

**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

Respondents.

HEARING REQUESTED

D.T.E. 02-47

**PETITION FOR INTERIM RELIEF
AND COMPLAINT
(Injunctive 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~~”) and Northeast Utilities Service Company d/b/a Western Massachusetts Electric Co. (“~~WMEC~~”) 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:

Summary

1. Fibertech is entitled, pursuant to G.L. c.166, § 25A, and 220 C.M.R. § 45.00, *et seq.*, to nondiscriminatory access to attach its communications fiber optic cables (“Fiber”) to Respondents’ poles and in Respondents’ conduits.

2. Respondents’ have unlawfully delayed (and therefore effectively denied) Fibertech’s access to these vital bottleneck monopoly facilities. Also, Respondents’ have attempted to charge Fibertech inflated and inappropriate make-ready charges as a condition of allowing Fibertech to have access to Respondents’ poles, ducts, conduits and rights-of-way (“Bottleneck Facilities”)

3. Respondents’ stated reasons (or lack thereof) for delaying and denying Fibertech access to their Bottleneck Facilities, and Respondents’ attempts to charge Fibertech for inflated and inappropriate make-ready charges, are anti-competitive and discriminatory tactics in violation of the letter and spirit of the DTE’s regulations as set forth in 220 C.M.R. § 45.00, *et seq.*

4. Fibertech requests Interim Relief, pursuant to 220 C.M.R. § 45.03, and permanent relief from Respondents’ attempt remove Fibertech’s attachments, and relief from Respondents attempts to deny Fibertech access to their Bottleneck Facilities and from Respondents’ attempt to impose illegal and inappropriate make-ready charges. Fibertech seeks an injunction preventing Respondents from disconnecting or otherwise interfering with the Fiber that Fibertech has already installed in the Springfield, Massachusetts metropolitan area or in the Worcester, Massachusetts metropolitan area.

Parties

5. 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. It is offering, initially, dark fiber for use by communications carriers (CLECs, ISPs, IXC's, ILEC's), 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 Bottleneck Facilities is essential to allow Fibertech to develop its network.

6. Upon information and belief, Respondent Verizon is the Incumbent Local Exchange Carrier 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.

7. Upon information and belief, Respondent WMEC 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.

Jurisdiction

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

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

10. 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' Bottleneck Facilities.

11. Fibertech has requested access to Respondents' Bottleneck Facilities for the installation of its Fiber. For over two (2) years, Respondents' delays had effectively denied such access.

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

Statement of Facts

13. Fibertech entered into a pole attachment agreement with Verizon on or about March 7, 2000 (the "~~Verizon Pole Agreement~~"), a true and accurate copy of which is attached hereto as Exhibit A, and entered into a conduit agreement with Verizon on or about June 6, 2000 (the "~~Verizon Conduit Agreement~~"), a true and accurate copy of which is attached hereto as Exhibit B (the Verizon Pole Agreement and the Verizon Conduit Agreement being collectively the "~~Verizon Agreements~~"). Fibertech began requesting to install Fiber on and in Verizon's Bottleneck Facilities in 2000.

14. Fibertech entered into a pole attachment agreement with Verizon and WMEC on or about March 31, 2000 (the "~~WMEC Agreement~~") a true and accurate copy of which is attached hereto as Exhibit C. Fibertech initially requested to install Fiber on WMEC's Bottleneck Facilities in 2000. True and accurate copies of Fibertech's requests for access to the Bottleneck Facilities are attached hereto as Exhibit D. The Verizon Agreements and the WMEC Agreement are collectively referred to as the "~~Facilities Agreements~~".

15. 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 Requirement”). 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).

16. For the approximately 1,245 poles for which Fibertech applied to Verizon in the Springfield region, in almost every case Verizon unlawfully failed to respond in any manner within the 45-day time period, and in many cases have failed to grant or deny access to this date. WMEC only complied with the 45 Day Requirement for 9 of the 410 poles for which Fibertech applied to WMEC. This unlawful conduct constitutes continuous breaches of the Facilities Agreements which have been ongoing for more than two (2) years in some instances. Copies of Respondents’ replies to Fibertech’s requests for access to the Bottleneck Facilities are being filed contemporaneously herewith.

