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June 5, 2008

Via Hand Delivery
Honorable Kristi Izzo
Board Secretary
New Jersey Board of Public Utilities
Two Gateway Center
Newark, New Jersey 07102

Re: I/M/O Verizon New Jersey Inc, Request for Assistance Resolving Interconnection Negotiations with US Cable of Paramus/Hillsdale, Time Warner, Cablevision and Comcast
BPU Docket Nos. CO0707521, CO0707522, CO0707524, CO0707525

Dear Secretary Izzo:

The New Jersey Division of Rate Counsel ("Rate Counsel") hereby submits this initial letter brief in the above referenced proceeding, in lieu of a formal brief. This brief is limited to issues raised in the dispute by and between Verizon New Jersey Inc. ("Verizon") and Cablevision TKR, Inc. of New Jersey ("Cablevision") and Verizon and Comcast Cable Communications, LLC, Comcast Cable Holdings, Inc., and their subsidiaries and affiliates ("Comcast").

For the reasons discussed below, Rate Counsel urges the New Jersey Board of Public Utilities ("Board") to:

- reject the proposals offered by Verizon, Cablevision and Comcast as not in the public interest and direct interconnection at the municipal end of each return line with the exception of Union, New Jersey (Comcast);
- direct interconnection in Union, New Jersey at the production facilities of Comcast;

- adopt Rate Counsel's "program cost model" and establish a interim rate for interconnection at \$0.30 per subscriber subject to refund and true up after agreement of the parties on the terms and conditions of interconnection including rates;

- direct that the parties produce for review, the various Cable interconnection agreements negotiated in New Jersey and other states;.

- continue its effort with the parties to reach mutual agreement on terms and conditions; and

- commence a rulemaking to adopt rules and procedures for resolving interconnection disputes by imposing requirements for arbitration and review, and approval of such arbitrated agreements similar to the requirements, rules and procedures now in use for the negotiation and arbitration of interconnection agreements under the Telecommunications Act of 1996.

INTRODUCTION

Verizon was granted a statewide franchise on December 15, 2006 and is now providing cable service in numerous areas of the state. However, PEG programming is not available to all of Verizon's cable customers because Verizon has been unable to agree on the terms and conditions of interconnection with various incumbent cable operators including Comcast and Cablevision. The Board initiated the subject proceedings in order to assist in resolving the disagreements among the parties concerning interconnection.

Verizon, Comcast and Cablevision must interconnect with one another for the provision of Public, Educational and Government ("PEG") access channel that are used to provide programs to the public in accordance with provisions of the System-wide Cable Television Franchise Act (State-wide Act")[1]. PEG channels aid and are essential to the public health, safety and welfare of New Jersey citizens. *N.J.S.A.* 48:5A-28(i) and

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1/ P.L. 1972, c. 186 codified in *N.J.S.A.* 48:5A-1 *et seq.*

N.J.S.A. 48:5A-28(m) set forth the requirement to interconnect on reasonable terms and conditions and the handling of service extensions.

At this time, the parties are no closer to resolving their disagreements and the public is suffering from that inability to agree. A benchmark for reasonable, terms and conditions, including rates, are the other commercial interconnection agreements entered into by new cable entrants and incumbent cable providers up to now. However, various parties have refused to make those agreements available for review in the proceeding. The terms of those agreements would materially assist in arriving at what are reasonable, terms and conditions. As discussed below, Rate Counsel offers the only viable solution to ensure interconnection now, consistent with the public interest and a reasonable approach that hopefully will lead to mutual agreement on the terms and conditions of interconnection.

LEGAL ARGUMENT

I. Verizon's Proposal Is Based Upon An Erroneous Interpretation of *N.J.S.A.* 48:5A-28(i) and (m) and Is Not in the Public Interest

Verizon's proposal has three parts which are (1) the Board should adopt a standard agreement containing standard terms and conditions applicable to all interconnection agreements; (2) the Board should specify an optimal point of interconnection ("OPI") which is the maximum point(s) of aggregation of PEG content on the incumbent's system(s); and (3) the Board should declare that the rates for interconnection are the absorbed costs for the extension per N.J.S.A. 48:5A-28(m). Verizon's proposal for adoption of standard terms and conditions assumes that the Board has the authority to impose standard terms and conditions on companies under *N.J.S.A.*

48:5A-28(i), that the Board can designate the OPI under *N.J.S.A* 48:5A-28(i), and that rates for interconnection are governed by *N.J.S.A.* 48:5A-28(m).

