, Exhs. B and C, Articles VIII(C). Fibertech was required to pay for the make-ready work before Verizon MA would perform the work. *Id.*, Exhs. B and C, Articles IV(A). Without Verizon MA's consent, Fibertech was statutorily prohibited under G.L. c. 166, § 25A from attaching to Verizon MA's poles, and subject to fines for unauthorized attachments under G.L. c. 166, § 35.

Pursuant to the Aerial License Agreements, Fibertech was required to place and maintain all proposed attachments in accordance with the requirements and specifications of the latest editions of the Manual of Construction Procedures ("Blue Book"), Electric Company Standards, the National Electrical Code ("NEC"), the National Electrical Safety Code ("NESC") and rules and regulations of the Occupational Safety and Health Act ("OSHA") or any governing authority having jurisdiction over the subject matter. *Id.*, Exhs. B and C, Articles V(A). The Agreements also obligated Fibertech to construct any approved attachments in a safe condition and in a manner acceptable to Verizon MA, and Verizon MA reserved the right to make periodic inspections of Fibertech's attachments at Fibertech's expense. *Id.*, Exhs. B and C, Articles IX(A) and XI(A).

In addition to obtaining the requisite licenses from Verizon MA, Fibertech was obligated under the Aerial License Agreements and pursuant to G.L. c. 166, §22 to request and obtain from the appropriate municipalities permission to construct, operate or maintain its attachments on public property, and was required under the Aerial License Agreements to submit evidence of such authority to Verizon MA before making any attachments. *Id.*, Exhs. B and C, Articles VI(A). Fibertech was also legally and contractually bound to "comply with . . . all laws, ordinances, and regulations which in any manner affect the rights and obligations of the parties hereto under [the Agreements]." *Id.*, Exhs. B and C, Articles VI(C).

Separate and apart from the attachments at issue in this proceeding, Verizon MA has licensed and Fibertech has attached to approximately 3,500 poles and 71,000 feet of conduit throughout Massachusetts under the Aerial License Agreements. *Verizon MA Appendix* (hereinafter "*App.*") filed herewith, Tab 3, Supplemental Affidavit of Carol

Leone, at ¶ 6. However, in late June 2002, Verizon MA discovered that Fibertech had surreptitiously and without authorization attached to nearly 700 Verizon MA poles located in the municipalities of Agawam, Easthampton, Northampton, and Springfield. *See App.* Tab 1. Fibertech installed these attachments without obtaining authorization from Verizon MA and the joint owners of the poles. In many instances, Fibertech placed these illegal attachments in a manner that jeopardized the safety of Verizon MA employees, the employees of other companies who attach to the poles, and the general public. *See App.* Tab 1, at ¶¶ 26-28; Tab 3, at ¶¶ 10 and 12; Tab 4, at p. 7; Tab 6. Moreover, at the time that Fibertech unlawfully attached to Verizon MA's poles, Fibertech had not obtained grants of location from the municipalities of Agawam, Northampton, Easthampton or West Springfield for its attachments, as required by G.L. c. 166, § 22. (Indeed, Fibertech had not even applied for grants of location from Easthampton or Northampton.) As of May 23, 2002, Fibertech still had not obtained the requisite permissions from any of these municipalities.[1] *See App.* Tab 3, at ¶ 11.

Thereafter, Verizon MA repeatedly notified Fibertech that its unlawful attachments constituted a material breach of the Aerial License Agreements and that Fibertech must remove them to prevent termination of those Agreements in accordance with their terms. *See App.* Tab 1, Clemons Aff. and Exhibits C, E, F, H and J thereto. Fibertech nevertheless disavowed any wrongdoing and failed to take any action to cure

[1] Verizon MA is investigating whether Fibertech has received any grants of locations from the City of Springfield. According to Fibertech, only 47 of the more than 700 poles to which it has attached are located in Springfield. *See Complaint*, Exh. F.

its extensive violations. Consequently, to enforce its rights under the License Agreements and to prevent Fibertech from making further unlawful and potentially unsafe attachments, Verizon MA commenced suit against Fibertech in the Superior Court of Hampden County on August 8, 2002, seeking among other things injunctive relief requiring Fibertech to cease any further unauthorized attachments and to remove its unlawful attachments from Verizon MA's poles. WMECO subsequently commenced a parallel action against Fibertech, and the two matters were consolidated.

