



Agenda Date: 9/13/12  
Agenda Item: 4A

**STATE OF NEW JERSEY**  
**Board of Public Utilities**  
44 South Clinton Avenue, 9th Floor  
Post Office Box 350  
Trenton, New Jersey 08625-0350  
[www.nj.gov/bpu/](http://www.nj.gov/bpu/)

TELECOMMUNICATIONS

PETITION OF FIBER TECHNOLOGIES )  
NETWORKS, LLC, FOR AN ORDER FINDING )  
UNREASONABLE THE MAKE-READY COSTS )  
IMPOSED BY VERIZON NEW JERSEY INC. ON )  
FIBER TECHNOLOGIES, LLC, REQUIRING )  
REFUNDS, AND ESTABLISHING REASONABLE )  
MAKE-READY RATES, TERMS, AND CONDITIONS )

ORDER

BPU DOCKET NO. TO12080722

**Parties of Record:**

**Dennis C. Linken, Esq.**, for Petitioner  
**William J. Balcerski, Esq.**, for Verizon New Jersey Inc.  
**Stefanie A. Brand, Esq.**, Director, for Division of Rate Counsel

BY THE BOARD:

**INTRODUCTION**

This matter comes before the New Jersey Board of Public Utilities ("Board") by the August 1, 2012 Verified Petition of Fiber Technologies Networks, LLC ("Fibertech") against Verizon New Jersey Inc. ("Verizon") and Verizon's August 21, 2012 motion to dismiss for lack of subject matter jurisdiction. For the reasons stated below, the Board denies Verizon's motion to dismiss and grants Fibertech's requests that the Board (i) retain the current petition and treat it on an expedited basis to enable the Board to resolve it within the 180-day timeframe and (ii) allow all discovery materials exchanged by the parties in Docket No. TO09121004 to be incorporated in the present matter, but only to the extent that said discovery materials are relevant to the issues in the case.

**PROCEDURAL HISTORY AND STATEMENT OF THE FACTS**

On August 1, 2012, Fibertech filed a Verified Petition with the Board in which it requests that the Board (i) find Verizon's rates, terms, and conditions regarding make-ready costs charged to Fibertech to be anticompetitive, unjust, unreasonable, and unlawful; (ii) establish reasonable

rates, terms, and conditions regarding make-ready costs for use in determining the lawfulness of make-ready charges imposed on Fibertech by Verizon in New Jersey in the past and prospectively, including establishment of a requirement that Verizon make a showing of proof as to the cost basis used to calculate make-ready charges; (iii) find the difference between the actual make-ready charges imposed and the amount the Board determines to be reasonable make-ready costs; (iv) require Verizon to refund to Fibertech the difference between the actual make-ready charges imposed and the amount the Board determines to be reasonable make-ready costs; and (v) grant Fibertech such other relief as the Board deems just, reasonable, and proper. Petition at 9-10.

Fibertech states that it is a duly authorized provider of telecommunications services in the State of New Jersey, and its business address is 300 Meridian Centre, Rochester, New York. Petition at 1. Fibertech avers that to deploy its competitive fiber-optic broadband networks in New Jersey, it is required to enter into Verizon's standard form pole attachment agreement, *i.e.*, Verizon New Jersey Inc. Joint Use License Agreement, governing the rates, terms, and conditions of attachment. *Id.* at 3. A review of the Joint Use License Agreement, which is attached to the Petition as Exhibit 1, indicates that it was executed by Fibertech and Verizon on August 30, 2007 in the State of New York and was never submitted to the Board for approval.<sup>1</sup>

According to Fibertech, the Board has certified to the Federal Communications Commission ("FCC") that it regulates the rates, terms, and conditions for pole attachments and therefore has jurisdiction over this matter pursuant to 47 U.S.C. § 224, N.J.S.A. 48:2-1 *et seq.*, and N.J.A.C. 14:3-2.3 *et seq.* Petition at 2<sup>2</sup>.

