**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**
**CABLE TELEVISION DIVISION**

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| Petition by Verizon New England, Inc. to Commence a Rulemaking Pursuant to 207 C.M.R. § 2.01(1) to amend 207 C.M.R. § 3.00 et seq.: Licensing | ) ) ) ) | Docket No. CTV 06-1 |

# INITIAL COMMENTS OF NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION, INC.

## I. INTRODUCTION AND SUMMARY

The New England Cable and Telecommunications Association, Inc. ("NECTA")[1] provides the following Comments in response to the Cable Division of the Department of Telecommunications and Energy's ("Division" and "DTE," respectively) Order Instituting Rulemaking ("Order") dated May 5, 2006 in the above-captioned docket. The Petition of Verizon New England, Inc. ("Verizon") for Adoption of Competitive License Regulation ("Petition"), filed with the Division on March 16, 2006, principally requests that the DTE establish a new "Section 3.04.5 Competitive Licenses" section to the Division's 207 CMR regulations to address license applications filed where the applicant would be operating a cable system in competition with an incumbent licensee or licensees.[2] Verizon proposes an approximately 90 day period for municipal completion of all of the following tasks, starting from the date Verizon's initial licensing application

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[1] NECTA is a nonprofit corporation and trade association that represents the interests of most cable television operators in the six-state New England region. NECTA and its member companies have participated actively in dockets of the Division that have updated the cable licensing process in Massachusetts, including the review of the Division's state-mandated licensing form (CTV 03-3) and the comprehensive rulemaking in the late-1990s (R-26) to review and update the Division's regulations.

[2] See Verizon Petition at 5-7 and attached draft text.

is submitted to the municipality: 1) a 60 day period to hold a public hearing to "assess the qualifications of the applicant"; and 2) a further 30 day period to render an approval or denial, issue a "written decision containing in detail the reasons for such approval or denial," and if approved, issue a final cable license. The Petition separately proposes an amended "Section 3.09 Rights of Appeal" that seeks modification of procedures for appeal of municipal denials and failures to act and includes a new requirement that the Division shall conduct a hearing "de novo" pursuant to the statutory appeal provision in G.L. c. 166A, § 14.[3]

The Order summarizes the proposed Rules and Verizon's justifications,[4] explains why the Division has chosen to open the instant rulemaking docket,[5] and solicits comments and relevant data on issues of general concern and on a half-dozen or more specific procedural and substantive questions.[6] The Division requested Initial Comments and Reply Comments from interested parties on or before July 14, 2006 and September 13, 2006, respectively, and will also hold a public hearing on August 16, 2006.[7]

NECTA hereby offers its general comments on issues raised by the Verizon Petition and on the specific questions raised in the Order.

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3 See Verizon Petition at 7-8 and attached draft text.

4 Order at 1-3 and Attachment A.

5 Id. at 3-6.

6 Order at 11. The Order also included a proposal to make a technical correction to 207 C.M.R. by changing "Community Antenna Television Commission" to "Community Antenna Television Division" in the title, and the reference "Commission" to "Division" in each instance it appears in the section. See Order at Attachment B. NECTA does not object to these proposed revisions regarding technical corrections to 207 C.M.R.

7 See id. at 11-12. By letter dated May 25, 2006, Verizon requested that the Division revise its proposed schedule in this proceeding. The Division denied Verizon's request on May 31, 2006.

## II. COMMENTS IN GENERAL

### A. Overview of Verizon Video Entry Initiatives.

In October 2004, Verizon announced plans to construct a fiber to the premises ("FTTP") network named "FiOS" in 19 Eastern Massachusetts communities in parts of Essex and Middlesex counties that would include capabilities for voice, high bandwidth Internet applications and video services.[8] In early 2005, Verizon identified 24 municipalities initially targeted for FiOS network construction, most of which are high demographic cities and towns such as Andover, Belmont, Lexington, Lincoln, Newton, Sherborn, Wellesley, Westwood and Winchester with minority populations of less than 10% of the population.[9] Verizon already has been issued cable television licenses in eleven Massachusetts communities[10] and is currently in negotiations with over 50 other communities to obtain additional franchises.[11]

### B. Verizon Has Not Established a Strong Policy Need to Curtail Municipal Licensing Time Frames.

#### 1. Introduction.

The Petition offers no compelling policy reasons for strongly curtailing the length of maximum time periods for reviewing license applications. In support of its proposal,

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8 See Verizon News Release – "Verizon Deploying Fiber Optics to Homes and Businesses in 6 More States in Northeast and Mid-Atlantic," October 21, 2004.

