

RCN and unlawfully impeding its roll out of competitive services.³⁵ Checklist item # 3, set forth in section 271(c)(2)(B)(iii) of the Communications Act, requires Verizon to provide “[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by [it] at just and reasonable rates in accordance with the requirements of section 224.” Section 224, the Pole Attachment Act, in turn, directs the FCC to implement that section but reserves primary jurisdiction to any state which certifies that it has adopted its own implementing regulations.³⁶ Massachusetts General Laws, Chapter 166, section 25A, authorizes the MDTE to adopt regulations concerning access to poles, ducts, conduits, and rights-of-way and the MDTE has adopted such regulations.³⁷ The FCC has certified that Massachusetts has adopted pole attachment regulations.³⁸

Before the MDTE, Verizon based its contention that it is in full compliance with the 14 point checklist in substantial part on the premise that it was found compliant in New York State by the New York Public Service Commission and thereafter by the FCC, and is providing the

³⁵ The provision of pole attachments to entities like RCN, or any other CLEC or cable entity, may be considered an element of the communications market for which Verizon does not normally sell to the general public. On the other hand, it surely uses its poles to distribute its own telephone service to subscribers throughout the Commonwealth. In any case this distinction is legally irrelevant. Whether pole access is considered to be analogous to retail service, or subject to function and performance benchmarks, Verizon’s failure to meet statutory requirements remains clear.

³⁶ 47 U.S.C. § 224(c)(1).

³⁷ See 220 CMR § 45.00, *et seq.* The MDTE's recent amendment to its pole attachment regulations is addressed *infra*, at III (B)(ii).

³⁸ See *States That Have Certified That They Regulate Pole Attachments*, Public Notice, 7 FCC Rcd 1498 (1992).

same access in Massachusetts and accordingly must be in compliance in Massachusetts.³⁹ This paradigm, to which Verizon frequently returns in its FCC Application, is a gross oversimplification and is not even factually accurate in respect to the principal subject matter of this opposition, *i.e.*, access to poles.

In approving Bell Atlantic's New York section 271 application, the FCC noted that no allegation of discriminatory access to poles had been presented and accordingly, there was no need for the Commission to consider the matter.⁴⁰ In New York City during the period the section 271 issues were being litigated the principal area in which RCN required access to distribution facilities was in Manhattan in which a monopoly supplier, Empire City Subway, is responsible for all underground conduit. There are few, if any, poles in Manhattan and accordingly access to poles was not a significant concern for RCN or any other CLEC in the New York context. By contrast, RCN's principal mode of distribution of its fiber optic lines in Massachusetts is by attachment to aerial poles. Accordingly, the FCC's approval of Bell Atlantic's New York application has no relevance or precedential value whatsoever to the present application insofar as Verizon's compliance with its pole attachment obligations is an issue.

³⁹ See, *e.g.* MDTE Supplemental Comments, subsection C, at 37.

⁴⁰ In *Bell Atlantic-New York*, RCN had challenged Bell Atlantic's access policies and practices in regard to access to conduit. See n. 5, *supra*, at ¶ 267. Similarly, in the recent approval of SBC's section 271 application involving Texas, no challenge to SBC's pole attachment practices or policies was raised below and that decision is accordingly of no relevance. See *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance To Provide In-region InterLATA Services in Texas*, FCC 00-238, *rel.* June 30, 2000 at ¶ 245.

B. Pole Attachments

1. Federal Law

Verizon's obligation to provide RCN and every other attacher with nondiscriminatory access to its poles, conduits, ducts, and rights-of-way on fair and reasonable terms and conditions is set forth in section 224 and, by reference to section 224, in section 251(b)(4) of the Act.⁴¹ In turn, section 271 (c)(2)(B) establishes fulfillment of this obligation as one of the criteria by which to test the eligibility of Verizon for the carriage of interLATA service within the Commonwealth of Massachusetts. The Commission staff needs no tutoring about the importance of pole attachments and access to conduits. The Commission has addressed the issue many times, both in the context of adopting rules to implement the 1996 amendments to section 224 of the Act,⁴² and in the more immediate context of section 271.⁴³ Most recently, the Cable Services Bureau adopted an order in *Cavalier Telephone, L.L.C. v. Virginia Electric and Power*

⁴¹ 47 U.S.C. § 224 and § 251(b)(4). Section 224 has been implemented in 47 C.F.R. §§ 1.1401-1.1418.

