



Agenda Date: 1/28/09
Agenda Item: 3A

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.nj.gov/bpu/

CABLE TELEVISION

IN THE MATTER OF VERIZON NEW JERSEY, INC.)
CERTIFICATION OF CAPABILITY TO PROVIDE)
CABLE TELEVISION SERVICE TO 60 PERCENT OF
HOUSEHOLDS IN 25 DESIGNATED MUNICIPALITIES

SECOND
FURTHER ORDER

BPU DOCKET NO. CO07110884

(SERVICE LIST ATTACHED)

BY THE BOARD:

On November 19, 2007, Verizon New Jersey, Inc. (Verizon) filed a petition with the Board of Public Utilities (Board), pursuant to N.J.S.A. 48:5A-30(d) and N.J.A.C. 14:18-15.7, seeking approval of its certification that it is capable of providing cable television service to at least 60 percent of the households in 25 municipalities.¹ On December 19, 2007, the Board approved Verizon's certification for 23 of the 25 municipalities; the Borough of Norwood (Norwood) and the City of Passaic (Passaic) were deferred, and by letter dated December 19, 2007, Verizon agreed to waive the statutory timeframe for consideration of its 60 percent certification in those two communities.

On December 14, 2007, CSC TKR, Inc. (Cablevision) filed for intervention on the certifications as to Norwood and Passaic. Cablevision claimed that Verizon had not shown that it was capable of serving 60 percent of the households in the two municipalities based upon questions over total households in each community, multiple dwelling unit (MDU) households, and households served by underground facilities. The Board granted Cablevision's request for intervention on December 19, 2007.

¹ The 25 municipalities included in Verizon's application are: Borough of Barrington, Borough of Carlstadt, City of Clifton, Township of Denville, Borough of Elmwood Park, Borough of Hasbrouck Heights, Borough of Lawnside, Borough of Lodi, Township of Lyndhurst, Borough of Maywood, Township of Medford, Township of Millburn, Borough of Moonachie, Borough of New Providence, Borough of Norwood, Township of Nutley, City of Passaic, Village of Ridgefield Park, Borough of Rockleigh, Borough of Somerville, Borough of Spring Lake, Borough of Wallington, Township of Waterford, Borough of Woodcliff Lake and Borough of Wood-Ridge.

By way of background, Verizon was granted a systemwide franchise by the Board on December 18, 2006, to provide cable television service to 316 municipalities² Through subsequent filings, Verizon is currently authorized to provide service to 359 municipalities.

The Cable Television Act (the Act), N.J.S.A. 48:5a-1 et seq., provides that each cable television company operating in the State must pay franchise fees to each municipality in which it provides service. N.J.S.A. 48:5A-30. Absent a showing by a systemwide franchise-holder, a cable operator operating under a municipal consent based franchise pays franchise fees each year in the amount of two percent (2%) of the gross revenues from all recurring charges in the nature of subscription fees paid by subscribers within the municipality for its cable television reception service, as such term is defined by N.J.S.A. 48:5A-3(e). The Act requires that the holder of a systemwide cable television franchise pay to each municipality served each year a sum equal to three and one-half percent (3.5%) of gross revenues derived from cable television service charges or fees paid by subscribers in the municipality to the systemwide cable television franchisee. N.J.S.A. 48:5A-30(d). In addition, an amount not to exceed one-half of one percent (0.5%) of those gross revenues must be remitted to the State Treasurer for a "CATV Universal Access Fund" to offset basic cable television service rates for seniors and disabled persons who are eligible for the Pharmaceutical Assistance for the Aged and Disabled ("PAAD") program. N.J.S.A. 48:5A-30(d). N.J.S.A. 48:5A-30(d) further provides that once a systemwide cable television franchise holder certifies that it is capable of providing service to at least 60 percent of the households within a municipality that are served by an incumbent cable television provider, and the Board approves that certification, the existing cable television company must also pay the increased franchise fee.

