

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS
89 JEFFERSON BOULEVARD
WARWICK, RHODE ISLAND 02888**

IN RE: Application Filing for a Construction :
 Certificate by Verizon New England, Inc. : Docket No. 2006-C-4

REPORT AND ORDER

A. INTRODUCTION

The Rhode Island Division of Public Utilities and Carriers (“Division”) received an application filing on February 7, 2006 from Verizon New England, Inc. (“Verizon”), seeking authority to construct and operate a Community Antenna Television System (“CATV” or “cable television system”) in Rhode Island’s CATV Service Area 6. Service Area 6 is comprised of the communities of Coventry, East Greenwich, Exeter, North Kingstown, Warwick, West Warwick and West Greenwich. Verizon’s application was filed in accordance with the requirements of Rhode Island General Laws, Section (“R.I.G.L. §”) 39-19-3 and the Division’s “*Rules Governing Community Antenna Television Systems*” (the “Cable Rules”).

Applications filed pursuant to R.I.G.L. §39-19-3 precipitate a three-phase regulatory response from the Division.¹ The first phase, called the “*Compliance Order Certificate*” phase, requires the Division to conduct a thorough evaluation

¹ The three-phase CATV regulatory process was comprehensively described by the Division in a previous order issued in this docket (See Order No. 18789, issued on December 20, 2006).

of the applicant's fitness, willingness, technical qualifications and financial ability to perform the proposed CATV services.² Additionally, the Division must be satisfied that the applicant is willing and able to comply with the Division's Cable Rules and the laws of the State of Rhode Island. The Division must also find that the proposed operation will be consistent with the public interest.³

The Division completed the first regulatory phase with respect to Verizon's February 7, 2006 CATV application filing on December 20, 2006. On this date the Division issued a report and order granting Verizon a Compliance Order Certificate.⁴ Verizon formally accepted the Division's grant of a Compliance Order Certificate on January 11, 2007, a condition-subsequent required under the Rules.⁵

In satisfaction of the timetable filing requirements contained in Section 8 of the Rules, Verizon next filed an application for a "Construction Certificate" on January 26, 2007. This filing begins the second regulatory phase regarding Verizon's quest for authority to construct and operate a cable television system in Service Area 6. This report and order summarizes Verizon's application and direct case for a Construction Certificate and the positions of the Intervenors. It also contains the Division's findings thereon.

B. SUMMARY OF VERIZON'S APPLICATION

Verizon filed its Construction Certificate application in conformance with the requirements established in Section 3.4 of the Cable Rules. The filing

² See Section 3.3(d) of the Rules.

³ See R.I.G.L. §39-19-4.

⁴ See Order Nos. 18789 and 18801.

⁵ Rule 3.3(e).

requirements mandated under Section 3.4 of the Cable Rules were enumerated and identified in the Division's December 20, 2006 report and order, previously issued in this docket, supra.⁶ In response to the obligatory filing requirements contained in Section 3.4 of the Cable Rules, Verizon addressed ten issues in its application filing. The ten relevant issues and Verizon's comments thereon are discussed in detail below.

1. Map and description of certified service area (Rule 3.4(b)(1)):

In its application, Verizon states that because it is a common carrier as defined in Title II of the Communications Act, federal and state law "give Verizon the legal authority to access the public rights-of-way in the Service Area."⁷ Relying on this authority Verizon states that it is not required to provide the Division with the "strand maps" mandated under Section 3.4 (b)(1) of the Cable Rules. Verizon relates that under its "Title II authority" it is placing fiber cable in the public rights-of-way that is capable of supporting various services including voice, data and video services. Verizon maintains that "detailed maps of its Title II facilities are proprietary, competitively sensitive, and beyond the scope of this application." Nevertheless, for "illustration purposes" Verizon provided a map showing its "plan for delivering CATV services" in Service Area 6 from the relevant Verizon Video Service Offices (VSO).⁸ Verizon also proffered

⁶ Order No. 18789, pp. 13-15.

⁷ Verizon Exhibit C-1, pp. 2-3.

⁸ Id., p. 2 and "Exhibit 4".

a chart illustrating the percentage of construction already completed in each community in Service Area 6.⁹

2. Technical and narrative description of system design (Rule 3.4 (b)(2)):

Verizon next proffered a technical and narrative description of its proposed Service Area 6 CATV system. The description provided by Verizon in its “Construction Certificate” application directly paralleled the description previously provided in the context of the Company’s application for a “Compliance Order Certificate”. Consequently, the Division will accept that the proposed system design remains as originally described and planned for Service Area 6.¹⁰

3. Proof of conformance with technical, engineering and safety standards (Rule 3.4(b)(3)):

In its application Verizon states that its network fully complies with all technical, engineering, and safety standards and codes required under the Cable Rules (Id.).¹¹

4. Location of towers and headend facilities (Rule 3.4(b)(4)):

As reported during the Compliance Order Certificate phase of this docket, Verizon still plans to provide CATV services to Service Area 6 through two of the Company’s national Super Head Ends (SHEs) located in Florida and Indiana, a Video Hub Office (VHO) located in Burlington, Massachusetts, and

⁹ Id., “Exhibit 3”.