⁴² See, in general, *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, 68 FCC 2d 1585 (1978), *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (1998), and *Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, rel. Apr. 3, 2000, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499, 15505 § 1 (1996) (*Local Competition First Report and Order*), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) *aff'd in part, rev'd in part, and remanded sub nom. AT&T Corp. V. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) (*Iowa Utilities Board*); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration, FCC 99-266, rel. Oct.26, 1999, at ¶ 15.

⁴³ E.g., *Bell Atlantic - New York*, ¶¶ 263-265.

Company,⁴⁴ in which the duties owed by pole owners to potential pole attachers were emphasized. As stated there, the Commission has the authority to regulate the rates, terms, and conditions for the attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility. Such rates, terms and conditions must be just and reasonable.⁴⁵

As *Cavalier* noted, in the *Local Competition Order*⁴⁶ the Commission outlined rules of general applicability to be applied in evaluating a request for access pursuant to the Pole Attachment Act. Specifically, 1) a utility may rely on industry codes, such as the National Electrical Safety Code ("NESC"), to prescribe standards for capacity, safety, reliability and general engineering principles; 2) a utility remains subject to any federal requirements imposed by, e.g. FERC or OSHA, affecting pole attachments; 3) state and local requirements will be given deference if not in direct conflict with Commission rules; 4) rates, terms and conditions of access must be uniformly applied to all attachers on a nondiscriminatory basis; and 5) a utility may not favor itself over other parties with respect to the provision of telecommunications or video services.⁴⁷ To put the effects of Verizon's unlawful exclusion of RCN from nondiscriminatory access to the poles in Quincy into some perspective, it is noteworthy that in the communities in which RCN can attach to the poles of its partner, BecoCom, the average

⁴⁴ DA 00-1250, *rel.* June 7, 2000.

⁴⁵ *See Cavalier* at ¶¶ 2-3.

⁴⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996), ¶ 1123.

⁴⁷ *See Cavalier*, at ¶ 3; *Local Competition*, First Report and Order at ¶¶ 1151-1158.

elapsed time for survey, make-ready, construction and the initiation of service is less than a year. By contrast in Quincy the process started in the summer of 1999, and although RCN has been licensed by Verizon on about one third of the poles, it has not been fully licensed on any,⁴⁸ is not physically attached to any poles, and cannot contemplate the inauguration of service for quite some time. No more clear illustration of the effectiveness of anticompetitive practices could be imagined.

The *Cavalier* decision also summarizes modifications or elaborations of the Commission's initial guidelines which occurred in the *Local Competition Reconsideration*

Order:

- utilities must explore potential accommodations in good faith before denying access based on a lack of capacity;
- utilities must expand capacity to accommodate requests just as they would to meet their own needs;
- assessments of capacity, safety, reliability and engineering must be done in a nondiscriminatory manner;
- attaching parties may use any workers who have the same qualifications and training as the utility's own workers;
- utilities must allow access, subject to conditions necessary for reasons of safety and reliability, to transmission facilities; and
- a utility or other party that uses a modification as an opportunity to correct safety violations will be responsible for its share of the modification costs.

Cavalier, ¶ 4. Verizon is currently in violation of virtually every one of these strictures.

⁴⁸ Where poles are jointly owned, both owners must issue licenses before RCN can attach to the pole.

