

By Mail and By E-Mail

September 13, 2006

Andrea Nixon, Clerk
Department of Telecommunications
and Energy
Cable Division
One South Station
Boston, MA 02110

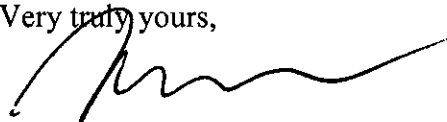
Re: Docket No. CTV 06-1
 Petition by Verizon New England, Inc. to
 Commence a Rulemaking Pursuant to
 207 C.M.R. § 2.01(1) to Amend
 207 C.M.R. § 3.00 et seq.: Licensing

Dear Ms. Nixon:

Enclosed please find the Reply Comments of New England Cable and
Telecommunications Association, Inc.

Please contact the undersigned if you have any questions.

Very truly yours,



Robert J. Munnely, Jr.

RJM/mb
Enc.

COMMONWEALTH OF MASSACHUSETTS

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

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**REPLY COMMENTS OF NEW ENGLAND CABLE
AND TELECOMMUNICATIONS ASSOCIATION, INC.**

I. INTRODUCTION AND SUMMARY

The New England Cable and Telecommunications Association, Inc. (“NECTA”) provides the following Reply Comments to address issues raised in the Initial Comments (“Written Comments”), at the August 16, 2006 public hearing conducted by the Cable Division of the Department of Telecommunications and Energy (“Division” and “DTE,” respectively) (“Hearing Comments”), and in the Division’s August 23, 2006 Notice of additional briefing issues (“August Notice”).

The record evidence overwhelmingly demonstrates that the Petition of Verizon New England, Inc. (“Verizon”) for Adoption of Competitive License Regulation (“Petition”) should be rejected as factually and legally unsupported, contrary to existing statutory authority and local interests, and duplicative of ongoing federal efforts to consider changes to the municipal franchise process. Contrary to Verizon’s generalized complaints in the Petition, the voluminous record is devoid of any evidence, from Verizon or any other party, of any instances in Massachusetts of excessive municipal

delays or overreaching in the cable franchising process.¹ Accordingly, no basis exists to support the proposed reduction of more than 75% in the approximately one-year maximum period for negotiating and finalizing initial cable licenses under current regulations.²

Verizon's one-sided proposal appears intended to seek to circumvent or gut the existing franchising process, directly contrary to the remarks last year of Ivan Seidenberg, Verizon's Chief Executive, that Verizon does not in fact view the franchising process as a substantial barrier to entry: **"We have the ability to work the current system We're bringing competition to every market that we operate in for video. Who's going to turn that down? I think this all gets worked out. It's a lot of noise. There's give and take on both sides. They [the LFA's] have an interest in doing it. We have an interest in doing it."**³ Given that Verizon's corporate leadership is not concerned about the "noise" of the franchising process, the Division need not respond to Verizon's attempts to game a viable and well-established franchising process in Massachusetts.

¹ See, e.g., Hearing Comments of Peter Kenney, Transcript at pp. 212-13 (hereinafter "Tr. 212-13") (asking the Division "What are the specific complaints? What are the specific problems that have brought us to the table today? Exactly what is not working?"); Hearing Comments of Mark Reilly for Comcast at Tr. 227 (" . . . Verizon's proposal tries to solve a problem that simply doesn't exist."); Hearing Comments of Paul Cianelli for NECTA at Tr. 274 ("Verizon has not offered any evidence whatsoever of specific instances of municipal delays or overreaching. We hear only innuendo and vague generalities.").

² The absence of evidence compelled the Division to ask Verizon in the August Notice to produce any evidence it possessed of unreasonable delays or unreasonable license provisions involving any Massachusetts municipality. See August Notice at Verizon-4. Should Verizon produce any such "evidence," it should be viewed skeptically, given that Verizon made a tactical decision not to produce it for examination by interested parties in its Petition, in Initial Comments or at the public hearing.

³ "Verizon: We've Got to Fix It," Business Week Online, Sept. 28, 2005, available at <http://www.businessweek.com/technology/content/sep2005/tc20050928_6174_tc057.htm> (emphasis supplied).