¹⁰ Id., pp. 3-4 and “Exhibit 5”. An additional summary of the system’s technical description can be examined in Order No. 18789, at pp. 19-20.

¹¹ Id., p. 4 and “Exhibit 6”. The Division’s technical and design standards requirements are set forth in Chapter 7 of the Rules.

seven Video Service Offices (VSOs) located in North Kingstown, Warwick, East Greenwich, Coventry, West Warwick, Providence and Hope Valley.¹²

5. Proof that applicant has obtained all licenses and other forms of permission required by state and local government bodies prior to commencement of construction (Rule 3.4(b)(5)):

Regarding this criterion, Verizon reiterates that it is not constructing a new network but instead “upgrading” its existing network. Verizon observed that “[g]enerally, state and local governments do not require Verizon to obtain a license or permission merely to install new plant on poles or in existing conduit.” However, Verizon states that where such governments do require a license or other permission, “for example where Verizon must replace a pole, install a new pole or excavate in the public way”, it “has applied for and/or obtained all licenses and other forms of permission known to be required.”¹³

6. Copies of consummated pole attachment, conduit occupancy and right-of-way agreements (Rule 3.4(b)(6)):

Verizon states that it is an owner or co-owner of the poles and conduit used in its network upgrade and is entitled under Rhode Island law to place its facilities in the public ways. As such, Verizon observes that “no pole attachment, conduit occupancy or right-of-way agreements are required...”¹⁴

¹² Id., p. 4.

¹³ Id., p. 5 and “Exhibit 6”.

¹⁴ Id., p. 5.

7. Copies of all arrangements with common carrier communications companies or services (Rule 3.4(b)(7)):

Verizon identified itself as a common carrier communications company in Rhode Island and, as noted above, claims an ownership interest in the poles and conduit used in the upgrade of its network. Verizon therefore declares that no “arrangements” are needed to perform the upgrade.¹⁵

8. Proof of satisfactory method of maintenance and continuing records of operations to show adequacy of service and performance and continuing financial responsibility (Rule 3.4(b)(8)):

In response to the issue of whether Verizon will be able to provide adequate service and performance, Verizon states that it has been providing high quality telecommunications services, satisfactory maintenance of its telecommunications system and unparalleled customer service for its customers in Rhode Island for over one hundred years. Verizon emphasizes that it employs 1119 people in Rhode Island and utilizes an advanced customer service center that provides valuable services to Verizon customers throughout the northeast. Verizon also emphasizes that it has previously provided the Division with ample evidence of its financial strength in this docket.¹⁶

9. Satisfactory evidence of liability insurance coverage in amounts specified by Chapter 12 of the Division’s Rules (Rule 3.4(b)(9)):

¹⁵ Id., p. 6.

¹⁶ Id.

Verizon expressed its willingness to comply with Section 12 of the Cable Rules by offering a copy of an insurance certificate with its application filing.¹⁷ The insurance certificate evidences liability coverage limits that exceed the requirements prescribed under Section 12.

10. Any corrections, updates or amplifications to items filed at the time of application for a Compliance Order Certificate, including especially system design parameters required to be filed by Section 3.3(c)(3) of the Cable Rules (Rule 3.4(b)(10)):

Verizon indicates that no such corrections, updates or amplifications are required.¹⁸

C. HEARINGS AND APPEARANCES

The Division conducted a duly noticed public hearing on the instant application on March 21, 2007. The hearing was conducted at the Division's hearing room located at 89 Jefferson Boulevard in Warwick. The following counsel entered appearances¹⁹:

For Verizon:	Alexander W. Moore, Esq.
For Cox:	Alan D. Mandl, Esq.
For Full Channel TV, Inc.:	William C. Maaia, Esq.
For the Division's Advocacy Section:	Leo J. Wold, Esq. Special Assistant Attorney General

¹⁷ Id., p. 7 and "Exhibit 7".

¹⁸ Id.

¹⁹ All of the following parties and counsel participated in the Compliance Order Certificate phase of this docket.

D. VERIZON'S DIRECT CASE

Verizon presented a brief direct case during the instant proceeding. In furtherance of its direct case, Verizon proffered one witness in support of its application. The witness was identified as Mr. Edward J. Gee, Verizon's Director of Network Engineering. The Division notes that Mr. Gee previously testified for Verizon during the Compliance Order Certificate phase of this docket.

Mr. Gee began his testimony by briefly addressing Verizon's line extension policy, an issue that Cox focused on during the discovery phase of the docket. In response to Cox's concerns, Mr. Gee related that Verizon has filed its line extension policy in conformance with Section 10.3 of the Cable Rules and plans to hold to that policy.