All three aspects of the Verizon proposal are premised upon its interpretation of the relevant provisions of the State-wide Act. Verizon's interpretation, however, is inconsistent with the plain meaning of the applicable sections of the State-wide Act and therefore should be rejected. N.J.S.A. 48:5A-28(i) provides in pertinent part:

> Any and all CATV companies operating in a municipality shall provide interconnection to all other CATV companies on reasonable terms and conditions, and the board shall adopt regulations for procedures by which disputes between such CATV companies shall be determined and expeditiously resolved. Each municipality or its non-profit designee shall assume responsibility for the management, operations and programming of the public, educational and governmental access channels.

N.J.S.A. 48:5A-28(m) provides, in pertinent part:

> A CATV company that has interconnected with another CATV company may require the second CATV company to pay for half of the CATV company's absorbed costs for extension.

N.J.S.A. 48:5A-28(i) does not explicitly authorize the Board to adopt standard terms and conditions for interconnection. The Board may review the terms and conditions of interconnection once agreed upon by the parties to determine whether they are reasonable. The Board may also adopt rules to resolve interconnection disputes. While Section 28(i) requires interconnection and provides that the interconnection must be on reasonable terms and conditions, the Board cannot impose conditions on the parties unless it adopts regulations to resolve disputes. The statute is silent as to where the interconnection should take place. As discussed more fully below, Rate Counsel submits that the Board may order Verizon to interconnect at various points pursuant to the provisions of the state-wide franchise granted to Verizon and these points need not be at the OPI. Subsequent thereto, if the individual parties can agree, they may on a case-by case basis agree to other interconnection points.

The third aspect of Verizon's proposal, *i.e.* that the rates for interconnection should be the absorbed cost of the extension, should also be rejected. The proposal is contrary to the plain language of the statute, and fails to recognize that the number of agreed points of interconnection is just one factor that affects the reasonable rate for interconnection.

Verizon's proposal is facially inconsistent with the expressed terms of N.J.S.A. 48:5A-28(m). Verizon's proposal is based on an argument that the word "extension" in Section 28 (m) is synonymous with "interconnection," and that therefore limits the rates for interconnections to absorbed costs. The word "extension," however, implies an expansion of the system to serve a previously unserved area or facility. An extension would only be necessary in the event the incumbent's system had to be expanded to serve a new facility such as school or municipal facility not previously served. An "extension" occurs after an interconnection has occurred. An interconnection is not synonymous with an extention, but a condition precedent to absorbing the costs for extension. Thus, Verizon's argument that rates for interconnections are limited to absorbed costs is simply wrong.

Verizon also argues that the cable companies should pay 100% of its absorbed costs. This argument is contrary to the clear and unambiguous language of Section 28 (m). If the statute is clear, the language generally governs. In interpreting statutory provisions words are to be given their ordinary and well-understood meaning. See *In re Barnert Mem. Hosp.*, 92 N.J. 31, 40 (1983) Verizon's interpretation renders meaningless the language "half of the absorbed costs,"[2] reading the word "half" out of the statute. As a result, Verizon's rate proposal is predicated upon linking its misinterpretation of Section 28(m) with Section 28(i).

On cross examination, Verizon reaffirmed its position set forth in its Joint Direct Testimony that under its claimed interpretation of "absorbed costs" recovery is limited to incremental costs, measured as the difference between the incumbent provider's cost without the provision of PEG interconnection and the provider's cost with the provision of PEG. According to Verizon, the company conveying signals is compensated so that it is no worse or better off than if the interconnection did not occur.[3] Verizon's interpretation is an unwarranted expansion of the statute. The statute contains no provisions identifying incremental cost as the appropriate standard to determine reasonableness nor does the statute set forth "a no worse" standard. Verizon improperly adds conditions not found in the statute and its interpretation should be rejected.

In view of the foregoing, Rate Counsel asks that the Board reject Verizon's proposal in its entirety as not being consistent with the State-wide Act and inconsistent with the public interest.