Absent clear evidence of systemic abuses requiring correction, cable applicants and municipalities should continue to work out license terms cooperatively and in good faith within the deadlines and standards set by the current Regulations, subject to review by the Division.⁴ Such evidence is not likely to be forthcoming as the very detailed written comments and hearing testimony of more than 70 municipalities and local boards, and more than 20 elected officials, including the Attorney General, strongly suggest that Verizon itself is principally responsible for any delays to date in finalizing licenses in the Commonwealth. By any measure, Verizon is having substantial success in obtaining license agreements in the Commonwealth, with new licenses being announced on August 31, 2006 (bringing the total to 15 municipalities).⁵ The current licensing process certainly has had no apparent impact on Verizon's vibrant construction activities and does not need to be changed at this time.⁶

If the Division still elects to consider the merits of the proposed changes contained in the Petition, it must comprehensively rewrite them to address their many serious flaws. The record demonstrates that adopting Verizon's proposed changes would

⁴ See 207 CMR 3.02(2) (providing municipalities with not more than 60 days to hold a public hearing on a license application and commence the licensing process); 207 CMR 3.02(4) (establishing a 12-month maximum period for approval or denial of each application). The Verizon Petition proposes to eliminate the 60-day period in Section 3.02(2) and reduce the 12-month period in Section 3.02(4) to 90 days, for a total reduction of more than 75%.

⁵ See Verizon News Release, August 31, 2006, "Verizon Expands FIOS TV Availability in Massachusetts," available at <<http://newscenter.verizon.com/proactive/newsroom/release.vtml.id=93715>>. The current list of Massachusetts towns and cities are as follows: Burlington, Hamilton, Ipswich, Lynnfield, Marion, Mattapoisett, North Reading, Reading, Rochester, Stoneham, Tewksbury, Wakefield, Wenham, Winchester and Woburn. Id. Verizon also claims that it is negotiating with 40 additional Massachusetts municipalities. See id.

⁶ Comcast Written Comments at pp. 5-6 (noting that Verizon had deployed or is constructing its network in 68 communities in Massachusetts); Hearing Comments of Mark Reilly for Comcast at Tr. 278 (testimony that Verizon has spent a half-billion dollars on its Massachusetts fiber build to deploy video and advanced broadband services, most of which was performed without a cable license).

preclude municipalities from effectively reviewing Verizon cable license proposals, trigger an increase in license related appeals to the Division, and lead to a legal morass if Congress, the Federal Communications Commission (“FCC”), or both, thereafter change the cable franchising process.⁷

II. PROCEDURAL HISTORY

A. Introduction

The Division established a July 14, 2006 deadline for Written Comments, an August 16, 2006 date for a public hearing in Boston, Massachusetts, and a September 13, 2006 deadline for filing Reply Comments. In the August Notice, the Division asked that Verizon and municipalities respond to seven and eight briefing questions, respectively, and also permitted other parties to comment on these questions in their Reply Comments.

B. Written Comments

The Cable Division received numerous written submissions, both before and after the July 14, 2006, deadline, including in the following categories:

1. State Elected Officials

Detailed comments or letters opposing the Petition were submitted by the Attorney General (through his Regulated Industries Division); six State Senators;⁸ and

7. See Hearing Comments of Mary Claire Higgins for Northampton at Tr. 83 (“it’s not a good idea for the [Division] to issue a rule which may now need to be corrected once the federal government acts”); see also Hearing Comments of Angelo Fireve for Belmont at Tr. 29-30 (“The unintended result would likely make it much more difficult and unnecessarily complex to harmonize state rules with federal mandates. In the end, it will inevitably fall to the towns and cities . . . to figure out how to abide by laws and regulations that are suddenly more complex and ambiguous”).

⁸ The Honorables Edward Augustus, Steven Brewer, Joan Menard, Michael Morrissey, Pamela Resor and Therese Murray.

twelve State Representatives.⁹ Letters generally supportive of the need for more cable competition were submitted after the July 14, 2006 deadline for Written Comments by State Senator Steven Panagiokos and State Representative William Galvin.

2. Municipal and PEG Access Commenters

Detailed written comments or letters opposing the Verizon Petition were submitted by Massachusetts Municipal Association (“MMA”) (two sets of comments); Joint Comments of 19 Municipalities, the Alliance for Community Media (a group devoted to supporting public, educational and governmental (“PEG”) access) (“ACM”) and three local PEG access groups (hereinafter “Joint Comments”); more than 60 individual municipalities; a half-dozen cable advisory committees; and a separately-filing local PEG access group.

3. Communications Providers

Detailed written comments addressing factual, legal and policy issues opposing the Petition, were filed by NECTA, Comcast, RCN (two sets of comments) and Shrewsbury Electric and Cable. AT&T was the only provider, other than Verizon, to support the Petition; notably, AT&T did not appear at the public hearing.