Mr. Gee next emphasized that Verizon will "comply with the timetable" set forth in Section 8.2(h) of the Cable Rules "while upgrading its Title II network facilities to carry video services."²⁰ Mr. Gee related that Verizon has completed portions of its network upgrade of the North Kingstown, Warwick, East Greenwich, Coventry, West Warwick, and Providence-Broad Street (Providence) wire centers, leaving only the Hope Valley wire center, which Verizon intends to upgrade in accordance with Section 8.2(h) of the Cable Rules. He testified that Verizon will install and activate its Video Hub Office (VHO) facilities and the Video Serving Office (VSO) facilities within its wire centers during the final stages of its Title II network upgrade and expects these

²⁰ Verizon Exhibit C-2, p.2.

upgrades to be substantially complete by May 2007. Mr. Gee related that Verizon would make cable service available to customers in Service Area 6 as the upgrades to each central office service area are completed and each central office is made video capable.²¹

Mr. Gee also testified that to the best of his knowledge Verizon has complied with all applicable federal, state, and local technical, engineering, and safety standards in performing the upgrade of its network. Similarly, he related that Verizon has applied for and/or obtained all necessary licenses and other forms of permission necessary for the construction and upgrade of its network in the communities comprising Service Area 6.²²

During cross-examination by Cox regarding Verizon's line extension policy and the Division's service density rules, Mr. Gee testified that if a Service Area 6 resident wants to inquire about "whether or not they're qualified for service" they can contact Verizon for an immediate answer. He related that the resident can also "ask for an engineered survey to find out when" "they might be able to obtain service." Mr. Gee testified that Verizon would, however, charge a fee for the survey.²³

Cox also asked Mr. Gee if Verizon planned to perform any signal leakage testing after its construction and whether Verizon would be submitting the signal leakage reports to the FCC. Mr. Gee was unfamiliar with such requirements and Verizon questioned the need for such reporting. Verizon

²¹ Id.

²² Id., p. 3.

²³ Tr. 22-24.

agreed to accept the question as a data request and provide a formal written response at a later date.²⁴

The Advocacy Section next questioned Mr. Gee about Verizon's line extension policy and the fees it plans to charge for engineering surveys. During this questioning Mr. Gee related that an engineering survey could cost the prospective subscriber "hundreds" of dollars.²⁵ He additionally explained that if Verizon concludes that services cannot be provided the engineering survey fee will not be refunded.²⁶

E. COX'S DIRECT CASE

Cox also presented a brief direct case during the instant proceeding. Cox proffered one witness, Mr. Alan Gardiner, Vice President of Network Services. Cox primarily proffered the pre-filed testimony from Mr. Gardiner for the purpose of expressing Cox's concerns regarding Verizon's planned underground construction in Service Area 6.

Mr. Gardiner testified that Cox has experienced "significant problems" with Verizon's underground construction in other states, and would like to avoid such problems in Rhode Island. Mr. Gardiner particularly cited Cox's experiences with Verizon in Virginia, which he described as "*damage to Cox's underground facilities and property owners calling Cox regarding property damages and service interruptions caused by Verizon or its contractors.*"²⁷ To illustrate the problems,

²⁴ Tr. 26-27.

²⁵ Tr. 55.

²⁶ Tr. 57.

²⁷ Cox Exhibit C-1, p. 4.

Mr. Gardiner offered a copy of the complaint that Cox filed against Verizon with regulators in Virginia.²⁸

Based on its experiences in Virginia, Mr. Gardiner related that Cox “*is requesting Verizon to discuss an underground construction protocol that is similar to the practices adopted in Virginia.*” Mr. Gardiner testified that Cox “*is hopeful that such a protocol will be in place before Verizon ramps up its underground construction in Service Area 6...*”²⁹

Mr. Gardiner thereupon asserted that the Division must require Verizon to file with the Division its underground construction protocol within a reasonable time after any award of a Construction Certificate for Service Area 6. Mr. Gardiner recommended that Verizon be required to “*follow the FTTP network construction process described in its August 10, 2006 letter to Spotsylvania County in Virginia*”, which he offered as another attachment to his pre-filed testimony.³⁰ Mr. Gardiner testified that this type of process is needed to assure that property owners are adequately protected.

Mr. Gardiner additionally recommended that the Division require the following construction procedures in order to reduce potential damage and disruption to Cox’s facilities:

- 1. utilization of an air knife to locate plant rather than hand digging;*
- 2. require that construction crews be trained in Dig safe practices and that Verizon certify that such training has*

²⁸ *Id.*, Attachment AG-1.

²⁹ *Id.*, p. 5.

³⁰ *Id.*, Attachment AG-2.

been provided before a crew is released to perform construction work;

3. require an English-speaking supervisor to be on a work site at all times;

4. require a demonstration of quality control and quality assurance, consistent with Cox's practices in Rhode Island; and

5. require weekly contractor meetings during which Verizon will share street sheets for future work so Cox and other underground plant owners know where and when Verizon will be working a couple of months in advance.³¹

Mr. Gardiner related that these additional requirements are needed also based on Cox's experience in Virginia. Mr. Gardiner testified that the Division has an opportunity to "*head off the problems encountered by Cox and property owners in Virginia by imposing reasonable conditions, many of which Verizon already has implemented in Virginia.*"³²

Mr. Gardiner also addressed one other construction-related concern, specifically, that Verizon use "*properly licensed contractors for performance of wiring work at multiple dwelling units.*" Mr. Gardiner related that he is raising the issue based on his awareness of "*instances where Verizon contractors were ordered to cease work on the ground that they did not hold required Rhode Island licenses or permits.*"³³

In his closing remarks, Mr. Gardiner also urged the Division to require Verizon to "*provide more definitive information*" with respect to its line extension

³¹ *Id.*, pp. 6-7.

³² *Id.*, p. 7.