Fibertech notes that "the within Petition is virtually the same as the Petition filed with the Board in Docket No. TO09121004." Cover Letter at 1. In its Letter Motion, Fibertech notes that the Board had dismissed Fibertech's December 19, 2009 petition, Docket No. TO09121004, for lack of subject matter jurisdiction.<sup>3</sup> "The basis of the Board's determination was that under 47 U.S.C. § 224(c)(3), the Board was required to have decided the case in Docket No. TO09121004 within 180 days and that, given its failure to do so, the Board no longer possessed jurisdiction over the matter." Letter Motion at 2. Accordingly, Fibertech requests that the Board retain the current petition and treat it on an expedited basis to enable the Board to resolve it within the 180-day

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<sup>1</sup> According to Article I, Definitions, Section 1.11 of the Joint Use License Agreement, "make-ready or make-ready work" is defined as follows: "All work, including but not limited to rearrangement and/or transfer of existing facilities, replacement of a Pole, and other changes, required to accommodate Licensee's Facilities on a Pole, or in a Conduit or Right of Way." Also, according to Article XXII, Conflicts: "This Agreement, including all exhibits and appendices thereto, shall be subject to the Communications Act of 1934, as amended, and any related rules and regulations, and in the event of any conflicting provisions of this Agreement and such laws, rules or regulations, such laws, rules and regulations shall govern."

<sup>2</sup> By a January 21, 1985 letter from Bernard R. Morris, Director, Office of Cable Television, to Margaret Wood, Esq., FCC, Mr. Morris certified, pursuant to 47 U.S.C. § 224, that the Board regulates cable television pole attachment rates, terms, and conditions. Mr. Morris also indicated that petitions concerning pole, trench, or conduit rates would be decided within 180 days of filing. Later in 1985, the Board's pole-attachment rules, N.J.A.C. 14:18-2.9 *et seq.*, as amended, were promulgated pursuant to the Cable Television Act, N.J.S.A. 48:5A-1 *et seq.* See also *States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, 25 FCC Rcd 5541 (WCB 2010)(including New Jersey).

<sup>3</sup> The Board at its July 18, 2012 agenda meeting determined that it no longer retained subject matter jurisdiction over Fibertech's Petition in Docket No. TO09121004 and officially issued an Order in that regard on August 2, 2012, which was accompanied by the Dissent of Commissioner Jeanne M. Fox.

timeframe. Fibertech also requests that "all discovery materials exchanged by the parties in Docket No. TO09121004 be incorporated in the present matter," since that docket "had proceeded to the point where testimony was about to be submitted by the parties." Letter Motion at 2-3.

On August 21, 2012, Verizon filed an Answer to Fibertech's Re-Filed Complaint ("Answer") in which it "incorporates by reference the response it filed with the Board dated January 29, 2010, in BPU Docket No. TO09121004." Answer at 1. Verizon "denies the allegations of wrongdoing and liability set forth in the re-filed Complaint and is filing a motion to dismiss for lack of jurisdiction concurrently with this response" and further "responds and avers that the claims of Fibertech's Complaint are barred by the doctrine of unclean hands." Id. Also on August 21, 2012, Verizon filed a Motion to Dismiss Fibertech's Re-Filed Complaint for Lack of Subject Matter Jurisdiction ("VMotion"). Verizon points out that "[a]s Fibertech acknowledges in its cover letter, this new complaint is 'virtually the same' as the complaint Fibertech filed on December 17, 2009, in BPU Docket No. TO09121004." VMotion at 1. Verizon argues that "[t]he notion that Fibertech can cure the subject matter jurisdiction defect by simply re-filing the same claims in a new complaint at the Board is frivolous and would defeat the intent of the federal law that required final adjudication within the 180-day time limit as a matter of jurisdiction." Id. at 2.

On August 31, 2012, Fibertech filed a letter brief ("FLB") in lieu of a more formal brief in opposition to Verizon's Motion. Fibertech states: "Verizon's bald motion, completely lacking in specificity as to any purported legal basis, leaves Fibertech at a disadvantage, for Fibertech is thereby forced to guess as to what argument Verizon relies upon. Verizon's simple assertion, without more, that Fibertech's present Petition should be dismissed because the Board ruled that it did not have jurisdiction over a previous petition by virtue of the fact that it did not meet the 180 day statutory time frame for a decision in that matter, is, at best, wanting." FLB at 2 (footnotes omitted).

According to Fibertech, nothing in 47 U.S.C. § 224 ("Section 224") or its legislative history suggests that the Board's failure to resolve one complaint in 180 days precludes its consideration of another complaint filed by the same entity concerning an ongoing violation. FLB at 3. Fibertech notes that, accepting Verizon's argument, the Board would be barred from ever considering Verizon make-ready pricing concerns if asserted by Fibertech solely because the Board did not resolve a different complaint in 180 days, and notwithstanding the fact that the Board never had the opportunity to consider the merits of the dispute. Id. Fibertech argues that Verizon's argument is premised upon its assertion that Fibertech's new Petition is simply a refiling of its last petition, which is erroneous; that although the prior and current Petitions concern pole attachment make-ready disputes, Fibertech's August 1, 2012 filing is in fact a new Petition which can now be heard by the Board; and that even if, *arguendo*, the new Petition is deemed to be a refiling (which Fibertech does not at all concede), it nevertheless is still not barred. FLB at 3.

