State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL
150 South Main Street • Providence, RI 02903
(401) 274-4400
TDD (401) 453-0410

Patrick C. Lynch, Attorney General

December 5, 2005

Via First Class Mail And Electronically

Luly Massaro
Clerk
Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

Re: Successor Alternative Regulation Plan For Verizon New England Inc., d/b/a Verizon Rhode Island – PUC Docket 3692

Dear Ms. Massaro:

Enclosed for filing please find an original and nine (9) copies of the position of the Attorney General on the George Wiley Center Motion to Continue, for filing in the above-referenced proceeding.

Thank you for your attention to this matter.

Sincerely,

William K. Lueker (R.I. Bar # 6334)
Special Assistant Attorney General
Tel. (401) 274-4400 ext. 2299
Fax (401) 222-3016

Encl.

Copy to: Service List for Docket 3692

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PUBLIC UTILITIES COMMISSION

IN RE: SUCCESSOR ALTERNATIVE REGULATION PLAN FOR VERIZON NEW ENGLAND INC., D/B/A VERIZON RHODE ISLAND	**)))**	**DOCKET NO. 3692**

POSITION OF THE ATTORNEY GENERAL ON THE GEORGE WILEY CENTER'S MOTION TO CONTINUE HEARING

Pursuant to Rule 1.15 of the *Rules of Practice and Procedure* (the "Rules") of the Public Utilities Commission (the "Commission"), and for the reasons set forth below, Patrick C. Lynch, Attorney General of the State of Rhode Island, does not object to the George Wiley Center's Motion to Continue.

ISSUE PRESENTED

The basic issue presented in the Wiley Center's Motion is whether the Wiley Center received sufficient notice of this proceeding to satisfy administrative due process requirements.

DISCUSSION

Notice.

The pertinent section of law for a contested proceeding such as this is R.I.G.L. § 42-35-9. That statute provides, in pertinent part, that "[i]n any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice." R.I.G.L. § 42-35-9(a). Further, "[o]pportunity shall be afforded all parties to respond and present evidence and argument on all issues involved." R.I.G.L. § 42-35-9(d). What constitutes "an opportunity for hearing after reasonable notice" in the context of R.I.G.L. § 43-35-9? Due process within administrative procedures requires the opportunity to be heard "at a meaningful time and in a meaningful manner." *Larue v. Registrar of Motor Vehicles*, 568 A.2d 755, 758 (R.I. 1990) [quoting *Millet v.*

Hoisting Engineers' Licensing Division of the Dept. of Labor, 377 A.2d 229, 235-36 (R.I. 1977).] The *Larue* decision goes on to state: "It is the opportunity to exercise a right, and not petitioner's actual implementation of that right, that constitutes due process." *Larue* at 758, quoting *Craig v. Pare,* 497 A.2d 316, 320-321 (R.I. 1985). The *Larue* court concluded its discussion of due process and notice by pointing out that in the examination of administrative proceedings, "the presumption favors the administrators, and the burden is upon the party challenging the action to produce evidence sufficient to rebut this presumption." *Larue* at 758, quoting *Gorman v. University of Rhode Island*, 837 F.2d 7, 15 (1st Cir. 1988). Has the George Wiley Center been afforded notice "at a meaningful time and in a meaningful manner"?

The earliest written notice of any type in the docket in this matter that would be accessible to the public (via the Commission's web site[1]) is a Memorandum from the Commission Clerk dated September 9, 2005, and addressed to attorneys representing Verizon Rhode Island, the Rhode Island Division of Public Utilities and Carriers, the Rhode Island Attorney General, Cox RI Telcom LLC, and Conversent Communications of Rhode Island; copies were provided to the Commissioners, Commission and Division Staff, and Verizon Rhode Island staff. The Memorandum set out a Procedural Schedule for this docket, agreed to by the addressees, and included deadlines for filing Motions to Intervene, testimony by Division and Intervenors, rebuttal testimony by Verizon, and surrebuttal testimony by the Division and Intervenors. It also established the date for the public hearing in this proceeding. All of these deadlines were established by the agreement of the parties present. There is nothing of record to show that any potentially interested entities other than those to whom the Memorandum was addressed were notified of this meeting by Verizon or the Commission either before or after, nor

[1] Reproducing an item such as this three or so levels down on the Commission's web site probably does not qualify as public notice, probably does not serve as the equivalent of publication in the Providence Journal, and in any event does not contain the type of information required by R.I.G.L. § 42-35-9.

is there any evidence of record that other potentially interested entities were afforded an opportunity to provide input to the Procedural Schedule.