17. Also, Fibertech applied to Verizon for 172,667 feet of underground conduit in the Springfield region, by means of 115 different applications, a true and accurate copy of which are attached hereto as Exhibit E. Contrary to commitments made by Verizon representatives during the proceedings through which Verizon sought permission to provide long distance service in Massachusetts, with respect to approximately ninety-five percent (95%) of this requested conduit, Verizon failed to either license the conduit or provide Fibertech with a make-ready estimate within the time period prescribed by law.

18. When Respondents did finally respond to a portion of Fibertech’s requests for access

to the Bottleneck Facilities, Respondents attempted to impose an unlawful, discriminatory and anti-competitive ‘Process’ that is designed to hinder those requesting access to Bottleneck facilities with excessive delay and expense. By way of example only, and without limitation, this Process:

- a. Violated Massachusetts law by unilaterally declaring that Respondents would not comply with the 45 Day Requirement;
- b. Established a multi-step scheme of delays, with a delay of at least 30 days at each step of the Process, which has caused Fibertech to incur significant expenses and has interfered with Fibertech’s performance of its contractual obligations;
- c. Threatened Fibertech with cancellation of applications (and thus the possibility of starting the whole Process over from the start) if Fibertech did not submit to Respondents’ excessive make-ready charges;
- d. Attempted to extort even higher make-ready charges from Fibertech by delaying and/or threatening to delay make-ready work unless Fibertech agreed to sign a new pole agreement with Verizon that would result in higher make-ready charges;
- e. Created a “chase-your-tail” conspiracy of circular departmental requirements whereby in some instances the requirements of one department could not be fulfilled without first meeting the requirements of a second department, which second department would then state that Fibertech had to meet the first department’s requirements before the second department would cooperate with Fibertech, exploiting what FCC Chairman Powell has called “strategic incompetence”¹;
- f. Created a “go fish” scheme for conduit applications, whereby Fibertech was denied access to maps and documents regarding conduit availability and was told that it must submit a proposed route and wait for confirmation of whether a duct was available. If duct was not available, Fibertech was basically told to “guess again” and was again denied access to maps and documents that would allow it to determine where available conduit might be. By committing in its

¹ “Over the last few years, network owners have shown that, notwithstanding contracts, tariffs and regulations aimed at establishing a level playing field, they can push CLECs into bankruptcy through delays, misplaced orders and its practice of what industry observers have dubbed “strategic incompetence.” Recognizing that this anti-competitive behavior will prevent the development of facilities-based networks, Chairman Powell has called for increased fines for these offenders.” *Testimony of Michael K. Powell, Chairman, Federal Communications Commission, before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, 107th Cong, 1st Sess., at 17 (Mar. 29, 2001).*

Section 271 proceeding to adhere to federal access standards, Verizon must allow Fibertech access to its maps and documents regarding conduit availability. *See Supplemental Comments of Bell Atlantic-Massachusetts to Mass. DTE Evaluation of Verizon-Massachusetts Section 271 Application* (May 26, 2000) at Page 47, fn. 25 (referencing *Application of Bellsouth Corporation*, FCC 98-271 (rel. October 13, 1998) at Paragraph 180).

- g. Created “dead end” situations for conduit facilities, where if an available duct was finally found along a certain route, Fibertech then was denied access to maps and documents necessary to determine whether there was adjoining conduit that would allow Fibertech to continue its underground construction; and – despite being denied information regarding adjoining conduit necessary to determine whether the available conduit would connect to any other available conduit, therefore, whether the available conduit would serve any useful function – Fibertech was required by Verizon to either pay make-ready charges related to the available conduit or have its application for that conduit cancelled;
- h. Falsely represented that conduit facilities were not available in several instances where they were available – causing Fibertech unnecessary delays and expense;
- i. Falsely represented that conduit facilities were available in several instances where they were not – causing Fibertech delays and expense in re-routing; and
- j. Discriminated against competitive telecommunications providers, in that, upon information and belief, Verizon did not impose on itself or its affiliates the senseless delays and expenses that are imposed on those companies, like Fibertech, subject to the Process.