II. The Record is insufficient to show that Cablevision's Proposal is in the Public Interest and Satisfies the Statutory Standard of Reasonable Terms and Conditions of *N.J.S.A.* 48:5A-28(i).

Cablevision proposes a partnering arrangement akin to a joint venture where the two parties would share equally the costs associated with PEG interconnection. Specifically, Cablevision proposes a five element pricing model which contains technical requirements

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[2]/ Cablevision T at 267, 268, 273, 274

[3]/ *Id.* at 261, 262.

and pricing. According to Cablevision, each partner contributes their share of the burden in maintaining and operating PEG.

- Element one considers the capital contribution made by the incumbent to municipalities for originating PEG programming and asks that one-half of the cost be borne by Verizon.

- Element two is the transmission charge associated with taking the municipal programming and sending it to an aggregation point. Cablevision is proposing 14 public access feeds. Cablevision is proposing that Verizon's tariffed TV-1 service rate is just and reasonable for this element.

- Element three is the physical exchange of a signal from one network to the other parties network. This requires Verizon to identify and provide equipment to transcode and multiplex the electronic signal from the aggregation points to Verizon's network. Cablevision proposes that pricing be based upon the virtual collocation charges Verizon now uses for interconnection with other telephone providers.

- Element four is the physical link between the virtual location and the aggregation point with the cost being reimbursed on a time and material basis.

- Element five is the allocation of capital, operational and administrative costs for interconnection. Capital cost includes public sunk access costs since 2003 excluding grants. Cablevision proposes one-half of these costs be borne by Verizon and be reimbursed as a fixed charge for each of the 14 aggregation points. Operational costs include the operating and administrative expenses associated with supporting Educational and Government programming allocated for the 21aggregation points with Verizon assuming one-half of the costs. The costs would be recovered through a monthly charge of $191.00 per aggregation point. Operational and administrative expenses for Public programming would be allocated across the 14 public access feeds and one-half would be reimbursed by Verizon through a monthly charge of $7,860.00 per feed.[4]

While Rate Counsel acknowledges that Cablevision's proposal represents one alternative, Rate Counsel submits that insufficient evidence exists in the record to support a determination that this proposal is reasonable under *N.J.S.A.* 48:5A-28(i). A joint venture can split costs in many ways other than on a 50-50 basis. In addition, joint ventures generally entail expectation of sharing profits. Cablevision's proposal

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4/ Initial Testimony of Bob Lee at 11-15, including New Jersey PEG Interconnection Pricing sheet.

contemplates no profits let alone the sharing of profits. In an arms-length situation, companies would either lease or construct their own facilities based upon a financial analysis of what the relative costs are for leasing as opposed to constructing facilities. Verizon did no such analysis and Cablevision has no analysis.[5] There is also no cost evidence in the record to determine the relative benefit from Cablevision's proposal versus the actual cost to deploy return lines or to modify existing cable lines to function as return lines.

On cross examination, Verizon admitted that it has no cost studies on providing PEG access where Verizon has installed return lines or what its operational costs are for maintaining return lines.[6] Verizon concedes that it has to provide various municipal buildings with FiOS lines that can provide voice, internet and video service to those buildings. Verizon also admits that those lines can be fitted with appropriate electronics so that those FiOS lines could function as return lines.[7] All of these factors are relevant to determine what is a reasonable rate for interconnection.

Other necessary and relevant information concerns the rates that exist under actual negotiated PEG agreements for cable interconnection. The rates in those agreements would tend to support or undermine the reasonableness of the proposals under review. Verizon concedes that it has interconnection agreements with cable companies across the country.[8] Those agreements are the best evidence of what is reasonable and whether terms and conditions proposed by the parties here are in fact

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5/ Cablevision T at 252 L 2-5.

6/ *Id.* at 251, 252, 258, 259.

7/ Comcast T at 107-110.

8/ Cablevision T at 249, 250; Comcast T 115-117; Cablevision T at 314 L 21-23; Comcast T at 187-188.

reasonable. The absence of those agreements in this record precludes a finding that Cablevision's or Verizon's proposals are reasonable.