More specifically, the *Cavalier* decision concludes that utilities may deny access only for reasons related to capacity or safety. To reserve the right to deny attachments based on their "character" is unacceptable. *Cavalier*, ¶ 14. A utility may not hold an attacher responsible for costs arising from the correction of safety violations of attachers other than the attacher itself. Any payments made by an attacher to correct other attachers' safety violations are improper, and if made, must be reimbursed. *Id.*, ¶ 16. It is the utility's obligation to coordinate the correction of any existing safety violations and the costs therefor can be collected only through make-ready or pole rental fees. *Id.*, ¶ 17.

While acknowledging that a utility may require that individuals who will work on attachments or make ready work must have the same qualifications, in terms of training, as the utility's own workers, the *Cavalier* decision emphasizes that the attacher must be able to use any individual workers who meet these criteria. *Id.* at ¶ 18, citing to the *Local Competition Reconsideration Order* at ¶ 86.⁴⁹ In any case, the utility must coordinate all make-ready work and perform any necessary work on its own facilities in a timely and cooperative manner. It cannot use its control of its own facilities to impede an attacher's deployment of telecommunications facilities. *Id.* at ¶ 18.

The *Cavalier* decision also speaks directly to the issue of boxing. It notes that the utility cannot discriminate against attachers in favor of other attachers or itself. Indeed, "[t]hat premise

⁴⁹ See also *Reconsideration Order*, ¶ 13. The Commission has also emphasized that utilities have an affirmative obligation to expand capacity to meet legitimate needs of attachers "just as it would expand capacity to meet its own needs." *Reconsideration Order* at ¶ 51. By analogy, therefore, if the utility has inadequate in-house personnel to meet the reasonable needs of attachers, its obligation is to hire or train additional in-house personnel.

is at the heart of the 1996 Act." The decision also notes that: "[r]espondent has already agreed to allow temporary attachments. Respondent uses extension arms and boxing for its own attachments and must allow other attachers to do the same.... [A] utility must 'take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs.'" *Id.* at ¶ 19.⁵⁰ "Respondent must cease and desist from selectively enforcing safety standards or unreasonably changing the safety standards to which Complainant must adhere." *Ibid.*

In prior rulings the Commission has also addressed another unlawful aspect of Verizon's pole attachment practices and policies: the reservation of space by the pole-owning utility for its own purposes. As set forth in the *Reconsideration Order, The Local Competition Order* established a narrow exception to the general principle of nondiscriminatory access by allowing a utility to reserve for itself some capacity consistent with a "bona fide development plan" that reasonably and specifically projects a need for that space in the provision of its core utility service.⁵¹ Even if a utility has a legitimate need to reserve capacity, it must allow an attacher to use that capacity until the utility has an "actual need" for the capacity.⁵² Whether a particular utility's attempt to deny an attacher access to pole space on the ground that it is reserved is legitimate or not must be resolved in the individual case.⁵³ The Commission has also ruled

⁵⁰ Footnotes omitted.

⁵¹ *Reconsideration Order* at ¶ 54.

⁵² *Id.*

⁵³ *Id.*, at ¶ 67.

explicitly that those entities which cause safety violations or whose attachment requests require make-ready work are the only entities which should be charged for the costs of correcting violations or doing the make-ready work.⁵⁴

ii) Massachusetts Pole Attachment and Conduit Rules

As noted above, section 224(c) provides that, if a state regulates pole attachments and has certified to the Commission that its regulatory program meets certain criteria, federal jurisdiction to adjudicate a pole access complaint is abated. Massachusetts does have a pole attachment regime, composed of state law⁵⁵ and implementing administrative regulations.⁵⁶ In July, the MDTE released a decision which updated the preexisting pole attachment rules applicable in Massachusetts to take account of the amendments to section 224, including principally the newly enacted right to nondiscriminatory access, imposed by the Telecommunications Act of 1996.⁵⁷ Accordingly, it is the Massachusetts law, regulations, and MDTE decisions which would govern

⁵⁴ *Cavalier* at ¶ 16. (Utility is prohibited from holding attacher responsible for costs arising from the correction of safety violations of attachers other than attacher); *Cavalier* at ¶ 19 (Utility must cease and desist from selectively enforcing safety standards or unreasonably changing the safety standards); *Cavalier* at ¶ 23 (Utility cannot require attacher to perform engineering work that other attachers are not required to perform.) *See also Reconsideration Order* at ¶ 15.