On August 13, 2002, Fibertech filed with the Massachusetts Department of Telecommunications and Energy (the "Department") a "Petition for Interim Relief and Complaint" against Verizon MA and WMECO.

On August 14, 2002, Fibertech then filed and served a motion to dismiss or, in the alternative, to stay Verizon MA's Superior Court Complaint pending the resolution of the proceedings before the Department on grounds of preemption and the doctrine of primary jurisdiction.[2]

On August 19, 2002, the Superior Court (Wernick, J.) issued a Memorandum of Decision on Plaintiffs' Motion for Preliminary Injunction, ordering that preliminary injunctions be entered against Fibertech as follows in relevant part:

> 1. Fibertech is to make no further attachments to any poles owned by Verizon or Verizon and WMECO jointly without express written authorization from the owner(s) of the pole or from this Court or the [Department]; and
>
> 2. Fibertech, at its sole election, shall either (a) remove within 45 days of this order all attachments and associated cable, fiber or other materials of any kind on all poles owned by Verizon and/or Verizon and WMECO for which it has not received an express license in writing from the

[2] Last week, the Superior Court denied Fibertech's motion to dismiss or, in the alternative, to stay following oral argument by the parties.

> pole's owner, or (b) deliver in hand to Keefe Clemons, as attorney for Verizon, within ten days of this order, cash or its equivalent in the amount of discretion $400,000, to be held by Mr. Clemons and disbursed by him as follows:
>
> To pay for corrections (which must be made within sixty days of the receipt of such funds) of all conditions to which the Plaintiffs in their sole discretion determine that the attachments were a substantial contributing factor *and* which the Plaintiffs *in their sole discretion* determine to be hazards to the health, safety and welfare of their employees, their licensees, or the public. . . .

See Superior Court Memorandum of Decision, at 10-11 (emphasis in original) (footnote omitted), a copy of which is located at *App.* Tab 4.

In entering the preliminary injunctions against Fibertech, the Court specifically rejected Fibertech's argument that it had a right to place its attachments without a license because Verizon MA and WMECo allegedly delayed licensing the poles. In that regard, the Court noted that Fibertech's claim was not supported by the terms of the Aerial License Agreements, *id.* at 4-5, by "any appellate case or any decision of any administrative body in this Commonwealth or in any other state" or by "any decision by any Federal court." *Id.* at 3. Accordingly, the court held that:

> [T]here is no authority whatsoever for the proposition that the mere lapse of time automatically entitles an applicant to make attachments to poles or to decide unilaterally what make ready work is required to insure that attachments may be made safely.
>
> The Court concludes, therefore, that Fibertech has made attachments to plaintiffs' poles without right to do so and is therefore committing a continuing trespass with respect to each such pole. Plaintiffs, consequently, have established a very strong likelihood of success on their claims that Fibertech had no right to make attachments when it did and no right presently to these attachments on Plaintiffs' poles.

Id. at 5-6.

In so holding, the Court found that Fibertech had acted in bad faith in making its unauthorized attachments. In that regard, the Court stated as follows:

> Fibertech . . . was not acting in good faith when it resorted to self help. As previously noted, there was no legal authority anywhere supporting Fibertech's resort to self help under these circumstances. Furthermore, although some of Fibertech's applications had been pending for over two years, Fibertech never sought the assistance of the [Department] or of a court of law . . . before resorting to self help. Nothing in the record before the Court explains why Fibertech could not have taken its dispute to court or to the [Department] before resorting to self help, or why Fibertech failed to advise plaintiffs of its intentions before erecting the attachments. The Court infers from this record that Fibertech deliberately resorted to self help, before instituting proceedings at the [Department] and before advising Plaintiffs of its intention to make attachments, in order to present Plaintiffs and the [Department] or a court of law with a fait accompli; thereby appropriating to itself all the benefits of a license and positioning itself to argue that a removal order would substantially harm Fibertech and subject it to undue and wasteful costs.

