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November 14, 2000

VIA MESSENGER

Magalie Roman Salas, Esq.
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

RECEIVED

NOV 14 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE FILING

Re: Application of Verizon-New England, Inc., et al. for Authorization
to Provide In-Region interLATA Services in Massachusetts
Docket No. 00-176

Dear Ms. Salas:

On November 8, 2000, Ms. Suzon Cameron and Eric Einhorn of the Common Carrier Bureau staff telephoned the undersigned to request ex parte responses from RCN-BecoCom, L.L.C. to a number of issues arising in the above-captioned proceeding. These issues related to the Commission's jurisdiction to adjudicate a BOC's compliance with checklist item # 3 (access to poles, conduits, licenses, and rights-of-way) in a state with its own pole attachment regulations; the number of pole attachment licenses issued in Quincy, MA by Verizon, and the relative costs of pole replacements, make ready work and boxing.

Submitted herewith in an original and six copies is RCN-BecoCom's response, in the form of Ex Parte Supplemental Comments. Because this filing is submitted at the staff's request, the 20 page limit is inapplicable, as set forth in DA 00-2159. Please note that copies of this letter and the accompanying filing are being served by U.S. mail, first class postage-prepaid, on Verizon.

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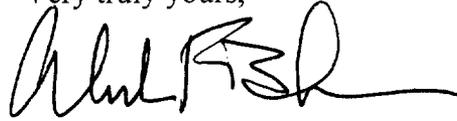
Magalie Roman Salas, Esq.

November 14, 2000

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Any questions in connection with the foregoing should be directed to the undersigned.

Very truly yours,

A handwritten signature in black ink, appearing to read "William L. Fishman". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

William L. Fishman

Enclosure

cc: Susan Pié, Esq.
Eric Einhorn, Esq.
Suzon Cameron, Esq.

ORIGINAL

Verizon Massachusetts 271 Application
Supplementary Ex Parte Comments of RCN
November 14, 2000

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Application by Verizon New England Inc.,)
Bell Atlantic Communications, Inc. (d/b/a)
Verizon Long Distance), NYNEX Long)
Distance Company (d/b/a Verizon Enterprise)
Solutions), and Verizon Global Networks, Inc.,)
for Authorization To Provide In-Region,)
InterLATA Services in Massachusetts)

CC Docket No. 00-176

**SUPPLEMENTARY EX PARTE COMMENTS
OF
RCN-BECOCOM, L.L.C.**

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November 14, 2000.

SUMMARY

This ex parte filing is made at the request of the staff to address certain matters raised by Verizon in its ex parte filings with the Commission and elaborated upon in its Reply Comments. Verizon is not in compliance with its obligation to provide nondiscriminatory access to its poles and is accordingly not entitled to grant of its application. RCN wishes to "box" Verizon's utility poles in various communities, a process in which wiring is attached to the side of a pole which is not being used by other attachers. Boxing dramatically accelerates the construction of a competitive network by eliminating the need for time-consuming rearrangement of existing wiring on the side of the pole which is already carrying other wiring. Boxing is widespread in the utility industry, is safe, and is widely practiced by Verizon itself. Because RCN is unique in needing access to virtually every residential home in its service area it needs to access up to 60,000 poles.

Nevertheless Verizon refuses to allow such boxing, and argues that it is not necessary in the test community of Quincy, MA, because it has already licensed many poles and very few poles need "make ready" work to accommodate RCN. These contentions are factually erroneous and misleading. The issuance of a bare license, when the rearrangement of existing wiring has not taken place, is of little or no use to RCN. Similarly, the fact that only 55 poles need to be replaced or that make ready on that portion of the poles controlled by Verizon is required only in one percent of the cases is irrelevant because the substantial make ready work remaining to be done on other portions of the poles renders rapid construction of RCN's system in Quincy

impossible. In fact, 6,000 of the 9,500 poles in Quincy carry wiring in violation of industry codes. Boxing would eliminate virtually all make ready issues.