³³ *Id.*, pp. 7-8.

policy. He related that Verizon “*should be able to determine the existing densities per mile within Service Area 6 and inform the Division where, if anywhere, in the Service Area, it will apply a line extension policy.*”³⁴

On cross-examination by Verizon, Mr. Gardiner indicated that although he was aware of Cox’s complaint against Verizon in Virginia, he was not aware of any regulatory action taken by the State Corporation Commission of Virginia against Verizon. Mr. Gardiner admitted that he did not know whether Virginia ever conducted an evidentiary hearing on the claims made by Cox.³⁵

F. VERIZON’S REBUTTAL CASE

Verizon subsequently offered a rebuttal witness to address the concerns raised in Cox’s direct case. The witness was identified as Mr. Lance P. Cummings, an Area Operations Manager for Verizon. Mr. Cummings testified that he oversees Verizon’s construction operations in Rhode Island.

In response to Cox’s concerns, Mr. Cummings related that if Verizon were to sever or damage the cables or underground facilities of another utility he is immediately contacted by the crew. He stated that he was aware of only two instances where Verizon crews damaged Cox’s underground cables, one on Finch Lane in North Kingstown and one at Four Seasons Condominiums in Warwick. Mr. Cummings thereupon provided details of the incidents. He

³⁴ Id., p. 8.

³⁵ Tr. 71-73.

testified that Cox was contacted after each mishap and responded to effectuate repairs to their facilities.³⁶

Mr. Cummings also testified that Verizon now has a policy in effect that requires that its contractors be properly licensed to do any work on the Company's underground cables and conduits. He related that the policy was put into effect in 2005, after Verizon's Four Seasons Condominiums project was ordered stopped by an inspector.³⁷

Mr. Cummings also sponsored a copy of a March 21, 2007 letter that Verizon hand-delivered to the Division's Administrator (on the same day as the hearing) that sets forth specific practices that Verizon has adopted to "ensure that, in the course of this work effort, we have made every reasonable effort to minimize customer confusion and disruption to personal property."³⁸ In the letter, Verizon states that it "is committed to both timely notification of our construction plans to property owners as well as to the prompt resolution of any disruptions or problems that might arise."³⁹ The notification and complaint resolution details were provided in the exhibit.⁴⁰

On cross-examination by Cox, Mr. Cummings stated that Verizon's construction crews are trained in Dig Safe practices.⁴¹

On cross-examination by the Advocacy Section, Mr. Cummings quantified the amount of underground-related construction as "4 percent" of the total

³⁶ Tr. 11-14.

³⁷ Tr. 14-16.

³⁸ Verizon Exhibit C-3.

³⁹ Id., p. 1.

⁴⁰ Id., p. 2.

⁴¹ Tr. 45-46.

upgrade work being performed on its existing Title II network in Service Area 6.⁴² He also responded to detailed questions from the Advocacy Section about the Dig Safe training that Verizon provides to its construction crews.⁴³

G. COX'S SURREBUTTAL CASE

Cox briefly recalled Mr. Alan Gardiner to respond to Verizon's rebuttal case. Mr. Gardiner sponsored and discussed a photograph depicting the damages to Cox's underground facilities at Finch Lane.⁴⁴

The Advocacy Section questioned Mr. Gardiner during cross-examination about whether Verizon's March 21, 2007 letter to the Administrator satisfied any of his concerns. Mr. Gardiner related that he would like to see greater "coordination" efforts by Verizon so that Cox gets ample notice of their construction locations and construction plans.⁴⁵ Mr. Gardiner did admit, however, that the State's Dig Safe laws currently provide notification and safe digging requirements.⁴⁶ Additionally, in response to an Advocacy Section inquiry, Mr. Gardiner testified that Cox does not charge prospective customers any fees for engineering surveys.⁴⁷

H. ADVOCACY SECTION'S FINAL POSITION

At the conclusion of the public hearing conducted on March 21, 2007, the Advocacy Section indicated that based on its review of the Company's application, the data responses and other documents that have been filed in

⁴² Tr. 49.

⁴³ Tr. 50-52.

⁴⁴ Tr. 66-68, and Cox Exhibit C-3.

⁴⁵ Tr. 73.

⁴⁶ Tr. 74.

⁴⁷ Tr. 74.

connection with this proceeding it was recommending that the Division approve Verizon's application for a Construction Certificate.

The Advocacy Section stated, however, that it was concerned with one aspect of Verizon's line extension policy, namely the fee that Verizon plans to charge for conducting an engineering survey for a prospective subscriber. The Advocacy Section observed that neither Cox nor Full Channel charge such fees and that the Division should amend the proposed line extension policy...to exclude that up-front initial evaluation fee."⁴⁸

In a post-hearing memorandum submitted at the conclusion of the proceedings, the Advocacy Section reiterated its opposition to the "evaluation fee" contained in Verizon's line extension policy. The Advocacy Section observed that Verizon's line extension policy requires customers to pay an 'evaluation fee' to 'cover preliminary design and development of the cost estimate related to the requested extension.' The Advocacy Section argues that this fee is inconsistent with the provisions of Section 10.3(b) of the Cable Rules, which provides that 'all line extension policies shall allow for the recovery of the *actual capital cost of each extension* from the Subscribers served by that extension.'⁴⁹ The Advocacy Section contends that Verizon's "evaluation fee" violates Section 10.3(b) of the Cable Rules because it charges customers for the

⁴⁸ Tr. 75-76.

