Agenda Date: 7/18/12
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, 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 OF DISMISSAL FOR LACK OF SUBJECT-MATTER JURISDICTION BPU DOCKET NO.TO09121004 OAL DOCKET NO. PUC 00784-2012

Parties of Record:

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

BY THE BOARD[1]:

This matter is before the New Jersey Board of Public Utilities ("Board") on the June 5, 2012 motion for reconsideration of respondent Verizon New Jersey Inc. ("Verizon"), pursuant to N.J.A.C. 1:1-14.10, for interlocutory review of the May 23, 2012 Order of the Honorable Leland S. McGee, Administrative Law Judge ("ALJ McGee" or "Judge McGee"), denying Verizon's motion to dismiss for lack of subject-matter jurisdiction the Verified Petition of Fiber Technologies Networks, LLC ("Fibertech"). By Order dated June 18, 2012, the Board granted Verizon's motion for interlocutory review. Also, by Order dated June 18, 2012, pursuant to N.J.A.C. 1:14-14.4(c), the Board requested and received a 20-day extension of time for issuing the decision on Verizon's motion until July 30, 2012. For the reasons set forth below, the Board now dismisses the petition for lack of subject-matter jurisdiction, pursuant to the federal Pole Attachment Act, 47 U.S.C. § 224(c)(3) and the promulgated regulations, 47 C.F.R. § 1.1414(e).

PROCEDURAL HISTORY AND STATEMENT OF THE FACTS

On December 17, 2009, Fibertech, a subsidiary of Fibertech Networks, LLC, filed a Verified Petition ("Petition") with the Board wherein it alleges, among other things, that (i) Verizon's fees,

[1] Commissioner Joseph L. Fiordaliso did not participate.

costs, and charges for make-ready work are anti-competitive, unjust, and unreasonable; (ii) Verizon's estimates and final make-ready bills include costs not associated with actual make-ready work; (iii) Verizon's New Jersey make-ready charges are excessive; and (iv) Verizon's unjust and unreasonable make-ready charges are anticompetitive and discriminatory. Petition at 8-15. Fibertech 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; and (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. Id. at 16.

Fibertech states that its business address is 300 Meridian Centre, Rochester, New York and that it received its authorization from the Board on September 14, 2005 in Docket No. TE05080683 to provide telecommunications services in New Jersey. Petition at 2. 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., Joint Use License Agreement, governing the rates, terms, and conditions of attachment. Id. at 6. 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.[2] 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 2-3.

Verizon filed a Response to Verified Petition on January 29, 2010, asserting, among other things, that its make-ready costs are fair and reasonable; denying that Petitioner is entitled to any of the relief requested; and, asking that the Petition be dismissed for various legal and factual reasons. Id. According to Fibertech, efforts were made to settle the matter, but because Fibertech and Verizon had failed to reach any settlement agreement, the Board on January 18, 2012 transmitted the matter as a contested case to the Office of Administrative Law ("OAL"), where it was assigned to ALJ McGee, who conducted a telephone pre-hearing conference on February 23, 2012 and subsequently issued a Prehearing Order on March 28, 2012. ALJ McGee set forth the issues to be resolved as follows: "Whether petitioner can establish that the make-ready costs imposed by Verizon are not just and reasonable and warrants a finding of a refund, and the establishment of reasonable rates, terms, and conditions related to the make-ready costs." Id. at 2. Judge McGee also scheduled the case for evidentiary hearings on July 24, 25, and 26, 2012. Id. at 3.

[2] 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."

On April 9, 2012, however, Verizon submitted letters both to the Board and the OAL, asserting that the Board's jurisdiction had reverted by operation of law to the Federal Communications Commission ("FCC"), pursuant to 47 U.S.C. § 224 (c), because more than 180 days had lapsed since Fibertech first filed its petition with the Board. Verizon on April 20, 2012 filed a formal motion to dismiss for lack of subject-matter jurisdiction, and on April 27, 2012, Fibertech filed a brief in opposition of Verizon's motion. Both parties filed additional papers in support of their position, and neither the Division of Rate Counsel nor Board Staff filed any papers regarding Verizon's motion.

On May 23, 2012, Judge McGee agreed with Fibertech's position and denied Verizon's motion and directed the parties to participate in a telephone conference for the express purpose of establishing a new procedural schedule. See ALJ McGee's May 23, 2012 Order at 3 and 14. Judge McGee reasoned that since the dispute between Fibertech and Verizon was not originally filed with the FCC, jurisdiction cannot be reverted to the FCC. Moreover, only Fibertech would be aggrieved by the Board's failure to act within the 180-day or 360-day period and thus would have the right to invoke the FCC's jurisdiction. Id. at 9-10.

Also, Judge McGee found that any "rates" charged pursuant to a pole-attachment agreement cannot be established retroactively, "[a]lthough retroactive ratemaking is permissible if specific statutory authorization exists, [but in this case], no such authorization exists." Id. at 13. Thus, under N.J.S.A. 48:2-21, "the BPU can only fix rates under a pole-attachment agreement prospectively." Id. at 13-14. However, Judge McGee found that the Board "maintains greater flexibility" as to surcharges and therefore the Board "can require a utility to repay any excess surcharge collected," and that "the scope of N.J.A.C. 14:18-2.9 suggests that the present dispute involving make-ready fees does not encompass pole-attachment rental rates because such rental rates are an ongoing payment." Id. at 14.

Accordingly, Judge McGee concluded that this matter should be decided in two stages: the first stage is to establish prospective rates for make-ready fees, and the second stage is to determine the reasonableness of the prior make-ready fees and fixing a remedy if warranted. Id. at 14. On June 5, 2012, Fibertech filed a motion for reconsideration and clarification of Judge McGee's Order, arguing that the relief sought in Fibertech's Petition does not constitute retroactive ratemaking and that the proceeding need not be bifurcated.

On June 5, 2012 Fibertech filed a motion for reconsideration and clarification requesting that the court reconsider portions of the Order issued on May 23, 2012 by Judge McGee specifically pertaining to the issues of retroactive ratemaking and the conclusion that the case should be bifurcated.

On June 5, 2012, pursuant to N.J.A.C. 1:1-14.10, Verizon filed a motion for interlocutory review of the denial of its motion to dismiss for lack of subject-matter jurisdiction ("Motion"), arguing that (i) the federal authority divesting state jurisdiction is unambiguous and dispositive; (ii) Judge McGee's Order fails to identify a valid basis for continued Board jurisdiction; and (iii) dismissal of Fibertech's Petition will not implicate any policy or fairness concerns. Verizon argues that the plain language of 47 U.S.C. § 224(c) and 47 C.F.R. § 1.1414(e) controls and divests the Board of jurisdiction, because the Board has taken no final action after 180 days of the filing of the complaint with the Board. Motion at 2-4.

According to Verizon, Judge McGee's Order relies exclusively on New Jersey case law and, in doing so, the legislative-history analysis is flawed because the scope of the Board's authority in this case is based on federal statute. Verizon states that federal law controls how a federal statute should be interpreted, although New Jersey law may be used as a guide in the absence of established federal common law. Nevertheless, here the plain language of the statute controls without the need to consult legislative history. Thus, Verizon is arguing that both the statute and the rule divesting state jurisdiction are unambiguous and dispositive and make clear that the reversion of jurisdiction from a state to the FCC is triggered by the passage of time, not by a filing requesting that the FCC assume jurisdiction. Id. at 4-6.

Attached as Exhibit B to Verizon's motion is a January 21, 1985 letter from Bernard R. Morris, Director, Office of Cable Television, to Margaret Wood, Esq., FCC, wherein Mr. Morris certified, pursuant to 47 U.S.C. § 224, that the Board regulates cable television pole attachment rates, terms, and conditions. Verizon asserts that the Board's certification confirmed the statutory deadline set forth in 47 U.S.C. § 224(c) and 47 C.F.R. § 1.1414(e) as follows:

> In order to assure issuance of decisions within the time frame contemplated by Section 224(c) as amended, appropriate scheduling information, including the notation that "Federal law requires a decision within 180 days of filing. 47 U.S.C. § 224(c)(3)(B)(i)," shall be entered in the Board's computerized case management system, for all petitions concerning pole, trench, or conduit rates.

Motion at 2. Verizon states that the Board thus had certified that "all" petitions concerning pole rates require a decision within 180 days of filing pursuant to federal law, and Verizon notes that other state commissions have similarly acknowledged the jurisdictional window. Verizon therefore argues that the Board no longer has subject-matter jurisdiction over Fibertech's petition, which cannot be waived, and thus dismissal of the petition is required, citing R. 4:6-7 and Fed R. Civ. P. 12. Id. at 6-7.

According to Verizon, Judge McGee's Order fails to identify a valid basis for continued Board jurisdiction. The majority of the discussion in the Order regarding jurisdiction involves the theory that the complaint involves "access" to Verizon's poles and that such access complaints are not subject to the deadlines set forth in 47 U.S.C. § 224(c). Verizon claims that this poses two distinct issues, only one of which the Order addresses (and incorrectly so). The Order does not address whether this is an access issue, only whether access complaints are subject to the deadlines of the federal statute. Motion at 8.