9 See Verizon News Release – "Verizon's New High-Fiber Diet" for 19 Eastern Massachusetts Communities," January 18, 2005; "Rollout by Verizon Triggers Concerns – Network Offered Mostly in Affluent, White Suburbs," *Boston Globe* (Feb. 9, 2005). Recent press accounts indicate that this number has increased to 37 towns. See Cable TV Law Reporter, May 31, 2006, at 19.

10 These licenses were granted in Burlington, Hamilton, Lynnfield, North Reading, Reading, Stoneham, Tewksbury, Wakefield, Wenham, Winchester and Woburn.

11 See Verizon News Release – "Tewksbury, Mass., Board of Selectmen Grants Verizon Authority to Offer FiOS TV to More Than 27,000 Potential Viewers," May 31, 2006.

Verizon points to what it erroneously claims is a lack of competition in the video market in Massachusetts. Likewise, Verizon's assertions that cable laws and regulations have not evolved over the last three decades is untrue.

### 2. Vigorous Competition Already Exists for Video Customers.

Contrary to Verizon's claim that there is only "potential competition" for video customers,[12] the market for video services is highly competitive and, based on available statistical evidence, far more competitive than Verizon's core telecommunications business. Verizon has not demonstrated a competitive emergency that requires an immediate 75% reduction in municipal review periods for competitive licenses.

Specifically, based on recent Federal Communications Commission ("FCC") data, more than 30% of video customers nationally are served by providers other than their incumbent cable television operator.[13] Almost all consumers have a choice between over-the-air broadcast TV, a cable service and at least two DBS providers.[14] Competitive alternatives include DBS companies such as DirecTV and Dish Network, which have subscriber bases making them the second and third largest Multichannel Video Programming Distributors ("MVPDs");[15] municipal overbuilds such as in Braintree and Norwood; private overbuilds, such as with RCN in its approximately 20 communities, as well as Verizon itself; and private companies that offer SMATV services in residential

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12 See Verizon Petition at 2 (comparing "highly competitive telecommunications business" to "potentially competitive video market").

13 In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket 05-255, at ¶ 8 (Feb. 10, 2006).

14 Id. at ¶ 5.

15 Id. at ¶ 13. According to the FCC's most recent report, DBS subscribers increased 12.8% from the prior year. Id.

developments such as the Pine Hills in Plymouth and in cities such as Framingham or Worcester. Virtually all residents have at least three video providers (cable, Direct TV, Dish Network) competing for their business and residents in approximately 30 Massachusetts communities have at least four (cable, Direct TV, Dish Network and either RCN, a municipal network or Verizon itself). The approximately 30 competitive cable licenses signed to date by Verizon and other competitors with a wide range of Eastern Massachusetts municipalities undercut any claim that the current regulatory scheme represents a significant entry barrier.

In contrast, recent FCC data demonstrates that CLECs reported only 19.1% of the nation's end-user switched access lines in service as of the end of June, 2005.[16] This percentage likely overstates the amount of telecom competition, insofar as the data analyzed by the FCC in this report includes data submitted by AT&T and MCI, which are no longer independent CLECs. Moreover, CLECs reported providing 56% of these lines via UNEs leased from other carriers and another 17% through resale arrangements with unaffiliated carriers.[17] Thus, ILECs also earn substantial revenue through the CLECs' provision of competitive local telephone service. In any event, competition in Verizon's core telephone business lags far behind competition in the video market.

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16 "Local Telephone Competition: Status as of June 30, 2005," Industry Analysis and Technology Division Wireline Competition Bureau (April 2006), at Table 1. All ILECs and CLECs were required to report to the FCC basic information about their local telephone service as of June 30, 2005. Previously, the FCC collected data from carriers with at least 10,000 switched access lines in service in a particular state. Id. at 1.

