

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
Fiber Technologies Networks, L.L.C.,
Petitioner,
v.
Verizon New England, Inc. d/b/a Verizon
Rhode Island,
Respondent.
File No. EB-03-MD-007

ORDER

Adopted: May 14, 2003

Released: May 15, 2003

By the Chief, Market Disputes Resolution Division, Enforcement Bureau:

1. On April 21, 2003, Fiber Technologies Networks, L.L.C. ("Fibertech") filed a petition for temporary stay pursuant to 47 C.F.R. § 1.1403(d) requesting, among other things, that the Commission prohibit Verizon New England, Inc. d/b/a Verizon Rhode Island ("Verizon") from terminating its pole attachment agreement with Fibertech and removing any Fibertech cables from Verizon poles.

2. Fibertech is a telecommunications provider in the northeastern and midwestern United States. Fibertech has constructed a fiber optic network, including in and around Providence, Rhode Island, providing telecommunications and dark-fiber

1 Petition for Temporary Stay, File No. EB-03-MD-007 (filed Apr. 21, 2003) ("Stay Petition") at 27-28.

2 Stay Petition at 4. For purposes of this Order, we assume the facts pled in the Stay Petition to be true.

services.<sup>3</sup> Fibertech's Rhode Island network is installed almost entirely on utility poles or underground conduit owned by Verizon, and Fibertech and Verizon have entered into a pole attachment agreement.<sup>4</sup> Verizon is the incumbent local exchange carrier in Rhode Island.<sup>5</sup>

3. Fibertech initially submitted applications for licenses to attach to Verizon poles in Rhode Island on July 21, 2000.<sup>6</sup> Verizon is required by Commission rules to respond to applications within 45 days by either granting access to poles or confirming the denial in writing by the 45<sup>th</sup> day, and including specific information supporting the denial based on lack of capacity, safety, reliability or engineering standards.<sup>7</sup> According to Fibertech's Stay Petition, Verizon did not respond to Fibertech's applications within the requisite 45 day time-frame.<sup>8</sup> Instead, Verizon responded to the initial applications 180 days after submission, and did not respond to others for 329 days.<sup>9</sup> In addition, according to Fibertech, the make-ready estimates accompanying Verizon's belated responses grossly inflated any necessary expenses.<sup>10</sup> In sum, Fibertech contends that Verizon's conduct is an anticompetitive attempt to thwart Fibertech's efforts to construct a competitive broadband network in Rhode Island.<sup>11</sup>

4. Instead of filing a complaint with the Commission based on Verizon's alleged violation of section 224 of the Communications Act of 1934, as amended ("Act"),<sup>12</sup> Fibertech installed its cable within the "supply space" of the poles utilized by Narragansett Electric Company ("NECO"), the local electric utility.<sup>13</sup> Based on Fibertech's agreement with NECO, a NECO contractor installed Fibertech's cable under the supervision and direction of NECO inspectors.<sup>14</sup> The record appears to reflect that, irrespective of its agreement with NECO, Fibertech nevertheless lacks the requisite licenses from Verizon, the pole owner, to lawfully attach.<sup>15</sup> At the same time, however, section 224 of the Act confers on Fibertech the right to nondiscriminatory access to

---

<sup>3</sup> Stay Petition at 4.

<sup>4</sup> Stay Petition at 4-5, 9.

<sup>5</sup> Stay Petition at 4.

<sup>6</sup> Stay petition at 6.

<sup>7</sup> 47 C.F.R. § 1.1403(b).

<sup>8</sup> Stay Petition at 6

<sup>9</sup> Stay Petition at 6.

<sup>10</sup> Stay Petition at 9-13.

<sup>11</sup> See Stay Petition at 4-8, 10-15.

<sup>12</sup> See 47 U.S.C. § 224.

<sup>13</sup> Stay Petition at 8.

<sup>14</sup> Stay Petition at 8-10.

<sup>15</sup> See, e.g., Stay Petition at 23 (Verizon "sought unlawfully to impose unnecessary and burdensome costs on Fibertech as a condition of access to its poles").

Verizon's poles, and requires Verizon to respond to requests for access promptly.<sup>16</sup>

5. Verizon has advised Commission staff that it recently filed a state court action in Rhode Island, alleging, *inter alia*, that Fibertech breached its pole attachment agreement with Verizon. While state courts have jurisdiction over certain breach of contract issues involving pole attachment agreements, the Commission has jurisdiction to hear and resolve complaints regarding the reasonableness of terms and conditions of attachment.<sup>17</sup>

6. The Commission may grant a stay if: (1) the Petitioner is likely to succeed on the merits; (2) the Petitioner would suffer irreparable injury absent a stay; (3) a stay would not substantially injure other interested parties; and (4) a stay is in the public interest.<sup>18</sup> Although we are not in a position at this preliminary stage to assess fully these four factors, we find that the public interest in having disputes resolved by swift agreement of the parties outweighs the other factors, warranting issuance of a limited interim stay that would maintain the status quo until the parties have an opportunity to participate in Commission-supervised mediation.<sup>19</sup> Such a stay will ensure that there will be no significant change in the status of Fibertech's attachments (and, concomitantly, its ability to provide service to its customers) before the parties have determined whether they can resolve their dispute without resort to costly and time-consuming litigation. Accordingly, we order Verizon to refrain from detaching any Fibertech cable from Verizon poles in Rhode Island, except to the extent necessary to prevent imminent harm to public safety or property, pending Commission-supervised mediation of this matter. Upon completion of the mediation, we will rule on the merits of the Stay Petition to the extent necessary.

FEDERAL COMMUNICATIONS COMMISSION

Alexander P. Starr  
Chief, Market Disputes Resolution Division  
Enforcement Bureau

<sup>16</sup> 47 U.S.C. § 224(f)(1); 47 C.F.R. § 1.1403(b).

<sup>17</sup> *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, Order, 16 FCC Red 12209, 12217 ¶ 18 (2001), review denied sub nom. *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11<sup>th</sup> Cir. 2002), petition for cert. filed 71 U.S.L.W. 3653 (Apr. 4, 2003) (No. 02-1474). See also 47 C.F.R. § 1.1415 (the Commission "may issue such other orders and so conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice").

<sup>18</sup> See *Virginia Petroleum Jobbers Ass'n v. F.P.C.*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metro. Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

<sup>19</sup> As noted above, the parties have agreed to participate in mediation under the Commission's auspices, and they are in the process of preparing written submissions to the Commission in anticipation of the mediation. The parties have been working to determine a mutually-convenient date for the mediation. To ensure that the mediation takes place in a timely manner, we hereby order the parties to advise Commission staff, **no later than May 16, 2003**, of dates that are acceptable to both sides.