⁵⁵ *See* M.G.L.A. 166 § 25A.

⁵⁶ *See* 220 CMR §§ 45.00-45.09.

⁵⁷ *See MDTE Order Establishing Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-Of-Way and to Enhance Consumer Access to Telecommunications Services, adopted July 26, 2000, available at <http://www.magnet.state.ma.us/dpu/telecom/98-36/final.htm>. The revised rules can be accessed at <http://www.magnet.state.ma.us/dpu/telecom/98-36/regs.htm>.*

any legal issues concerning RCN-BecoCom's access to utility poles and the terms and conditions of such access arising in a pole access complaint.

However, because the present matter concerns principally questions of access, for which no Massachusetts precedent exists, and because a section 271 determination, by statute, lies solely in the jurisdiction of the FCC with the MDTE playing only an advisory role,⁵⁸ it is the body of federal precedent to which the Commission must turn in assessing the access obligations of Verizon.⁵⁹ Accordingly, the *Cavalier* case and prior FCC precedent provide relevant guidance which is applicable to the present circumstances. As demonstrated in part IV, *infra*, Verizon's pole attachment practices with respect to boxing violate most, if not all, of the FCC's decisions interpreting a utility's pole attachment obligations under section 224 of the Act.

C. The Verizon Massachusetts Performance Assessment Plan (PAP)

The Commission's evaluation of Verizon's performance to date, and the significance of its assurances of future adherence to checklist obligations, must take into account the Performance Assessment Plan which was proposed by Verizon and which, with some modifications, was adopted by the MDTE. As the Commission noted in its approval of Verizon's New York State application, one of the most important elements, indeed a vital factor in the evaluation of the applicant's market opening efforts, is the adoption of performance

⁵⁸ See 47 U.S.C. § 271 (d)(3) and § 271 (d)(2)(B).

⁵⁹ Moreover, even if there were anything in the Massachusetts pole attachment regulations, either those which have been in effect for many years, or those newly-adopted, which are inconsistent with, or confine in any way, the Commission's own pole attachment policies, the Commission's policies are paramount and controlling in the section 271 context. *Local Competition*, First Report and Order, ¶ 1154.

assurance measures that create a strong financial incentive for post-entry compliance with the checklist.⁶⁰ RCN will leave to other Commenters a detailed analysis of the weaknesses and inadequacies of the PAP. There are, however, a number of provisions or omissions in that plan which could seriously undermine the prophylactic or preventive penalty provisions of the plan.

In its *Order Adopting Performance Assurance Plan*, adopted September 5, 2000, the MDTE noted that this Commission had specifically denied Verizon the opportunity to recover the cost of service quality penalties through its interstate revenue requirement, since doing so would "seriously undermine the incentives meant to be created by the [PAP]," quoting from the *Bell Atlantic -New York Order* at ¶ 443.⁶¹ The MDTE decision went on to note that the NYPSC "specifically precluded Verizon from recovering the costs of making performance credits from retail rates," citing from NYPSC Enforcement Plan Order, at 31. *Id.*

Nevertheless, and incredibly, the MDTE specifically declined to follow the recommendation of its own state Attorney General's office, and refused to exclude the possibility that Verizon could seek in the future to recover any PAP penalties by classifying them as exogenous costs under the Massachusetts Price Cap plan. It hardly needs to be emphasized that any such recovery would eviscerate the PAP and mitigate or eliminate the financial pressures on Verizon to faithfully execute its market-opening obligations. While the possibility remains that Verizon will ultimately be able to recover any PAP-related financial penalties from future

⁶⁰ *Bell Atlantic-New York, supra*, at ¶ 8.