According to Verizon, this case is clearly about "the rates, terms and conditions for pole attachments pursuant to 47 U.S.C. § 224(c)," as the Petition itself states at ¶ 3, yet somehow and without analysis, the Order contends the complaint involves "access" issues. Verizon argues that Fibertech does not allege that it was ever denied access to any poles, but instead asserts that the rates, terms and conditions under which Verizon has granted access to its poles are unreasonable, and it requests the Board to require Verizon to refund the allegedly excessive amounts and to establish going-forward rates. Also, 47 U.S.C. § 224(f) requires nondiscriminatory access to poles, and the FCC's rule for access complaints makes clear that an indispensable pleading requirement is the allegation of a "denial" of access by the pole owner, citing 47 C.F.R. 1.1404(m). Motion at 9-10.

Verizon states that Fibertech in its briefs tries to shift the focus on the reasonableness of make-ready rates as being an access issue, but the reasonableness of rates is not an access issue because there is no allegation that it has ever resulted in the denial of access. Verizon asserts that the FCC has accepted the practice of up-front payment for make-ready work, but Fibertech is trying to support its argument by asserting that claims of discrimination make its complaint one for "nondiscriminatory access," falling outside the scope of Section 224(c). Verizon's position is that a discrimination claim is not the same as an access claim, and the reasonableness of rates and charges is Fibertech's principal claim and its secondary claim is that the rates are discriminatory and anticompetitive. According to Verizon, the Order, while embracing the access framework urged by Fibertech, does not identify any Fibertech claim that purportedly qualifies as an "access" issue that might be subject to a statutory provision outside the scope of Section 224(c)(3), and there simply is no basis for making such finding. Motion at 10-14.

Verizon contends that there is no basis for asserting that the FCC does not assume jurisdiction over a complaint unless a party files a complaint with the FCC alleging the complaint filed with the state remained unresolved beyond the statutory time period. Motion at 18-19. According to Verizon, the FCC has on numerous (and more recent) occasions explained clearly, in generally applicable rulemaking proceedings, that the reversion of jurisdiction kicks in based on the passage of time, i.e., when a state fails to resolve a case in time. Id. at 20, citing "In re Promotion of Competitive Networks in Local Telecom. Markets, 15 FCCR 22983, 23025 (FCC 2000), ¶ 92 ("Should a state fail to resolve a complaint within specified time limits, the Commission's rules provide that we [the FCC] assume jurisdiction over the complaint."); 16 FCCR 12103, at n.33 (FCC 2001) ("Jurisdiction for pole attachments reverts to the Commission generally if the state has not issued and made effective rules implementing the state's regulatory authority over pole attachments. Reversion to the Commission, with respect to individual matters, also occurs if the state does not take final action on a complaint within 180 days after its filing with the state..."); 15 FCCR 6453, at n.11 (FCC 2000) (same); 13 FCCR 6777, at n.20 (FCC 1998) (same); 12 FCCR 11725, at n.13 (FCC 1997) (same); 12 FCCR 7449, at n.10 (FCC 1997) (same)."

Verizon avers that "[i]t also appears (although it is unclear) that the Order may endorse the reasoning in some dicta contained in Commission Investigation into FairPoint's Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation, Docket No. 2010-206 (Me. Pub. Util. Comm'n issued Nov. 15, 2010) ("FairPoint Order") that was later abandoned." Motion at 20. In that case, Verizon argues, "no complaint was *ever* filed with the state commission - so the commission simply determined that the time frame in Section 224(c) was not triggered. FairPoint Order at 8-9. By contrast, there is no dispute that Fibertech filed a formal Verified Petition (i.e., a complaint) with the Secretary of the Board 902 days ago." Motion at 21. In addition, Verizon notes that the Maine commission has subsequently made clear that its interpretation of Section 224(c)(3) conforms to the statute's plain language, and that, consistent with the Board's certification to the FCC, the Maine commission recently stated that "Section 224(c)(3)(B) requires a state that regulates the rates, terms, and conditions of pole attachments to resolve disputes within 180 days of the filing of the complaint or whatever time period is prescribed in the State's rule's provided, in any event, that the period is no greater than 360 days." Motion at 21, citing Order, *Investigation into Practices and* 21 *Acts Regarding Access to Utility Poles,* Docket No. 2010-371, 2011 Me. PUC LEXIS 361 (Me. Pub. Util. Comm'n issued July 12, 2011), at *11-12.

In addition, Verizon contends that the statutory history relevant to Section 224(c)(3) confirms that Congress meant what it said; adopting Fibertech's strained argument would effectively repudiate the Board's 1985 certification to the FCC; dismissal of Fibertech's petition will not implicate any policy or fairness concerns; the FCC is an expert forum available to Fibertech; and, adjudication by the FCC will not delay Fibertech's deployment of its network in New Jersey. Motion at 22-24. Verizon therefore contends that the Board must reverse Judge McGee's May 23, 2012 Order's jurisdictional finding and must dismiss Fibertech's petition for lack of subject-matter jurisdiction. Id. at 25.

On June 7, 2012, Fibertech filed a letter with the Board arguing that it does not believe that interlocutory review is warranted, but, if the Board grants Verizon's motion, it will be prepared to submit comprehensive arguments with additional comments to support Judge McGee's decision.

On June 15, 2012, Verizon filed with Judge McGee an opposition to Fibertech's motion for reconsideration, arguing that a determination on the appropriateness of retroactive relief should be denied as both unripe and misguided and that the ALJ's decision to bifurcate is reasonable given the different issues associated with Fibertech's prospective and retroactive claims. On June 20, 2012, Fibertech filed a reply to Verizon's opposition, arguing that its requested relief does not constitute retroactive ratemaking and that bifurcation is not necessary.

On June 22, 2012, Fibertech filed with the Board a brief opposing Verizon's motion for interlocutory review to dismiss the Petition ("Opposition"). To summarize, according to Fibertech, Judge McGee's decision that the Board has jurisdiction is well founded and should be upheld. Fibertech contends that 47 U.S.C. § 224(c)(3) does not automatically deprive certified states of jurisdiction; the plain language of section 224(c)(3) does not divest the Board of jurisdiction; Verizon's proffered reading of section 224(c)(3) would produce "absurd results" in contradiction of established canons of statutory construction; the legislative history confirms that section 224(c) was never intended to automatically divest certified states of jurisdiction; the FCC's rules, orders and past practice also demonstrate that Section 224(c)(3) does not operate to divest certified states of jurisdiction automatically; Fibertech's complaint concerns non-discriminatory access and thus is not subject to the time frames in Section 224(c)(3); and Verizon is estopped from raising Section 224(c)(3) now as grounds for dismissal.

Fibertech states that the placement by Fibertech of its wires and equipment on Verizon's utility poles frequently requires the performance of what is commonly referred to as "make-ready" work -- the process of making the poles ready for an additional attaching party typically by moving existing wires and equipment up or down. Generally attaching parties reimburse pole owners for just and reasonable costs of make-ready necessitated by their attachments. Verizon has invoiced, and Fibertech has paid, make-ready costs beginning in 2007, to the tune of many millions of dollars. The basis on which Verizon's make-ready charges are assessed is time and materials, with the overwhelming component being time. As set forth in Fibertech's Petition, Verizon's charges greatly exceed a just and reasonable level, primarily based upon the fact that the hourly time factors utilized by Verizon are excessive. In addition, Verizon has improperly charged Fibertech for make-ready work necessary to rectify pre-existing violations. In other words, there are instances in which Fibertech will request permission to attach to particular poles, where the then-existing parties on the poles are already in violation of the National Electrical Safety Code. Fibertech has been charged the costs of rectifying such pre-existing violations. Opposition at 1-2.

According to Fibertech, Verizon "loads" its hourly charges by various factors, notwithstanding the fact that Verizon's annual pole attachment fee (i.e., the ongoing rental rate paid by CLECs and other attachers) already covers some of the loading factors. Thus, Verizon double-recovers its costs. Compounding the situation is the fact that the supporting information provided by Verizon in response to questions or complaints by Fibertech with regard to make-ready charges is wholly insufficient and lacking in necessary detail. Fibertech should not be obligated to pay excessive make-ready costs, whether based upon excessive time entries, improper loading factors, double-recoveries or otherwise, and it certainly should not be required to pay for the make-ready costs required to rectify violations caused by others. Moreover, to add insult to injury, Verizon requires that Fibertech pay all estimated make-ready costs in advance. It is these and other similar complaints as to which Fibertech requests relief. Id. at 2.

Fibertech states that following the submission of Fibertech's petition, the parties began to engage in the discovery process. Thereafter, upon mutual agreement, according to Fibertech, the parties determined to exchange discovery on an informal basis in an attempt to try and reach a settlement in this matter. Thus, they met and exchanged extensive documents and attempted to reach agreement. However, only one party ever produced any settlement offer -- Fibertech. Verizon never did so and Fibertech eventually came to the conclusion that the settlement discussions were in vain. As a result, according to Fibertech, it notified Board Staff of its request that the case be reinstated onto the "active" list and that it be forwarded to the Office of Administrative Law, which was accomplished in January 2012. Id. at 2-3.