19. Once Respondents finally responded to Fibertech’s requests for access to the Bottleneck Facilities, Respondents issued egregiously expensive make-ready estimates that discriminated against Fibertech in the attachment methods required of Fibertech and would unlawfully require Fibertech to correct previously existing conditions on or in the Bottleneck Facilities, including but not limited to (true and accurate copies of Respondents’ make-ready estimates are attached hereto as Exhibit E):

- a. Requiring Fibertech to pay all costs to correct pre-existing safety violations (which is particularly expensive when such correction requires replacing a utility pole). Attempts to impose such costs on Fibertech are inconsistent with the prohibition against a pole owner charging a license applicant “for the costs of other attachers’ safety violations or other attachers’ rearrangements which are not necessitated by [an applicant’s] attachment” (*Cavalier, infra*, at Para. 13)

or otherwise requiring payment “in excess of the actual cost of make-ready or pole change-out work necessitated by [the applicant’s] attachment” (*Cavalier, infra*, at Para. 12).

- b. Discriminating against Fibertech by denying Fibertech the right to “box” poles (attach Fiber to the side of the pole opposite to the majority of attachments) when, upon information and belief, other attachers have been permitted to box poles in the Springfield metropolitan area and Verizon has used this construction technique for its own purposes;
- c. Discriminating against Fibertech by denying Fibertech the right to attach to poles using extension arms when, upon information and belief, other attachers have been permitted to use extension arms to attach to poles in the Springfield metropolitan area;
- d. Selectively neglecting to enforce Verizon’s rights to the communication space on poles jointly owned by Respondents, thereby having Fibertech charged with the expense of raising WMEC’s attachments that were encroaching on the communications space when, upon information and belief, Verizon has enforced its rights to the communications space when Verizon or its affiliates have attached to poles and/or would exercise its rights when attaching to poles in the future.
- e. Attempted to impose unnecessary and heavy make-ready costs on Fibertech by directing Fibertech to attach its cable below the cable television line throughout the network, although the cable television line is typically located only twelve inches above the next lower line, thereby requiring Fibertech (if Fibertech had not refused) to pay for make-ready work on virtually every pole, including poles already amenable for attachment.
- f. Encroaching, by WMEC, on the space reserved for communications attachments (with Verizon’s support) and discriminating against Fibertech by failing to honor the communications space as it would if Verizon needed additional space to attach to such poles.
- g. Encroaching, by WMEC, on the space reserved for communications attachments (with Verizon’s support) thereby failing to arrange the power facilities in a correct manner that efficiently uses the space allotted for power facilities -- without justification based on actual and genuine service needs -- thereby unlawfully reserving space on the poles.

20. Because of Respondents multiple and lengthy violations of the 45 Day Requirement, Fibertech asserts that its requests for licenses to the Bottleneck Facilities were “deemed granted” after

the expiration of the 45 day period following each request for access. *See Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 15 F.C.C.R. 9563, Paragraph 15 (released June 7, 2000) (citing *In the Matter of Application of Bellsouth Corporation*, FCC 98-271, 13 F.C.C.R. 20599 (1998)). This conclusion that the licenses for which Fibertech applied and to which Respondents made no response are deemed granted flows from 220 C.M.R. 45.03, which, like 47 C.F.R. § 1.1403, requires licensing or a legitimate make-ready estimate within 45 days of the date of the application.

21. The federal standard set forth in *Cavalier* becomes especially meaningful in Massachusetts when one considers that the DTE's evaluation of Verizon's Section 271 application states that Verizon uses standard agreements for poles and conduits in all New England states and that "Verizon states that it has amended its standard license agreements to conform with the Act and has not enforced terms and conditions contained in its existing agreements that may conflict with the Act." *Mass. DTE Evaluation of Verizon-Massachusetts Section 271 Application* (October 16, 2000) at Page 225 (citing VZ-MA Application, Appdx. B, Vol. 32a-b, Tab 423 at 37 (VZ-MA May Supplemental Comments)). Therefore, Verizon has committed to the DTE that Verizon's practices will conform to the Federal Telecommunications Act as it relates to pole and conduit access: this elevates its commitment beyond simple adherence to Massachusetts law regarding Bottleneck Facilities: that this conformance with the Act is not merely by means of compliance with state law is underscored by the fact that the Verizon agreements apply in all Verizon New England states, and some are federally regulated. As indicated by Verizon during its Section 271 proceeding before the DTE, Verizon does administer access to its poles and conduits throughout New England service territories in a uniform manner. Fibertech is preparing for submission to the FCC a complaint against Verizon for its failure to provide non-discriminatory and otherwise lawful access to its facilities in Rhode Island.

