



Agenda Date: 10/23/12
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/

TELECOMMUNICATIONS

IN THE MATTER OF THE 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, L.L.C.,)
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
Hesser G. McBride Jr., Esq., for Verizon New Jersey Inc.
Stefanie A. Brand, Esq., Director, for Division of Rate Counsel

BY THE BOARD¹:

INTRODUCTION

This matter comes before the New Jersey Board of Public Utilities ("Board") by Verizon New Jersey Inc.'s ("Verizon") September 28, 2012 motion for reconsideration ("Reconsideration Motion") of the Board's September 13, 2012 Order ("September 13 Order") by which the Board denied Verizon's motion to dismiss for lack of subject matter jurisdiction the Verified Petition of Fiber Technologies Networks, L.L.C. ("Fibertech") filed with the Board on August 1, 2012. Verizon argues that the Board should reverse its September 13 Order because the Board is preempted under federal law from adjudicating Fibertech's re-filed complaint, for it involves the same matter that the Board had dismissed during its July 18, 2012 agenda meeting, as ratified by an Order dated August 2, 2012 ("August 2012 Order") in Docket No. TO09121004. Verizon argues that the Board did not lose jurisdiction over Fibertech's complaint filed in 2009, but rather over the underlying dispute set forth in that complaint. According to Verizon, federal law does not permit Fibertech to cure a lack of subject matter jurisdiction by re-filing its petition in another

¹ Commissioner Mary-Anna Holden did not participate.

docket. For the reasons set forth below, the Board denies Verizon's motion for reconsideration because Verizon has failed to establish any sufficient legal ground for reconsideration.

PROCEDURAL HISTORY AND STATEMENT OF THE FACTS

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) ("Section 224") and 47 C.F.R. § 1.1414(e) ("Regulation"), and consistent with the Board's 1985 certification to the Federal Communications Commission (FCC), requiring the State to adjudicate pole attachment complaints within 180 days or lose jurisdiction. Although the Board dismissed "Fibertech's Petition" in Docket No. TO09121004, it did not do so with prejudice or precluded Fibertech from filing any future case against Verizon regarding make-ready rates, terms, or conditions. August 2012 Order at 17. Nevertheless, it appears that Fibertech could have sought relief from the FCC, pursuant to Section 224 and 47 C.F.R. 1.1414(c). Instead, Fibertech on August 1, 2012 filed a Verified Petition with the Board, which, according to Fibertech, "is virtually the same as the Petition filed with the Board in Docket No. TO09121004." Cover Letter at 1.

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 pointed 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 argued 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.

After Fibertech and Verizon had fully briefed the issue of subject matter jurisdiction, the Board denied Verizon's motion to dismiss and allowed Fibertech to proceed with its petition, noting that 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. The Board found 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 and therefore the Board has subject matter jurisdiction over Fibertech's newly filed petition and its attendant make-ready claims against Verizon, and that Fibertech's newly filed petition is not barred by res judicata, because the Board did not adjudicate the merits of Fibertech's petition in Docket No. TO09121004. Id. 5-6.

According to Verizon, the Board determined that under 47 U.S.C. § 224(c) and 47 C.F.R. § 1.1414(e), subject matter jurisdiction over the pole attachment complaint Fibertech filed in December 2009 in Docket No. TO09121004 had reverted from the Board to the FCC because the Board had not issued a final decision within 180 days after Fibertech had filed its complaint. The Board memorialized that decision in its Order of Dismissal for Lack of Subject-Matter Jurisdiction issued on August 2, 2012 in Docket No. TO09121004. Verizon argues that the

Board committed reversible error by conflating the matter filed by Fibertech with the procedural vehicle (the complaint) that Fibertech filed to seek adjudication of the matter with the Board. Reconsideration Motion at 1-3.

Verizon contends that by assuming that reversion of jurisdiction to the FCC applied to the procedural vehicle (the complaint) through which Fibertech had sought adjudication of the dispute, the Board incorrectly assumed that the 180-day deadline could be re-set by the filing of another complaint. Id. at 4. Relying on 47 U.S.C. § 224(c)(3) and 47 C.F.R. § 1.1414(e), Verizon states that the Board did not lose jurisdiction over the "complaint" that Fibertech filed, but rather over the underlying dispute set forth in that complaint, and that the 180-day deadline for state action applies to "any individual matter" and it is triggered by the filing of "a complaint regarding such matter" with a state. Thus, according to Verizon, jurisdiction over the "matter" filed in December 2009, not merely jurisdiction over Fibertech's initial "complaint," reverted to the FCC after the Board did not issue a final order within 180 days. Id.