There is no sound reason not to allow boxing, which this Commission has specifically endorsed as one of a number of proactive affirmative steps pole owners must take to find room on their poles for competitive carriers or cable overbuilders. RCN is the only CLEC/cable overbuilder in Massachusetts which will be competing with Verizon for every residential subscriber in the areas RCN plans to serve. Verizon's only reason to deny RCN the right to box poles is that it wishes to delay as long as possible RCN's competitive entry into its telephone, ISP, DSL, and other markets. The FCC has mandatory and exclusive jurisdiction under section 271 of the Act to determine whether Verizon is complying with its checklist obligations concerning access to poles. Contrary to Verizon's assertions, the "reverse preemption" in section 224 of the Act does not oust the Commission of jurisdiction to determine whether Verizon is complying with its section 271 checklist obligations.

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**Before The
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

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InterLATA Services in Massachusetts)	

**SUPPLEMENTARY EX PARTE
COMMENTS
OF
RCN-BECOCOM, L.L.C.**

RCN-BecoCom, L.L.C. ("RCN"), pursuant to an oral request of FCC staff described in an ex parte Notice accompanying this filing, herewith, by undersigned counsel, submits these Supplementary Comments to respond to ex parte materials submitted to the Commission by Verizon and to address factual matters first introduced by Verizon in its Reply Comments.

I. BACKGROUND

In its initial Opposition to Verizon's section 271 application, RCN contended that Verizon was not in compliance with section 271(c)(2)(B)(iii), concerning nondiscriminatory access to poles, conduits, ducts, and rights of way, because it unjustifiably refused to permit RCN to "box" utility poles co-owned by Verizon in Massachusetts. In its Reply Comments, RCN demonstrated why the Massachusetts DTE's favorable Evaluation of Verizon's application

was factually and legally erroneous. Both RCN and Verizon have also conducted ex parte meetings with the Commission's staff. On Tuesday, November 7, 2000, Common Carrier Bureau staff telephoned the undersigned and sought RCN's response to certain representations made by Verizon in one of its ex parte meetings with the staff. This inquiry concerned Verizon's allegation that it had already licensed RCN to attach to some 4,500 poles in Quincy. Staff also inquired about the relative cost of substituting a new pole for an existing one rather than boxing an existing pole. Finally, RCN was asked for its views on Verizon's suggestion set forth in its Reply Comments, that the question whether Verizon is in compliance with its pole attachment obligations is committed by section 224(c)(1) of the Communications Act¹ solely to the jurisdiction of the MDTE. This submission provides RCN's response to those inquiries.

On November 3, 2000, Verizon filed its Reply Comments which, in part, address for the first time the merits of RCN's contentions concerning Verizon's failure to fulfill its market-opening obligations under section 271. The portion of Verizon's Reply Comments that addresses RCN's pole attachment contentions is in violation of the rules established by the Commission for the processing of all section 271 applications in that its substance should have been addressed in Verizon's Application itself, rather than withheld until this stage of the proceeding.² Verizon

¹ 47 U.S.C. § 224(c)(1).

² See RCN Opposition filed October 16, 2000 at 5-7, citing Memorandum Opinion and Order, *Bell Atlantic-New York Section 271 Application*, 15 FCC Rcd 3953, *affirmed sub nom. AT&T v. FCC*, 230 F. 3d 607 (D.C. Cir. 2000) at ¶ 36 (BOC must address in its initial application all facts that the BOC can reasonably anticipate will be at issue).

indisputably knew that RCN believed Verizon had acted unlawfully in refusing to permit nondiscriminatory access to pole boxing, yet it chose to forego any discussion of the issue in its initial application. Moreover, Verizon's new data and argumentation concerning pole boxing is intertwined with its ex parte presentations to the staff and with the staff's request for responses to Verizon's ex parte presentation to such a degree that responding in an integrated way to Verizon's allegations is the most efficient and effective way to address the newly-introduced contentions.³

