COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

FIBER TECHNOLOGIES NETWORKS, L.L.C. f/k/a FIBER SYSTEMS, L.L.C.	)	D.T.E. 03-56
v.	)	
VERIZON NEW ENGLAND, f/k/a NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY	)	
and	)	
WESTERN MASSACHUSETTS ELECTRIC COMPANY	)	
and	)	
MASSACHUSETTS ELECTRIC COMPANY	)	

MEMORANDUM IN SUPPORT OF THE MOTION OF WESTERN MASSACHUSETTS ELECTRIC COMPANY TO DISMISS THE COMPLAINT AND PETITION OF FIBERTECH

The Department of Telecommunications and Energy ("Department") should dismiss the Complaint and Petition of Fiber Technologies Networks, L.L.C. ("Fibertech") for several reasons.

First, Fibertech has "unclean hands" and has engaged in "self-help" by virtue of its trespassing on WMECO's property to remedy what it perceived to be a burdensome application process. If the Department does not dismiss this complaint, then it has

opened the door for any party to take improper actions first and deal with the consequences at a later date.

Second, Fibertech lacks standing to bring this complaint since it is not a "utility", nor a "licensee" under 220 CMR 45.02.

Third, pursuant to 220 CMR 45.04(4), Fibertech failed to provide the required accompanying affidavit in support of its Petition and Complaint.

Fourth, Fibertech may not file a 'new' case because its earlier complaint in D.T.E. 02-47 remains pending before the Department.

I. FIBERTECH'S UNCLEAN HANDS SHOULD NOT BE REWARDED BY THE DEPARTMENT

WMECO has a specific procedure in place for dealing with pole attachments. That process includes first entering into an Aerial License Agreement. On or about March 31, 2000, WMECO entered into an Aerial License Agreement with Fibertech's predecessor, Fiber Systems, L.L.C., which established the terms and conditions under which WMECO agreed to allow Fibertech to place and maintain "attachments" on WMECO's poles. Pursuant to the Agreements, Fibertech was obligated to apply for and have received a license from WMECO and Verizon prior to placing any attachments.

Before any license would be issued to Fibertech for permission to attach to a particular pole, the parties were required to perform a joint field survey 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. Exhibit 1, Articles I(E) and (F),

VIII(A). The "make-ready work" is necessary to ensure that the licensee's attachments will comply with all safety laws and regulations. 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"), WMECO's overhead distribution 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., Article V(A). If WMECO determined, as a result of the joint field survey, that a pole to which Fibertech sought to attach was "inadequate or otherwise need[ed] rearrangement of the existing facilities" to accommodate the requested attachments in accordance with the foregoing specifications, WMECO would notify Fibertech of the estimated cost of any make-ready work required to prepare the pole. Id., Article VIII(C). Further, Fibertech was required to pay for the make-ready work before WMECO would schedule the work within its "normal work load schedule." Id., at Articles IV(A) and VIII(C) and (H).

Fibertech illegally attached to WMECO's poles prior to receiving a license from WMECO, which is in direct contradiction to WMECO's procedures. If Fibertech was aggrieved by WMECO's actions, it should have filed a complaint with the Department and not taken it upon themselves to attach to WMECO's poles without consent or authorization. Fibertech's rationale for taking its actions has been totally discredited by the Hampton Superior Court decision. See Exhibit 2. In its Decision, the court chastised Fibertech for taking matters into its own hands.[1] If the Department allows this complaint

[1] *See* Exhibit 2, page 8. The Court notes in its Order that "Fibertech never sought the assistance of the DTE or of a court of law and never asserted in writing to the Plaintiffs any claim of a grant of license by

to go forward, it will be affording parties the right to take extrajudicial actions, such as illegal pole attachments, before seeking proper adjudication of any claims it may have.[2] The Department should not in any way give legitimacy to such an action. Rather, the Department should dismiss this complaint to send a strong message that if a party want to engage in improper and illegal 'self-help' actions, they should not expect to file an 'ex post' claim at the Department.

II. FIBERTECH HAS NO STANDING TO BRING THIS COMPLAINT

Fibertech filed its amended complaint and petition pursuant to 220 CMR 45.03, and 45.04. 220 CMR 45.02 defines who may bring a complaint to the Department pursuant to the pole attachment regulations. A complainant is defined as a "licensee or a utility who files a complaint." 220 CMR 45.02. This regulation also states that a "[c]omplaint means a filing by either a licensee or a utility . . ." Id. A licensee is defined as "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." Id. A utility is defined as "any person, firm, corporation, or municipal lighting plant that owns or controls or shares

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failure to comply with the so-called 45 days rule 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 DTE before resorting to self-help…."