In support of its position, Verizon cites the following cases and purported propositions as follows: Facha v. Cisneros, 914 F. Supp. 1142, 1148-49 (E.D. Pa. 1996), aff'd, 106 F.3d 384 (3d Cir. 1996) (confirming that "matters" are the underlying disputes raised in procedural vehicles and finding that a complaint did not set forth a new matter where the adjudicator would "necessarily have needed to inquire into a topic" covered by the initially-filed dispute); McKenna v. City of Philadelphia, 304 Fed. Appx. 89, 92 (3d Cir. 2008) (non-precedential) (even complaints with minor differences (such as the inclusion in the second complaint of a termination claim in addition to a retaliation claim in an employment matter) should be deemed duplicative); Bowles v. Russell, 551 U.S. 205, 213 (2007) (overturning decision to assert jurisdiction over an untimely appeal because federal statutory deadlines are of jurisdictional magnitude); In re Viacom Cablevision v. Dayton Power & Light Co., 1984 FCC LEXIS 1499, at ¶ 2 (FCC 1984) (it is "the intent of Congress that either a state or this [FCC] have pole attachment jurisdiction at all times."); Freehold Cogeneration Assoc. v. Board of Regulatory Commissioners of the State of New Jersey, 44 F.3d 1178, 1194 (3d Cir. 1995) (holding that a federal district court should enjoin a state agency from adjudicating a rate issue where a federal statute preempted the agency from regulating the rate). Reconsideration Motion at 5-7.

Verizon states that the FCC, not the Board, can now adjudicate Fibertech's make-ready complaint against Verizon. According to Verizon, whether the Board may issue or enforce an order relating to Fibertech's new petition is a federal question to be determined by a federal forum, and both legal principles and judicial economy dictate that Fibertech's complaint be dismissed, but Verizon does not object to a dismissal without prejudice in case the FCC determines that the Board may continue to adjudicate it. Reconsideration Motion at 6-7.

On October 9, 2012, Fibertech filed its Memorandum in Opposition to the Motion for Reconsideration ("Reconsideration Opposition"). Fibertech points out that the Board by its September 13, 2012, Order dismissed its first Petition "simply because the Board had not made a final decision within the mandated 180-day period"; the Board did not, it clarified, dismiss Fibertech's make-ready claims against Verizon with prejudice, nor did it find that 47 U.S.C. § 224(c)(3) or 47 C.F.R. § 1.1414(e) preclude Fibertech from filing another petition with the Board; and the Board found that Fibertech's new petition was not barred by res judicata, because the Board did not adjudicate the merits of the original petition. Reconsideration Opposition at 2-3. Fibertech states that Verizon's motion for reconsideration should be denied because Verizon has simply rehashed its original arguments and fails to demonstrate that the Board's decision was arbitrary, capricious, or unreasonable. Reconsideration Opposition at 3-5.

According to Fibertech, Verizon's emphasis on the term "matter" as a basis to limit the Board's plenary jurisdiction is inconsistent with the text, purpose, or history of Section 224; Verizon's erroneous interpretation (whereby a pole owner whose behavior the statute seeks to regulate could use the phrase "individual matter" as a sword to prevent an intended beneficiary of the statute from obtaining its protection in a state agency that has certified jurisdiction over "such matters") simply cannot be countenanced; and there is no "regulatory vacuum" for the FCC to fill in this instance, and thus, the Board has plenary jurisdiction over Fibertech's complaint. Reconsideration Opposition at 5-8.

Relying on general principles of statutory interpretation, Fibertech claims that that Verizon is mistaken in its argument that the Board, in refusing to dismiss Fibertech's second complaint, has wrongly conflated the "procedural vehicle" with the subject matter underlying the complaint. Fibertech notes that Verizon inappropriately diminishes the specific phrase "any individual matter" to "matter" in order to define the term unreasonably broadly and to preclude Board jurisdiction over any topic raised in Fibertech's first complaint. Reconsideration Opposition at 8-9.