According to Fibertech, the plain language of Section 224 does not give or withdraw authority to or from a state. Section 224(c) speaks only to when the FCC can hear a case. Also, as widely recognized, Section 224 is based on reverse preemption – an explicit preference for state regulation, and an invitation for states to regulate. Fibertech notes: "Under the 'reverse preemption' provision in Section 224, states may certify that they regulate rates, terms and conditions for pole attachments in their respective states; the [Federal Communications] Commission retains jurisdiction over pole attachments only in states that do not so certify." Opposition at 9, citing In re Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, 5242 (2011) (emphasis added). In addition, Fibertech points outs that New Jersey regulates pole attachment rates, terms and conditions, and access to poles, ducts, conduits and rights of way. Opposition at 9, citing N.J.S.A. 48:5A-20; N.J.S.A. 48:5A-21; N.J.A.C. 14:18-2.10. Referencing the Board's 1985 certification to the FCC and the FCC's acknowledgement thereof, Fibertech states that it is undisputed that the Board long ago satisfied its obligation to certify to the FCC that it regulates the rates, terms and conditions of pole attachments. Fibertech thus argues that pursuant to Section 224(a)(1), the FCC does not have jurisdiction over pole "rates, terms and conditions" or "access" to poles in New Jersey, and New Jersey does have jurisdiction. Motion at 9-10.

Fibertech claims that numerous cases support the notion that states derive their jurisdictional authority to regulate poles from state law, and that Section 224 does not grant or limit a state's inherent jurisdiction, and that in this case, Section 224(c)(3) does not "clearly state" that it is jurisdictional. In contrast, where Congress has sought to delimit jurisdiction, it has done so expressly, as in subpart (c)(l), limiting the FCC's "jurisdiction." Opposition at 11-12.

Fibertech argues that Verizon's proffered reading of Section 224(c)(3) would produce "absurd results," primarily because it would undermine Congress' intent to ensure fair pole-attachment practices; would harm the attaching entity by divesting that entity of its rights to continue a

compliant proceeding before a state regulatory body; would cause Fibertech to incur unnecessary costs and add significant delay and burden to a pending complaint in direct contravention of the very purpose of Section 224 (c)(3); would undermine Congress' preference for state regulation of pole attachments and for the protection of attaching entities against anticompetitive practices by pole owners; and would contravene the FCC's rebuttal presumption that a certifying state, such as New Jersey, is regulating pole attachments. Opposition at 13-19.

According to Fibertech, the Maine Public Utilities Commission faced a similar claim to that espoused by Verizon in a case involving FairPoint Communications, Inc., an ILEC in Maine. Opposition at 20. Fibertech states: "In that case, the Maine Commission explained that non-regulation by a state is merely '**evidenced** when a State has not adopted rules and regulations implementing its authority over pole attachments, or where a State has not taken final action on a complaint ... within a prescribed period.' Commission Investigation into FairPoint's Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation, 2010 Me. PUC LEXIS 708 (Me. PUC Nov. 15, 2010) (hereinafter "Maine 2010 Decision") at *6-7 (emphasis added)." Id. According to Fibertech, "Verizon would have the Board dismiss the Maine case as "dicta" and would distinguish the case based on the fact that the case involved a slightly different procedural posture. Vz. Br. at 20-21. The plain truth of the matter, however, is that the Maine PUC rejected the ILEC's argument that it lacked jurisdiction based on its failure to adhere to the timeframes in Section 224(c)(3)." Ibid. Moreover, Fibertech notes, in recently shoring up its complaint procedures to avoid another battle along those lines, "the Maine PUC demonstrated its continuing belief that Section 224(c)(3) is not jurisdictional but rather an evidentiary 'consideration.' See Investigation into Practices and Acts Regarding Access to Utility Poles, 2011 Me. PUC LEXIS 361 (Me. PUC July 12,2011) at *12 ("With the exception of this timing consideration, Section 224 places no requirements upon the particulars of how a state exercises its authority over the rates, terms and conditions of pole attachments. The FCC identified the absence of federal authority to regulate in these areas stating, 'Congress' clear grant of authority to the states to preempt federal regulation in these cases undercuts the suggestion that Congress sought to establish federal access regulations of universal applicability.'") (citation omitted))." Opposition at 20-21.

Fibertech argues that even if Section 224(c)(3) could somehow be construed on its face as jurisdictional in nature, a construction clearly at odds with the text, purpose and legislative history of Section 224(c)(3), Fibertech's Petition concerns, inter alia, non-discriminatory pole access issues to which Section 224(c)(3) on its face does not even apply, and that its complaint fundamentally concerns Verizon's failure to provide non-discriminatory access. Opposition at 24-25. In addition, Fibertech contends that Verizon is estopped from raising Section 224(c)(3) now as grounds for dismissal, especially since, according to the FCC, Section 224(c)(3) was intended to protect a party that has filed a complaint with a non-responsive state regulatory body. According to Fibertech, Verizon, having failed to raise the time frames until April of this year, having itself contributed to the delay of the proceeding, and having then agreed to the procedural schedule worked out with its participation, may not raise the time frames now as evidence of a failure on the part of New Jersey to regulate pole attachments. Such a result would impose unfair hardship on Fibertech, the precise entity Section 224 is intended to protect. Id. at 27-28.

On June 27, 2012, Verizon filed a letter in support of its motion for interlocutory review filed on June 5, 2012, arguing that Fibertech's June 22, 2012 filing ignores most of Verizon's arguments, including that the FCC is an appropriate forum for adjudicating Fibertech's complaint. On June 29, 2012, Fibertech filed a letter, arguing that the Board should disregard Verizon's June 27,

2012 filing, because the interlocutory-review rules do not allow Verizon to file a pleading in response to Fibertech's opposition. If, however, the Board chooses to consider Verizon's letter, then simple equity and fairness dictate that the Board also consider a further response by Fibertech, as set forth in Fibertech's June 29, 2012 letter. Also, on July 9, 2012, Fibertech filed with the Board a letter notifying the Board "of a newly decided case which bears upon the issue," Cole v. Jersey City Medical Center, et al., 425 N.J. Super. 38 (App. Div. 2012), where the court reversed and remanded on equitable-estoppel grounds the judgment of the lower court granting defendant employer's motion to enforce an arbitration clause. Id. at 51.

On June 29, 2012, Judge McGee issued a decision in the matter granting Fibertech's motion, holding that a determination regarding whether or not the case will be bifurcated will be made after direct testimony is received.

DISCUSSION AND FINDINGS

Under N.J.A.C. 1:1-14.10, any request for interlocutory review shall be made to the agency head no later than five working days from the receipt of the written order, and an opposing party may, within three days of receipt of the request, submit an objection to the agency head. Any request for interlocutory review or objection to a request shall be in writing by memorandum, letter or motion. Also, a party opposed to the grant of interlocutory review may, within three days of receiving notice that review was granted, submit to the agency head in writing arguments in favor of the order or ruling being reviewed. Thus, the proponent and opponent of a motion for interlocutory review are each allowed one pleading only. The Board has determined that any additional arguments made or proposed by the parties in their "extra" filings mentioned above are superfluous and need not be specifically addressed for the Board to reach its decision on whether it still has subject matter jurisdiction over Fibertech's Petition.

The federal Pole Attachment Act, 47 U.S.C. § 224, provides in relevant parts as follows:

> (a) Definitions. As used in this section:
> (1) The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.
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> (4) The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.
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> (c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation.
> (1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to 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.
(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that--
(A) it regulates such rates, terms, and conditions; and
(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.
(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments--
(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and
(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter--
(i) within 180 days after the complaint is filed with the State, or
(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

Similarly, 47 C.F.R. § 1.1414, the regulations promulgated under § 224 regarding certification by a state that it regulates rates, terms, and conditions for pole attachments, provides in relevant parts as follows:

(a)(3) It has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state) . . .

(b) Upon receipt of such certification, the Commission shall give public notice. In addition, the Commission shall compile and publish from time to time, a listing of states which have provided certification.[3]

(c) Upon receipt of such certification, the Commission shall forward any pending case thereby affected to the state regulatory authority, shall so notify the parties involved and shall give public notice thereof.

(d) Certification shall be by order of the state regulatory body or by a person having lawful delegated authority under provisions of state law to submit such certification. Said person shall provide in writing a statement that he or she has such authority and shall cite the law, regulation or other instrument conferring such authority.

(e) Notwithstanding any such certification, jurisdiction will revert to this Commission with respect to any individual matter, unless the state takes final action on a complaint regarding such matter:

[3] Twenty states and the District of Columbia have certified that they directly regulate utility-owned infrastructure in their regions. See App. C; States That Have Certified That They Regulate Pole Attachments, Public Notice, WC Docket No. 10-101, 25 FCC Rcd 5541, 5541-42 (WCB 2010).