II. RCN'S NEED TO BOX POLES IN MASSACHUSETTS

In its initial Opposition RCN indicated that it needed to attach to a minimum of 60,000 poles in Massachusetts in communities in which its partner, BecoCom, a subsidiary of Boston Edison company, was not the joint pole owner.⁴ RCN noted that it, unlike virtually all other CLECs in Massachusetts, intended to offer both telecommunications and broadband video services to all the residents within its service area, and accordingly needed access to far more poles than other CLECs.⁵ RCN's requirement to attach to so many poles is undoubtedly unique and RCN fully recognizes that the scope of its need for such widespread attachment poses special

³ In the event these Supplementary Ex Parte Comments are deemed in whole or in part improperly filed, RCN asks for leave to file them in view of Verizon's blatant disregard of the section 271 filing procedures. In the alternative, RCN asks that those portions of Verizon's Reply Comments which violate the filing procedures be stricken from the record.

⁴ RCN Opposition at 9-10.

⁵ *Id.* at 4-5.

challenges to Verizon. On the other hand, it is the very scope and uniqueness of this need which makes RCN the quintessential product of the pro-competitive provisions of the Telecommunications Act of 1996. Of all the CLECs in the Massachusetts market, only RCN plans to bring its competitive offerings to all residential subscribers within its service area. For Verizon, therefore, to archly note that "only" RCN raises the issue of boxing poles⁶ is simply to miss the point.

In any event, RCN contended that to proceed in the traditional fashion of doing make-ready work on those poles needing such efforts would be a multiyear undertaking at the rate Verizon was proceeding, and that RCN had to have faster access to the Verizon poles.⁷ Such access could be expedited by allowing RCN to box the poles, or attach to the so-called "field side" of the pole where no other attachers' wiring is generally located. RCN proved, by numerous sworn statements, that this form of attachment is widely practiced in the pole construction industry, is widely practiced by Verizon in other states, and is fully consistent with all applicable industry and government codes, including the Bellcore Blue Book.⁸ RCN noted

⁶ Joint Reply Declaration of Lacouture and Reusterholz ("Joint Reply Declaration") at ¶ 153; Verizon Reply Comments at 39.

⁷ RCN Opposition at 8, 11, 34-5.

⁸ *Id.* at Apps. B-G. In its early filings RCN contended that Verizon itself employs boxing both in Massachusetts and in other jurisdictions. *See* RCN Opposition at 13, and Reply Comments at 2. On November 11, 2000 RCN received a letter from Verizon-Pennsylvania, Inc. which, summarizing that company's requirements for third party attachments, lists boxing as an approach to be considered and approved/rejected on a per attachment basis. *See* App. C hereto. RCN seeks nothing more in this proceeding than the same privileges in Massachusetts. As

also that, by way of example, in Quincy, Massachusetts, it had been denied the right to box poles even though some 20% of Verizon's poles were already boxed, except for the 20% which were already boxed. By way of illustration of the slow pace imposed on RCN by Verizon, RCN noted that after a year of pole attachment efforts and the payment of some \$478,071 for make ready and survey costs, licenses had been issued for only approximately one third of the poles in Quincy.⁹

In an ex parte meeting which occurred on October 27, 2000, Verizon apparently advised the Commission staff that it has now granted licenses in Quincy for 4,400 poles,¹⁰ and in its Reply Comments Verizon notes that this number is now up to 4,600.¹¹ Moreover Verizon also argues, albeit for the first time, that in fact only some 55 poles in Quincy need to be changed out for taller poles – a task which is not inordinately time consuming or expensive, and that RCN's emphasis on boxing is misplaced because more than 99% of the poles requested by RCN can be

Verizon itself notes in its Att. S to the Joint Reply Declaration, "Licensees should expect the same standards to apply, within the law, when dealing with Bell Atlantic from one district to another." *Id.* at p. 3 of 7.

⁹ RCN Opposition. at 11.

¹⁰ Verizon Ex Parte filing of October 30, 2000.