Based on 47 U.S.C. § 224(c)(1) ("Nothing in this section shall be construed to apply to, or to give [the FCC] jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State"), Fibertech argues that the term "matter" cannot be interpreted in isolation but rather must be viewed and defined in the context of its immediately adjacent language and the entirety of subpart (c), which creates a clear preference for state regulation in the first instance. Also, according to Fibertech, the meaning underlying the statute's reference to "any individual matter" in subpart (c)(3)(B) is made even more clear when viewed by comparison to the preceding provision, subpart (c)(3)(A), which refers to "rules and regulations." When these sequential subparts are read together, it is clear that Congress sought to differentiate between rules on the one hand and individual complaint proceedings on the other, not to limit the Board's authority over entire subject matter areas going forward. Reconsideration Opposition at 10.

Finally, Fibertech points out that the cases cited by Verizon do not support its argument that the Board has no jurisdiction over Fibertech's second petition or the subject matters thereof, especially because the Board never addressed the merits of Fibertech's claims and, therefore, principles of *res judicata* are inapplicable here; Section 224 contradicts Verizon's position on subject matter jurisdiction; Verizon's reliance on legislative history contradicts its previous position in Fibertech's first complaint that the Board should ignore Section 224's underlying legislative purpose and intent; and, contrary to Verizon's argument, judicial economy actually favors the Board's adjudicating Fibertech's second petition. Reconsideration Opposition at 10-17.

DISCUSSION

A motion for reconsideration requires the moving party to allege "errors of law or fact" that were relied upon by the Board in rendering its decision. N.J.A.C. 14:1-8.6(a)(1). Generally, a party should not seek reconsideration merely based upon dissatisfaction with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis" or (2) it is

obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. See, e.g., Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the action was arbitrary, capricious, or unreasonable. D'Atria, supra, 242 N.J. Super. at 401.

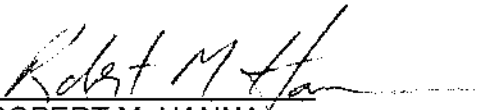
This Board will not modify an Order in the absence of a showing that the Board's action constituted an injustice or that the Board misunderstood or failed to take note of a significant element of fact or law. The Board does not find that the issues raised by Verizon are sufficient to warrant reconsideration. None of the cases cited by Verizon, in support of its argument that the Board cannot adjudicate Fibertech's pending petition, applies here, especially because the Board never addressed the merits of Fibertech's first petition. Generally, the absence of subject matter jurisdiction in those cases cited by Verizon involved principles of res judicata based on adjudication of the merits or the prohibition of simultaneous parallel proceedings in different courts. As to In re Viacom Cablevision v. Dayton Power & Light Co., 1984 FCC LEXIS 1499 at 1-2 (FCC 1984), the only arguably relevant case cited by Verizon, while the FCC noted Congress's intent that either a state or the FCC have pole attachment jurisdiction at all times, the actual question was whether the FCC should grant a public utility's request to relinquish its jurisdiction over a pending motion for reconsideration of a Common Carrier Bureau Order, because the Ohio Public Utilities Commission had since certified its regulation of pole attachments.

Section 224 and the Regulation require the Board "with respect to any individual matter" to take final action "on a complaint regarding such matter . . . within 180 days after the complaint is filed with the State." See 47 U.S.C. § 224(c)(3)(B) and 47 C.F.R. § 1.1414(e). Thus, taking final action on a pole attachment complaint within 180 days preserves State jurisdiction over such complaint, and the Board was obliged to dismiss Fibertech December 17, 2009 complaint because it had not taken final action within 180 days. Based on Verizon's arguments regarding the terms "complaint" and "matter" in Section 224 and the Regulation, the Board's failure to adjudicate Fibertech's December 17, 2009 complaint within 180 days forever precludes Fibertech from filing with the Board any make-ready complaint against Verizon. Thus, the Board would be barred from adjudicating any Fibertech complaints against Verizon after June 16, 2010, the end of the 180-day period for Fibertech's 2009 complaint against Verizon. Nothing in Section 224 or the Regulation, however, persuades the Board to accept Verizon's arguments.