Id. at 8. In light of these findings, the court concluded that, it was "very clear that Fibertech acted wrongfully in erecting the attachments *and did so to obtain an inappropriate tactical advantage in litigation it knew was forthcoming*. There is nothing unfair about forcing Fibertech to accept the consequences of the very risk it knowingly and unreasonably assumed." *Id.* at 9 (emphasis added).[3]

Rather than remove its unauthorized attachments, Fibertech elected to deposit $400,000 with Verizon MA to pay for corrections of the widespread safety hazards Fibertech had created on the poles at issue ("Make-Safe Work"). Thereafter, Verizon MA and WMECO performed significant Make-Safe Work in an effort to correct

[3] Fibertech subsequently moved for reconsideration, which the Court denied.

Fibertech's safety violations. The cost of the Make-Safe Work performed by Verizon MA and WMECO exceeded the amount deposited by Fibertech. *See App.* Tab 3, at ¶ 12.

By order dated December 24, 2002, the Department dismissed Fibertech's Petition without prejudice, on three grounds. First, the Department found that the Petition failed to meet the pleading requirements of 220 C.M.R. § 45.02, which 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." *Department Order*, at 4. Fibertech's Petition and supporting documents failed 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 relief requested by Fibertech. *Id.* Finally, the Department found that the injunction entered by the Superior Court rendered Fibertech's requests for injunctive relief moot. *Id.* at 6.

Additionally, consistent with the Superior Court's Memorandum of Decision and Order, the Department ruled 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. Rather than engage in self-help, an applicant should follow the procedures for filing a complaint alleging that it has been improperly denied access to the requested poles. . . ." *Department Order*, at 7. Further, the Department stated that there was no relief that it could grant to Fibertech at this time relative to any attachment that Fibertech installed without first obtaining permission from Verizon MA because "[t]he remedy to a legitimate denial of access claim is to order a

utility to permit the licensee to install its attachments. Fibertech cannot sustain a denial of access claim under 220 C.M.R. § 45.04(e), because it already has physical access to the poles. . . ." *Id.*[4]

In its Complaint, Fibertech admits, as it must, that it attached to the poles in question without Verizon MA's or the joint pole owners' authorization. *Complaint*, at ¶¶ 10, 11, 62. Fibertech asserts that it was nevertheless justified in attaching to Verizon MA's poles because Verizon MA and the joint pole owners had engaged in an alleged scheme to delay Fibertech's license applications by imposing as a condition of licensure "egregiously expensive make-ready estimates that were discriminatory and unreasonable." *Id.* at ¶¶ 4-11, 39-62, 64, 68. Fibertech suggests that it was forced to attach without authorization in order to avoid losing an important customer and the possible loss of Fibertech's funding. *Id.* at ¶ 63.

II. STANDARD OF REVIEW

The Department's procedural regulations specifically permit parties to file motions to dismiss an initial filing:

> Motions to Dismiss and for Summary Judgment. A party may move at any time after the submission of an initial filing for dismissal or summary judgment as to all issues or any issue in the case. The motion shall be filed in writing and served on all parties…. The presiding officer shall afford other parties a reasonable time to respond in writing, and may, in his or her discretion, permit oral argument on the motion.

220 CMR §1.06(6)(e). Although the Department has not adopted the Massachusetts Rules of Civil Procedure, the Department often is "guided by the principles and

[4] Fibertech subsequently moved for reconsideration of the Department's decision, which Verizon MA opposed. Fibertech's purported Amended Complaint and Petition moots Fibertech's motion for Declaratory Relief.

procedures underlying the Rules of Civil Procedure…." *See, e.g.*, 220 CMR § 1.06(6)(c)2. *See also, Riverside Steam & Electric Company*, D.P.U. 88-123, at 26-27 (1988), in which the Department stated that a motion to dismiss for failure to state a claim upon which relief can be granted. This standard has consistently been described in subsequent proceedings as follows:

> In determining whether to grant a motion to dismiss, the Department takes the assertions of fact as true and construes them in favor of the non-moving party. [D.P.U. 88-123, at 26-27.] Dismissal will be granted by the Department if it appears that the non-moving party would be entitled to no relief under any statement of facts that could be proven in support of its claim.