Relying partly on Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398 (1991) and Walker v. Choudhary, 425 N.J. Super. 135 (App. Div. 2012), Fibertech also contends that to the extent that Verizon believes that the principles of res judicata apply to bar the Board's consideration of the new Petition, Verizon is also mistaken; that it is well established that where, as here, there has been no adjudication of the merits of a case, principles of res judicata do not apply; and that adjudication on the merits of a case is fundamental for the application of the doctrine. FLB at 4-5. Fibertech also relies on R. 4:37-2, which indicates that a dismissal for lack of jurisdiction is not an adjudication on the merits. FLB at 5.

In addition, Fibertech argues that there is nothing in Section 224 which bars a complainant from bringing a new complaint, whether or not based upon the same factual allegations, before the Board; while the statute requires a state agency to rule on a pole attachment complaint within 180 days, there is no mention whatsoever of any bar to a new complaint being brought before the agency in a situation in which the agency was unable to decide the case within such time period; Fibertech's new complaint is not the same complaint as that which was filed in 2009 and is governed by a different period. FLB at 5-6.

Finally, referencing, N.J.A.C. 14:1-4.4, Fibertech contends that "Verizon's motion is procedurally defective in that it lacks certification and a supporting brief." FLB at 7. N.J.A.C. 14:1-4.4 states as follows: "Pleadings will be liberally construed with the view to effect justice. The Board may disregard errors or defects in pleadings which do not affect the substantial rights of the parties. However, if the defect in a pleading prejudices a substantial right of any party the Board may, on notice, strike the pleading or take such other action as it deems appropriate." Fibertech does not, however, state how Verizon's "defective" motion prejudices a substantial right of Fibertech.

On September 4, 2012, Verizon filed a Reply in Further Support of Its Motion to Dismiss Fibertech's Re-Filed Complaint ("VReply"), arguing that (i) Fibertech has flouted the Board's clear interpretation of the unambiguous federal authority; (ii) the dismissal for lack of subject matter jurisdiction is not "procedural" and cannot be "cured" by re-filing "virtually the same" complaint; (iii) Fibertech misconstrues issues of res judicata; and (iv) the Board has a sua sponte obligation to evaluate subject matter jurisdiction and Verizon's motion to dismiss is proper. VReply at 1-7.

According to Verizon, 47 U.S.C. § 224(c)(3)(B) and 47 C.F.R. § 1.1414(e) "make clear that subject matter jurisdiction reverts to the FCC with respect to the 'individual matter' - not with respect to the particular 'complaint' that may have been filed in order to initiate adjudication of the matter." VReply at 2. Verizon reasons that "the Board lacks jurisdiction not only over the specific complaint that Fibertech filed in BPU Docket No. T009121004 in December 2009, but over the subject matter of that initial complaint - and the subject matter of the re-filed complaint is the same as the subject matter of the initial complaint." VReply at 2.

Verizon states that Fibertech's principal argument that the Board's continuing jurisdiction to regulate future pole attachment disputes means that it has jurisdiction over Fibertech's newly-filed complaint is simply incorrect. Instead, Verizon contends, the Board's decision to continue to generally regulate pole attachments in New Jersey does not change the fact that the Board lacks subject matter jurisdiction over the "individual matter" that Fibertech filed in BPU Docket No. T009121004. VReply at 3, citing 47 U.S.C. § 224(c)(3)(B), 47 C.F.R. § 1.1414(e)). Thus, according to Verizon, the Board, as required by federal law, has already made the determination that it lacks subject matter jurisdiction over the complaint Fibertech filed in 2009, and it is black letter law that a federal statute removing subject matter jurisdiction is not a mere procedural defect that a tribunal has the discretion to ignore. VReply at 3.

Verizon argues that the basis for Fibertech's current inability to seek Board adjudication is "of jurisdictional magnitude" and cannot be ignored; it is not, as Fibertech urges, merely procedural. VReply at 4. Relying on Bowles v. Russell, 551 U.S. 205 (2007) (petitioner's untimely notice, even though filed in reliance upon a District Court's order, deprived the Court of Appeals of jurisdiction) and International Longshoremen's Assoc., AFL-CIO v. Davis, 476 U.S. 380 (1986) (where a state law is pre-empted by federal law, the state courts lack the very power to adjudicate the claims that trigger pre-emption), Verizon argues that, contrary to

Fibertech's claims, the Board's dismissal of Fibertech's 2009 Petition was based on jurisdictional rather than procedural grounds, thus precluding Fibertech from filing a new petition with the Board to adjudicate its same make-ready claims against Verizon. VReply at 4-5.