¹¹ Verizon Reply Comments at 39, n. 57; Joint Reply Declaration at ¶ 156. RCN's original claim that only one third, or some 3,200 had been licensed was accurate when made. Over time, the number of licenses increases. However, the underlying point that RCN should have access to boxing which would significantly accelerate its system build out is unaffected by the foreseeable growth in pole licenses as time passes (and as RCN continues to press its objections to the section 271 application). As shown herein, the slow licensure is only a symptom of Verizon's anticompetitive practices.

licensed without any make ready work.¹² This sounds quite forthcoming and cooperative, but is fundamentally misleading because what it neglects to tell the Commission is that the make ready work needs to be done not on Verizon's wiring, but on the wiring of other attachers and on the electric wiring.¹³ By refusing to allow RCN to box on the field side of the pole in the communications space, Verizon effectively forces RCN to address complicated, expensive, and slow-moving make ready work with Mass Electric, the joint pole owner and with CLEC, cable, or other attachers. Verizon well knows that this delay is the inevitable result of its refusal to allow boxing, and is indeed the reason for its refusal.

III. THE FCC HAS EXCLUSIVE AUTHORITY TO ADDRESS POLE ATTACHMENTS IN THE SECTION 271 CONTEXT

RCN has been asked to address the contention, apparently made by Verizon representatives in an ex parte meeting with the staff, and repeated in its Reply Comments,¹⁴ that section 224(c)(1)¹⁵ of the Communications Act bars this Commission from considering RCN's pole attachment claims in this proceeding. Simply put, Verizon argues that the "reverse preemption" language of section 224(c)(1) ousts this Commission of its authority even to consider RCN's claim that Verizon is not in compliance with its market opening obligations set

¹² Verizon Reply Comments at 40; Joint Reply Declaration at ¶ 154.

¹³ Apps. A and B hereto.

¹⁴ Verizon Reply Comments at 39-40.

¹⁵ 47 U.S.C. § 224(c)(1).

forth in sections 271(c)(2)(B)(iii), the derivative obligations in section 251(b)(4), and its pole attachment obligations under section 224(f)(1).¹⁶ Similarly, Verizon disputes RCN's claim that the Cable Services Bureau's recent decision in *Cavalier Telephone Company, L.L.C. v. Virginia Electric and Power Co.*, 15 FCC Rcd 9563 (CSB, 2000), imposes any duty whatever on the MDTE. Further Verizon argues that *Cavalier* in any event does not impose a pole boxing obligation on Verizon beyond the extent of its own boxing.

The problem with Verizon's jurisdictional arguments is that they read section 271(c)(2)(B)(iii) and 251(b)(4) out of the Communications Act. It is otherwise indisputable that section 271 determinations belong solely to the FCC. Neither the local state regulatory body nor the U.S. Department of Justice has a determinative role; they are both advisory, albeit Congress directed the FCC to give substantial weight to the views of the DOJ but imposed no such requirement on any state regulatory findings.¹⁷ The Commission itself has recognized that inconsistent state attachment policies must give way to its own.¹⁸ Because the question of pole attachments is one of the so-called checklist items specifically listed by Congress in the statute as one of 14 individual determinations which the FCC is instructed to make and because section 271(d)(3)(A)(i) requires the Commission specifically to find that the applicant has "fully

¹⁶ Respectively 47 U.S.C. § 271 (c)(2)(B)(iii), 251 (b)(4), and 224 (f)(1). *See* Verizon Reply Comments at 39-40.

¹⁷ *Compare* section 271(d)(2)(A) *with* section 271(d)(2)(B).

¹⁸ *See Local Competition*, First Report and Order, at ¶ 1154; RCN Opposition at 25-26.

implemented the competitive checklist," it is simply inconceivable that Congress intended to leave a factual determination of the BOC's compliance with section 271(c)(2)(B)(iii) beyond the jurisdiction of the FCC and to make it solely a matter for state determination. While more comprehensive drafting would have been helpful in this respect, the overall intention of the Congress is quite clear. When it enacted the Telecommunications Act of 1996, Congress gave the FCC the authority to do what is necessary to fulfill all of the Act's provisions without reference to any other law. The Supreme Court has found that Congress intended its grants of authority to implement the Telecommunications Act to be read broadly when potential conflicts with state grants of authority arise.¹⁹