(1) Within 180 days after the complaint is filed with the state, or

(2) Within the applicable periods prescribed for such final action in such rules and regulations of the state, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

When interpreting a federal statute, the Court's purpose is to discern Congress' intent, which is the "ultimate touchstone." Indiana Bell Tel. Co. v. Smithville Tel. Co., 31 F. Supp. 2d 628, 635-636 (S.D. Ind. 1998), citing Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138 (1990). To accomplish this, the Court must look "not only [to] the particular statutory language, but to the design of the statute as a whole and to its object and policy." 31 F. Supp. 2d at 636, citing Crandon v. United States, 494 U.S. 152, 158 (1990). Consequently, it is important that no provision be taken out of context in a way that would disrupt the statutory scheme and frustrate the legislative purpose." 31 F. Supp. 2d at 636. See also Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co., 534 U.S. 327, 333 (2002) ("If the statute were thought ambiguous, however, the FCC's reading must be accepted nonetheless, provided it is a reasonable interpretation."), citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-844 (1984). The FCC has declared as follows in In the Matter of Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, RELEASE-NUMBER: FCC 00-116, 15 FCC Rcd 6453, 6456 (FCC 2000); 2000 FCC LEXIS 1690, April 3, 2000:

> The Commission's authority does not extend to pole attachment rates, terms, and conditions that a state regulates. 47 U.S.C. § 224(c)(1). Jurisdiction for pole attachments reverts to the Commission generally if the state has not issued and made effective rules implementing the state's regulatory authority over pole attachments. Reversion to the Commission, with respect to individual matters, also occurs if the state does not take final action on a complaint within 180 days after its filing with the state, or within the applicable period prescribed for such final action in the state's rules, as long as that prescribed period does not extend more than 360 days beyond the complaint's filing. 47 U.S.C. § 224(c)(3).

See also In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, WT Docket No. 99-217; CC Docket No. 96-98; CC Docket No. 88-57, RELEASE-NUMBER: FCC 00-366, 15 FCC Rcd 22983, 23025 (FCC 2000), 2000 FCC LEXIS 5672; October 25, 2000 ("We emphasize, moreover, that federal regulation of access, rates, terms, or conditions for pole attachments is preempted only to the extent a state is actually regulating attachments. Should a state fail to resolve a complaint within specified time limits, the Commission's rules provide that we assume jurisdiction over the complaint."). Cf. Global NAPs, Inc. v. FCC, 291 F.3d 832, 836 (D.C. Cir. 2002) (Where Petitioner local exchange carrier (LEC) sought review of respondent Federal Communications Commission's refusal to preempt the regulatory authority of the Massachusetts Department of Telecommunications and Energy for failure to act timely over the interpretation of an interconnection agreement between the LEC and intervenor incumbent LEC, the court held: "Only where there is such a failure does § 252(e)(5) [47 U.S.C. § 252] obligate the Commission to step in. Otherwise - such as where the state agency actually "makes a determination" under

§ 252 - there is no statutory basis for FCC preemption. Under such circumstances, an aggrieved party may bring an action for judicial review in federal court under § 252(e)(6), or, if that provision is inapplicable and there is no federal question at issue, in state court."); Village of Schaumburg v. Cablenet, No. 86 C 1710, 1986 U.S. Dist. LEXIS 22001 (N.D. Ill. July 31, 1986) ("47 U.S.C. § 543(d) requires that a franchising authority act within 180 days on any cable operator request for a rate increase of a rate subject to regulation or it will be deemed to be automatically granted--unless the 180-day period is extended by mutual consent."); accord City of Gillette v. TCI Cablevision, Inc., Docket No. 90-CV-1046-J, 1991 U.S. Dist. LEXIS 21734 (D. Wyo. Nov. 15, 1991).

The Board regulates pole attachments under the Cable Television Act, N.J.S.A. 48:5A-1 et seq. N.J.S.A. 48:5A-20(b) provides:

> Whenever the board shall find that public convenience and necessity require the use by a CATV company or a public utility of the wires, cables, conduits, poles or other equipment, or any part thereof, on, over or under any highway or any right-of-way and belonging to another CATV company or public utility, and that such use will not result in injury to the owner or other users of such equipment or any right-of-way or in any substantial detriment to the service, and that such CATV companies or public utilities have failed to agree upon such use or the terms and conditions or compensation for the same, the board may order that such use be permitted and prescribe a reasonable compensation and reasonable terms and conditions for the joint use. If such use is ordered, the CATV company or public utility to which the use is permitted shall be liable to the owner or other users of such equipment for such damage as may result therefrom to the property of such owner or other users thereof.

Also, N.J.S.A. 48:5A-21 states:

> Upon the prior approval of the board, any person may lease or rent or otherwise make available facilities or rights-of-way, including pole space, to a CATV company for the redistribution of television signals to or toward the customers or subscribers of such CATV company. The terms and conditions, including rates and charges to the CATV company, imposed by any public utility under any such lease, rental or other method of making available such facilities or rights-of-way, including pole space, to a CATV company shall be subject to the jurisdiction of the board in the same manner and to the same extent that rates and charges of public utilities generally are subject to the board's jurisdiction by virtue of the appropriate provisions of Title 48 of the Revised Statutes.

Thus, 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.

In N.J.A.C. 14:18-2.9 ("Calculation of pole attachment rent"), the total percentage of gross plant as annual cost shall include the sum of the following percentages: (i) rate of return; (ii) depreciation expense; (iii) miscellaneous taxes; (iv) maintenance expenses; (v) administrative

expenses; and (vi) federal income tax. The calculation set forth in N.J.A.C. 14:18-2.9 seems consistent with the federal formula. See, e.g., Cable Television Association of Georgia, et al.; Complainants v. BellSouth Telecommunications, Inc., Respondent, File No. PA 98-004, RELEASE-NUMBER: DA 02-1733, 17 FCC Rcd 13807, 13809 (FCC 2002); 2002 FCC LEXIS 6988, July 19, 2002) ("The Cable Formula includes recovery for all pole-related costs, including administrative, maintenance, and tax expenses, as well as depreciation and a rate of return approved by the utility's state public service commission.").

According to N.J.A.C. 14:18-12.3 ("Requirements for plant rearrangement verification"):

> (a) Applicants for a certificate of approval for an additional cable television franchise shall submit verifiable cost estimates of projected aerial utility and cable television plant rearrangement needed (**make-ready work**) to permit the attachment of the proposed cable television system.
>
> (b) The estimates shall be compiled by one of the following methods:
>
> 1. A field survey conducted by the applicant of all utility poles on which the applicant may attach in the proposed service area;
>
> 2. A field survey conducted by the applicant of at least 10 percent of the poles on which the applicant may attach using a statistical random sampling method and extrapolation process. The sample shall include the full range of all **make-ready** work categories which the applicant can reasonably expect to encounter in the proposed service area; or
>
> 3. A field survey conducted at the applicant's cost by the pole-owning utility or other such utility that owns or controls those portions of the poles to which the applicant proposes to attach.
>
> (c) Any survey shall be submitted in a form permitting verification by the pole owning utility, the Office or an independent party with experience in conducting utility make-ready surveys. All surveys shall contain the underlying facts and assumptions determining the cost estimate and a description of the process for conducting the survey.
>
> [emphasis added].

New Jersey has no statute specifically prescribing a period for final action by the Board on a complaint regarding the rates, terms, and conditions for pole attachments or make-ready service, and the Board has never promulgated a prescribed time for final action for such matter. In addition, the New Jersey Supreme Court has declared that "[a]dministrative agency power derives solely from a grant of authority by the Legislature." See, e.g., General Assembly of New Jersey v. Byrne, 90 N.J. 376, 393 (1982). Thus, an administrative agency, such as the Board, possesses only "the powers expressly granted which in turn are attended by those incidental powers which are reasonably necessary or appropriate to effectuate the specific delegation." New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978) (citations omitted). Moreover, "[w]here there exists reasonable doubt as to whether such power is vested in the administrative body, the power is denied." In re Closing of Jamesburg High School, 83 N.J. 540, 549 (1980).

Thus, consistent with the Board's 1985 certification to the FCC, the 180-day period for final action applies regarding a pole-attachment complaint. Also, the Board has generally addressed the rates, terms, or conditions for pole attachments or make-ready service only in the context of attachment by a cable television operator or attachment to the facilities of a cable television operator. See, e.g., In re a Report on the Status of Construction by Shore Cable Company of New Jersey, Inc. of a New Cable Television System in the Communities of Ventnor, Longport and Margate, OAL Docket No. BRC 90043-92; Agency Docket No. CE89050499, Order dated October 14, 1991, 92 N.J.A.R.2d (BRC) 37; 1991 N.J. AGEN LEXIS 2517, *16-18 ("The procedures developed for pole attachments and associated make-ready are designed to allocate pole space in a safe, efficient and economic manner. There is no statute, regulation, agreement or Board Order which requires that Sammons be attached precisely at the reference gain or which prohibits reassignment of the reference gain location. . . . The Board **FINDS** that all the make-ready work, including but not limited to rearrangements, pole replacements, bonding, guying, etc., undertaken to accommodate a new license applicant and not otherwise required to be performed because of NESC violations, is to be done at the expense of the new license applicant."). See also In re Cablevision of Hudson County, LLC for the Conversion to a System-Wide Franchise in the Town of West New York, BPU Docket No. CE10050328, Order dated February 10, 2012, 2012 N.J. PUC LEXIS 49 (N.J. PUC 2012) (a commercial establishment requesting line or service extension shall bear all of the following costs to make a tap available from which a drop line may be installed, including the direct costs of any easements, make-ready or other third party actions required to perform and complete construction such as, but not limited to, power companies, telephone companies, road work, trenching or the like); accord In re the Petition of Cablevision of Oakland, LLC. for Renewal of a Certificate of Approval To Continue To Operate and Maintain a Cable Television System in the Borough of Riverdale, County of Morris, BPU Docket No. CE02030149, Order dated May 16, 2002, 2002 N.J. PUC LEXIS 160 (N.J. PUC 2002); In re the Petition of Cablevision of Oakland, Inc. for Renewal of a Certificate of Approval To Continue To Operate and Maintain a Cable Television System in the Township of Little Falls, County of Passaic, BPU Docket No. CE00120972, Order dated August 30, 2001, 2001 N.J. PUC LEXIS 150 (N.J. PUC 2001).