Accordingly, the Board **FINDS** that nothing in Verizon's motion for reconsideration causes or requires the Board to reconsider its September 13 Order allowing Fibertech's new petition to proceed. Verizon's request for reconsideration fails to provide a legal basis that would justify the Board's reversing its decision. Therefore, the Board **HEREBY DENIES** Verizon's motion for reconsideration of its September 13 Order. The Board **HEREBY DIRECTS** Staff to post this Order on the Board's website.

DATED: 10/23/12

BOARD OF PUBLIC UTILITIES
BY:


ROBERT M. HANNA
PRESIDENT



JEANNE M. FOX
COMMISSIONER


JOSEPH L. FIORDALISO
COMMISSIONER


NICHOLAS ASSELTA
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


**In the Matter of the 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**

SERVICE LIST

Dennis C. Linken, Esq.
Scarinci & Hollenbeck, LLC
1100 Valley Brook Avenue
Lyndhurst, New Jersey 07071
DLinden@scarincihollenbeck.com

William D. Smith, Esq.
Assistant General Counsel
Verizon New Jersey, Inc.
One Verizon Way-VC545222
Basking Ridge, New Jersey 07920
william.d.smith@verizon.com

William J. Balcerski, Esq.
Verizon
One Verizon Way
Basking Ridge, New Jersey 07920-1097
william.j.balcerski@verizon.com

Jeffrey A. Rackow, Esq.
Verizon New Jersey, Inc.
One East Pratt Street
Baltimore, Maryland 21202
jeffrey.rackow@verizon.com

Christopher D. Oatway, Esq.
Assistant General Counsel
Verizon
1515 North Court House Road
Suite 500
Arlington, VA. 22201
christopher.d.oatway@verizon.com

Maria T. Browne, Esq.
Davis Wright Tremaine, LLP
1919 Pennsylvania Ave. NW
Suite 800
Washington, DC 20006-3401
mariabrowne@dtw.com

Stefanie A. Brand, Esq., Director
Division of Rate Counsel
31 Clinton Street, 11th Floor
P.O. Box 46005
Newark, New Jersey 07101
sbrand@rpa.state.nj.us

Christopher J. White, Esq.
Division of Rate Counsel
31 Clinton Street, 11th Floor
P.O. Box 46005
Newark, New Jersey 07101
cwhite@rpa.state.nj.us

Maria Novas-Ruiz, Esq.
Division of Rate Counsel
31 Clinton Street, 11th Floor
P.O. Box 46005
Newark, New Jersey 07101
mnovas-ruiz@rpa.state.nj.us

Jose Rivera-Benitez, Esq.
Division of Rate Counsel
31 Clinton Street, 11th Floor
P.O. Box 46005
Newark, New Jersey 07101
jrivera-benitez@rpa.state.nj.us

Anthony Centrella, Director
Board of Public Utilities
Division of Telecommunications
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, New Jersey 08625
anthony.centrella@bpu.state.nj.us

Lawanda Gilbert, Esq.
Acting Director, OCTV
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, New Jersey 08625-0350
Lawanda.Gilbert@bpu.state.nj.us

Carol Ann Entenza-Artale, Esq.
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, New Jersey 08625-0350
carol.artale@bpu.state.nj.us

Alan C. Molner
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, New Jersey 08625-0350
alan.molner@bpu.state.nj.us

James F. Murphy
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, New Jersey 08625-0350
James.murphy@bpu.state.nj.us

John DeLuca
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, New Jersey 08625-0350
john.deluca@bpu.state.nj.us

Caroline Vachier, DAG
Section Chief
Board of Public Utilities Section
Division of Law
124 Halsey Street, 5th Floor
P.O. Box 45029
Newark, New Jersey 07101
Caroline.Vachier@dol.lps.state.nj.us

Carolyn McIntosh, DAG
Division of Law
124 Halsey Street, 5th Floor
P.O. Box 45029
Newark, New Jersey 07101
Carolyn.McIntosh@dol.lps.state.nj.us

Alex Moreau, DAG
Division of Law
124 Halsey Street, 5th Floor
P.O. Box 45029
Newark, New Jersey 07101
Alex.Moreau@dol.lps.state.nj.us

Valerie Haynes, Director
Board of Public Utilities
Case Management
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, New Jersey 08625-0350
valerie.haynes@bpu.state.nj.us