Massachusetts Electric Company, D.T.E. 02-43, at 6 (2002); *Fitchburg Gas and Electric Light Company*, D.T.E. 99-118, at 4 (2001); *New England Telephone and Telegraph Company*, D.P.U. 94-50, at 33 (Interlocutory Order, February 2, 1995).

III. ARGUMENT

As described in more detail below, even if the Department were to accept Fibertech's factual allegations as true,[5] Fibertech has failed to state a claim for which relief may be granted. The issues raised in Fibertech's Complaint are largely moot in that they involve Fibertech's dissatisfaction with the obligations that it voluntarily incurred under the terms and conditions of the Aerial License Agreements entered into with Verizon MA. The time is past for Fibertech to dispute those contractual obligations. Similarly, it is far too late for Fibertech to complain about alleged past delays in the

[5] If this matter were to move forward, Verizon MA would vigorously dispute many of the factual assertions and allegations contained in the Complaint. *See* Answer of Verizon Massachusetts, filed herewith.

processing of individual license applications.[6] Fibertech "resolved" any such complaints by unilaterally and illegally invoking the doctrine of self-help. The Court has properly enjoined such actions, and the Department, as a matter of law and policy, cannot and should not condone illegal behavior by considering a complaint at this time. Finally, because Fibertech has not been granted locations by the relevant municipalities, it is not a "licensee" for the locations that are the subject of the Complaint, and thus it lacks standing to bring a complaint and the Department lacks jurisdiction to resolve it.

A. As a Matter of Law and Policy, Fibertech Must Not Be Permitted To Collaterally Attack the Terms and Conditions Pursuant to Which It Would Have Been Authorized To Attach to the Poles in Question Where Fibertech Has Already Attached to Such Poles Unlawfully Without Authorization From Verizon MA, the Other Owners and the Appropriate Municipalities.

As a matter of both law and policy, the Department must dismiss with prejudice Fibertech's Complaint and bar Fibertech's transparent attempt to avoid its contractual obligation to pay in advance for make-ready work and its liability for the legitimate cost

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6 The simple fact is that Fibertech's own actions are the principal cause of any delays it experienced in gaining access to Verizon MA's poles. Since about October of 2000 Verizon MA has worked closely with Fibertech in connection with its applications for pole attachments in Massachusetts, advising the company of the steps necessary to secure its requested attachments. *See App.* Tab 1, Leone Aff., at ¶ 10. Almost from the beginning, Fibertech has been unwilling or slow to comply with the licensing requirements. *Id.*, at ¶ 11. Instead of following the licensing requirements set forth in the applicable agreements, Fibertech spent a substantial amount of time and energy objecting to those requirements. *Id.* The disarray within Fibertech's business and its unwillingness to follow documented processes for gaining access to Verizon MA's poles and conduit lie at the root of its problems.

Some of the types of conduct that delayed Fibertech obtaining licenses were: incomplete and erroneous applications; regular changes in the scope of Fibertech's network affecting the routing of pole and conduit routes; failure to assign sufficient personnel to projects so that necessary steps in the process could be completed in a timely manner, such as field surveys; repeated changes in project managers; failure to pay or delays in paying field survey and make-ready charges; failure to respond to Verizon MA's efforts to schedule field surveys; requests for multiple field surveys; cancellation of project management meetings; and placing applications on hold for indefinite periods. To the extent Fibertech encountered delays in the licensing process, they were largely attributable to Fibertech's unwillingness or inability to comply with its obligations in connection with that process. Id. at ¶¶12-15.

of Make-Safe work needed to correct the safety hazards Fibertech has created. Indeed, by virtue of this proceeding, Fibertech is seeking to collaterally attack the terms and conditions of the Aerial License Agreements pursuant to which Verizon MA would have authorized Fibertech to lawfully attach and, more particularly, the make-ready requirements thereunder. Having failed to pursue the resolution of these claims in a lawful and orderly manner through a proceeding before the Department or a court, and having chosen instead to commit a continuing trespass and violations of G.L. c. 166, §§ 22, 25A and 35 with respect to the poles in question, Fibertech cannot now be heard to complain that Verizon MA allegedly delayed its license applications.