⁶¹ See MDTE *Order Establishing Performance Assurance Plan, supra* at V.G (p. 33). On September 15, 2000 the MDTE adopted a revised PAP.

ratepayers, this Commission should find that the Massachusetts PAP is, on that ground alone, destructive of any confidence that Verizon will in the future adhere to market opening measures that the PAP should be providing.⁶²

In addition, the PAP approved by the MDTE deviates in significant respects from the New York PAP on which it was modeled. AT&T has asked the MDTE to reexamine its approval of the Verizon PAP on the basis of certain unauthorized changes introduced by Verizon unilaterally.⁶³ RCN recommended to the MDTE that a publicly designated senior official of Verizon be required to bear personal and administrative responsibility for the good faith execution of the PAP.⁶⁴ The MDTE ignored this suggestion altogether.

IV. VERIZON DISCRIMINATES AGAINST RCN IN RESPECT TO POLE ACCESS BY REFUSING TO PERMIT RCN TO BOX POLES

As noted in the Introduction, *supra* at 5-7, in respect to checklist item # 3, Verizon has chosen to present its affirmative case in very broad terms only. It thus devotes less than one page of text in its Application to pole and conduit issues,⁶⁵ and five pages of generalities to the subject in its supporting papers.⁶⁶ In these materials Verizon proffers very conclusory assurances and

⁶² There is no comparable back door exception in the New York State PAP.

⁶³ See Motions for Clarification and Reconsideration of AT&T Communications of New England, Inc., Regarding Verizon's Revised Performance Assurance Plan, filed at the MDTE on September 28, 2000.

⁶⁴ Reply Comments of RCN on Verizon's proposed PAP, filed with the MDTE on May 23, 2000.

⁶⁵ Application, at 34-35.

⁶⁶ Lacouture-Ruesterholz Declaration, at ¶¶ 187-202.

very broadly based data. For example, we learn that Verizon has provided more than one million pole attachments and more than 2.6 million feet of conduit in Massachusetts. This gross aggregation/blunderbuss approach to presenting its case is typical of Verizon's Application. Apart from the fact that these data are nowhere described in any detail, they would be meaningless in any case.⁶⁷ What happened decades ago, in a legally and technologically constrained monopoly climate, is simply irrelevant to the present matter.

As forcefully stated by the Massachusetts Attorney General's Office, which urged the MDTE to find that Verizon is not in compliance with the fourteen point checklist on the basis of the record made before the MDTE:

I commend to you the analysis the environmental regulators do which they pointed out to me when looking at questions like this: When you measure dissolved oxygen in a river, you can look at what's the average over the year, what's the average over the months, what's the average over the day. But if you get it wrong for 20 minutes, all the fish are dead.⁶⁸

To extend the Attorney General's analogy, Verizon is killing RCN by denying it the oxygen of the right to box poles, even while it has already allowed boxing on some 20% of its poles in Quincy and allows unrestricted boxing in other states, as set forth in Appendices A-G. Verizon admits that pole boxing creates no safety hazards and violates no applicable industry codes.

⁶⁷ By way of illustration, it is not vouchsafed to the reader over what period of years this number has been derived, nor who the attachers were, or in what part of Massachusetts the attachments have been made, or how many attachment requests were denied or delayed, and for what reasons. Verizon has been issuing attachments for at least 20 years, because it mentions that period of time at ¶ 188, but how long before that attachments have been granted and how many were granted in the period 1996 to the present, is not revealed. The same weaknesses apply to the conduit-miles figure.

⁶⁸ MDTE Tr. at 5545. *See also* Tr. 5546-7.