Verizon clarifies that its Motion mentioned the term "res judicata" only once and only in a very specific context: Verizon simply noted that Fibertech, which has not sought reconsideration of the Board's Order, is precluded from challenging the Board's specific finding regarding which party can invoke the federal limitation. Nevertheless, Verizon states that given that Fibertech has not sought reconsideration, the Board's determinations regarding its lack of subject matter jurisdiction over this matter are binding on Fibertech, for example, Fibertech has not challenged (and is precluded from challenging) the Board's determination that the FCC now has subject matter jurisdiction over its complaint. VReply at 6-7.

### **DISCUSSION AND FINDINGS**

The Board dismissed Fibertech's Petition in Docket No. TO09121004 for lack of subject matter jurisdiction, pursuant to 47 U.S.C. § 224(c)(3) and 47 C.F.R. § 1.1414(e), and consistent with the Board's 1985 certification to the FCC, simply because the Board had not made a final decision within the mandated 180-day period. As the Board noted in its August 2, 2012 Order ("August 2012 Order"), it found no authority or overwhelming public interest in continuing to adjudicate Fibertech's complaint, given that FCC jurisdiction is the clear consequence for the lack of adjudication within 180 days, and the FCC could remand the Petition to the Board if it determined that the Board should have continued to adjudicate Fibertech's Petition. August 2012 Order at 16-17. But the Board did not deem it necessary to state that Fibertech's make-ready claims against Verizon were being dismissed with prejudice. Nevertheless, the Board simply dismissed Fibertech's Petition in Docket No. TO09121004 and never stated that Fibertech could not file with the Board another petition against Verizon regarding make-ready rates, terms, and conditions. Instead, the Board noted that its Order does not at all diminish its ability to regulate pole attachments, but merely signals that, consistent with its 1985 certification to the FCC, the Board will need to process any such complaint within 180 days of filing, unless the Board establishes rules to allow it up to 360 days to take final action on such complaint. Id. at 17.

Indeed, nothing in 47 U.S.C. § 224(c)(3) or 47 C.F.R. § 1.1414(e) precludes Fibertech from filing another petition with the Board, even if it is "virtually the same" as that in Docket No. TO09121004. Rather, Section 224 and the regulation simply require the Board or the State to take final action "within 180 days after the complaint is filed with the State"; otherwise, the State loses jurisdiction over the complaint for which it has not taken final action within 180 days. Thus, although the FCC has no jurisdiction over "rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by a State," 47 U.S.C. § 224(c)(1), the State is not deemed to regulate, "with respect to any individual matter," 47 U.S.C. § 224(c)(3)(B), if it has not taken final action on a filed complaint within 180 days. Thus, the Board finds that its loss of subject matter jurisdiction over Fibertech's Petition in Docket No. TO09121004 was the only legal preclusive effect regarding Fibertech's make-ready claims against Verizon. The Board therefore has subject matter jurisdiction over Fibertech's newly filed petition and its attendant make-ready claims against Verizon.

Fibertech's petition is not barred by *res judicata*, because the Board did not adjudicate the merits of Fibertech's petition in Docket No. TO09121004. The doctrine of *res judicata* cannot be asserted where the issue earlier adjudicated was not the same as that raised in the later proceeding. Washington Tp. v. Gould, 39 N.J. 527, 533 (1963); Ettin v. Ava Truck Leasing, Inc., 100 N.J. Super. 515, 527 (App. Div. 1968), modified on other grounds, 53 N.J. 463 (1969); 46 Am. Jur. 2d, Judgments, §§ 394, 407 (1969). Also, the application of *res judicata* requires substantially similar or identical causes of action and issues, parties, and relief sought. Eatough v. Board of Medical Examiners, 191 N.J. Super. 166, 173 (App. Div. 1983); Constant v. Pacific Nat'l Ins. Co., 84 N.J. Super. 211, 216 (App. Div. 1964). In addition, there must be a "final judgment by a court or tribunal of competent jurisdiction." Charlie Brown of Chatham v. Board of Adjustment, 202 N.J. Super. 312, 327 (App. Div. 1985); Culver v. Insurance Co. of North America, 115 N.J. 451, 460 (1989). Because the Board never adjudicated the merits of Fibertech's Petition in Docket No. TO09121004, *res judicata* is inapplicable here. See also Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 425 (1991) ("because the federal court judgment was not on the merits, it does not preclude plaintiffs from raising their state claims in state court."); Walker v. Choudhary, 425 N.J. Super. 135, 154 (App. Div. 2012) ("When summary judgment was granted, the merits were never examined. We agree to label such an order as an adjudication on the merits would be the embodiment of promoting form over substance.").