22. Even given Respondents' flagrant disregard of their obligations to allow Fibertech non-

discriminatory access to their Bottleneck Facilities in compliance with the 45 Day Requirement, Fibertech still attempted to resolve these matters with Respondents in an amicable fashion. These efforts by Fibertech were of no avail.

23. Therefore, on or about June 22 and 23, 2002, Fibertech installed Fiber in and on the Bottleneck Facilities for which it had applied for access, but had been unlawfully denied non-discriminatory access as stated above, and which licenses were therefore “deemed granted” (the “June Installation”). Fibertech’s placement of competitive communications facilities on the poles of Verizon, Western Mass Electric, and Mass Electric was performed pursuant to detailed instructions designed to ensure compliance with the National Electric Safety Code and all other relevant safety standards, including the requirement that 40 inches separate a communications cable from a secondary electric line. Certain installations performed by a contractor that were found to have deviated from Fibertech’s instructions were detected by means of post-construction inspections conducted by Fibertech and were corrected. Fibertech has since had customers “light” the Fiber with communications traffic.

24. Fibertech’s placement of competitive communications facilities occurred after Respondents failed to comply with the 45 Day Requirement and was a step necessitated by the refusal of Western Mass Electric and Verizon to provide Fibertech access to their poles as required by law, by the contractual requirements under which Fibertech’s customers operated and their concomitant business needs, and by Fibertech’s contractual requirements and urgent business and financial needs, all of which dictated that the creation of an operative competing telecommunications network for Springfield and the rest of the Pioneer Valley be achieved despite the obstruction of the pole owners and without further delay.

25. On Monday, June 24, 2002, Fibertech’s Vice President and Corporate Counsel Charles B. Stockdale contacted Verizon’s counsel, Mr. Beausejour, informing him of the installation in

and around Springfield, including Easthampton, Northampton, and Agawam over the preceding weekend, June 22 and 23, 2002. At that time, Mr. Stockdale informed Mr. Beausejour of its legal basis for this action, noting also that the critical business needs of Fibertech and its customers, who were awaiting the completion of Fibertech's network were at stake.

26. Mr. Stockdale further suggested to Mr. Beausejour that the parties bring their differences to the Massachusetts Department of Telecommunications and Energy in an effort to reach a resolution. After initially "be my guest" regarding DTE involvement, Mr. Beausejour retracted that statement and expressed what Mr. Stockdale understood to be support for the idea of informal discussions, and represented that he would speak to others at Verizon about the subject. Following that conversation, Verizon took the position that Fibertech had engaged in unauthorized attachments, as is documented in correspondence attached to this Petition as Exhibits .

27. In response to Verizon's call for a "disciplinary meeting" with Fibertech, on July 17, 2002, Fibertech arrived at Verizon's Springfield offices for a meeting. WMEC representatives were also present. In response to Fibertech's request for assurance that the meeting would address its concerns as well as Verizon's, Verizon had stated that the meeting would "provide a useful forum for the parties to resolve a number of important issues" (July 9, 2002, letter from Keefe B. Clemons, attached hereto as Exhibit G). However, Verizon informed Fibertech that the meeting would address only the question of remediation of Fibertech's attachment practices. The meeting was adjourned shortly thereafter because Respondents refused to continue in the absence of their own counsel. Despite Fibertech's requests for information in writing of any safety violations that they believed were created by Fibertech's attachments to correct Verizon's alleged violations, Verizon has not identified to Fibertech a single pole involving an alleged safety violation.

28. Subsequent to the June Installation, Respondents have threatened to dismantle and

otherwise interfere with Fibertech's Fiber, and Verizon has specifically threatened to terminate the Facilities Agreements. True and accurate copies of Respondents letters are attached hereto as Exhibit H. This threatened retaliation ignores the sixty (60) day notice requirement in 220 C.M.R. § 45.03(a) and would cause immediate and irreparable harm to Fibertech, its customers, and their end users; and therefore if such retaliation is allowed it could signify an end to the development of facilities-based competitive telecommunications in the Commonwealth of Massachusetts.