As explained *supra*, at 12-13 and in Appendices B-G, boxing of utility poles is a common practice throughout the utility industry and is even widely practiced in Verizon service territories other than Massachusetts.⁶⁹ The FCC has made crystal clear that utilities must permit boxing. Yet, as the MDTE record clearly demonstrates, Verizon refuses to allow RCN to box poles except in the limited cases which Verizon has already boxed a pole. Approximately 20% of the poles in the City of Quincy have been boxed and accordingly Verizon will allow RCN to box its wiring on those poles, but not on the 80% which are not boxed.⁷⁰ This is flagrantly discriminatory and is largely responsible for the poor progress RCN has been able to make wiring Quincy.

The MDTE record does not document the circumstances under which Verizon agreed to box 20% of the poles in Quincy, even though Verizon had every opportunity to do so, and in any case it is irrelevant.⁷¹ What is relevant is that those poles are boxed because it suited Verizon to box or permit the boxing of those poles. Now, when RCN seeks to box some of the other 80%, Verizon has refused. In an Affidavit dated May 14, 2000 and submitted to the MDTE, Verizon's spokesperson claimed that Verizon "evaluates requests for access based on widely-accepted standards regarding capacity, safety, reliability, and general engineering (*i.e.* National Electric

⁶⁹ It appears that the anti-boxing attitude evident in Massachusetts is a legacy of the New England Telephone Company since it is not characteristic of the pre-merger Bell Atlantic.

⁷⁰ MDTE, Tr. at 4140-47.

⁷¹ At MDTE Tr. 4139-40, Verizon claimed that it would box where another solution would be very expensive or on a temporary basis, but it offered no documentation whatsoever that those principles were followed in the decision to allow boxing of 20% of the poles in Quincy nor any justification for refusing to allow RCN to box using these criteria.

Code, National Electric Safety Code, Bellcore Blue Book Manual of Construction Procedures... and Occupational Safety and Health Act."⁷² Some months later, when asked whether boxing violates any industry code, the Verizon representative said no.⁷³ In this respect, at least, Verizon is right, as Appendices B-G confirm. Indeed, these statements reveal that boxing is practiced by Verizon itself, or with its concurrence, in at least three other states – New York, New Jersey and Pennsylvania; it is only in Massachusetts that boxing is forbidden.

The Verizon witness did say that boxing is undesirable because it can require a more expensive make-ready process or scheduling problems for the next attacher or even for Verizon.⁷⁴ But this is both irrelevant and too indefinite to justify discriminatory treatment. Presumably boxing created the same potential issues for the 20% of the poles which have already been boxed, yet Verizon boxed or permitted the boxing of those poles. Moreover, before the MDTE Verizon failed to cite a single instance in which this had proven to be the case. As ¶ 19 of the *Cavalier* case makes crystal clear, RCN, or any other attacher, must have the right to box poles and yet RCN does not. Verizon's statements in the LaCouture-Ruesterholz Declaration that it does not

⁷² See MDTE Affidavit of Gloria Harrington dated May 14, 2000, at 6, and ¶ 15. In its letter to the Mayor of Quincy, Verizon also claimed that attaching fiber in the supply space was forbidden by the NESC code which mandated a 40 inch separation. Letter of May 2, 2000, Attachment C to Appendix A hereto. This simply misreads the NESC, which provides for exceptions to the 40 inch separation under certain circumstances. See App. G, Statement of E. Feloni, at ¶ 13.

⁷³ MDTE Tr. at 4145.

⁷⁴ MDTE Tr. at 4144.

favor itself are thus untrue. For this reason alone Verizon is in violation of its obligations under sections 224, 251, and 271 of the Act.

Indeed, Verizon's unsubstantiated antiboxing justifications verge on the comical. Before the MDTE it claimed that the Mayor of Quincy not only would not allow the municipal space to be used by RCN but that he wanted no further boxing of poles in Quincy.⁷⁵ At RCN's request the MDTE asked Verizon to substantiate the latter claim and Verizon conceded it could not do so.⁷⁶ What all this illustrates is an attitude-- a frame of mind-- an arrogance which belies the easy and superficial assurances tendered by Verizon in its filed materials. It is all the more striking that the poles' co-owner, Mass Electric, seems willing to try to come to grips with the issue whereas Verizon seems quite determined not to.