⁴⁹ Advocacy Section Post-hearing memorandum, p. 1.

preparation of a ‘cost estimate,’ not for the ‘actual capital cost’ of the ‘line extension.’⁵⁰

I. COX’S FINAL POSITION

Although Cox did not oppose Verizon’s application for a Construction Certificate, Cox used its post-hearing memorandum to reiterate its concerns about Verizon’s underground construction plans for Service Area 6. Cox requested as a condition of the award, that the Division require Verizon to adopt an underground construction protocol that incorporates the recommendations espoused by Mr. Gardiner, supra. Cox maintains that the conditions it seeks are reasonable and within the power of the Division to require.⁵¹ Cox also argues that its experience with Verizon in Virginia “demonstrated that these types of requirements are needed to avoid undue damage to existing underground facilities and service interruptions for customers.”⁵²

Cox also urges the Division to require Verizon to identify those portions of Service Area 6 that it anticipates would receive service only through application of its line extension policy. Cox argues that because Verizon has assumed an obligation to build out its system in accordance with the Division’s density requirements under Rules 8 and 10 of the Cable Rules, it is not unreasonable for the Division to require Verizon to indicate what parts of

⁵⁰ Id., pp. 1-2.

⁵¹ Cox Initial Brief, pp. 1-6.

⁵² Id., p. 6.

Service Area 6 would receive service only through application of its line extension policy.⁵³

Lastly, Cox contends that Verizon should, as another condition of the award, be directed to comply with any applicable FCC signal leakage requirements. Citing a Verizon discovery response, Cox observes that “Verizon has taken the position that it is not subject to FCC requirements regarding signal leakage reporting...”⁵⁴ Cox argues that at a minimum, Verizon is subject to the requirements imposed by the FCC “under 47 C.F.R. Section 76.605(b), which imposes obligations upon cable television systems distributing signals using methods such as fiber optical cable hybridization techniques or other techniques that make it unable to comply with technical standards in 47 C.F.R. Section 76.605(a).” Cox argues that RF emissions and signal leakage can occur at a customer premises served by Verizon, especially at locations where Verizon is using amplifiers. Cox is concerned that Verizon’s RF emissions may create “a potential for signal interference.”⁵⁵

J. VERIZON’S FINAL POSITION

In its brief, Verizon contends that it has shown that it is in compliance with all conditions, terms and requirements of the Compliance Order Certificate and the Division’s Cable Rules. Verizon also argues that the Division “has neither authority nor a sufficient evidentiary basis to impose any

⁵³ Id., p. 8.

⁵⁴ Id., p. 9, citing Verizon’s response to “RR-1”.

⁵⁵ Id.

of the conditions on Verizon's Construction Certificate suggested by the Advocacy Section or by Cox..."⁵⁶

In support of its position, Verizon asserts that Section 3.4 (c) of the Cable Rules requires the Division to issue a Construction Certificate if it finds that the applicant "...has met all of the conditions, terms, and requirements of the Compliance Order Certificate, and of these rules..."⁵⁷ Verizon maintains that it has met this standard. Verizon observes that its Compliance Order Certificate contains only three general conditions and that "no party has alleged that Verizon has not complied with them."⁵⁸

Verizon also alternatively attacked the merits of the conditions being recommended by Cox and the Advocacy Section. Starting with the Advocacy Section's recommendation that Verizon delete Section 3(b) of its line extension policy, regarding engineering evaluation fees, supra, Verizon offered several counter-arguments. Verizon first asserted that it was "entitled to compensation for its work" and that such compensation is not prohibited under the Cable Rules. Verizon also argues that there are no provisions in the Cable Rules that require that the terms of Verizon's line extension policy "mirror those of other operators in the Service Area."⁵⁹

Verizon also argues that ordering a change to its line extension fees "could be considered impermissible rate regulation under federal law."⁶⁰

⁵⁶ Verizon's Initial Brief, p. 1.

⁵⁷ Id., p. 2.

⁵⁸ Id.

⁵⁹ Id., p. 4.

⁶⁰ Id.

Verizon states that once it begins to provide video service, Service Area 6 will be subject to “Effective Competition” under federal law, and “the Division will not have authority to regulate Verizon’s rates.”⁶¹

Verizon also observes that the line extension policy for its cable services is the same line extension policy it uses for its voice customers. Verizon contends that it is not appropriate to apply separate policies to different services delivered over the same system, especially since the engineering fees associated with the provision of voice service were approved by the Commission and are contained in the Company’s retail tariff.⁶²

Lastly on this issue, Verizon contends that because competition will now exist in Service Area 6, “any potential video customer of Verizon who is unhappy with the prospect of paying for a cost estimate for a line extension from Verizon can always request a similar estimate from Cox.”⁶³

Verizon next attacked Cox’s request that Verizon file a ‘construction protocol.’ Verizon stated that it has already sent a letter to the Division’s Administrator outlining Verizon’s underground construction protocol and customer care practices for Rhode Island.⁶⁴ Verizon also urged the Division to reject the five construction conditions discussed in Mr. Gardiner’s testimony. Verizon argues that those conditions are outside the Division’s authority and not required by the Cable Rules.