17 Id. at Table 3.

### 3. Cable Franchising Procedures to Facilitate Entry Have Already Been Streamlined in Massachusetts.

Additionally, contrary to Verizon's argument,[18] cable laws and regulations already have evolved substantially since the industry's birth in the 1970s and do not need to be substantially changed to enable competition. At the federal legislative level, Congress comprehensively revised federal law in 1996 to (1) confirm the existence of three video entry mechanisms for telephone companies in addition to cable television franchising, and (2) make clear that telecommunications networks being upgraded to provide cable television service would not be regulated as cable systems until the network was used to deliver video programming or video-only equipment is installed.[19] As is seen from the swift service launches in Woburn, Reading and Lynnfield following licensing, Verizon has already taken advantage of these pro-competitive federal law changes over the past decade that enabled it to undertake substantial network construction work in advance of license execution.

In addition, as discussed in the Order, at the federal regulatory level the FCC opened an investigation in November 2005 to identify and eliminate municipal barriers to

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[18] See Verizon Petition at 3-4.

[19] See 47 U.S.C. §§ 571-73 (provisions governing delivery of video programming by telephone companies); U.S.C. § 522(7)(C) (special definition of "cable system" for telephone companies using their own facilities to deliver video programming); see also Joint Petition of the Town of Babylon, the Cable Telecommunications Association of New York, Inc. and CSC Holdings, Inc. for a Declaratory Ruling Concerning Unfranchised Construction of Cable Systems in New York by Verizon Communications, Inc.; Petition of the City of Yonkers for a Declaratory Ruling Concerning the Installation by Verizon New York Inc. of a Fiber to the Premises Network, 2005 N.Y. PUC LEXIS 253 (June 15, 2005) (providing that cable system definition and franchising obligations attach when a telephone company offers video services or installs video-only equipment).

local franchising efforts.[20] Initial and Reply Comments have been submitted in Spring 2006 and a decision by the FCC is expected at any time. The FCC's Notice indicated probable jurisdiction over the type of measures proposed in the Petition, including time period for municipal action on competitive and other licenses.

Finally, at the state level, the Division has repeatedly and proactively streamlined the procedural requirements for initial and renewal cable licensing. Among other measures, in 1996 the agency comprehensively rewrote and simplified the then-complex cable regulations.[21] In 2003, the Division opened an investigation to substantially revise the state-mandated form (Form 100) submitted by cable operators to municipalities to initiate initial and renewal cable licensing procedures.[22] The Petition gives insufficient credit to the Division's work at streamlining cable regulation within the legal parameters established by federal and state statutes.

C. Verizon's Constitutional Claims Allegedly Requiring a Curtailment of the Franchising Process Lack a Valid Legal Basis.

Verizon alleges, in support of its proposal for circumscribed time periods on the licensing process, that the "franchise process is a classic prior restraint on constitutionally protected speech."[23] This contention has never been recognized in more than 20 years of

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20 In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, Notice of Proposed Rulemaking (rel. Nov. 18, 2005).

21 In Re Amendment of 207 CMR, Report and Order, R-26 (1996).

22 See Investigation by the Cable Television Division of the Department of Telecommunications and Energy on its Own Motion to Review the Form 100, Docket CTV 03-3, Order (Nov. 30, 2004).

23 See Verizon Petition at 7 (citing cases).

litigation over franchises since the enactment of the 1984 Cable Act.[24] Despite decades of often-contentious and time-consuming disputes between municipalities and cable operators over timely issuances of initial and renewed cable licenses across the country, NECTA is not aware of any precedent holding that municipal review periods must be shortened in order to avoid possible constitutional violations -- especially a period as short as the one-year-plus review period at issue under the current Division regulations.[25]