Notwithstanding Mass Electric's more forthcoming attitude, it is important that the Commission not allow Verizon to escape its legal responsibilities by attempting to blame restrictive practices on Mass Electric. When RCN requests the right to attach in the middle, or "safety" zone, Verizon claims that it must have Mass Electric's concurrence to do so. As Mr. Musseau indicates in Appendix B, Mass Electric then declines to grant such permission unless Verizon will also agree, and when the issue is returned to Verizon, it simply refuses, as its letter to the Mayor indicates. These ping-pong denials, however, require weeks or months of

⁷⁵ Affidavit of G. Harrington, ¶ 70; MDTE Tr. at 4145.

⁷⁶ See MDTE Record Request No. 319 and Verizon's Answer dated August 28, 2000, NET RR # 136.

delays, so that little forward progress can be made. These practices violate the law and must not be allowed to continue while Verizon is authorized to enter the interLATA market.

In connection with the boxing of poles, Verizon's refusal to permit RCN to hire its own fully qualified contractors to expedite the attachment process also warrants attention. The Commission has iterated and reiterated that attachers must be allowed to hire their own qualified employees or contractors to do pole attachment work as set forth both above in section III (B)(i). These cases are crystal clear that, provided attachers' employees or contractors are suitably qualified technically for the specific work required, pole owners cannot prohibit the use of such personnel. When it became apparent that Verizon lacked adequate craftspeople to promptly meet the pole attachment needs of the CLEC and/or cable attachers, RCN sought permission to supplement Verizon's personnel with fully qualified outside contractors.⁷⁷ Yet Verizon has continuously refused to permit anyone other than their own employees to do survey and make-ready work. Verizon justifies this restriction on the grounds that its labor contract forbids the use of outside contractors.⁷⁸

The requirement that RCN's survey and make-ready work can be accomplished only by Verizon's own employees is unlawful and as such is a violation of sections 224, 251, and 271 of the Act. Had RCN had access, as it should have had, to outside qualified contractors, both the make-ready work and the boxing of poles could have progressed more quickly, which, of course,

⁷⁷ See MDTE Supplemental Comments of Verizon at 44-45 and Checklist Affidavit at ¶ 156. It should be noted that cost was not the issue. RCN was prepared to pay for outside workers or even to pay overtime for Verizon's employees.

⁷⁸ See MDTE Tr. 4134-5.

would have accelerated RCN's ability to enter the market in Quincy and elsewhere. Before the MDTE, Verizon attempted to distinguish this Commission's requirement that attachers be able to use their own qualified personnel by claiming that the FCC's policy applied only to the attacher's own work and not to make-ready work.⁷⁹ There is no language in any Commission decision addressing this issue which justifies that distinction. On the contrary, in the *Reconsideration Order* the Commission specifically declined to modify its decision that "otherwise qualified, third-party workers may perform pole attachment and related activities, *such as make-ready work*, in the proximity of electric lines.⁸⁰ The Commission should therefore require Verizon to permit RCN to use its own, fully qualified, contractors or employees to do survey work, make-ready work and to box poles.

To put the effects of Verizon's unlawful exclusion of RCN from nondiscriminatory access to the poles in Quincy into some perspective, it is noteworthy that in the communities in which RCN can attach to the poles of its partner, BecoCom, the average elapsed time for survey, make-ready, construction and the initiation of service is less than a year. By contrast in Quincy

⁷⁹ MDTE Tr. at 5621-2.