⁶¹ Id., citing 47 U.S.C. 543 (a)(2) and 47 U.S.C. 543 (l).

⁶² Id., p. 5.

⁶³ Id.

⁶⁴ Id., and Verizon Exhibit 3.

In further attack on Cox’s proposed construction protocol, Verizon reiterates that it is constructing its network in Service Area 6 as an upgrade to its existing telecommunications network pursuant to its authority under Title II of the Communications Act. Accordingly, Verizon asserts that the Division “has the authority to regulate Verizon’s construction only to the extent that it is legally permitted to regulate the construction of any telecommunications network in Rhode Island and not pursuant to the instant proceeding.”⁶⁵

Additionally, Verizon argues that it would be unreasonable for the Division to impose any conditions on its Construction Certificate based on the evidentiary record in this proceeding. Verizon notes that there is no evidence on the record that the Virginia Commission had ever conducted an evidentiary hearing on Cox’s allegations, made any findings on these allegations, or imposed any construction conditions on Verizon as a result of Cox’s claims. Verizon also observes that Cox has only identified two instances in Rhode Island in which Verizon damaged Cox’s underground facilities in the course of its underground construction work. Verizon argues that these two instances do not reflect a “consistent failure to follow sound practices that might justify the conditions Cox seeks.”⁶⁶

In its concluding arguments, Verizon described the conditions that Cox seeks as inappropriate and unnecessary. Verizon questioned whether using an “air-knife – a mechanical device – near underground facilities could potentially

⁶⁵ Id., p. 6.

⁶⁶ Id., pp. 7-8.

violate the state’s dig safe statute, which requires hand digging.”⁶⁷ Verizon also emphasized that it already trains its crews in dig safe practices, and already provides an English-speaking supervisor on its crews, rendering those proposed conditions “moot.”⁶⁸ Lastly, Verizon stated that it is willing to meet with Cox to discuss construction issues as needed, however, it asserted that Cox offered no support to justify weekly meetings.⁶⁹

K. FULL CHANNEL’S FINAL POSITION

In its post-hearing “Position Statement” Full Channel indicated that it supported the Advocacy Section’s request that the Division amend Verizon’s line extension policy to exclude the evaluation fee. Full Channel reasoned that “every applicant should be required to follow the rules or comply in the same manner and degree as all the other cable operators.”⁷⁰

Full Channel “defers to the Hearing Officer” regarding Cox’s request for conditions on Verizon’s Construction Certificate. Full Channel opined that the Division “must decide if the conditions are necessary or if said conditions are in the public interest.” Full Channel further opined that the question of whether Cox “presented testimony that was sufficient to support imposing condition(s) of protocol in construction must be determined by the Hearing Officer by weighing ...the evidence and the arguments of the intervenor and applicant.”

Full Channel complimented Cox for offering recommendations on how to improve the level of cooperation between competing cable providers, but

⁶⁷ Id., p. 8.

⁶⁸ Id.

⁶⁹ Id., p. 9.

⁷⁰ Full Channel Position Statement, p. 1.

maintained that the Division “must, however, be left to determine what is reasonable or practical....” Full Channel cautioned that the Division should not have “to become the de facto regulator on every issue, every rule...”⁷¹ However, Full Channel recommended that the Division exercise its authority to ensure that the rights of the incumbent cable service provider are protected and that fair play is enforced between competing cable service providers. In this regard, Full Channel stated that it “agrees with [Cox] in its position to impose ‘steps to protect’ the public interest and incumbent operators’ existing system from ‘damage’ and ‘interruption.’”⁷²

L. FINDINGS

In order to satisfy the requirements for obtaining a Construction Certificate an applicant must first possess a Compliance Order Certificate. Verizon was issued a Compliance Order Certificate on December 20, 2006.⁷³

As an additional requirement, an applicant seeking a Construction Certificate must also submit documentation in accordance with the information mandate delineated in Section 3.4 (b) (1-10) of the Rules. Verizon proffered detailed information and various documents with the instant application, which Verizon maintains satisfies the filing requirements set forth in Section 3.4 (b) (1-10) of the Rules.⁷⁴

If upon receipt and after consideration the Division finds that the applicant for a Construction Certificate has met all of the conditions, terms,

⁷¹ Id., p. 2.

⁷² Id.

⁷³ See Order No. 18789, supra.

⁷⁴ Verizon Exh. C-1.

and requirements for a Compliance Order Certificate, and the Division's Rules, then the Division must grant a Construction Certificate to the applicant.⁷⁵

The Division has carefully examined the record in this matter. The Division has also considered the legal arguments made by Cox with respect to its assertion that the Division require Verizon to (1) adopt an underground construction protocol that incorporates certain recommendations espoused by Mr. Gardiner, (2) identify those portions of Service Area 6 that it anticipates would receive service only through application of its line extension policy and (3) comply with any applicable FCC signal leakage requirements. The Division has also fully considered the legal arguments made by the Advocacy Section with respect to its recommendation that the Division amend the proposed line extension policy to exclude the up-front "evaluation fee"; and Full Channel with respect to its recommendation that the Division protect incumbent cable operators from unfair competition.