Essential information is also lacking with respect to Cablevision's proposal that precludes a finding that it is reasonable. The costs identified by Cablevision are based upon historic costs some of which may have been expensed or amortized. On cross examination, Cablevision was unable to quantify what portion of its costs were expensed or amortized. In addition, Cablevision was unable to verify whether some or all of these costs were recovered in rates charged to end users.[9] Such information bears directly on whether Cablevision's proposal, if adopted would amount to double recovery of its costs and a windfall, to the extent those costs are recovered in rates charged to ratepayers. The public interest requires that ratepayers should receive a refund of any over recovery. The record lacks the necessary information to even analyze these issues. As a result the Board cannot make a determination as to whether Cablevision's proposal is reasonable.

III. The Record is insufficient to show that Comcast's Proposal is in the Public Interest and Satisfies the Statutory Standard of Reasonable Terms and Conditions of *N.J.S.A.* 48:5A-28(i).

Comcast's proposal is based upon a subset of 21 municipalities.[10] In twenty of those municipalities, Comcast proposes that Verizon construct its own facilities to the PEG origination point identified by Comcast.[11] Comcast proposes interconnection in Union, New Jersey where there are facilities to transmit PEG programming.[12] According to Comcast, its proposal provides interconnection at little or no cost.[13]

9/ Cablevision T 292 L 14-18; Comcast T 183-184; Cablevision T 125-126; *Id.* at 193.

10/ Comcast Initial Testimony at 4-5.

11/ *Id.* at 7-15.

12/ *Id.* at 5.

Comcast notes that PEG interconnection has been negotiated and agreed upon in many states and urges that such agreements be used to set what are reasonable terms and conditions.[14] Comcast asserts that it and other cable operators have expended significant costs to obtain educational and governmental programming in the first place. Comcast submits that Verizon's proposal seeks to limit its obligations to transmission costs without sharing the overall costs for providing public, educational and government programming.[15] Attachment A to Comcast's Joint Reply Testimony contains a list of cost areas and a description of the costs necessary for the provision of PEG programming.

Verizon asserts that Comcast's proposal is not an actual interconnection proposal and conflicts with the State-wide Act.[16] As a result, Verizon asks that the Board order Comcast to provide interconnection based upon Verizon's proposal.[17]

The record shows that the Board has inadequate and insufficient information to make any determinations as the merits of the positions advocated by Comcast. As a result, Rate Counsel urges the Board to reject Comcast's proposal and direct interconnection as discussed above, with interim rates pending final agreement by the parties.

13/ *Id.* at 15

14/ Comcast Joint Rebuttal Testimony at 8.

15/ *Id.* at 9-10.

16/ Verizon Joint Reply Testimony at 7-8.

17/ *Id.* at 8.

IV. The Board Should Adopt Rate Counsel's Recommendations and Direct Interconnection with Establishment of Interim Rates.

Rate Counsel submits that under the State-wide Act, the Board has the inherent authority to take all reasonable steps necessary to ensure that the spirit and intent of the statute is followed and that interconnection occurs. *N.J.S.A.* 48:5A-28(i) mandates that interconnection take place. In implementing legislative initiatives, a state agency has discretion to fill in the gaps in order to achieve the overall purposes of the law as long as the agency's interpretation is not plainly unreasonable. See *In re Pub. Serv. Elec. & Gas Co.'s Stranded Costs & Restructuring Filings*, 167 N.J. 377, 384 (2001).

Nothing in the statute precludes the Board from ordering each cable company to interconnect. The record is more than adequate for the Board to direct interconnection consistent with the recommendations made by Rate Counsel. The parties have shown that interconnection is possible at the site at which PEG programming is transmitted to the cable company for re-broadcasting on the respective cable networks. While the Board may direct the point of interconnection under Section 28 (i), Rate Counsel submits that the Board may not direct the companies to accept what the terms and conditions of such interconnection will be, absent mutual agreement or absent the Board adopting regulations for resolving disputes regarding such terms and conditions

The Board, as the local franchising authority, is authorized by federal law to negotiate and award cable franchises and to promote the public health, safety and welfare under any state law. Section 636(a) of the federal cable Act provides:

> Nothing in this title shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare to the extent consistent with the express provisions of this title.[18]

Interconnection relates directly to the public health, safety and welfare of New Jersey citizens. PEG programming provides essential information to citizens of New Jersey. PEG channels provide the mechanism for state, local and municipal agencies to communicate important information to the public, especially when local disasters or public health emergencies occur.