4. Other Groups and Individuals

Letters were submitted by business and charitable groups and hundreds of individuals generally supporting cable competition and the need for a “shorter and more predictable timeline” for cable franchising. Many of the filings were from individuals or

⁹ The Honorables Paul Casey, Stephen Canessa, Brian Dempsey, Anne Gobi, Patrick Natale, Vincent Pedone, Karyn Polito, Kathleen Teehan, Eric Turkington, Timothy Toomey, Cleon Turner, and Alice Wolf.

groups with admitted ties with Verizon.¹⁰ None of the filings responded to any of the specific issues raised in the Petition or the Division's Notices.

C. Comments at Public Hearing

Numerous interested persons provided live comments to a panel of Division and Department staffers at the August 16, 2006 public hearing, including the following:

1. Verizon

Verizon provided a short overview of issues raised by the Petition from Deborah Lathen, a Washington D.C. communications consultant retained by Verizon, and John Conroy, Verizon's Vice President of Government Affairs. Verizon offered no specific responses to the legal and factual arguments in the Written Comments of other parties.

2. State Elected Officials

The following legislators or representatives provided testimony or written statements opposing the Petition: State Senators Joan Menard, Robert O'Leary, Pamela Resor, James Timilty and Dianne Wilkerson; and State Representatives Rachel Kaprielian, Liz Malia, Frank Smizik, Eric Turkington and Cleon Turner.

3. Municipalities

Testimony or written statements were provided – all in strong opposition to the Petition – by the following Mayors and Town Administrators or representatives: Ashland, Easthampton, Hingham, Northampton, Reading, Westwood, Worcester and Wilmington; by Councilors or Selectpersons from the following cities and towns: Asburnham, Belchertown, Belmont, Cambridge, Douglas, Lexington, Salisbury,

¹⁰ See, e.g., June 28, 2006 letter from Massachusetts Amateur Sports Federation (acknowledging Verizon as a good corporate citizen and donor to the group); July 12, 2006 identical form letters from self-identified Verizon employees; July 12, 2006 letter from Mary Rafferty (admitting to be a recent Verizon rehired); July 19, 2006 letter from AFL-CIO (discussing need to support union construction by Verizon of communications networks).

Somerset and Westborough; by members of Cable Advisory Committees from the following additional cities and towns: Boston, Brookline, Canton, Chelmsford, Falmouth, Groton, Lakeville, Norwood, Peabody, Wellesley, West Newbury, Westford and Whitman; and three attorneys representing a wide range of cities and towns.¹¹

4. Access Groups

In addition to representatives of the ACM (Northeast Region), representatives of PEG access groups from the following cities, towns and regions gave testimony in strong opposition to the Petition: Brockton, Cambridge, Cape Cod, Falmouth, Lowell, Methuen, Newton and Stoneham.

5. Business and Charitable Groups

Hearing comments also were provided by Metrowest Chamber of Commerce, Massachusetts Business Roundtable, North Shore Chamber of Commerce, Merrimack Valley Economic Development Council, and the New England Area Conference of the NAACP. Generally, these groups demonstrated their support of the Verizon petition, without specifically addressing the issues in the Division's Notice. Some of these witnesses, in apparent recognition that Verizon's 90-day proposal was unreasonable, proposed that the Division should adopt unspecified middle ground alternatives shorter than the current deadlines.¹²

¹¹ Attorneys William August, Peter Epstein and William Solomon.

¹² E.g., Hearing Comments of Alan MacDonald for Massachusetts Business Roundtable at Tr. 202-03 ("If the problem is 90 days – I've heard 90 days is not sufficient; I haven't heard what is sufficient, necessarily").

6. Communications Providers

Live testimony substantially in opposition to the Petition was presented by RCN (Thomas Steele); NECTA (Paul Cianelli); Charter Communications (Robert Spain); and Comcast (Mark Reilly).

III. ARGUMENT

A. The Petition is Gravely Flawed and Should be Rejected

1. Introduction

The evidence provided in the voluminous written comments and live public hearing testimony overwhelmingly supports the position that the Petition should be rejected in its entirety without further consideration. Conversely, the Verizon Petition, its Written Comments and public hearing testimony provide no valid arguments in fact, law or policy that support Verizon's requests for a more than 75% reduction in municipal review time and for one-sided and unsound changes to legal standards governing a licensing appeal to the Division. The detailed, fact-specific filings and testimony from all of more than 70 municipalities, the Attorney General, virtually all of more than 20 elected legislators, and several communications providers (other than the Petitioner and its fellow incumbent local exchange carrier AT&T, a "no-show" at the public hearing) provide a compelling breadth and depth of factual, legal and policy arguments demonstrating the patent unreasonableness of the Petition. Conversely, the letters and emails from business groups and individuals – many with admitted ties to Verizon – that supported Verizon's positions superficially and uncritically using nearly identical text and formats, provide no useful information regarding the issues before the Division.