The courts have addressed the issue of whether government agencies lose jurisdiction for failure to comply with statutory time limits. In Brock v. Pierce County, 476 U.S. 253 (1986), the Court stated: "Section 106(b) of the Comprehensive Employment and Training Act (CETA), 92 Stat. 1926, 29 U. S. C. § 816(b) (1976 ed., Supp. V), provides that the Secretary of Labor (Secretary) "shall" issue a final determination as to the misuse of CETA funds by a grant recipient within 120 days after receiving a complaint alleging such misuse. The question presented in this case is whether the Secretary loses the power to recover misused CETA funds after that 120-day period has expired." Id. at 254-255. There, the Secretary disallowed Pierce County's expenditure of approximately $ 500,000 of CETA funds after an investigation disclosed that the funds had not been used appropriately. The county challenged the Secretary's determination in court alleging that the Secretary had no authority because his determination had been made after the 120 day period had expired.

The Secretary argued that while § 106(b) speaks in mandatory language, it nowhere specifies the consequences of a failure to make a final determination within 120 days. The Secretary was relying on a line of precedent in the Courts of Appeals to the effect that Government agencies do not lose jurisdiction for failure to comply with statutory time limits unless the statute "'both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision.'" Id. at 259, citing St. Regis Mohawk

Tribe, New York v. Brock, 769 F.2d 37 (2d Cir. 1985), (quoting Fort Worth National Corp. v. Federal Savings & Loan Ins. Corp., 469 F.2d 47, 58 (5th Cir. 1972)). Having specified no consequences for the failure to make the determination required by § 106(b) within 120 days, the Secretary argued, the courts should not impute to Congress the desire to remedy such a failure by preventing the Secretary from protecting both the public fisc and the integrity of a Government program. Brock v. Pierce County, supra, 476 U.S. at 259.

The Court was "most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." Id. at 260. The Court unanimously held that "the mere use of the word 'shall' in § 106(b), standing alone, is not enough to remove the Secretary's power to act after 120 days." Id. at 262. The Court concluded that "the normal indicia of congressional intent" should be used to determine whether an agency has authority to act despite the expiration of a statutory deadline. Id. Nevertheless, the Court pointed that it did not need to, and did not, hold that a statutory deadline for agency action can never bar later action unless that consequence is stated explicitly in the statute. Ibid.

In Shenango Inc. v. Apfel, 307 F.3d 174 (3d Cir. 2002), appellants sued to challenge appellee Commissioner of Social Security's assignment of responsibility for health care premiums of retired miners and qualified dependents pursuant to the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722. One of the issues was whether some of the Commissioner's assignments were invalid because the word "shall" in 26 U.S.C. § 9706(a) prohibited the Commissioner from making initial assignments after October 1, 1993 where 26 U.S.C. § 9706(a) stated that the Commissioner "shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business. . . .". The Companies contended that "shall" means "shall" and thus since Congress explicitly mandated the Commissioner to make all Coal Act assignments by a date certain, any initial assignments made after that October 1, 1993 were invalid. Id. at 192.

The court noted that the courts have stated that "shall" is generally mandatory when used in a statute. Id. at 193 (3d Cir. 2002), citing United States v. Monsanto, 491 U.S. 600, 607 (1989) ("Congress could not have chosen stronger words [than 'shall order forfeiture'] to express its intent that forfeiture is mandatory. . . ."). The court also noted that Companies' position was supported by Dixie Fuel Co. v. Commissioner of Social Security, 171 F.3d 1052 (6th Cir. 1999), where the Court of Appeals for the Sixth Circuit held that the plain language of the statute, the statutory scheme for assigning beneficiaries and the legislative history all demonstrate that "the intent of Congress is clearly expressed in the statute. The October 1, 1993 date is a deadline." 307 F.3d at 192, citing Dixie Fuel, supra, 171 F.3d at 1064. However, the court stated that a statutory deadline does not, by itself, establish that Congress intended to strip an agency's authority to act after the deadline has passed. Shenango Inc. v. Apfel, supra, 307 F.3d at 192.

The court pointed out that reading "shall" to invalidate post-October 1, 1993 assignments would eviscerate a program intended to impose funding burdens on the most responsible parties and shift funding burdens to the government or to other companies with no connection to the beneficiaries assigned to those companies. Also, the court was reminded of the situation in Brock v. Pierce County, supra, where the Court was reluctant to find that a statutory deadline barred agency action because "public rights [were] at stake" and the "public fisc" was implicated. Shenango Inc. v. Apfel, supra, 307 F.3d at 196, citing Brock v. Pierce County, supra, 476 U.S. at 262. The court noted that such a result here would also result in a financial

windfall to some operators at the expense of those operators whose assignments were completed before October 1, 1993 because the former would be relieved of paying for miners' expectations that they or their related entities helped create. 307 F.3d at 196. Thus, the court found that the Commissioner had the authority to make original assignments after October 1, 1993. Id. at 197. Compare Barnhart v. Peabody Coal Co., 537 U.S. 149, 159 (2003) ("if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."), citing United States v. James Daniel Good Real Property, 510 U.S. 43, 63 (1993).

The Board **FINDS** that under 47 U.S.C. § 224(c)(3) and 47 C.F.R. § 1.1414(e), a state is not considered to regulate rates, terms, and conditions for pole attachments, unless it has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments. The Board has adopted rules pertaining to pole attachments and as such state regulatory authority in New Jersey is evident. In addition, for any matter filed with the State, it must take final action on a complaint regarding such matter within 180 days after the complaint is filed with the State, but no later than 360 days if the State prescribes a particular time period. 47 U.S.C. § 224(c)(3) "was added by the Cable Consumer Communications Policy Act of 1984 to ensure that States could not preempt Federal regulation of pole attachments unless they had adopted and implemented their own regulatory regime and acted on complaints within a reasonable period of time." See 2-16 Telecommunications & Cable Regulation P 16.10, footnote 2 (Matthew Bender & Company, Inc. 2012). The Board finds no basis to accept Fibertech's argument that only a complainant or a petitioner can invoke the 180-day time limit for the case to revert to the FCC when the State has not taken final action on the complaint.

While the Board in its January 21, 1985 letter to the FCC indicated that petitions concerning pole, trench, or conduit rates would be decided within 180 days of filing, apparently Fibertech failed to prosecute its complaint in a way that could have allowed the Board to decide it within 180 days. The Board finds no basis for Fibertech's argument of equitable estoppel here. The elements of equitable estoppel are well settled. In sum, the essence of that doctrine is to prevent a party from disavowing its previous conduct where that conduct amounts to a concealment or misrepresentation of material fact, unknown to the party claiming estoppel, and where that conduct was motivated by the intention or expectation that it would be acted upon by the adverse party who does in fact rely thereon in good faith in prejudicially changing its position. Charter Oak Fire Ins. Co. v. State Farm Mut. Auto. Ins. Co., 344 N.J. Super. 408, 416-417 (App. Div. 2001), citing Heuer v. Heuer, 152 N.J. 226, 237 (1998); Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334 (1979). There is no indication that Verizon acted in bad faith or engaged in conduct that prejudiced Fibertech or caused it to act to its detriment.

The Board notes that nothing in the Joint Use License Agreement, which was executed by Fibertech and Verizon in the State of New York and which was never submitted to the Board for approval, references the Board as possible arbitrator of any dispute between the parties. 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."

Nevertheless, consistent with the aforementioned case law and the plain meaning of 47 U.S.C. § 224(c)(3) and 47 C.F.R. § 1.1414(e), the Board **FINDS** no authority or overwhelming public interest in continuing to adjudicate Fibertech's complaint. Under 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, FCC jurisdiction is the clear consequence for the lack of adjudication within 180 days. In addition, the FCC is best able to interpret its enabling statutes and rules promulgated thereunder and, thus, it can remand the case to the Board if it determines that the Board has misconstrued 47 U.S.C. § 224(c)(3) and 47 C.F.R. § 1.1414(e) and should continue to adjudicate Fibertech's Petition.

Accordingly, the Board **HEREBY GRANTS** Verizon's motion to dismiss for lack of subject-matter jurisdiction and **HEREBY DISMISSES** Fibertech's Petition and accordingly directs the Board Secretary to retrieve the case from the OAL. The Board notes that this 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.