As an initial finding, based on the record evidence, the Division finds that Verizon has satisfied its requirements under the Cable Rules and that a Construction Certificate must be issued. The Division also notes that none of the parties ever claimed that Verizon failed to satisfy its burden of proof in this case or argued in favor of denying Verizon's application for a Construction Certificate.

With respect to the remaining issues, specifically, Cox's request for various conditions on Verizon's Construction Certificate, and the Advocacy

⁷⁵ See Section 3.4 (c) of the Rules.

Section's recommendation that the Division reject the "evaluation fee" contained in Verizon's line extension policy, the Division must find for Verizon, with one imposed modification to the Company's line extension policy. The supporting rationale for these findings is discussed below.

Cox maintains that Verizon's Construction Certificate should include a condition that mandates that Verizon adopt and adhere to a construction protocol that incorporates five specific Cox-recommended construction practices. The five recommended practices are identified and described in Mr. Gardiner's direct testimony. After considering the merits of imposing such construction practices, the Division finds the recommended condition unnecessary. As an initial reason for its finding, the Division notes that it is not aware of a single Construction Certificate that has ever been issued to a cable television service provider doing business in Rhode Island with a like or similar condition.

The Division also rejects Cox's proposed construction protocol condition for several other reasons. First, Verizon has already adopted a substantially comparable construction protocol on its own volition, which the Division construes as a good faith effort designed to mitigate and avoid any future excavation-related mishaps.

The Division also finds insufficient evidence on the record to show a pattern of unsafe or flawed construction practices on Verizon's part. While the "Virginia experience" related testimony and evidence causes some concern, the record suggests that Verizon has taken meaningful steps to reduce the

potential for property damage to other cable companies' (and public utilities') underground facilities.

The Division is also unwilling to condition Verizon's Construction Certificate with a requirement that it train its crews to abide by the State's Dig Safe laws. Respecting Rhode Island's Dig Safe statutes is always a requirement for cable operators, making it a condition in Verizon's Construction Certificate would be superfluous.

Also arguably related to the Dig Safe issue, the Division will not compel Verizon to use an "air knife" during its excavations. There is no requirement for such practice in the Dig Safe laws or the Division's Cable Rules.

Further dovetailing into the Dig Safe issue, the Division finds no reason to compel Verizon to participate in "weekly" contractor meetings with Cox. Cox will receive ample notice of Verizon's planned excavations as a direct result of Verizon's compliance with the State's Dig Safe notification requirements.⁷⁶ Through these Dig Safe notifications Cox will "know when and where Verizon will be working," thereby negating the need for the weekly meetings. Moreover, Verizon never objected to meetings with Cox if "specific instances" warranted such meetings.⁷⁷

The Division also finds Cox's request that Verizon's Construction Certificate be conditioned on "a demonstration of quality control and quality assurance" to be vague and unnecessary. The Division possesses broad

⁷⁶ See R.I.G.L. §39-1.2-5.

⁷⁷ Tr. 46.

regulatory authority over cable service providers “to prevent their operations from having detrimental consequences to the public interest.”⁷⁸ Cox’s proposed condition would be redundant.

Similarly, the Division finds no compelling reason to condition Verizon’s Construction Certificate with a mandate that it comply with any applicable FCC signal leakage requirements. The record does not provide clear evidence of whether Verizon’s Title II network is actually subject to the FCC’s signal leakage reporting requirements. As such, the Division is reluctant to condition Verizon’s Construction Certificate without clear evidence of its applicability. Cox is free to file an independent complaint with the FCC for a determination of applicability. Alternatively, after Verizon becomes operational in Service Area 6, Cox may file a request with the Division for a detailed evaluation of this matter, after which the Division may, after it has completed a more thorough investigation of the issue, conduct a hearing into the FCC-related requirements.

Cox also urges the Division to require Verizon to identify those portions of Service Area 6 that it anticipates would receive service only through application of its line extension policy. As the Division previously indicated in a discovery-related order issued in this docket on March 12, 2007:

“Section 3.4(b)(1) of the Division’s Cable Rules does not require Verizon to identify those parts of Service Area 6 that it anticipates would receive service only through application of the Company’s line extension policy, unless the Division specifically requests such information.”⁷⁹

⁷⁸ See R.I.G.L. §39-19-7; and also Berkshire Cablevision of Rhode Island, Inc. v. Burke, 488 A. 2d 676 (R.I. 1985).

⁷⁹ Order No. 18899, pp. 6-7.

The Division notes that the Advocacy Section, who is the public advocate in this docket, does not support Cox on this issue. Independent of the Advocacy Section's lack of support, the Division finds insufficient evidence on the record to compel such a condition.

In response to Full Channel's expectation of a level playing field for incumbent cable operators, the Division wants to emphasize that all of the Division's overbuild-related regulatory actions, including all the decisions it has made throughout this docket, have been made with an eye toward fostering a level playing field environment between those cable providers competing in the same Service Area. The Division wants to reassure Full Channel that the Division's resoluteness and commitment in this area shall continue.

The final issue for consideration is the Advocacy Section's recommendation that the Division amend Verizon's proposed line extension policy to exclude the Company's "evaluation fee." The Advocacy Section contends that the proposed evaluation fee violates Section 10.3(b) of the Cable Rules because it charges customers for the preparation of a "cost estimate" not for the "actual capital cost" of the line extension. The Division disagrees.