The numerous specific grounds supporting dismissal of the Petition without further action are discussed in the following sections.

2. No Compelling Policy Grounds Support the Need to Grant the Petition at this Time

Verizon has not demonstrated any compelling policy need to curtail the maximum time period for issuance of initial licenses. Key policy points include the following:

- The video market is already highly competitive and, based on available evidence, far more competitive than Verizon's core telecommunications business, thereby providing substantial benefits to consumers.¹³
- Cable franchising procedures already have been streamlined at both state and federal levels to facilitate entry by telephone companies and other new video entrants.¹⁴ Indeed, federal law now permits Verizon to expedite roll outs by commencing construction on joint use plant in advance of receiving a municipal cable license.¹⁵ Verizon can and should expedite licensing by initiating the licensing process in a municipality at or even before, the time it begins its facilities build out.¹⁶
- Despite generalized claims in the Petition, there is no record evidence of systemic abuse of the licensing process in Massachusetts that would justify a sharp curtailment in municipal review periods -- or evidence of any abuse at all for that matter. The record shows that municipalities have negotiated in good faith with Verizon over business terms and license language, taking time commensurate with the importance of a

¹³ NECTA Written Comments at 4-5. The Hearing Comments critical of the cable television industry from Steven Pociask of the "American Consumer Institute" (Tr. 178-84) should be taken with a pound or two of salt. Mr. Pociask, the former Chief Economist for Verizon predecessor Bell Atlantic, is the head of a consulting firm that regularly supports Bell Company positions. See "Phone Companies and the Truth: A Bad Connection," released by National Cable & Telecommunications Association (March 14, 2006), available at <<http://www.ncta.com/DocumentBinary.aspx?id=299>> (debunking as inaccurate or misleading the cable bashing claims of several Bell-friendly "astroturf" consumer groups, including ACI). For all his claims about municipalities abusing the franchising process by demanding free services from incumbent telcos (see Tr. 180-81), Mr. Pociask offers no evidence this is a problem in the Commonwealth.

¹⁴ NECTA Written Comments at 6-7.

¹⁵ 47 U.S.C. § 522(7)(C) (special definition of "cable system" for telephone companies using their own facilities to deliver video programming); see Joint Petition of the Town of Babylon et al. for a Declaratory Ruling Concerning Unfranchised Construction of Cable Systems in New York by Verizon Communications, Inc. and companion case, 2005 N.Y. PUC LEXIS 253 (June 15, 2005) (holding that telephone companies need a franchise before offering video services or installing any video-only plant).

¹⁶ Hearing Comments of William Solomon, Esq. at Tr. 254-55.

municipal contract that can last 15 years.¹⁷ The record supports a finding that Massachusetts municipalities favor cable competition but need to retain the ability to review proposals for consistency with the public interest.¹⁸

- Finally, any negotiating delays during Verizon's initial roll out period are likely to work themselves out without regulatory intervention. Since Verizon has insisted on use of its own form agreement and many unprecedented terms, extended negotiations have been required to work out acceptable agreements with municipalities.¹⁹ Now that Verizon has reached 15 agreements that can be used as templates for new communities, the parties can focus in on key business terms and reach agreement in relatively short order, as is demonstrated by the accelerating pace of franchising activity as months go on.²⁰

3. The Record Overwhelmingly Supports Denial of the Petition

As enumerated above, the vast majority of commenters that provided written or oral presentations on the issues raised by this proceeding expressed strong and unequivocal opposition to Verizon's Petition to adopt a 90-day franchising process and to make other changes to the Division's regulations.²¹ The Written and Hearing Comments provide compelling evidence on multiple grounds for the Division to reject the Petition.

¹⁷ E.g., Hearing Comments of John Petrin for Ashland at Tr. 54-55 ("...[W]e're not talking about buying a copier here or long-distance phone service; we're talking about a huge undertaking with a lot of infrastructure within a community that means a lot to its citizens"); Hearing Comments of Jeffrey Hull for Wilmington at Tr. 74-75; see also G.L. c. 166A, § 3 (setting 15-year maximum length for initial licenses).