DATED: 8/2/12

BOARD OF PUBLIC UTILITIES
BY:

ROBERT M. HANNA
PRESIDENT

NICHOLAS ASSELTA
COMMISSIONER

MARY-ANNA HOLDEN
COMMISSIONER

DISSENT BY COMMISSIONER JEANNE M. FOX

As will be discussed more fully below, I HEREBY DISSENT from the decision issued by the majority of the Board to accept the recommendation of the Division of Law to dismiss the petition of Fibertech for lack of subject matter jurisdiction. Instead, I would recommend adopting, without modification, the thoughtful and thorough May 23, 2012 decision of Administrative Law Judge ("ALJ") Leland McGee ("ALJ Order"), concluding that the Federal Pole Attachment Act did not divest the Board of Public Utilities ("BPU") of jurisdiction over this proceeding, and thus denying both Verizon's motion to dismiss and Fibertech's motion to compel.

It is unfortunate that the BPU did not take final action to resolve the matter within the Federal Pole Attachment Act deadline of 180/360 days. However, I find that the Federal rules are intended to protect the entity seeking redress rather than as a "shield" from state action. In the present matter, Verizon fully participated in a long process including discovery with the New Jersey Office of Administrative Law ("OAL"); yet never invoked the 180/360 day time period set forth in the Federal Pole Attachment Act. Judge McGee found, and I agree, that Verizon should be considered to have waived its right to invoke the deadline, and that the principle of equitable estoppel should prevent Verizon from asserting the deadline as a foundation for dismissing the petition. Instead, the majority of the Board accepted the assertion that the timeframe was jurisdictional and thus not subject to extension or waiver. This approach results in an unfair result – penalizing Fibertech for a failure that was not of its making.

ALJ McGee opined persuasively, I believe, that a matter never filed with the FCC does not revert to the FCC upon the expiration of the Act's 180/360 day time period. ALJ McGee points to a 1985 FCC Order as follows:

> The FCC's 1985 Order suggests that 47 U.S.C.A. § 224 (c)(3) does not automatically divest a state of jurisdiction when a final action is not taken within the 180 or 360 day periods; instead, the FCC will not even inquire into a matter until a party files a complaint with the FCC alleging that "the complaint **it** filed with the state remained unsolved" beyond the 180- or 360-day time period.
>
> [ALJ Order at 9, citing In re Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, 58 R.R.2nd 1, ¶ 143 (FCC 1985)].

The New Jersey Appellate Court recently decided a case in which it held that a defendant was equitably estopped from invoking an arbitration clause to prevent a plaintiff from proceeding to trial on her claims. In Cole v. Jersey City Medical Center, 425 N.J. Super. 48 (App. Div. 2012), the court pointed out that it had noted that "participation in prolonged litigation, without a demand for arbitration or an assertion of a right to arbitrate, may operate as a waiver." Id. at 59, citing Hudik-Ross, Inc. v. 1530 Palisade Avenue Corp., 131 N.J. Super. 159, 167 (App. Div. 1974)). The court stated:

> [Defendant] opted to participate in the suit brought in the Superior Court for a period of twenty months and did not raise the issue of arbitration until three days before the case was scheduled for trial. During this time, the parties completed their reciprocal discovery obligations and the case was ready for trial. This indicates a knowing and deliberate decision by [the Defendant] to forgo raising

arbitration as a forum to adjudicate plaintiff's claims. Under these circumstances, [defendant] is equitably estopped from compelling plaintiff to submit her claims to arbitration.

[Cole, supra, 425 N.J. Super. at 51].

Thus, the Cole matter involved the attempt to invoke a contractual arbitration clause after a plaintiff had settled with a co-defendant through litigation. Its finding, however, highlights the court's abhorrence to the use of the tactic of participating in a lengthy proceeding and then suddenly moving to dismiss the matter on a technical issue, such as the federal deadline here, to end the litigation without resolution on the underlying issue.

Furthermore, although the majority did not address the issue, I agree with the ALJ that the make-ready cost that is the subject of the Fibertech's petition is not a ratemaking issue, and therefore any action taken by the Board would not constitute a retroactive ratemaking. The make-ready cost associated with the installation of Fibertech's infrastructure is a one-time charge by the utility to allow a company to use an existing pole or set of utility poles. If the Board had not agreed to dismiss for lack of subject matter jurisdiction, the OAL would have been able to determine if a rebate was appropriate and the amount of that rebate. The OAL could have and should have been allowed to resolve the Petitioner's issue fairly and would have provided the factual information necessary for the Board to decide the matter on its merits.

For these reasons, I HEREBY DISSENT from the Board's vote today to grant Verizon's motion to dismiss Fibertech's Petition. The Board's decision is overly legalistic and does not sufficiently consider the equities of the issue before the Board. Instead, I would adopt, without modification, the well-reasoned and complete opinion issued by ALJ McGee.

Jeanne M. Fox
JEANNE M. FOX
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

I/M/O the Petition of Fiber Technologies Networks, LLC for the 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
OAL Docket No. PUC 00784-2012N
BPU Docket No. TO09121004

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Leland S. McGee
Administrative Law Judge

May 23, 2012

SEE ATTACHED SERVICE LIST

Re: 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 Networks, L.L.C., Requiring Refunds, and Establishing Reasonable Make-Ready Rates, Terms, and Conditions
OAL DKT. NO. PUC 00784-12
AGENCY DKT. NO. T009121004

Dear Parties:

Enclosed please find a copy of the Order in the above referenced matter.

Very truly yours,

Leland S. McGee,
Administrative Law Judge

LSM/kep
Enclosure

ATTACHED SERVICE LIST

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. PUC 00784-12
AGENCY DKT. NO. TO09121004

IN THE MATTER OF THE 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.

Dennis C. Linken, Esq., for petitioner Fiber Technologies (Scarini Hollenbeck, attorneys)

William D. Smith, Esq., and **Jeffrey A. Rockow**, Esq., for respondent Verizon

Alex Moreau, Deputy Attorney General and **Carolyn McIntosh**, Deputy Attorney General, for Board of Public Utilities (Jeffrey S. Chiesa, Acting Attorney General)

Anthony Centrella, Director, for Board of Public Utilities

BEFORE **LELAND S. MCGEE**, ALJ:

Petitioner, Fiber Technologies Networks, LLC, (Fibertech) filed a Verified Petition against respondent, Verizon New Jersey, Inc., (Verizon) with the Board of Public Utilities (BPU) on December 17, 2009. Fibertech asserted that the "make-ready" charges imposed by Verizon as a condition of access to Verizon's poles are inflated compared to make-ready costs of other pole occupants, and that the fees are anti-competitive, unjust, unreasonable, and unlawful. Fibertech requested that the BPU

> [e]stablish 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.[1]
>
> [(Pet. of Fiber Technologies Networks, LLC, at 16 (December 17, 2009).)]

Verizon requires that the make-ready costs be paid at the time that Verizon provides its make-ready estimate, and before any make-ready work is begun or access to the pole is provided. (Id. at 8.)

Verizon filed an answer on January 29, 2010, and a conference convened on May 12, 2010, "to discuss the potential for settlement and/or procedural steps needed to resolve" the matter. (Pet'r's Br. at 6 (April 20, 2010).) Additional meetings were held during the summer of 2010, and Fibertech contends that "the case was subsequently put on hold by mutual agreement so the parties could discuss possible settlement." (Id. at 7.) On December 15, 2011, Fibertech determined that settlement was not possible, and the BPU transmitted the matter as a contested case to the Office of Administrative Law (OAL) on January 18, 2012. (Ibid.) A telephone conference call was convened on February 23, 2012, and a schedule was set for the remaining phase of the proceeding, with the completion of discovery scheduled for March 30, 2012, the submission of testimony to be filed by April 18, 2012, and hearing dates scheduled for July 24, 25, and 26, 2012. (Ibid.)

[1] Notably, Fibertech contends that Verizon charged Fibertech an average of $19,233 per mile for make-ready work while other pole occupants in New Jersey have charged an average of only $3,644 per mile. (Fibertech's Pet. at 13.)

On April 9, 2012, Verizon submitted letters both to the BPU and OAL asserting that the BPU's jurisdiction had reverted by operation of law to the Federal Communications Commission (FCC) because more than 180 days had lapsed since Fibertech first filed its petition pursuant to 47 U.S.C.A. § 224(c). Verizon subsequently filed a Notice of Defective Jurisdiction on April 18, 2012. On April 25, 2012, Verizon filed a Motion to Dismiss for Lack of Jurisdiction. On April 27, 2012, Fibertech filed a "corrected copy" brief in support of its Motion to (1) Compel Verizon's Compliance with the Prehearing Scheduling Order, and (2) to Bar Dismissal and Removal of this Matter to the Federal Communications Commission. On April 27, 2012, Fibertech also filed a Brief in Opposition to Verizon's Motion to Dismiss. On April 30, 2012, Verizon filed a Brief in Opposition to Fibertech's Brief in Support of Jurisdiction. Both parties have filed additional clarifying submissions. The BPU Staff and the Division of Rate Counsel declined to file submissions.