For nearly three months after the limited distribution of the Procedural Schedule Memorandum, the parties to whom that Memorandum was addressed engaged in significant pre-litigation activity, including performing discovery, filing testimony and preparing their cases for hearing. The first notice to the public of this proceeding appeared in the Providence Journal on November 25, 2005, a Friday and the day after Thanksgiving. As a result, anyone interested in participating as a party in this case had just six business days to review the testimony and discovery on record, evaluate whether or not they would petition the Commission to allow them to seek intervenor status out of time, and actually file with the Commission.[2] A notice to the public that is published long after certain deadlines applicable to the public have already passed, and that as a result requires special permission to file out of time before a party can seek intervenor status, would hardly seem to be "reasonable notice" as a matter of law under R.I.G.L. § 42-35-9.

Of course one can argue that waiving the deadline for seeking intervenor status would cure this defect. It does not. Commission Rules "favor prompt and complete disclosure and exchange of information" and the "timely use of discovery as a means toward effective presentations at hearing." Rule 1.18(a)(1). They allow parties of whom discovery is requested twenty-one (21) days in which to respond, a period which far exceeds the time provided the Wiley Center by the notice in November and in effect denies the Wiley Center any effective opportunity for discovery. Rule 1.18(c)(2). The Rules favor submission of pre-filed testimony,

[2] Under Commission Rule 1.13(d), a motion to intervene filed after the date set by the Procedural Schedule Memorandum is untimely and need not be granted. Put another way, the George Wiley Center Motion to Intevene, though filed less than a week after notice was first given the Center, was already too late. Even if the Center's Motion to Intervene is granted, by filing out of time Commission Rule 1.13(f) acts to limit their scope of action. That is, the Center has already effectively been denied some of its right under the Rules as a result of untimely notice.

and specify that the testimony should be filed fourteen (14) days prior to the hearing. Rule 1.20(e)(1). If the Wiley Center wishes to submit testimony from an expert witness of its own, and assuming that it can locate one who has the time to review this filing prior to the hearing, it is still bound to comply with the requirements of Rule 1.20(e)(1). None of these problems can be cured simply by allowing the Wiley Center to intervene out of time on short notice.

Part II of the Rules.

There is a second area of concern with respect to the notice afforded the public – and the Wiley Center – in this case. Rule 2.4 provides:

> Within ten (10) days after filing for general rate schedule changes, *the applicant* shall cause a notice of the filing, in a form to be approved by the Commission, to be published in the newspaper of widest circulation within the applicant's service territory. In addition, the company shall include a notice of its proposed general rate schedule changes in the next general customer billing, if within sixty (60) days following the filing of the application, or by a separate mailing.

(Emphasis supplied). Should not Rule 2.4 apply in this case? If the instant application is granted, Verizon will be free to largely change its rates more or less at will. This filing is certainly equivalent in effect to a general rate filing. In fact, given that we would know what rates Verizon was seeking in a standard general rate filing, and do not know in this filing, this application arguably requires even closer scrutiny than the standard case covered under Rule 2.4.

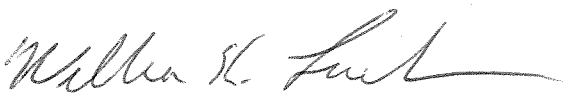
Verizon will point out, correctly, that Rule 2.4 is in Part II, a section of the Rules explicitly concerned with the requirements for filings for general rate schedule changes, and applicable to proceedings where a utility's overall revenue requirements are at issue. Verizon has not been regulated on revenue requirements for some time; instead, Verizon has been allowed to come under an "Alternate Form of Regulation Plan" to which that whole series of additional requirements does not apply. That Plan, however, is an "<u>alternate</u>" to the type of plan regulated under Part II. The fact that Verizon has been allowed to seek an alternate form of regulation does not mean that the Rules set out in Part II should not be applied to that alternate

form of regulation as well as to the standard form of regulation for which it has been substituted *to the extent that it is possible to do so.*

We agree that much of Part II simply does not fit well with the "Alternate Form of Regulation Plan" and cannot be applied to that Plan directly. However, Rule 2.4, particularly the first sentence, can easily be applied to the instant application and should be. That Rule imposes a notice requirement on Verizon in cases equivalent to this one, and affords a clear right to public notice on the public. Had Verizon complied with Rule 2.4 in filing its application for an alternate to the type of regulatory plan covered by Part II of the Rules, the Wiley Center would have been on notice, could have intervened in a timely fashion, and could have exercised its full range of pre-litigation rights.

WHEREFORE, the Attorney General believes that the George Wiley Center has not been afforded reasonable notice in this matter and that the George Wiley Center's Motion to Continue should be granted.

PATRICK C. LYNCH
ATTORNEY GENERAL
By his attorney,



William K. Lueker (R.I. Bar # 6334)
Special Assistant Attorney General
150 South Main Street
Providence, RI 02903
Tel. (401) 274-4400 ext. 2299
Fax (401) 222-3016

December 5, 2005

CERTIFICATE OF SERVICE

I certify that a copy of the within position of the Attorney General was served electronically as well as by regular mail, postage prepaid, to all persons listed this date on the service list for PUC Docket No. 3692 on the 5th day of December, 2005.