¹⁸ Hearing Comments of Mark Hymowitz for the MMA at Tr. 81-82; Hearing Comments of Peter Epstein, Esq. at Tr. 146. The best evidence on this point is the 30-plus competitive licenses that have been issued to date in the Commonwealth to RCN, municipal lighting plants, and Verizon itself.

¹⁹ See, e.g., Hearing Comments of Peter Hechenbleikner for Reading at Tr. 88-90; Hearing Comments of Jeanne Krieger for Lexington at Tr. 39-40; Hearing Comments of William August, Esq. at Tr. 164; Hearing Comments of Amy Palermo for Stoneham Community Access at Tr. 249; Hearing Comments of William Solomon, Esq. at Tr. 253-54.

²⁰ Comcast Written Comments at 3; Hearing Comments of Mark Reilly for Comcast at Tr. 280 (noting efforts to develop model Comcast response to level playing field inquiries); Hearing Comments of Gabriel Nucci for Groton Consumer Affairs Commission at Tr. 119-21. See also *supra* note 5.

²¹ As discussed above, the letters supporting the Verizon Petition uniformly failed to address any of the specific issues raised in the Department's Notices and merely expressed general support for increased cable competition and shorter time lines for cable franchising.

Key points raised in opposition include the following:

Re: Licensing Process

- Verizon license applications have been incomplete, including frequent omission of PEG access proposals.²² This has resulted in municipalities expending substantial time to obtain information from Verizon that should have been provided by Verizon in the first place. Verizon's tardiness has resulted in the very delays about which it is complaining in the Petition.
- Verizon has presented many provisions in proposed cable licenses that are unprecedented and, accordingly, have required significant and time consuming municipal analysis and negotiation.²³
- Verizon has insisted on initiating negotiations with a town from its own draft agreement, even where the municipalities had proposed to start from existing Verizon agreements with other local municipalities, again complicating and unnecessarily prolonging the negotiation process.²⁴
- Verizon has failed to make timely responses to municipal licensing proposals or requests for follow up information or meetings, sometimes failing to respond to discussion opportunities for months at a time.²⁵

²² E.g., Joint Comments at 8. While Verizon's witness tried to assuage concerns that Verizon was not interested in supporting PEG access; see Tr. at 11 ("... I recognize that it is critical ... that public access channels are maintained, and that the local franchising fees ... are also maintained. ...") and 13 ("... nor would [the Verizon proposal] remove any statutory obligations a competitive provider has to provide local access channels or pay a franchise fee. ..."), Verizon has argued vociferously to the FCC that its PEG access obligations are extremely limited as a matter of federal law (a position that Verizon neglected to disclose in this proceeding), contending, *inter alia* that franchise fees can be considered "an invalid prior restraint" (Comments of Verizon on Video Franchising, Feb. 13, 2006, MB Docket No. 05-311) and asserting that "Many Common PEG Demands Are Contrary to Federal Law and Invalid" *Id.* at 64-72 (emphasis in original).

²³ Joint Comments at 8; MMA July 14, 2006 Written Comments at 1-2; Hearing Comments of Peter Hechenbleiker for Reading at Tr. 89-90.

²⁴ See, e.g., Hearing Comments of Robert Marshall for Lakeville at Tr. 128.

²⁵ E.g., Lakeville Written Comments at 1 (observing that Verizon had failed to respond to town letter of concern issued on February 21, 2006 as of the date of July 2006 written comments); Hearing Comments of Robert Marshall for Lakeville at Tr. 127-29; Sherborn Written Comments at 2 (discussing lengthy course of talks since January 2005); see also Hearing Comments of Theresa Park for Newton at Tr. 63-64; Hearing Comments of William Plasko for Norwood at Tr. 46; Hearing Comments of George Barrette for Westborough at Tr. 48-49; Hearing Comments of James Michael Teal of West Newbury at Tr. 137-38; Hearing Comments of David Levy for Westford at Tr. 142.

