



Agenda Date: 9/12/08

Agenda Item: 3 c

**State of New Jersey  
Board of Public Utilities**

Two Gateway Center

Newark, NJ 07102

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CABLE TELEVISION

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

(SERVICE LIST ATTACHED)

**BY THE BOARD:**

On November 19, 2007, Verizon New Jersey, Inc. ("Verizon" or "VNJ") filed a petition with the Board of Public Utilities ("Board"), pursuant to N.J.S.A. 48:5A-30d 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.<sup>1</sup> On December 19, 2007, the Board approved Verizon's certification for 23 of the 25 municipalities; the Borough of Norwood and the City of Passaic were deferred. By letter dated December 19, 2007, Verizon agreed to waive the statutory timeframe for consideration of its 60 percent certification for the Borough of Norwood and the City of Passaic.

The Board's actions were predicated on a motion to intervene by CSC TKR, Inc. ("Cablevision") filed on December 14, 2007 in this matter with regard to the Borough of Norwood and the City of Passaic. Cablevision claimed that Verizon was not capable of serving 60 percent of the municipalities in question due to the large number of underground facilities in them, and as further discussed below. The Board granted Cablevision intervention in this matter on December 19, 2007.

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<sup>1</sup> 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 municipalities<sup>2</sup> pursuant to the newly enacted amendments to the State Cable Television Act, N.J.S.A. 48:5A-1 et seq. (the "Act"). The Act, as amended, provides for competitive system-wide cable television franchises to certain providers of cable television service. Prior to the passage of the amendments to the Act, cable television providers negotiated with each municipality separately for the grant of municipal consent, and then petitioned the Board for a certificate of approval to provide service within that municipality. Since the passage of the amendments to the Act, cable television companies now have a choice of continuing under the municipal consent based franchise system or proceeding under the systemwide franchise option, which does not require negotiation with the individual municipality, but instead includes the franchise requirements directly in the statute.

Each cable television company operating in the State of New Jersey must pay franchise fees to each municipality in which it provides service. Currently, an incumbent 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 for its cable television reception service, as such term is defined by N.J.S.A. 48:5A-3(e), within the municipality. The Act, as amended, requires at N.J.S.A. 48:5A-30(d) that the holder of a systemwide cable television franchise pay to each municipality each year a sum equal to three and one half percent (3.5%) 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 systemwide cable television franchisee, and an additional amount not to exceed one-half of one percent (0.5%) of those gross revenues 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) 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

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<sup>2</sup> Order, In the Matter of the Application of Verizon New Jersey, Inc. for a Systemwide Cable Television Franchise, Docket No. CE06110768 (December 18, 2006).

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 FiOS service. In its review, Staff also reviewed Verizon's capabilities of serving multi-dwelling unit ("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 the City of Passaic and the Borough of 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 at least 60 percent of the households in the City of Passaic and the Borough of Norwood, where it had represented that it could serve 64 and 63 percent of households, respectively. In particular, Cablevision questioned Verizon's ability to provide its FiOS service to those households served by underground facilities and those in the majority of the MDUs in the City of Passaic and the two MDUs in the Borough of 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 in its motion.

By order dated December 19, 2007, the Board granted Cablevision's motion to intervene finding that due to the potential increase in franchise fees triggered by a certification, Cablevision would be specifically and directly affected by the outcome of the matter. Additionally, the Board found sufficient grounds to defer certification of Passaic and Norwood pending further investigation. As noted above, Verizon agreed to waive the 45 day period for a decision on the certification for Norwood and Passaic.

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.”

Cablevision maintains that unless it is provided with all of the information Verizon has filed in connection with the proposed certification of Passaic and Norwood, and is then afforded an opportunity for evidentiary hearings, the Board will have deprived Cablevision of its due process rights. Based on a review of the motion and all of the supporting and opposing papers, the petition and accompanying documentation, and the cited law, Cablevision’s arguments fail.

Cablevision was granted intervention to allow it 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 failed to support its position in the case of the Borough of Norwood, and access to the information that Verizon has claimed is highly sensitive would not cure that failure. As the incumbent provider, Cablevision is in a unique position to be able 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 advantage, Cablevision submitted evidence which improperly included a combination of duplicate addresses, non-residential addresses and, also, in the case of the Borough of Norwood, addresses outside of the municipality.