[2] *See* Exhibit 2, page 8. The Court found that "Fibertech deliberately resorted to self-help, before instituting proceedings at the DTE and before advising Plaintiffs of its claims to licenses and its intention to make attachments, in order to present Plaintiffs and the DTE 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. Having unjustifiably and, in this Court's view, unlawfully created the likelihood of precisely the injunctive relief which it now contends will irreparably harm it and offering no compelling reason why court or DTE approval could not have been sought before erecting the attachments, Fibertech is in no position to argue that any harm it might suffer from preliminary relief outweighs the harm to Plaintiffs which would result from permitting the attachments to remain in place."

ownership or control of poles, ducts, conduits, or rights-of-way. . . for the transmission of intelligence by telegraph, telephone, or fort the transmission of electricity." Id. Therefore, in order to qualify to bring a complaint pursuant to the pole attachment regulations, Fibertech must demonstrate that they are either a "licensee" or a "utility."

Fibertech has failed to demonstrate that it is either a "licensee" or a "utility" and therefore its complaint and petition must be dismissed. Fibertech's amended complaint states in paragraph 27 that it is a "telecommunications provider" and a "common carrier within the meaning of G.L. c. 159 § 12" and therefore is "authorized to construct its lines along, under and across public ways and, as such, it is a 'licensee' within the meaning of G.L. c. 166, § 25A, and 220 CMR 45.02."[3] Fibertech does not contend that it is a utility; it claims only to be a "licensee" under 220 CMR 45.02.

Fibertech's assertion that is a licensee, however, is contrary to recent Department precedent. In D.T.E. 01-70 (December 24, 2002), the Department issued an order pursuant to a complaint filed by Fibertech against Shrewsbury's Electric Light Plant. See Exhibit 3. In that order, the Department held that registering as a common carrier does not qualify an entity as a "licensee" under the pole attachment regulations. That order states specifically that "Fibertech's registration as a common carrier does not itself establish that it is actually in the business of transmission of intelligence . . ." Id. pg. 19.

Accordingly, Fibertech has not demonstrated that it is a "licensee" or a "utility." In fact, this is simply another instance of Fibertech ignoring the findings of the Department and other judicial and regulatory bodies and repeating its discredited positions. Because Fibertech is not a licensee or a utility under 220 CMR 45.02 it has no

[3] M.G.L. c. 159, § 12 states that the Department shall supervise and regulate common carriers.

standing to bring this complaint before the Department and the complaint must be dismissed.

III. FIBERTECH HAS NOT COMPLIED WITH THE FILING REQUIREMENTS OF 220 CMR 45.04(4)

The Department's pole attachment regulations, 220 CMR 45.04, govern the elements to be included in any complaint filed with the Department. The regulations state that a complaint must include an affidavit to support "all factual allegations set forth in the complaint." 220 CMR 45.04(4). Since Fibertech's complaint has failed to set forth the accompanying affidavit, Fibertech's amended complaint and petition must be dismissed. This is particularly important in this instance in light of Fibertech's prior manipulation of the facts and because the current assertions are not any more accurate. If no one at Fibertech is willing to swear to the factual allegations made and to be responsible should they not prove to be truthful, the 'new' complaint and petition must be dismissed.

IV. FIBERTECH STILL HAS A MOTION FOR RECONSIDERATION PENDING IN D.T.E. 02-47

On August 13, 2002, Fibertech filed a complaint in D.T.E. 02-47 alleging many of the same discriminatory and anti-competitive actions with respect to pole attachments that it alleges in the 'new' complaint, which has been docketed as D.T.E. 03-56. On December 24, 2002, the Department issued an Order dismissing that complaint without prejudice. On January 15, 2003, Fibertech filed a Motion for Reconsideration and

Clarification and in addition, requested an extension of the time in which it could file an appeal. To date, Fibertech's Motion for Reconsideration has not been ruled upon.

To WMECO's knowledge there is no precedent for a party to file a complaint before its similar or identical earlier complaint has been finally adjudicated. Such a result is, moreover, completely antithetical to the customary manner in which matters are taken up and resolved by the Department. Clearly there is no Department rule or practice which condones such an action. If possible, this result is even more appropriate in this instance because Fibertech itself has prolonged, by their Motion for Reconsideration, consideration of their first complaint.

Based on the pendency of its earlier complaint, Fibertech's 'new' complaint must be rejected. Any other result is contrary to common sense, the efficient administration of resources and Department practice

For all the aforementioned reasons, WMECO respectfully requests that the Department dismiss Fibertech's complaint with prejudice.

Respectfully submitted,

Western Massachusetts Electric Company

By its attorneys,

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Stephen Gibelli
107 Selden St.
Berlin, Connecticut 06067
(860) 665-5513

Stephen Klionsky
101 Federal St., 13th Floor
Boston, Massachusetts 02110
(617) 748-5140

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