- Verizon failed to provide its third party negotiators with authority to negotiate license terms, necessitating lengthy delays while issues were taken back to Verizon corporate.²⁶
- Verizon has proposed substantial changes to licensing proposals after negotiations had reached advanced stages, triggering extensive additional discussions.²⁷
- Open meeting law requirements and time spent to schedule public hearings to facilitate public input requires inclusion of additional time in any cable license review process and renders unworkable Verizon's 90-day deadline even in a best case scenario.²⁸
- Verizon itself has failed to adhere to reasonable time deadlines in its non-cable practices, including responding to municipal requests to remove double poles.²⁹

Re: Mode and Standard of Review on Appeal

- Verizon's proposed instructions for municipal review, limited to the applicant's "qualifications," omit the ability of municipalities to review the substance of the license proposal and whether it meets local needs.³⁰
- Verizon's proposed standard of review, allowing a license to be ordered by the Division if a Verizon license proposal met minimum requirements in G.L. c. 166A, §§ 3-5, omits important factors commonly found in Massachusetts licenses to go beyond the statutory minimum requirements, including universal service, absence of redlining, consideration of community needs and interests, level playing field

²⁶ E.g., Lexington Written Comments at 2; Sherborn Written Comments at 2; Hearing Comments of William Solomon, Esq. at Tr. 253; Hearing Comments of Theresa Park for Newton at Tr. 63-64.

²⁷ E.g., Sherborn Written Comments at 2.

²⁸ Hearing Comments of Jeffrey Hull for Wilmington at Tr. 71; Hearing Comments of Karen Hayden for Methuen Community Television at Tr. 233 (noting that town officials cannot enter into binding agreements during "lame-duck" periods, a problem if they coincided with the requested 90 day maximum period).

²⁹ See, e.g., Hearing Comments of Mary Claire Higgins for Northampton at Tr. 84-85 (noting that a 180-day time frame is considered fast in land use permit situation and that cable licensing is more complicated and requires a longer term); Hearing Comments of Owen Dugan for Wellesley ("It almost takes a lifetime to get a [Verizon double] telephone pole removed.").

³⁰ Hearing Comments of Jeffrey Hull for Wilmington at Tr. 72-75.

issues and federally-mandated technical and safety requirements – all of which are not expressly addressed in G.L. c. 166A, §§ 3-5.³¹

The certain result of a Verizon proposal to cram the public hearing, municipal review and license finalization and signature into a 90-day maximum period would be, at best, incomplete and potentially erroneous (or even sloppy) work on an important municipal contract that remains in effect for as long as 15 years; an inability to fully review license proposals for potential public interest and infrastructure implications; a virtual certainty of formal and informal requests from existing providers to address level playing field issues;³² and a sharp increase in the appellate workload of the Division. At worst, it would eviscerate local review over licenses and lead to the end of PEG access in the Commonwealth.³³

4. Action on the Petition is Unnecessary and Potentially Counterproductive In Light of Federal Developments

As noted in NECTA's Written Comments (at 9-11), Verizon and the other telephone incumbents have been actively pursuing changes to the franchising process at both the FCC and before Congress. In Congress, the House has already passed a bill establishing national cable franchising (H.R. 5252) and Senator Stevens is leading action on a counterpart Senate Bill.³⁴ The FCC docket on potential barriers to competitive cable

³¹ Hearing Testimony of Paul Cianelli for NECTA at Tr. 275-76.

³² E.g., Hearing Comments of Henrietta Davis for Cambridge at Tr. 35; Hearing Comments of Jeanne Krieger for Lexington at Tr. 40; Hearing Comments of Gabriel Nucci for Groton Cable Advisory Committee at Tr. 123.

³³ E.g., Hearing Comments of William Solomon, Esq. at Tr. 253 (with short deadlines and a favorable standard of review, Verizon will have no incentive to be fair); Hearing Comments of Paul Berg of Newton Community Access at Tr. 239 (noting near-total loss of PEG access in Texas following implementation of state-wide franchising with short negotiation periods).

³⁴ NECTA Written Comments at 10.

franchising (MB 05-311) is fully briefed and awaiting decision, with several press accounts suggesting that the FCC is prepared to render a decision if Congressional efforts to revise franchising laws are shelved.³⁵ Enactment of any of these regulatory and legislative proposals would modify or preempt existing laws and likely would result in significant changes to the existing Massachusetts cable franchising regulations and guidelines and almost certainly would require a myriad of changes to any new or revised regulations implemented as a result of this proceeding.³⁶

Absent a compelling policy need for immediate action not present here, the Division should take into account the results of federal developments before deciding whether it can or should amend current Massachusetts regulations. Premature action on changes sought in the Petition easily could conflict with the text and underlying policies of the new federal enactments. Moreover, if short maximum time limits are adopted in this proceeding, chaos would result when providers and municipalities have to scramble in a matter of months to understand and cooperatively implement complex changes required by new federal laws or regulations.