In support of its petition, Verizon filed an Affidavit of Jeffrey B. Olson, Director, Video Network Services, explaining the methodology used by Verizon in calculating the percentage of households where Verizon is capable of providing cable television service. The affidavit states that Verizon first identified the number of residential addresses passed by Verizon's network and served by Verizon's cable facilities, which were validated as capable of receiving Verizon's services (FiOS). Because the Act requires the franchise operator to identify the percentage of households rather than addresses, Verizon performed additional calculations to convert the data on validated addresses to reflect household data by utilizing information from the 2000 US Census and mid-2006 estimates from that data provided by a company called ESRI, Inc. Verizon projected the number of occupied households as of October 31, 2007 by comparing the number of households in 2000 to those in mid-2006 as estimated by ESRI, and adjusting that trend forward to the 2007 date. Verizon also multiplied its FiOS validated residential address counts in the filing by the ESRI estimated occupancy rates for 2006 to estimate the households in each town that were capable of being provided FiOS service. Verizon then divided these projected household numbers by the total number of estimated households in each municipality as of October 31, 2007 as calculated in the first step. Verizon provided a list of the final calculations, which demonstrated the percentage of occupied households where Verizon is capable of providing cable television service, ranging from a minimum of 62 percent to a maximum of 70 percent availability.

Staff reviewed the petition and supporting documentation. As part of its analysis, Staff performed its own calculations to project the ESRI supplied mid-2006 data forward to October 31, 2007 and estimate the number of households within each municipality for the purpose of converting Verizon's FiOS validated residential address data to households capable of receiving

² I/M/O the Application of Verizon New Jersey, Inc. for a Systemwide Cable Television Franchise, Docket No. CE06110768 (December 18, 2006).

FiOS service. In its review, Staff also reviewed Verizon's capabilities of serving MDU households within a particular municipality, and requested additional data from Verizon that the MDUs in the affected municipalities were not just passed by Verizon's cable television service, but capable of being provided cable television service if a resident requested it. Staff's review of MDU service capability also focused on important issues highlighted in the Governor's Executive Order No. 25 (2006), which supplemented anti-redlining elements of the Act. Verizon clarified in its discovery responses that no MDUs or any units within a particular MDU were included unless they could be provided service at the time they were included in the certification. Verizon provided information that only households within MDUs that were able to be served upon request of a resident were counted towards the 60 percent certification.

By letter dated December 14, 2007, Cablevision filed a motion to intervene and/or reject the certifications as they relate to Verizon's operations in Passaic and Norwood. Cablevision maintained, based on its own internal records concerning households and requests for underground facility mark-outs, as required by the Underground Facility Protection Act, N.J.S.A. 48:2-73 et seq., that Verizon was not capable of serving the claimed 64 and 63 percent of the households in the Passaic and Norwood. In particular, Cablevision questioned Verizon's ability to provide its FiOS service to those households served by underground facilities, as well as those in the majority of the MDUs in Passaic and two specific MDUs in Norwood. Accordingly, Cablevision sought leave to intervene in the proceeding and requested that the Board provisionally reject Verizon's certifications for these two municipalities subject to further review and demonstration by Verizon that it is currently capable of serving 60 percent of the households in the subject towns. By letter dated December 18, 2007, the Department of the Public Advocate, Division of Rate Counsel, recommended approval of Cablevision's motion and deferral of Verizon's certification with respect to the two towns pending resolution of the issues raised by Cablevision. By order dated December 19, 2007, the Board granted Cablevision's motion to intervene.

Board Staff initiated its investigation by sending additional questions to both Cablevision and Verizon on various technical aspects of the petition, in an attempt to determine the basis for the discrepancies in the calculations of the two cable providers. Meetings were held separately with each company on January 11, 2008 and January 25, 2008.

By letter dated January 14, 2008, Cablevision responded to the technical questions sent by OCTV on January 3, 2008. Cablevision also requested access to Verizon's unredacted filing, subject to the execution of a confidentiality agreement, contending that it was being deprived of "the opportunity to meaningfully participate." Cablevision also requested that the Board establish a "procedural schedule for the proceeding."