While First Amendment protections apply to cable programming,[26] and a refusal by a municipality to consider any competing cable licenses might constitute a constitutional violation,[27] the cases cited by Verizon are not on point. The Turner case deals with federal must carry requirements for broadcast signals rather than the cable franchising process. Moreover, with respect to content-neutral regulations, such as the requirements at issue in Turner and the franchising process, Turner holds that the more deferential "intermediate" level of constitutional scrutiny should apply, rather than "strict" scrutiny.[28] Thus, franchising schemes will be upheld so long as they "further an important or substantial governmental interest; if the governmental interest is unrelated to suppression of free expression; and if the incidental restriction on alleged First

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[24] Several rulings have held that exclusive franchising schemes violated the first amendment since the governmental interest was not sufficient to satisfy the O'Brien standard that has been uniformly applied by courts to challenges to cable regulations and franchising requirements. Preferred Communications, Inc. v. City of Los Angeles, No. CV 83-5846 (CBM), 1990 U.S. Dist. LEXIS 20205 at *22 (C. D. Cal. Jan. 5, 1990), aff'd 13 F.3d 1327 (9th Cir. 1994), cert denied Preferred Communications, Inc. v. Los Angeles, 512 U.S. 1235 (1994); Pacific W. Cable Co. v. Sacramento, 672 F. Supp. 1322, 1339 (E.D. Cal. 1987); Group W Cable, Inc. v. Santa Cruz, 669 F. Supp. 954, 967 (N.D. Cal. 1987).

[25] In contrast, renewal licensing can take more than three years for negotiation and license finalization. See 47 U.S.C. § 546 (establishing formal and informal renewal licensing procedures).

[26] Turner Broadcasting Systems v. FCC, 512 U.S. 622, 636 (1994).

[27] City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 491 (1986).

[28] 512 U.S. at 661-62.

Amendment freedoms is no greater than is essential to the furtherance of that interest."[29] The franchising process in Massachusetts that provides a right to provide service for as long as 15 years in a municipality will not be overturned as a violation of the cable operator's First Amendment rights under the Turner standard.

Similarly, the "undue delay" cases relating to judicial review of denials of licenses for adult-oriented businesses and municipal rules requiring substantial advance notice of political demonstrations cited by Verizon have no apparent application to a cable television licensing environment.[30] Significantly, the current system for cable franchising and renewals has been established under federal law for over 21 years. Not one court has found that the system effects a violation of federal constitutional rights.

## III. COMMENTS ON SPECIFIC TOPICS IN THE ORDER

### A. Proper Forum for Discussing Franchising Changes (Order at 6-7).

The Order raises the important point of whether the Division is the proper forum for discussing licensing changes. The very issues posed by Verizon in its Petition are currently under critical review by the FCC, as well as the subject of active discussions regarding cable franchising before Congress.

First, as discussed above and in the Order, the FCC has a pending, fully briefed, proceeding to address competitive cable franchising.[31] Verizon has participated in the 621(a) proceeding, where it has argued that the FCC has the authority to order LFAs to

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29 512 U.S. at 663 (citing United States v. O'Brien, 391 U.S. 367 (1968)).

30 City of Littleton v. Z-J Gifts D-4, L.L.C., 541 U.S. 774 (2004); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990); Church of the American Knights of the Ku Klux Klan v. City of Gary, 334 F.3d 676 (7th Cir. 2003).

31 See MB Docket No. 05-311.

comply with a streamlined franchise application process, as has AT&T.[32] A ruling in the FCC proceeding may establish new timelines for franchising that apply to Massachusetts municipalities or, conversely, may explain why expedited timelines are unnecessary or contrary to the public interest. The Division should take into account the results of the FCC's investigation before deciding whether it can or should make additional changes to current regulations.

Second, Verizon is heading a national effort to enact federal legislation preempting municipal action over licensing and creating a national license process. On June 8, 2006, the U.S. House of Representatives voted by a 321-101 margin to adopt a bill (H.R. 5252) sponsored by the House Committee on Energy and Commerce that establishes national standards facilitating competitive cable franchising. Similar bills are also being fast tracked on the Senate side as well.[33]

Verizon, as well as AT&T and most cable operators, has already invested a great deal of time and effort filing comments and providing testimony with the FCC and Congress regarding the need for changes to video franchising procedures, including expedited time frames of the type sought by Verizon. Given the imminent changes likely from this Congress or the FCC, the Division should defer a decision on the merits of Verizon's Petition pending the FCC's ruling in the pending franchising docket or likely legislative changes. Otherwise, the Division could end up expending a great deal of time

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[32] See In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended, MB Docket No. 05-311, Verizon Comments at 36-38; Verizon Reply Comments at 43-44; AT&T Comments at 75, 79-80; AT&T Reply Comments at 46-48.