B. If Considered at all, the Petition Must Be Substantially Revised

**1. Current Time Frames for Municipal Review and
Negotiations Should Be Substantially Maintained**

As discussed above, the overwhelming record evidence demonstrates that Verizon's proposed 90-day maximum period for a municipality to review a license

³⁵ Id. at 9-10.

³⁶ See, e.g., note 7 *supra*. Significantly, Verizon, while petitioning the Division to adopt these fairly radical changes to the Massachusetts approach to cable licensing, has been simultaneously urging the FCC to preempt state and local franchising law, and procedures by regulation at the federal level. See, e.g., Comments of Verizon on Video Franchising, dated Feb. 13, 2006, MB Docket No. 05-311 (at 21-27) ("The Commission has authority to adopt binding and preemptive rules to interpret and enforce the provisions of the Cable Act, including Section 621(a) [of Title 47]").

proposal, conduct a public hearing, negotiate a license with a competitive provider and finalize jointly-acceptable license language is grossly unreasonable. While some of Verizon's supporters at the public hearing have argued that, if the Division rejects the 90-day period proposed, some deadline between 90 days and one year should be imposed, no party has proposed a specific time period.³⁷ Moreover, municipalities and other interested parties have not had an opportunity to offer evidence and argument regarding the reasonableness of any such deadline. Accordingly, the Division should reject Verizon's proposed deadlines outright and not adopt an interim deadline without a solid record basis. If the Division insists on shortening the applicable time periods, it should adopt only minimal changes to current deadlines and start a time clock on the filing of a complete application by the new provider. Alternatively, the Division could convene a stakeholders' meeting and discuss joint proposals for expediting applications that take into account the legitimate interests of all participants.³⁸

2. Verizon's Standard of Review on Appeal is Contrary to Law and Sound Public Policy

To the extent that the Division elects to expand the current regulations to address the standard of review issues raised in the Petition, NECTA's Written Comments make clear that the proper mode and standard of review in a de novo appeal to the Division from a denial or inaction within regulatory deadlines of an initial licensing request should be one of reasonableness, with the Division basing its decision principally, if not entirely, upon the license proposals and supporting materials exchanged by the parties and level

³⁷ NECTA expressly reserved the right in its Initial Comments (at 16) to comment on specific interim proposals offered by Verizon or any party, but no one has proposed any alternative schemes for consideration.

³⁸ Hearing Comments of Marc Hymovitz for MMA at Tr. 82-83.

playing field considerations with the existing licensee.³⁹ Moreover, the LFA denial certainly cannot be found to be arbitrary or capricious.⁴⁰ There is no sound reason for the Division to render a decision on appeal based solely on its own policy choices, without consideration of information exchanged between the parties leading up to the denial, as the Petition appears to envision.

Verizon's proposed standard of review is gravely flawed in multiple respects and should be rejected in total, for the following reasons. First, Verizon attempts to convince the Division that the scope of issues potentially in a Massachusetts cable license is "limited."⁴¹ That view is not consistent with licensing practices in Massachusetts or with the broad set of information required to be filed with a municipality in the Division's Form 100 licensing form.⁴² Municipalities have broad ability to propose license terms consistent with their cable-related needs and the overarching reasonableness standard.

Second, NECTA agrees with concerns voiced by Joint Comments, Comcast and other parties that the proposed standard of review to be used in appealing of local denials or inaction is too narrow.⁴³ The text of proposed regulation 3.04.5(3) that a license "shall be approved" if it substantially complies with G.L. c. 166A, §§ 3, 4 and 5 ignores that those statutes set minimum state law requirements for what must be in a license.⁴⁴ They

³⁹ NECTA Written Comments at 16-17.

⁴⁰ Id. at 17.

⁴¹ Verizon Petition at 6-7; Verizon Initial Comments at 8.

⁴² NECTA Written Comments at 11.

⁴³ Joint Comments at 10-11; Comcast Written Comments at 16; see also Hearing Comments of Paul Cianelli for NECTA at Tr. 275-76.

⁴⁴ These provisions primarily reflect the safety, and indemnification and insurance issues that concerned state legislators when initially enacted in the early 1970's.

do not purport to establish an exhaustive or complete list of provisions that may be contained in a license.⁴⁵ Thus, among other omissions, the proposed standard would eliminate universal service, absence of redlining, consideration of community needs and interests, level playing field issues and federally-mandated technical and safety requirements – all of which are not expressly addressed in G.L. c. 166A, §§ 3-5.⁴⁶

NECTA also agrees with the Comcast Comments that the Verizon standard of review proposal for initial licensing is so different from the multi-year renewal license process that it would establish, in effect, an unbalanced two-tier licensing system in the Commonwealth.⁴⁷ This would raise serious level playing field issues if adopted and may support the need for changes to the current renewal guidelines in the Division's Form 100 Order.