If Fibertech had a legitimate complaint regarding the alleged delays or make-ready requirements, which it does not, Fibertech could and should have sought the resolution of such claims through a lawful proceeding before the Department or a court *before* it attached to the poles. As the Superior Court correctly noted, there is absolutely no reason why Fibertech "could not have taken its dispute to court or to the Department before resorting to self help, or why Fibertech failed to advise plaintiffs of its intentions before erecting the attachments." *App.* Tab 4, at 8. Although Fibertech claimed that some of its applications had been pending for over two years, Fibertech "never sought the assistance of the Department or of a court of law…before resorting to self help." *Id.* Under these circumstances, the Court concluded that Fibertech had "deliberately resorted to self help, before instituting proceedings at the [Department] and before advising Plaintiffs of its intention to make attachments, in order to present Plaintiffs and the [Department] or a court of law with a fait accompli; thereby appropriating to itself all the

benefits of a license and positioning itself to argue that a removal order would substantially harm Fibertech and subject it to undue and wasteful costs." *Id.*

Under these circumstances, the Department must not reward Fibertech for attaching to Verizon MA's poles without authorization and in an unsafe manner by permitting Fibertech to challenge *ex post facto* Verizon MA's make-ready and Make-Safe costs. If the Department were to do so, there would be nothing to stop other similarly situated entities from taking the law into their own hands and attaching to poles throughout the state, whether in a safe or unsafe manner, without authorization and in violation of governing statutes, and then raising as a defense or collateral counter-attack to a subsequent legal action by the pole owners the argument that make-ready work was unnecessary, unreasonable and discriminatory. Indeed, if the Department allows Fibertech to proceed on these claims, the Department will be creating an incentive for others to make unauthorized attachments in the same manner. The Department must not encourage this type of unlawful, irresponsible and potentially dangerous vigilantism.

Moreover, if the Department were to entertain Fibertech's complaint, the Department will have effectively enabled Fibertech to usurp the Department's jurisdiction and authority to "determine and enforce reasonable rates, terms and conditions of use of poles or of communication ducts or conduits of a utility for attachment," G.L. c. 166 § 25A, by allowing Fibertech, and others who will no doubt follow Fibertech's example, to determine in the first instance for itself whether any given rates, terms and conditions of use of poles or conduits of a utility are reasonable. Even if there were any shred of merit to Fibertech's complaint in this case, which there is not, allowing Fibertech to proceed would result in the abrogation of the Department's

complaint and enforcement procedures pursuant to which the Department is authorized to prescribe just and reasonable rates, terms or conditions and to:

> (1) terminate the unjust and unreasonable rate, term or condition; and
>
> (2) substitute in the attachment agreement the reasonable rate, term or condition established by the Department; or
>
> (3) order relief the Department finds appropriate under the circumstances.

220 C.M.R. § 45.07. Conversely, barring Fibertech from proceeding here, where it has taken the law into its own hands, would promote the goals of the Pole Attachment Statute by ensuring the lawful, orderly and safe attachment to poles and the fair and efficient resolution of disputes arising thereunder. [7]

B. Because Fibertech Failed To Obtain Grants of Location From the Appropriate Municipalities, Fibertech Is Not a "Licensee" Within the Meaning of the Pole Attachment Statute and, Therefore, Fibertech Lacks Standing and Is Not Entitled To Nondiscriminatory Access To the Poles in Question, and the Department Lacks Jurisdiction Over Fibertech's Complaint.

Because Fibertech failed to obtain grants of location from the municipalities of Agawam, Easthampton, Northampton or West Springfield**,** Fibertech is not a "licensee" within the meaning of the Pole Attachment Statute with respect to the poles in question and, therefore, Fibertech does not have standing to complain, nor is it entitled to

[7] Fibertech's claimed right to maintain this action finds no support in the Department's comment in its Order of Dismissal without Prejudice, at 7, that "[i]f . . . the utilities actually impose unreasonable rates, terms, or conditions for the right to keep those attachments on the poles, Fibertech may be able to file a proper pole attachment complaint at that time under 220 C.M.R. § 45.04(b)." Verizon MA is not suggesting that the Department intended by this comment to forever bar Fibertech from complaining about rates, terms and conditions in the event of future alleged violations. Fibertech has the right to complain about future alleged violations, but it must resolve such claims before attaching. If Fibertech fails to do so and takes the law into its own hands as it did in this case, Fibertech should be barred from complaining.

nondiscriminatory access to such poles, and the Department lacks jurisdiction over this matter.