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 easily 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.

Since the Act requires Verizon to make a showing 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, the Board believes it is appropriate for Verizon to rely on the use of occupied households, since vacant households could not be considered to be served by an incumbent cable television provider.

In reviewing the data submitted by Verizon and Cablevision, it is clear that the major dispute with regard to the Borough of Norwood is the number of serviceable households within the municipality. Although Cablevision has advanced a position that Verizon is not capable of serving MDUs or households in the Borough of Norwood served by underground facilities, those arguments, even if assumed correct, do not reduce the number of serviceable households below 60 percent. Therefore, it is only necessary to address the issue of households here.

Verizon's filing reflects a housing unit total of 1,857 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 63 percent.

Cablevision maintains based on its business records that there are approximately 2,725 households in the Borough of Norwood. This number was recently disclosed by the Mayor of Norwood in a recent letter to the Board concerning this matter placing it in the public domain. Cablevision's household number represents some 900 additional households since the 2000 US Census or an average growth rate of 6.4 percent over seven and one-third years. Such a level of growth is inconsistent with the growth rates in most municipalities in the state over the same period and given the relative size of the Borough of Norwood is questionable. Therefore, the Board looked to other sources to verify the number of households within Norwood. One in particular was a letter from the Mayor of Norwood. According to the Mayor, the Borough, as of February 2008 had a total of 1,791 residential units. This number is substantially lower than the number put forth by Cablevision, and is also less than that forecast by Verizon. Although our conclusions herein are based on the more conservative and supportable household count provided by Verizon, Norwood's household count does not change the conclusion that in the Borough of Norwood Verizon satisfies the 60 percent service availability threshold for certification provided in the Act as amended.

Based on Staff's recommendation, and the Board's review of the information in the record, the Board FINDS that Verizon is capable of providing service to at least 60 percent of the households currently served by a cable television company that operates under a municipal consent in the Borough of Norwood, and HEREBY APPROVES Verizon's certification. The Board has determined that it may, as a matter of law, make this determination over the objections of Cablevision, and despite Cablevision's failure to review the full application, 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).

At this time, the Board is not considering Verizon's 60 percent certification for the City of Passaic. The Board will continue that investigation and provide a final decision as appropriate.

As previously stated, N.J.S.A. 48:5A-30(d) requires that once the Board approves the 60 percent certification of a systemwide franchisee, each cable operator currently providing service in the affected municipalities must also pay increased franchise fees. To effectuate the legislative objectives while at the same time recognizing the needs of both cable companies and their subscribers, as mandated by N.J.S.A. 48:5A-2, the Board HEREBY DETERMINES that the effective date of this increase shall be the date on which the cable companies first bill their subscribers for this increased fee.

Therefore, beginning no later than 90 days from the date of this Board Order approving Verizon's certification, pursuant to N.J.S.A. 48:5A-30(d), each cable operator currently operating in the Borough of Norwood 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

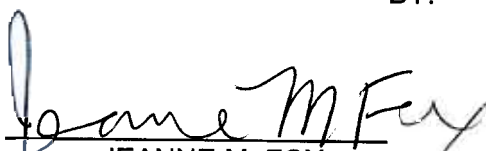
from cable television service charges or fees paid by subscribers in the municipality to the cable television franchisee, and an additional amount not to exceed one-half of one percent of those gross revenues to the State Treasurer for a "CATV Universal Access Fund" to offset basic cable television service rates for low income (PAAD eligible) seniors and disabled persons.

Cable 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.

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

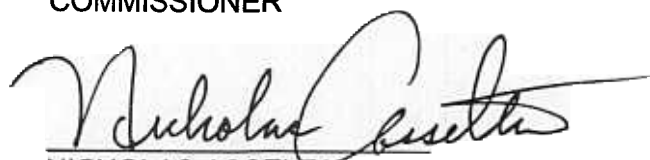
DATED: 9/15/08

BOARD OF PUBLIC UTILITIES  
BY:

  
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PRESIDENT

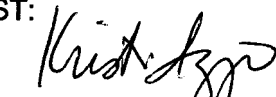
  
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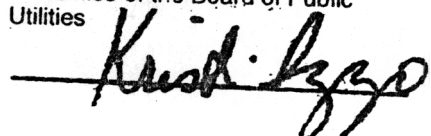
  
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COMMISSIONER

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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