By letter dated January 29, 2008, Verizon opposed Cablevision's motion asserting that it must be denied because the certification proceeding is not a contested case requiring evidentiary hearings, and Cablevision was simply attempting to circumvent the Board's "well-established practice of protecting proprietary commercial information."

Discussion

The Board granted Cablevision's request for intervention to allow Cablevision to present evidence to rebut Verizon's certification that it was capable of providing service to 60% of the households in Passaic and Norwood. Cablevision was given numerous opportunities to present its case as to why certification at this point would be improper. Cablevision's submission, however, failed to support the position that Verizon had failed to satisfy its statutory

requirements. Further, access to the information that Verizon has claimed is highly sensitive would not cure that failure. As the incumbent provider, Cablevision is in a position to identify households within the communities it serves as well as the capability of a landline competitor to compete with it in those communities. Despite this ability, Cablevision's submission failed to successfully refute Verizon's certification.

Cablevision maintains that it was not given an opportunity to evaluate Verizon's methodology for determining the number of households in either community. That is not correct. Verizon's methodology has and continues to rely on household information from the 2000 US Census and updated estimates of that data provided by a company called ESRI, Inc. That data is readily available directly from ESRI, Inc. and can easily be obtained and evaluated by Cablevision. Cablevision maintains that it was denied the opportunity to challenge Verizon's claim that it is capable of serving MDUs. Again, as the incumbent provider, Cablevision would be able to gauge the capability of a landline competitor to serve its customers. As part of its normal business activities, Cablevision could easily monitor Verizon's facility buildout in its service area and should, on that basis, be able to present evidence to the extent it exists to rebut a claim by Verizon that it is capable of serving area MDUs. Access to the information that Verizon has claimed is highly sensitive would therefore not be necessary for Cablevision to assert its claim.

In reviewing the data submitted by Verizon and Cablevision, it is clear that the major disputes with Passaic are the overall number of households within the municipality, the number of serviceable households fed by underground facilities, and the number of serviceable MDU households. Cablevision claims that using its residential household figure, Verizon is not capable of serving a sufficient number of MDUs or households in Passaic served by underground facilities to achieve a 60 percent availability rate.

The data submitted with Verizon's original filing reflects a total of 19,458 households according to the 2000 US Census. The filing also includes a projection of that number to October 31, 2007 based on the data provided by ESRI, Inc., that reflects a modest growth rate over the census figure. Verizon compares its validated service addresses against the resulting household calculation to arrive at a FiOS capable rate of 64 percent in Passaic.

In its motion, Cablevision maintained that based on its business records, the actual number of households in Passaic was at least 1,000 units higher than the ESRI, Inc. household projection figure utilized by Verizon. Staff's investigation, however, did not support Cablevision's contentions. A review of the US Census estimated occupied housing (household) figure (19,405 +/- 553) released for Passaic for the period 2005-2007³ compares favorably to the ESRI, Inc. estimate for the same time period, and calls Cablevision's figure into question. Similarly, a letter from Passaic to Verizon, dated November 3, 2008, appears to confirm both the ESRI, Inc. and US Census figures.⁴ Therefore, the Board concludes that use of the ESRI, Inc. figure supplied by Verizon in support of its filing is reasonable.

³ US Census Bureau: American Community Survey 3-Year Housing Estimates 2005-2007, City of Passaic, New Jersey ("American Community Survey estimates are used to produce this Fact Sheet and are based on data collected over a 3-year time period. The estimates represent the average characteristics of population and housing between January 2005 and December 2007 and DO NOT represent a single point in time").

⁴ Letter from Gary S. Schaer, Acting Mayor City of Passaic to Mr. Samuel A. Delgado, Vice President, External Affairs, Verizon New Jersey, Inc.

As a second point of its motion, Cablevision maintained that based on a lack of notifications of digging or excavation activity to the company during the time Verizon was constructing its FiOS facilities within the City, there was no evidence that Verizon was capable of serving any residential addresses served by underground facilities. To support its claim, Cablevision provided a list of residential addresses purportedly served by underground facilities within Passaic.