Pursuant to the Pole Attachment Statute, a utility must "provide a licensee with nondiscriminatory access to any pole, duct, conduit, or right-of-way used or useful, in whole or in part, for the purposes described in M.G.L. c. 166, § 25A owned or controlled by it." 220 C.M.R. § 45.03(1). For purposes of the Pole Attachment Statute, the term "Licensee" includes any "person, firm or corporation other than a utility, which is authorized to construct lines or cables upon, along, under and across the public ways." Fibertech lacks standing and is not entitled to nondiscriminatory access to the poles at issue in this case because it was not a licensee with respect to such poles, having failed to apply for and receive grants of location from the appropriate municipal authorities prior to attaching.[8]

As the Department held in the *Matter of Fibertechnologies Networks, L.L.C. v. Shrewsbury's Electric Plant*, D.T.E. 01-70,

> a company that is in the business of transmission of intelligence is 'authorized to construct lines or cables upon, along, under and across the public ways' for the purposes of G.L. c. 166, § 25A, *after* the board of selectmen in the town where the attachments in question are to be located has granted a location for the line. *See Cablevision of Boston v. Public Improvement Comm'n,* 184 F.3d 88, 91 (1st Cir. 1999) (noting that § 21 permits Cablevision to install conduit, but that Cablevision must 'first obtain a grant of location from the appropriate municipal authority' pursuant to § 22).

[8] In commenting on Fibertech's conduct, the Mayor of Easthampton noted that Fibertech "just blew in and blew out" of town with its attachments. The Mayor's characterization of how Fibertech made the attachments fairly states its conduct. On information and belief, Verizon MA understands that Fibertech placed a number of the attachments on the weekend of June 23, 2002, under the cloak of darkness during the evening.

Department Interlocutory Order, at 22-23 (emphasis in original) (footnote omitted). Because the Board of Selectmen of Shrewsbury had yet to make a determination on Fibertech's petition for a grant of location in that case, and since no facts had been alleged that would permit the Department to review or construe the Board of Selectmen's inaction, the Department "[could not] hold that Fibertech [was] authorized to construct lines across public ways for purposes of G.L. c. 166, § 25A." *Id.* at 24. Thus, since Fibertech could not conclusively establish that it was a "licensee" within the meaning of the Pole Attachment Statute, the Department held that it could not grant summary judgment on the ultimate question of whether Fibertech was entitled to access to attachments in Shrewsbury until the Board of Selectmen acted on Fibertech's petition for a grant of location. *Id.*

By contrast to the *Shrewsbury* case, there is no genuine issue of material fact in this case because Fibertech never obtained grants of location from the municipalities before it attached to Verizon MA's poles or even before filing its present Complaint with the Department. As such, Fibertech is not now, nor was it ever, authorized to construct lines across the relevant public ways for purposes of G.L. c. 166, § 25A, and it is not and was not a "licensee" with respect to those poles.

By the same token, the Department lacks jurisdiction over Fibertech's Complaint because Fibertech is not a licensee with respect to the poles and conduit at issue. *See* G.L. c. 166, § 25A (Department is authorized to "regulate the rates, terms and conditions applicable to attachments . . .; and upon its own motion or upon petition of any utility or *licensee* said department shall determine and enforce reasonable rates, terms and conditions of use of poles or of communication ducts or conduits of a utility for

attachments of a licensee in any case in which the utility and *licensee* fail to agree.") (emphasis supplied). Accordingly, Fibertech's Complaint must be dismissed.[9]

IV. CONCLUSION

WHEREFORE, based upon the foregoing points and authorities Verizon MA respectfully requests that its motion to dismiss be granted.

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[9] Even if Fibertech were to obtain grants of locations for its illegal attachments in the future, such authorization would not under any theory apply retroactively to cure Fibertech's deliberate failure to obtain such permission before illegally attaching to Verizon MA's poles. Nor could such belated grants operate retroactively to "cure" the Department's lack of jurisdiction over Fibertech's claims here.