Verizon has offered no convincing legal basis to support its motion to dismiss, and none of the cited case law is relevant to Fibertech's newly filed petition. The Board therefore **HEREBY DENIES** Verizon's motion to dismiss Fibertech's petition.

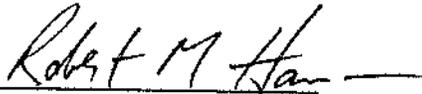
Regarding Fibertech's motion for expedite treatment of its petition, the Board is cognizant of the requirement under the federal Pole Attachment Act, 47 U.S.C. § 224(c)(3) and the promulgated regulations, 47 C.F.R. § 1.1414(e), that the Board take final action on Fibertech's petition within 180 days, *i.e.*, by January 28, 2013. The Board has determined that Fibertech's Petition should be retained by the Board for hearing and, pursuant to N.J.S.A. 48:2-32, **HEREBY DESIGNATES** Commissioner Mary-Anna Holden as the presiding officer who is authorized to rule on all motions that arise during the pendency of this proceeding and modify any schedules that may be set as necessary to secure a just and expeditious determination of the issues. The Board therefore **HEREBY GRANTS** Fibertech's motion for expedited treatment and **HEREBY ORDERS** that all discovery materials exchanged by the parties in Docket No. TO09121004 be incorporated in the present matter to the extent that said discovery materials are relevant to the issues in the case.

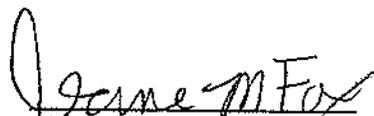
Also, to expedite review of this matter, the Board **HEREBY ADOPTS** the schedule attached hereto, which was developed by the parties. This schedule is subject to modification by the Board or the designated presiding officer as necessary and appropriate in the interests of economy and justice. All parties are **HEREBY DIRECTED** to conduct this case so that the Board may have sufficient time to take final action on Fibertech's petition by the last agenda date in 2012. Meanwhile, however, the Board strongly urges Fibertech and Verizon to try to resolve their dispute.

Also in the interests of economy, all parties are HEREBY DIRECTED to serve all documents electronically, while still providing hard copies to the Board for those documents which must be filed with the Board, and also providing a hard copy to each party, unless otherwise requested by the parties. Finally, the Board HEREBY DIRECTS Staff to post this Order on the Board's website.

DATED: 9/13/12

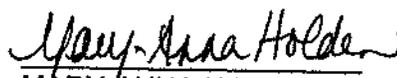
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BY:

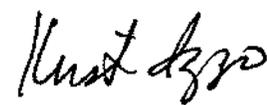
  
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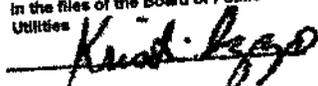
  
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COMMISSIONER

ATTEST:  
  
KRISTI IZZO  
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities  


**Petition of Fiber Technologies Networks, L.L.C., for an Order Finding  
Unreasonable the Make-Ready Costs Imposed by Verizon New Jersey Inc. On  
Fiber Technologies, LLC, Requiring Refunds, and Establishing Reasonable Make-  
Ready Rates, Terms and Conditions  
BPU Docket No. TO12080722**

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**Fibertech/Verizon Make Ready Rates, Terms & Conditions  
Parties' Proposed Scheduling Order for Board Review  
Docket No. TO12080722**

EVENT	DATE
Filing of Fibertech's direct testimony Last day to file discovery motions	September 14, 2012
Deadline for Verizon to file discovery on direct testimony	September 19, 2012
Deadline for Fibertech to file responses to Verizon's discovery requests on direct	September 28, 2012
Deadline for Verizon to file reply testimony	October 9, 2012
Deadline for Fibertech to file discovery on reply testimony	October 12, 2012
Deadline for Verizon to file responses to Fibertech's discovery requests on the reply testimony	October 19, 2012
Deadline for Fibertech to file rebuttal testimony	October 22, 2012
Hearing	October 25 & 26, 2012
Deadline for filing initial closing briefs	November 12, 2012
Deadline for filing reply briefs	November 16, 2012
Anticipated Board Decision	December 19, 2012