After thorough review of this list, Staff finds that of the addresses presented, many consist of duplicative addresses. Furthermore, significant numbers of addresses were identified by Staff as commercial structures and entities, while others were public buildings, including at least one school. Regardless, the areas in question appeared mainly to be in the central business district and were not counted by Verizon as serviceable residential households fed by underground facilities. There also do not appear to be substantive areas of the City where residential addresses are fed by underground facilities. Therefore, Staff concludes that the lack of One Call dig requests for underground facilities does not require rejection of the certification.

Finally, Staff reviewed updated information regarding the availability of FiOS service in the City filed on October 27, 2008, and conducted further investigation in the City via visual inspection on December 15, 2008. Staff notes that after this investigation, it is satisfied that Verizon has constructed FiOS facilities throughout the City as claimed, and is capable of serving a sufficient number of MDU households such that it now exceeds the 60 percent threshold for certification by an even larger margin than that claimed in the original filing.

Based on Staff's recommendation, and the Board's review of the information in the record, the Board HEREBY FINDS that Verizon has certified to its ability to provide service to at least 60 percent of the households currently served by the cable television company that operates under a municipal consent in the City of Passaic, and HEREBY ACCEPTS Verizon's certification. The Board has determined that it may, as a matter of law, make this determination over the objections of Cablevision, because the matter is not a contested case but is instead an extension of the Board's statutorily-mandated oversight authority. In this case, due process was satisfied by allowing Cablevision an opportunity to be heard and to present reasons why the proposed action should not be taken, and a full hearing and access to Verizon's application was neither necessary nor warranted as to this particular issue at this particular time. See, e.g., I/M/O the Request for Solid Waste Utility Customer List, 106 N.J. 508, 520-21 (1987).

Each cable television operator currently operating in the City of Passaic is HEREBY REQUIRED to pay to the municipality each year a sum equal to 3.5 percent of gross revenues, as such term is defined by N.J.S.A. 48:5A-3(x), derived from cable television service charges or fees paid by subscribers in the municipality to the cable television franchisee, and an additional amount not to exceed one-half of one percent of those gross revenues to the State Treasurer for a "CATV Universal Access Fund" to offset basic cable television service rates for low income (P.A.A.D. eligible) seniors and disabled persons.

Cable television operators may begin implementation of the increased franchise fee collection from their subscribers up to, but no later than, 90 days following the date of this Board Order approving the certification, pursuant to N.J.A.C. 14:18-15.7(d).

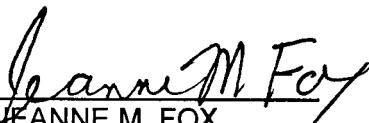
Cable operators shall notify the municipality, Rate Counsel and the Office of Cable Television in writing of the effective date of the increased franchise fee.

DATED:

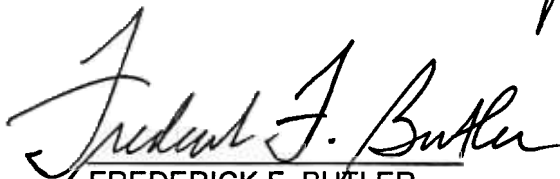
1/28/09

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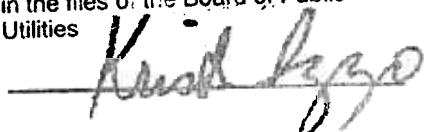
ELIZABETH RANDALL
COMMISSIONER

ATTEST:



KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within
document is a true copy of the original
in the files of the Board of Public
Utilities



IN THE MATTER OF VERIZON NEW JERSEY, INC. CERTIFICATION OF CAPABILITY TO
PROVIDE CABLE TELEVISION SERVICE TO 60 PERCENT OF HOUSEHOLDS IN 25
DESIGNATED MUNICIPALITIES - DOCKET NO. CO07110884

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