⁸⁰ *Reconsideration Order* at ¶ 86 (emphasis added). Since attachment work in the vicinity of electric power lines poses some risk to life, it is the hardest case in which to justify the use of outside contractors. The use of such contractors other than in the vicinity of power supplies is, therefore, *a fortiori*. See also *Application of Bellsouth Corporation, Bellsouth Telecommunications, Inc. and Bellsouth Long Distance, Inc., for Provision of in-Region, Interlata Services in Louisiana*, 13 FCC Rcd 20599 (1998) : "BellSouth has satisfied its statutory obligation to permit attaching parties to use the individual workers of their choice *to perform any make-ready or other work* necessary for the attaching of their facilities, so long as those workers have the same qualifications as BellSouth's own workers." *Id.* at ¶ 181 (emphasis added; footnote omitted).

the process started in the summer of 1999, and although RCN has been licensed by Verizon on about one third of the poles, it has not been fully licensed on any,⁸¹ is not physically attached to any poles, and cannot contemplate the inauguration of service for quite some time. No more clear illustration of the effectiveness of anticompetitive practices could be imagined.

V. RECOMMENDATIONS

As noted above, RCN has no objections whatever to Verizon's entry into the interLATA market in Massachusetts. Indeed, it welcomes such entry because it will help to make the public more aware of the variety of long distance options that are available to it, and such awareness, in the long run, will expand the market for all carriers. Nor does RCN seek to demonize Verizon. It has unquestionably taken some steps to open up access to poles and conduits, even if most of its measures are window-dressing and designed principally to ensure grant of its interLATA request rather than to actually expedite the development of competitive offerings. What is important to RCN is that Verizon be compelled to fully and fairly open its poles and conduits to new competitors, and until it has done the latter, authority to enter the interLATA market must be withheld. Specifically, RCN seeks denial of Verizon's present application until it has demonstrated, by a test period of three months, at a minimum, that it has done the following:

1. Removed all restrictions on the use of qualified non-Verizon contractors to do survey, make-ready and pole attachment work;

⁸¹ Where poles are jointly owned, both owners must issue licenses before RCN can attach to the pole.

2. Permitted RCN to box, bracket, backbolt or otherwise configure Verizon's poles, both those already boxed and those not yet boxed, provided only that such reconfiguration complies with all applicable state, federal, or industry codes.

If the Commission agrees with RCN that the record shows that Verizon has violated its obligations under checklist item #3, RCN urges the Commission not to approve the pending Application by imposing a condition subsequent on Verizon to bring itself into compliance.⁸² Instead, the Commission should affirmatively find that grant of the Application will be dependent on Verizon's proving to the Commission's satisfaction that it has brought itself into compliance with the Act. This, in turn, will require actual performance over a period of some months, coupled with clear and explicit obligations the violation of which will lead to the imposition of substantial fines or prompt withdrawal of section 271 authority.

Again, RCN does not seek to delay Verizon's entry into the interLATA market, but as a CLEC and overbuilder active in most of the northeast Verizon areas, RCN knows only too well that once the 271 application is granted, RCN's pole attachment issues will get short shrift from Verizon and, whatever the law, as a practical matter the burden will fall on RCN to see that

⁸² In *Bell-Atlantic-New York, supra*, the Commission observed that it applies the standards set forth in section 271 on a pragmatic basis, considering, for example "the overall picture presented by the record, rather than focusing on any one aspect of performance." *Id.*, at ¶ 5. It is not apparent what the Commission meant to convey by these words. If the intended meaning is that within any one checklist item there is room for a rule of reason or balancing of good and bad performance, RCN does not in principle disagree. But if the Commission intends to assert that compliance with each and every checklist item can be waived by the Commission in its discretion, RCN disagrees vehemently. There is no basis cited by the Commission, and RCN knows of none, for any such interpretation. A failure to meet the minimum requirements of any individual checklist item should lead to rejection of the application.

Verizon complies with its obligations. This is not what Congress intended and should not be countenanced.

Respectfully submitted,

RCN-BecoCom, L.L.C.

By:



William L. Fishman
Swidler Berlin Shereff Friedman, LLC
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
Telephone: (202) 945-6986
Facsimile: (202) 424-7645

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