3. Verizon's Preferred Form of Relief on Appeal Is
Beyond the Division's Statutory Authority

Verizon's proposal includes advocating that the Division adopt a regulation that would give it the authority to issue cable licenses.⁴⁸ In the August Notice, the Division requested comment on the Division's statutory remedies,⁴⁹ including the ability to issue cable licenses, as requested by Verizon. NECTA respectfully submits that the Division does not have the statutory authority to issue cable licenses. The power to issue a cable license is expressly reserved solely to cities and towns.

⁴⁵ Hearing Comments of Paul Cianelli for NECTA at Tr. 276.

⁴⁶ Id.

⁴⁷ E.g., Comcast Written Comments at 16-18.

⁴⁸ Verizon Petition at 7-8; see also Verizon's proposed revisions of 207 CMR 3.09.

⁴⁹ August Notice at Question 7.

Section 2 of G.L. c. 166A establishes the statutory authority of the Division. It authorizes the Division, through the Director, to “presid[e] at hearings pursuant to section 2A,” “maintain or intervene in an action pursuant to section 12,” “hear appeals and issue enforcement orders pursuant to section 14,” “regulate rates pursuant to section 15,” “promulgate rules and regulations pursuant to section 16,” undertake “enforcement actions pursuant to section 17,” and have “all other authority to carry out the duties and responsibilities of this chapter.” Nothing in section 2, the specific statutory sections mentioned in section 2, or any other section in Chapter 166A authorizes the Division to grant licenses to an applicant, as Verizon requests. To the contrary, G.L. c. 166A, § 3, clearly and expressly limits that power to municipal issuing authorities, as follows:

No person shall construct, commence construction or operate a CATV system in any city or town by means of wires and cables of its own or of any other person without first obtaining as herein provided a written license from each city or town in which such wires or cables are installed or are to be installed, a copy of which shall be forwarded to the division . .

..

Id. (emphasis supplied). Similarly, in the event of a successful appeal, G.L. c. 166A, § 14 authorizes the Division to “order[] the issuing authority to conform with such decision” rather than issue a license itself. Finally, in the specific context of deciding a Petition brought by subscribers, a consumer council or upon its own initiative, the Division is permitted to “investigate the granting, renewal, transfer or assignment” of a license and may, after hearing, “modify, suspend, revoke, cancel or declare forfeited” a license, but “no license shall be issued by the division except in ratification of a prior issuance to the same party by the issuing authority.” G.L. c. 166A, § 14 (emphasis added). Therefore, the Division is without the statutory authority to adopt a regulation that would give it

authority to issue licenses.⁵⁰ If this issue needs to be addressed at all, it is a matter for the General Court.

4. Other Issues

- Initial 60-day period – Verizon gave no sound reason to eliminate the initial 60-day application review period and public hearing requirement which provides towns with a time-limited period to ensure completeness of the application and to solicit early comments from the public. The above comments highlighting that Verizon has filed incomplete applications in many Massachusetts municipalities support the continued need for a time limited period for the municipality to review and decide to take action on an application before the municipality formally commences the licensing process.
- Publication/Provisional License Requirement – Verizon has not demonstrated that these provisions should be eliminated. Waiver requests for “good cause” may be used where appropriate.

IV. CONCLUSION


Verizon’s proposals to adopt radical changes to the existing cable television license process to benefit Verizon – and to amend the current appeal regulation to shorten the municipal review period by 75% – are unnecessary and unsupportable on legal, factual and policy grounds, especially given active ongoing developments in Congress and at the FCC. The three month time period for municipal review of a license application proposed by Verizon appears designed to minimize or eliminate the role of Issuing Authorities by depriving them of 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.


⁵⁰ As the Supreme Judicial Court has held, “an agency has no authority to promulgate rules or regulations which are in conflict with the statutes or exceed the authority conferred by the statutes by which such [agency] was created.” Telles v. Comm’r of Ins., 410 Mass. 560, 564 (1991) (internal citations omitted); accord Greater Boston Real Estate Bd. v. Dep’t of Telecomms. and Energy, 438 Mass. 197, 204 (2002).

Finally, to the extent the Cable Division addresses the merits of the Petition at all, it should reject Verizon's one-sided standard of review proposal and, instead, 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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