Cablevision's claim that Section 531(a) of the federal cable act precludes the Board from ordering interconnection is inconsistent with sections 531(b) and (c) of the federal cable act.[19] Section 531(b) provides, in pertinent part, that the franchise authority, *i.e.,* the Board, may require rules and procedures for the use of channel capacity designated pursuant to this section. This section permits the Board to adopt rules or procedures as to the use of PEG channel capacity. Those rules and procedures are to be based upon authority delegated to the Board consistent with Section 636 of the federal cable Act which permits the Board to impose PEG obligations in furtherance of the public health, safety and welfare that are not inconsistent with the expressed provisions of the Act. Section 531(c) explicitly authorizes the Board to enforce any requirement regarding the use of PEG channels, including the provisions of the franchise for services, facilities or equipment related to PEG, whether or not required by the franchise authority under subsection (b). Thus, the Board under subsection (c) has the authority to order

18/ 47 U.S.C. § 556.

19/ *Id.* at § 531(Section 611 of the Cable Act).

PEG interconnection separate and apart from ordering PEG in the award of an initial franchise or renewal of franchise as permitted by subsection (b).

The New Jersey State-wide Act requires cable companies to interconnect, and Verizon's specific franchise requires compliance with all aspects of the State-wide Act and that includes interconnection. As a result, the Board may order interconnection and such action is fully consistent with applicable franchise requirements, including the Board rules adopted for interconnection. Such action is consistent with Section 531 of the federal cable Act. Under the State-wide franchise awarded to Verizon, the Board can direct Verizon to interconnect.

Rate Counsel asks that the Board direct interconnection and that the Board adopt an interim rate subject to refund and true-up once the parties agree on all terms and conditions of interconnection. Rate Counsel recommends an interim rate of $0.30 per subscriber per month to be paid by Verizon. The interim rate enables interconnection to occur without financial harm to any party since the rates are not final rates. This is similar to the approach taken by the Board in the implementation of IntraLata toll competition where interim rates for equal access recovery charges were established pending a proceeding to determine the actual recovery rates.[20]

Rate Counsel proposes its programming cost model as the most appropriate method of establishing an interim rate at this time. Cable companies purchase programming at various rates and rates for such programming are based upon a set price per subscriber. During the cross examination of Verizon on May 14, 2008, Rate Counsel offered its program cost model and how it could be used to derive a rate so that the costs

[20]/ *I/M/O The Investigation of IntralLata Toll Competition for Telecommunications Services on a Presubscription Basis*, BPU Docket No. TX94090388; *I/M/O The Filing by Bell Atlantic-New Jersey, Inc for Revisions to Tariff B.P.U. No. 2 Access Service Providing for Rates and Charges in Connection with the Provisions of IntraLata Presubscription*, BPU Docket No. TR97040228, OAL: Docket No. 5760-97.

for interconnection would be shared between Verizon and Cablevision.[21] Rate Counsel took the costs proposed by Cablevision and then divided those costs by the number of subscribers and then derived a monthly cost per subscriber. The monthly cost per subscriber was $0.34. Rate Counsel then proposed that Verizon pay Cablevision $0.34 per subscriber it has for those areas where interconnection exists. Rate Counsel's proposed model shares the cost based upon the number of subscribers served.

Rate Counsel's example was predicated on Cablevision's costs contained in their proposal. As discussed above, there are various outstanding issues related to what portion of those costs have been reimbursed through rates, expensed or otherwise amortized. With all these uncertainties, Rate Counsel proposes to set the monthly charge at $0.30 per subscriber per month to be paid by Verizon, the same programming rate Cablevision charges its end users for its news channel.

CONCLUSION

As a result of the foregoing, Rate Counsel asks that the Board adopt Rate Counsel's recommendations set forth above. Rate Counsel notes that all transcript requests from the hearings remain unanswered at this time. Rate Counsel reserves its right to supplement this brief once answers to transcript requests are provided.

21/ Cablevision T at 302-311.

Very truly yours,

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CC: Service List

I/M/O Verizon NJ. Inc. Request for Assistance Revolving Interconnection Negotiations w/ Cablevision, Comcast, Time Warner, patriot Media, US Cable of Paramus-Hillsdale

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