[33] See S. 2686, "Communications, Consumer's Choice and Broadband Deployment Act of 2006," sponsored by Sen. Ted Stevens (R-Alaska) and Sen. Daniel Inouye (D-Hawaii).

and trouble modifying or promulgating regulations that turn out to be unnecessary or inconsistent with federal standards now being established.

B. Initial Procedural Steps (Order at 8-9, 10-11).

**1. Introduction**

Verizon's proposed three month time period for municipal processing of "competitive licenses" assumes the elimination of a number of steps in the process for issuing initial licenses as established in the Division's regulations. Specifically, Verizon proposes to eliminate the following steps as unnecessary:

- a formal decision by the issuing authority, following submission of the Form 100 application, to initiate the licensing process; [34]
- initiation of solicitation process for additional applicants;[35]
- issuance by the issuing authority of a report that includes specifications for the cable license; [36] and
- issuance of a provisional license in advance of finalization and execution of the final license. [37]

**2. Elimination of Municipal Decision to Open the Licensing Process**

NECTA disagrees with Verizon's proposal to eliminate the initial decision, following a public hearing, by the LFA opening the licensing process within 60 days after submission of the Form 100. NECTA supports giving LFAs a time-limited period within which to conduct an initial review of the application and ensure completeness before

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34 207 CMR 3.02(2).

35 207 CMR 3.03(2).

36 207 CMR 3.03(3).

37 207 CMR 3.03(6); 207 CMR 3.04(1).

issuing a decision that formally commences the review of the licensing proposal and associated time periods. As the Order correctly points out, Verizon's proposal puts the timing of the licensing process within an applicant's exclusive control.[38] If the applicant does not respond to LFA requests for information, the LFA would begin the time-limited license review process with an incomplete record, a substantial problem especially given the shortened timeframes proposed by Verizon.

As requested in the Order, retaining the requirement that an LFA issue a decision to open the franchising process within a specified period after filing is consistent with 47 U.S.C. § 541(a).[39] Section 3.02(2) simply provides a time limited mechanism for an LFA to ensure the completeness of an application – which is necessary for the LFA to adequately review an application and assess the merits of the proposal.

### 3. Solicitation and Specification Procedures

Verizon's position that the second and third steps in most cases are needed only for towns that are commencing a process to seek applicants for installing cable facilities for the first time and want to ensure that the most qualified applicants are allowed to proceed has validity, in NECTA's experience. In such cases, Verizon can and should request a waiver of these particular requirements pursuant to 207 CMR 2.04 for "good cause shown."

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38 Order at 10.

39 Order at 8.

The Order notes that the Division routinely reduces the notice requirement from 60 days to 30 days.[40] NECTA sees no reason as to why the Division's practice of shortening this notice requirement should not be formalized by regulation.[41]

C. Length Of The Process (Order at 9-10).

Based on the experience of NECTA's members in licensing settings, Verizon's proposal of a three month period between the filing of a license application and approval or denial thereof will not permit sufficient time for municipal review and decision on an applicant's proposal and qualifications. Verizon suggests that the issues to be considered in reviewing a competitive franchise application are essentially limited and fungible, given that "Verizon has made clear that it is willing to provide reasonable PEG capacity and pay franchise fees consistent with the federal Act."[42] This ignores that certain municipalities may not agree with the "reasonable" nature or "consistency" with federal law of Verizon's offers. Verizon's statement also avoids mention of the customer service standards issues that often require substantial negotiation based on a municipality's particular priorities. Again, Verizon appears to believe that the Division, and the municipalities in the Commonwealth, should in all cases accept Verizon's unilateral views on franchise terms. Verizon has not offered evidence that any such concerns expressed by municipalities to date have been excessive or unreasonable.