DISCUSSION

Jurisdiction

New Jersey law governing regulation of access to utility poles provides that

> [w]henever the [BPU] shall find that public convenience and necessity require the use by a CATV company or a public utility of the wires, cables, conduits, poles or other equipment, or any part thereof, on, over or under any highway or any right-of-way and belonging to another CATV company or public utility, and that such use will not result in injury to the owner or other users of such equipment or any right-of-way or in any substantial detriment to the service, and that such CATV companies or public utilities have failed to agree upon such use or the terms and conditions or compensation for the same, the board may order that such use be permitted and prescribe a reasonable compensation and reasonable terms and conditions for the joint use.
>
> [N.J.S.A. 48:5A-20(b); see also N.J.A.C. 14:18-2.10.[2]]

[2] N.J.A.C. 14:18-2.10 provides that "(a) [i]n the event of a dispute over pole attachment or conduit rental rates, any party to a pole attachment agreement under N.J.A.C. 14:18-2.9 . . . may petition the Board for

The applicable federal law provides that

> [s]ubject to the provisions of subsection (c) of this section, the [FCC] shall regulate the **rates, terms, and conditions for pole attachments** to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions.
>
> [47 U.S.C.A. § 224(b)(1) (emphasis added).]

Subsection (c)(1) adds that

> [n]othing 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), for pole attachments **in any case where such matters are regulated by a state.**
>
> [47 U.S.C.A. § 224(c)(1) (emphasis added).]

However, subsection (c)(3) explains that

> [f]or purposes of this subsection, a state shall not be considered to regulate the **rates, terms, and conditions** for pole attachments—
>
> (A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and
>
> (B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter–
>
> (i) within 180 days after the complaint is filed with the State, or
>
> (ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend

---

a resolution of such dispute by filing a petition with supporting documentation in accordance with N.J.A.C. 14:17-6.1 through 6.5" and that "(b) [i]n the event of a dispute over terms and conditions, any party to a pole attachment or conduit rental agreement may petition the Board for resolution."

> beyond 360 days after the filing of such complaint.

[47 U.S.C.A. § 224(c)(3) (emphasis added).]

In 1996, Congress expanded Section 224 to require pole occupants to provide non-discriminatory access to poles by adding subsection (f), providing, in part, that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." Telecommunications Act of 1996, Pub. L. No. 104-104, § 224, 110 Stat. 56, 703 (1996).

Congress expanded the state's preemption authority by adding the words "or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f)" to Section 224(c)(1). Ibid. However, Congress never added the "access" language to Section 224(c)(3)'s description of when a state will not be deemed to regulate particular aspects of pole attachments. Ibid.

Similarly, the "access to poles" language is omitted from the provision of the rule governing FCC jurisdiction when a state fails to take final action within 180 or 360 days; that rule provides that

> [n]otwithstanding any [certification by a state that chooses to preempt FCC jurisdiction regarding the regulation of rates, terms and conditions],[3] jurisdiction will revert to this Commission with respect to any individual matter, unless the state takes final action on a complaint regarding such matter:
>
> (1) Within 180 days after the complaint is filed with the state, or
>
> (2) Within the applicable periods prescribed for such final action in such rules and regulations of the state, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

[47 C.F.R. § 1.1414(e).]

[3] New Jersey has provided such certification. States that Have Certified that They Regulate Pole Attachments, WC Docket No. 10-101 (May 19, 2010), <http://transition.fcc.gov/eb/Public_Notices/DA-10-893A1.html> (last visited April 24, 2012).

Instead, Section 1.1414(c) explains that "[u]pon receipt of such certification [regarding the state's regulation of rates, terms, and conditions], the Commission shall forward any pending case thereby affected to the state regulatory authority, shall so notify the parties involved and shall give public notice thereof." No reference to pole access exists in 47 C.F.R. § 1.1414. Instead, Section 1.1420 addresses the timeline for access to utility poles, and explains, in part, that

> [w]here a request for access is not denied, a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work within 14 days of providing the response required by § 1.1420(c), or in the case where a prospective attacher's contractor has performed a survey, within 14 days of receipt by the utility of such survey.
>
> (1) A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented.
>
> (2) A cable operator or telecommunications carrier may accept a valid estimate and make payment anytime after receipt of an estimate but before the estimate is withdrawn.
>
> [47 C.F.R. § 1.1420(d).]

Fibertech contends that the omission of the "access to poles" language from subsection (c)(3) of Section 224 means that "the statutory provision is limited to complaints concerning only 'rates, terms, and conditions' of attachment [which] . . . pertain to the annual rental and related matters concerning attachment" while the present dispute involves the make-ready work, "including payments for such work prior to the attachment on the pole." (Pet'r's Br. at 13.) Fibertech then asserts that "[w]hat is primarily in dispute in this matter are issues involving make-ready work—including payments for such work prior to the attachment on the poles." (Ibid.)

When interpreting a statute, "[t]he court's objective is to determine the meaning of the statute to the extent possible by looking to the Legislature's plain language." State v. Regis, 208 N.J. 439, 447 (2011). "It is only when a statute's language is

ambiguous that the court should resort to extrinsic aids, such as legislative history, committee reports, and contemporaneous construction." Ibid. "Regulations are subject to the same rules of construction as a statute [and] should be construed in accordance with the plain meaning of its language, and in a manner that makes sense when read in the context of the entire regulation." Medford Convalescent and Nursing Ctr. v. Div. of Med. Assistance and Health Servs., 218 N.J. Super. 1, 5 (App. Div.), cert. denied, 102 N.J. 385 (1985) (internal citation omitted).

Section 224 could be read as Fibertech contends, such that the FCC does not have jurisdiction with respect to "access to poles" disputes even if a state fails to take final action on such a complaint within the proscribed 180- or 360-day time periods, because unlike subsection (c)(1) "access to poles" is not included with subsection (c)'s "rates, terms, and conditions" language describing when a state is not considered to regulate particular aspects of pole attachments. However, one could alternatively construe the "any individual matter" language contained in Section 224(c)(3)(B) and 47 C.F.R. § 1.1414(e) as encompassing not only the "rates, terms, and conditions for pole attachments" referenced earlier in Section 224(c)(3), but all aspects of pole-attachment disputes referenced in Section 224(c)(1), including not only "rates, terms, and conditions[,]" but also "access to poles." Under this interpretation, a state would be deemed to not regulate when a state fails to take final action on an "access to poles" complaint within the proscribed 180- or 360-day time periods, because "access to poles" is not included in subsection (c)(3). However, that reading would ignore the disparity in language used by the different Section 224's subsections. Nonetheless, since ambiguity remains, additional inquiry is required to determine the statutory and regulatory intent.

In 1977, the Senate Committee on Commerce, Science, and Transportation explained that the Committee

> believe[d] that the Federal involvement in pole attachment arrangements should serve two specific, interrelated purposes: To establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole

> attachment practices on the wider development of cable television service to the public.
>
> [S. Rep. No. 95-580, at 16-17 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109.]

The Committee further stated that it

> consider[ed] the matter of CATV pole attachments to be essentially local in nature, and that various State and local regulatory bodies which regulate other practices of telephone and electric utilities [we]re better equipped to regulate CATV pole attachments. Regulation should be vested with those persons or agencies most familiar with the local environment within which utilities and cable television systems operate. It is only because such State or local regulation currently does not widely exist that Federal supplemental regulation is justified.
>
> [Id. at 16–17.]

The Report added that "in the absence of regulation by these State and local authorities of CATV pole attachments, the Federal Communications Commission should fill the regulatory vacuum to assure that rates, terms, and conditions otherwise free of governmental scrutiny are assessed on a just and reasonable basis." Id. at 17. Additionally, "[r]eceipt of such a certification from the State shall be conclusive upon the Commission . . . . However, since the purpose of the bill as reported is to create a forum that is, in fact, available to adjudicate pole attachment disputes, State preemption of FCC jurisdiction would not occur if a State only had authority to regulate in this area but was not actually implementing that authority." Ibid.

More directly to the point, when Congress added subsection (c)(3) to 47 U.S.C.A. § 224 in 1984, the FCC's Order adopting regulations implementing Section 224(c)(3) explained that

> [t]he new Section 224(c) merely makes it clear that a state will not be considered to be regulating pole attachments unless it has issued and made effective rules to implement that authority. While we will not define the methodology to be followed by the state, we believe that the rules and regulations should include a specific methodology which has

> been made publicly available in the state. Therefore, we will require that a state certify that its rules and regulations include a specific methodology for regulating pole attachments. Accordingly, if the state certifies that it has rules in place which include a specific methodology, which has been made publicly available in the state, **we will not inquire further unless a complaint is filed with us that alleges that a party attempted to file a complaint at the state-level and could not because of the lack of appropriate procedures or that the complaint it filed with the state remained unresolved** 180 days after the complaint was filed (or within the applicable period prescribed for final action if the state's rules provide for resolution within 360 days after the filing of a complaint).
>
> [In re Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, 58 R.R.2d 1, ¶ 143 (FCC 1985) (emphasis added) (hereinafter "1985 Order").]