29. Despite Fibertech's efforts over the past two years to resolve this matter with Respondents, Respondents have maintained their discriminatory and unlawful course of conduct, and thus Respondents and Fibertech have been unable to reach agreement regarding Fibertech's access to Respondents' Bottleneck Facilities.

30. In light of the efforts undertaken by the parties to date, and the position of Respondents as set forth in their recent correspondence, Fibertech believes that any further efforts to resolve the issue prior to the filing of this Complaint would be futile. Further, as set forth in Respondents' correspondence, both Respondents have threatened to dismantle or otherwise interfere with Fibertech's Fiber. Any such interference will cause immediate and irreparable harm to Fibertech, cessation of Fibertech's service to Fibertech's customers, and the cessation of service provided by Fibertech's customers to the end-users of services provided by Fibertech's customers. Therefore, Fibertech requests that the DTE immediately enjoin Respondents from taking any action which would interfere with Fibertech's Fiber.

Prayer for Relief

WHEREFORE, Fibertech respectfully requests that the Department:

1. Direct the Respondents to recognize the licensure of Fibertech's facilities on the poles in

question, and direct the Respondents to issue written licenses as proof of same;

2. Grant Fibertech Interim Relief pursuant to 220 C.M.R. § 45.03(3)(a), and permanent relief, prohibiting Respondents from:

- a. terminating the Facilities Agreements or any license granted under such Facilities Agreements or deemed granted under law and annulling any termination notices already given;
- b. dismantling any portion of Fibertech's Fiber or other Fibertech facilities, attaching liens on Fibertech's facilities or franchises, or drawing on performance bonds or pole attachment bonds posted by Fibertech;
- c. taking any action to attempt to force payment of additional amounts with respect to make-ready work pertaining to Fibertech's current Springfield or Worcester networks;
- d. taking any retaliatory action against Fibertech, including but not limited to: canceling the Facilities Agreements, charging multiple annual rental rates, or refusing to process any current or future applications for access to Bottleneck Facilities in the Springfield and/or Worcester regions;

3. Order Respondents to allow Fibertech access to their Bottleneck Facilities in Massachusetts upon non-discriminatory, just and reasonable terms, rates, and conditions, and to issue written licenses as proof of same;

4. Hold that the Respondents' current Process for licensing Bottleneck Facilities is not just and reasonable, but instead constitutes an unfair barrier to entry and a violation of Verizon's Section 271 obligations, and establish an inquiry into Respondents' current licensing Process allowing comments from other competitive telecommunications companies;

5. Hold that Respondents' refusal to allow Fibertech access to Respondents conduit maps and related documents is not just and reasonable, but instead, constitutes an unfair barrier to entry.

6. Prohibit Respondents from imposing on Fibertech more stringent requirements than it imposes on themselves or other entities attached using its Bottleneck Facilities;

7. Hold that Respondents may not lawfully require a pole license applicant to pay the costs of correcting pre-existing compliance issues, but rather must charge all costs of bringing the poles into compliance with relevant safety and construction codes to the pole occupants responsible for putting the poles out of compliance;

8. Require that Respondents file with the DTE, with notice to all pole licensees and license applicants, any proposed changes in its pole and/or conduit make-ready process including but not limited to procedures to ensure compliance with the 45 Day Requirement and to establish review of make-ready costs, together with supporting cost data;

9. Require Respondents to return to Fibertech any unnecessary make ready charges paid by Fibertech; and

10. Grant such other, further and general relief as it may deem 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: August 13, 2002

* motion to enroll as counsel *pro hac vice* filed contemporaneously herewith

CERTIFICATE OF SERVICE

I hereby certify that on August 13th, 2002, I served a copy of the foregoing Complaint on the Respondents, by delivering a copy of the same to:

Bruce P. Beausejour, Esq.
Verizon New England
185 Franklin Street
Room 1403
Boston, MA 02110

Stephen Gibelli, Esq.
Northeast Utilities Service Company
107 Selden Street
Berlin, CT 06037