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[40] Order at 8.

[41] In the Order, the Division also seeks comment regarding the continued significance of the provisional license in circumstances where Verizon's proposed regulations would apply to providers who do not have access to public rights-of-way and must engage in significant construction prior to offering services. Order at 8-9. NECTA has not developed a position on this issue at this time.

[42] Verizon Petition at 6-7.

Moreover, Verizon's view of the limited nature of issues reviewed during franchising also is not consistent with federal and state statutes or Division-promulgated procedures.[43] Verizon's proposal ignores many factual and legal issues that lawfully may, and often are, raised and discussed during the initial licensing process.[44] All of these individual data pieces will not generate municipal inquiries or follow up in every instance, but many could have importance in individual licensing settings. The three month deadline to review data, seek additional information, conduct the public hearing and issue a license and statement of reasons fails to account for these and other issues which arise during the course of a municipal cable license review. Additionally, under federal law, the Issuing Authority is required to "assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents."[45] To the extent that the proposed competitive license does not seek to build out all areas in a municipality, the Issuing Authority will be obliged to seek information from the operator in order to assure compliance with these anti-redlining

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[43] See, e.g., Form 100 at 4-13; 47 U.S.C. § 541; G.L. c. 166A, § 3-5 (review of cable license applications involves far more issues than just PEG capacity and franchise fees).

[44] For example, the Form 100 requires submission of information to the municipality in the following areas: term of license; start date of license; status of licenses or pending applications in other jurisdictions; status of license-related legal actions in other jurisdictions; insurance coverages; bonding; privacy policies; proposed customer service policies and practices; broadcast television signals (including must carry and retransmission consent channels); non-automated local origination programming; the number and technical attributes of public, educational and governmental ("PEG") channels; amount and type of PEG support; willingness to provide PEG facilities and equipment and, if so, operational details and availability of technical assistance; provision of institutional networks; service area configuration and locations of system head ends; specification of the area to be served and, if not the entire municipality, an explanation of why the entire municipality will not be served; detailed regarding any technical problems that might prevent extensions to the entire municipality; network construction scheduling; technical system descriptions; a description of customer premise equipment; proposed cable system safety measures; emergency alert system details; and ownership and financial information, including annual reports, audit and financial statements, a "corporate family tree" and information on corporate officers, directors and large stockholders. Form 100, at 4-9 (questions 4-34); see also G.L. c. 166A, §§ 3-6 (establishing minimum licensing requirements codified in the Form 100).

[45] 47 U.S.C. § 541(3).

requirements. Such efforts could well put pressure on pre-set deadlines, especially if the operator does not timely respond to legitimate information requests.

Additionally, competitive licensing situations virtually always involve difficult questions of fairness between the license terms and conditions proposed by the new entrant and the license terms imposed on existing cable operators that require investigation and discussion at the municipal level. The municipality often has to ensure compliance with level playing field clauses in existing licenses[46] and prevent unbalanced license grants that may trigger requests for franchise modifications due to commercial impracticability or other reasons.[47] It also has to determine whether the operators are willing to share existing PEG access facilities and equipment and, if so, to allow operators time to try to reach agreement on reasonable financial arrangements that compensate the existing operator for a portion of sunk costs and equitably share future expenses. These investigations, discussions and, ultimately, policy judgments likely will exceed the three month Verizon deadline.

Finally, most Issuing Authorities in the Commonwealth consist of municipal boards, commonly without a professional manager, who lack professional cable

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[46] See, e.g., Charter license with Auburn at § 8.12 (requiring terms and conditions of any cable television contract, license or similar agreement between Town and another multichannel video programmer to be substantially equivalent to terms and conditions in current cable operator's license); Comcast license with Andover at § 2.6 (containing similar language and also requiring that, if Licensee demonstrates that it is at a competitive disadvantage with material economic injury as result of competing multichannel video programmer operating in Town that is not required to be licensed by Town, "commercial impracticability" proceedings are available under Section 625 of the Cable Act; in which Licensee has the right to obtain modification of its license requirements upon demonstrating that (i) it is commercially impracticable for Licensee to comply with such requirement without modification and (ii) proposal by Licensee for modification of such requirement is appropriate because of commercial impracticability); Comcast license with Reading at § 2.6 (containing similar language to Andover license).