The Division does not find that Section 10.3(b) restricts line extension costs to "actual capital costs." Section 10.3(a) of the Cable Rules provides that: "[a]ll CATV Certificate holders shall file a statement of the CATV Company's policy on line extensions for the Administrator's review and approval. Each such policy must at a minimum conform to the provisions of...[Section 10.3(b)]."

Section 10.3(b) in turn states that “[a]ll line extension policies shall allow for the recovery of the actual capital cost of each extension from the Subscribers served by that extension.” From a combined reading of the foregoing provisions, the Division cannot agree with the Advocacy Section’s interpretation that only “actual capital costs” can be recovered. The Division finds that Section 10.3(b) requires CATV Certificate holders to include “at a minimum” a provision in their line extension policies that requires “the recovery of the actual capital cost.” In short, the Cable Rules require that the capital costs of extending service to the potential subscriber be borne by that subscriber and not spread out among the general body of ratepayer subscribers.

Additionally, the Division cannot agree with the Advocacy Section’s contention that Verizon’s “evaluation fee” is not an “actual capital cost.” The Division would liken the engineering survey in issue to “design” work, which is more akin to a capital cost than an operations and maintenance expense. To buttress this conclusion, the Division points to Verizon’s “Engineering Design Charge” for its telephone customers, which includes a similar “rate element” or fee provision, and, which has been approved by the Public Utilities Commission as an appropriate cost to be charged to potential customers for individualized construction services.⁸⁰

The Division is further inclined to agree with Verizon’s assertion that restricting its ability to charge a fee for line extension-related survey work

⁸⁰ The Division takes administrative notice of Verizon Tariff PUC RI No. 15, Part A, Section 2.1.5.B.1 and Part M, Section 1.2.2.

could be considered impermissible rate regulation under federal law. The Division has reviewed the applicable federal law and finds sufficient evidence to conclude that the State is preempted in this area.

As a closing finding, the Division does have a concern about Section 3(e) in Verizon's line extension policy. The provision is reproduced below:

Notwithstanding [sic] the above requirements, the Company may deny extension requests where significant technical or legal limitations on the Company's ability to satisfy the request make a line extension impracticable or unreasonably expensive, including, but not limited to, the company's technology, access to rights-of-ways, the ability to extend the FTTP network or lack of utility company facilities.

The Division finds that this section may be interpreted to mean that Verizon can charge and collect its "evaluation fee" and then deny the request for a line extension. The Division takes exception to this possible, however unlikely, scenario. Therefore, the Division shall direct Verizon to refund the evaluation fee in the event it elects to exercise the Section 3(e) option.

Now, Accordingly, it is

(18916) ORDERED:

1. That the January 26, 2007 application filing of Verizon New England, Inc., seeking a Construction Certificate for authority to construct a Community Antenna Television System in Rhode Island's CATV Service Area 6, is hereby granted.
2. That all of the written commitments and representations made by Verizon New England, Inc, through its representatives in the instant

docket as contained in their: (i) written application and supporting documents, and (ii) sworn testimony and exhibits that were made part of the record on March 21, 2007, are restated and incorporated as terms and conditions of the certificate and are hereby binding on Verizon New England, Inc.

3. That Verizon is hereby directed to amend Section 3(e) of its line extension policy to include language that would provide for a customer refund of the evaluation fee in the event that Verizon elects to exercise the Section 3(e) option.
4. The Construction Certificate approved herein is attached to this Report and Order as “Appendix 1” and is incorporated by reference.
5. That Verizon New England, Inc. shall comply with the relevant timetable mandated in Section 8 of the Rules.

Dated and Effective at Warwick, Rhode Island on April 5, 2007.

John Spirito, Jr., Esq.
Hearing Officer

APPROVED: _____
Thomas F. Ahern
Administrator

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF PUBLIC UTILITIES AND CARRIERS

CONSTRUCTION CERTIFICATE

(For Service Area 6, Consisting Of Warwick, West Warwick, East Greenwich, North Kingstown, Coventry, West Greenwich and Exeter)

This Construction Certificate is issued to Verizon New England, Inc., d/b/a Verizon Rhode Island ("Verizon") by the Division of Public Utilities and Carriers ("Division") pursuant to Order No. 18916 in Docket No. 2006-C-4. This Construction Certificate authorizes Verizon to construct a community antenna television ("CATV") system in Service Area 6, and is issued upon, and subject to, Verizon's compliance with the following findings, terms and conditions:

1. Verizon is, and continues to be, of good character, fit, willing, financially and technically able properly to provide cable service to the residents of the Service Area.
2. Verizon has satisfied, and continues to satisfy, all of the terms, conditions and requirements of its Compliance Order Certificate.
3. Construction of its CATV system in the Service Area is consistent with the public interest.
4. Verizon has complied with, and continues to comply with, federal law, the Rhode Island General Laws, the Rules Governing Community Antenna Television Systems (2007), as amended and all Orders of the Division.

John Spirito, Jr., Esq.
Hearing Officer

Thomas F. Ahern
Administrator

Dated this 5th day of April, 2007.