The FCC's 1985 Order suggests that 47 U.S.C.A. § 224(c)(3) does not automatically divest a state of jurisdiction when a final action is not taken within the 180 or 360 day periods; instead, the FCC will not even inquire into a matter until a party files a complaint with the FCC alleging that "the complaint it filed with the state remained unresolved" beyond the 180- or 360-day time period. Maine's Public Utilities Commission, when considering the jurisdictional nature of 47 U.S.C.A. § 224(c) and 47 C.F.R. § 1.1414(e) regarding pole-attachment disputes agreed that a state would not be divested of jurisdiction by operation Section 224(c), and explained that

> the federal Act, which expressly confers authority to the FCC where a void is left by a State that does not regulate in this area, does not to [sic] grant to the FCC exclusive jurisdiction over a pole attachment dispute even in situations it would be permissible under the Act for the FCC to "consider" a State as not regulating pole attachments.
>
> [Comm'n Investigation into FairPoint's Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corp., No. 2010-206, 2010 Me. PUC Lexis 708, at *10–11 (November 15, 2010).]

Instead, the Maine Public Utilities Commission expressed that

> the correct reading of 47 C.F.R. § 1.1414(e) is one that is informed by 47 C.F.R. § 1.1414(d),[4] which describes the process by which the FCC will forward any pole attachment case pending before it to a State that certifies that it regulates pole attachments. Read in this light, the "reversion" language of § 1.1414(e) provides a mechanism for the FCC, after inaction by the relevant State commission, to resume its consideration of a pole attachment dispute that it had previously forwarded for resolution to a State. Here, as the dispute between FairPoint and GWI was never brought before the FCC, there is nothing to "revert" back to it.
>
> [Id. at *11.]

Similarly, the dispute between Fibertech and Verizon was not brought before the FCC, so there would be no FCC jurisdiction to revert back to.

The 1985 Order also suggests that only a petitioner can invoke the FCC's jurisdiction pursuant to Section 224(c)(3), as it would be the party "aggrieved" by the failure of the state regulatory agency to resolve the matter within either the 180-day or 360-day time period. That petitioner would have to file a petition with the FCC in order for jurisdiction to be established. In the present matter, Verizon did not file a petition with the FCC nor at the state-level.

Additionally, even if Verizon filed such complaint seeking FCC resolution of this matter on the grounds that final action was not taken by the state within the 180- or 360-day time period, it is not clear that the FCC would accept jurisdication, because Verizon filed no complaint at the state-level. As such, unless Verizon files a complaint with the FCC and the FCC communicates otherwise, the BPU, and therefore the OAL, should retain jurisdiction in this matter. For the foregoing reasons, I **CONCLUDE** that the BPU retains jurisdiction of this proceeding.

[4] The provision actually referred to is 47 C.F.R. § 1.1414(c), not subsection (d).

Rates

In its original petition filed with the BPU, Fibertech requested that the BPU "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*" (emphasis added). With respect to the past charges, "[u]nless there is specific statutory authorization, retroactive ratemaking occurs when rates are established that permit a utility to recover past losses or that require the utility to refund excess profits." Penpac v. Passaic County Utilities Auth., 367 N.J. Super. 487, 500 (App. Div. 2004). "[R]etroactive ratemaking is impermissible regardless of whether it favors the utility or the ratepayers." Ibid. "Ratemaking is 'necessarily present and prospective.' When rates are set too low, the normal relief is to raise rates prospectively. It is not permitted to attempt to recoup past deficits by way of a surcharge on present rates. Ratemaking should not 'look both forward and backward.'" Id. at 499–500 (citations omitted).

> Upon the prior approval of the [BPU], any person may lease or rent or otherwise make available facilities or rights-of-way, including pole space, to a CATV company for the redistribution of television signals to or toward the customers or subscribers of such CATV company. **The terms and conditions, including rates and charges** to the CATV company, imposed by any public utility under any such lease, rental or other method of making available such facilities or rights-of-way, including pole space, to a CATV company **shall be subject to the jurisdiction of the board in the same manner and to the same extent that rates and charges of public utilities generally are subject to the board's jurisdiction by virtue of the appropriate provisions of Title 48 of the Revised Statutes.**
>
> [N.J.S.A. 48:5A-21 (emphasis added).]

With respect to prospective rate setting,

> [w]henever the board shall find that public convenience and necessity require the use by a CATV company or a public utility of the wires, cables, conduits, poles or other equipment, or any part thereof, on, over or under any highway or any right-of-way and belonging to another CATV

> company or public utility, and that such use will not result in injury to the owner or other users of such equipment or any right-of-way or in any substantial detriment to the service, and that such CATV companies or public utilities have failed to agree upon such use or the terms and conditions or compensation for the same, **the board may order that such use be permitted and prescribe a reasonable compensation and reasonable terms and conditions for the joint use.**
>
> [N.J.S.A. 48:5A-20(b); see also N.J.A.C. 14:18-2.10.[5]]

Further, the BPU is empowered to

> [f]ix just and reasonable individual rates, joint rates, tolls, charges or schedules thereof, as well as commutation, mileage and other **special rates** which shall be imposed, observed and followed thereafter by any public utility, whenever the board shall determine any existing rate, toll, charge or schedule thereof, commutation, mileage or other special rate to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential.
>
> [N.J.S.A. 48:2-21(b)(1).[6]]

However, the BPU has broader authority regarding surcharges, and N.J.S.A. 48:2-29.4 provides that

> [w]henever after hearing upon notice the board shall determine that any public utility has collected by means of a surcharge an amount of money exceeding the authorized amount or has continued to collect a surcharge after the specified purpose for which it was authorized has been accomplished, the board may require such public utility by an order in writing to repay the excess so collected to those from whom the same was collected.

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[5] See footnote 2.

[6] Notably, N.J.S.A. 48:2-21 also provides that

> [i]n every such proceeding the board shall complete and close the hearing within 6 months and enter its final order within 8 months after the filing of the order of the board initiating such proceeding, when such proceeding is on the board's own motion; or after issue is joined through the filing of an answer to a complaint, when such proceeding is initiated by complaint.

The existence of a distinction between pole-attachment rental rates and the terms and conditions associated with a pole-attachment agreement is also demonstrated by N.J.A.C. 14:18-2.10, which provides that

> (a) In the event of a dispute over **pole** attachment or conduit rental **rates**, any party to a **pole** attachment agreement under N.J.A.C. 14:18-2.9 or conduit rental under N.J.A.C. 14:18-2.11 may petition the Board for a resolution of such dispute by filing a petition with supporting documentation in accordance with N.J.A.C. 14:17-6.1 through 6.5.
>
> (b) In the event of a dispute over terms and conditions, any party to a **pole** attachment or conduit rental agreement may petition the Board for resolution.

Regarding pole-attachment rental rates, the BPU rules explain that

> [i]n cases where the Board must determine the appropriate rental rate for cable television or similar third party attachments on utility poles, it shall be calculated in the following manner:
>
> 1. Total percentage of gross plant as annual cost shall be the sum of the following percentages:
>
> i. Rate of return;
> ii. Depreciation expense;
> iii. Miscellaneous taxes;
> iv. Maintenance expenses;
> v. Administrative expenses;
> vi. Federal income tax.
>
> [N.J.A.C. 14:18-2.9.]

Conclusion

Any "rates" charged pursuant to a pole attachment agreement would be subject to the BPU's jurisdiction "in the same manner and to the same extent that rates and charges of public utilities generally are subject to the board's jurisdiction" under N.J.S.A. 48:5A-21. Although retroactive ratemaking is permissible if specific statutory authorization exists, no such authorization exists, and N.J.S.A. 48:2-21 expressly

empowers the BPU to "fix just and reasonable individuals rates . . . which shall be imposed, observed, and followed thereafter[.]" Therefore, the BPU can only fix rates under a pole-attachment agreement prospectively. However, the Board maintains greater flexibility with regards to "surcharges" and can require a public utility to repay any excess surcharge collected. Nonetheless, the scope of N.J.A.C. 14:18-2.9 suggests that the present dispute involving make-ready fees does not encompass pole-attachment rental rates because such rental rates are an ongoing payment.

Finally, it is my opinion that the proofs required to determine the reasonableness of the prior make-ready fees are distinctly different from the proofs required in the rate-setting process. The regulations are clear as to the rate-setting process.

For the foregoing reasons I **CONCLUDE** that these proceedings should be decided in two stages. One stage is establishing prospective rates for make-ready fees. The second is determining the reasonableness of the prior make-ready fees and fixing a remedy if warranted.

Motion to Compel

I **CONCLUDE** that based upon the decision herein, Fibertech's Motion to Compel is moot.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Motion to Dismiss for Lack of Jurisdiction is hereby **DENIED**. It is further **ORDERED** that the Motion to Compel is hereby **DENIED**.

It is **ORDERED** that the parties participate in a telephone conference for the express purpose of establishing a new procedural schedule.

This order may be reviewed by **BOARD OF PUBLIC UTILITIES** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

May 23, 2012
DATE

LELAND S. MCGEE, ALJ

kep