[47] 47 U.S.C. § 545 (governing franchise modifications due to commercial impracticability or other grounds); Cable TV Fund 14-A, Ltd., d/b/a Jones Intercable v. City of Naperville, 1998 U.S. Dist. LEXIS 9447 (1998) (successfully challenging town's denial of operator's request for franchise modification after town had granted new cable franchise to Ameritech).

experience and who are also involved with or responsible for other municipal business in addition to the cable franchising process. As the Division has pointed out, municipal groups involved in the license review process often may consist of volunteers "who are not able to devote their full energies to the task."[48] Moreover, "given recent municipal budget issues and the variety of municipal issues requiring attention, resources are strained such that Issuing Authorities might not be able to match the dedicated resources of the cable operator."[49] Even given the various scope of issues envisioned by Verizon, the three month period proposed by Verizon would simply not be workable for most municipalities.

NECTA reserves judgment regarding whether a longer deadline than three months should be set and, if so, what would be a more reasonable outside review period, per the facts gleaned during the filings made in this docket.

D. Mode of Review (Order at 11).

The Division recently held that a de novo standard is to be applied in reviewing the denial of a franchise renewal proposal by an Issuing Authority.[50] While this is not binding on the proper approach in reviewing a denial of an initial license proposal, the analysis is helpful to determine the principles that should govern an appeal before the Division.

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48 Id. at 10.

49 Id. at 4.

50 Petition of Comcast of Massachusetts, III, Inc. on Appeal of Decision by Board of Selectmen of the Town of Framingham Denying Franchise Renewal Proposal, Interlocutory Order on Standard of Review, Administrative Notice and Partial Summary Decision (March 22, 2006) (hereinafter, Framingham Order).

The Division cannot be expected to conduct a de novo review in a vacuum. Both the cable operator and the municipality should take care to fully address the issues by the other party at the municipal level including, but not limited to, any applicable level playing field provisions. The de novo review should not mean that the Division makes a decision based on its own policy choices, without consideration of information gleaned at the municipality, as Verizon contends.[51] To the contrary, as in the Framingham order, the Division should decide the appeal by conducting a detailed review that will include the information provided below by each party on each disputed issue.[52]

E. Standard of Review of Initial License (Order at 11).

The Order notes that the standard of review of an initial license is not defined by statute.[53] The Order seeks comment on the standard by which the Division would determine whether an application were reasonable and whether such standard should be included in the regulation.[54] Title 47 U.S.C. 541(a) prohibits an LFA from unreasonably denying a competitive franchise. NECTA believes that the standard of review of an initial license is one of "reasonableness," such that an LFA's decision to grant or deny an initial license must be fairly based on the evidence on record in the proceeding and that the applicant's proposal must meet the cable-related needs of the local community. Moreover, an LFA's decision in this regard must not be found to be arbitrary or capricious.

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51 Verizon Petition at 7-8 (stating that the Division "in as good a position as the issuing authority to determine whether the applicant for a competitive license is qualified to operate a CATV system and whether the applicant has met the substantive standard for issuance of a final license...").

52 See Framingham Order.

53 Order at 11.

54 Id.

## IV. CONCLUSION

Verizon's proposal to adopt a competitive license regulation and amend the current appeal regulation to shorten the municipal review period by 75% is unnecessary and is unsupportable on legal and policy grounds. Nor has Verizon established a need for the regulatory relief it requests. The three month time period for municipal review of a license application proposed by Verizon likely will not provide Issuing Authorities with sufficient time to review and act on the application materials. Moreover, certain important steps in the current licensing procedure should not simply be voided by the

Division – as proposed by Verizon. Finally, the Cable Division should decide appeals based upon consideration of materials submitted by both parties at the municipal level and utilize a standard of review that any denial must be reasonable and not arbitrary or capricious.

Respectfully submitted,

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Dated: July 14, 2006