In this case, Congress intended provision of the items detailed in the checklist to be no less than a prerequisite for interLATA relief, regardless of the circumstances present in the state for which interLATA relief is sought. The Senate Report on the Telecommunications Act of 1996 makes this clear: "[T]he Committee intends the competitive checklist to set forth what must, at a minimum, be provided by a Bell operating company in any interconnection agreement approved under section 251 to which that company is a party (assuming the other party or parties to that agreement have requested the items included in the checklist) before the FCC may

¹⁹ In *AT&T v. Iowa Utilities Board*, the Court said that Congress intended the Commission's rulemaking authority to extend to implementation of the local competition provisions, even where such implementation reaches past purely interstate matters. *See* 525 U.S. 366, 378 (1999). The Court dismissed arguments that the Commission's jurisdiction was limited to interstate matters and found that Section 201(b) of the Communications Act (47 U.S.C. 201(b)) "means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include 251 and 252, added by the Telecommunications Act of 1996." *Id.*

authorize the Bell operating company to provide in region interLATA services."²⁰ Furthermore, the Conference Report on the Telecommunications Act states, "The Commission is specifically prohibited from limiting or extending the terms of the 'competitive checklist'"²¹

To be sure, in the context of an ordinary pole attachment complaint filed under section 224 of the Act against a non-BOC utility, or a BOC which either has not yet applied for, or has already been granted interLATA authority in a particular state, section 224(c)(1) remits the matter to the sole jurisdiction of a certified state. But when such a dispute arises as an integral issue to a section 271 application, the only interpretation that is clearly consistent with the overriding policy purpose and jurisdictional allocations of section 271 is plenary power in the FCC to resolve the issue.

How any other interpretation would work is difficult to imagine. If Verizon's view of the law is correct, the FCC would presumably be bound to make its section 271 determination without knowing if the state regulator will ultimately find for the complainant or the defendant in the subsequently filed formal complaint.²² Presumably one way to deal with this would be to put the federal section 271 application on hold pending the release of a state regulatory decision, but the 90 day clock in section 271(d)(3) would preclude that approach as well.

²⁰ S. Rep. No. 104-23, at 43 (1995).

²¹ H.R. Conf. Rep. No. 104-458, at 144 (1996).

²² Even if the complaint had been previously filed, the 90 day statutory limit imposed on the Commission by section 271(d)(3) might leave it in the position of having to act before a state determination had been made.

Other difficulties with Verizon's view of the law arise. As RCN has previously noted, in a formal complaint the burden of proof is generally on the complainant, whereas in the section 271 context it is firmly and unmistakably on the BOC seeking section 271 approval.²³ Shifting the contentions from a section 271 proceeding to a formal complaint filed at the MDTE, therefore, relieves the BOC applicant of a burden of proof Congress intended it to bear and, contrary to section 271(d)(2)(B), which assigns no particular weight to the local regulator's findings, would make those findings conclusive and binding on the FCC in respect to checklist item # 3.

Verizon observes that RCN has not filed a formal pole attachment complaint at the MDTE and, by inference, should not be allowed to cure its failure to do so.²⁴ But RCN had no obligation to file such a complaint and indeed, could not even have done so until after the MDTE adopted its revised pole attachment rules in July of this year.²⁵ By that time the issue had long since been presented to the MDTE in its section 271 proceeding, and no party suggested at that time that RCN should withdraw its opposition to Verizon's application. Even if RCN had chosen

²³ RCN Oppos. at 7 n.12 citing to the *Bell-Atlantic-New York* decision at ¶ 47 (BOC applicant retains at all times the ultimate burden of proof.)

²⁴ Verizon Reply Comments at 39-40.

²⁵ 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, Docket No. 98-36, 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>.

to proceed in that fashion, since the MDTE has never adjudicated a pole attachment complaint involving the issue of nondiscriminatory access, the prospect of a resolution prior to this Commission's upcoming section 271 decision would have been virtually nonexistent. In short only the FCC can adjudicate the sufficiency of Verizon's pole attachment practices in the context of its section 271 application. Only the MDTE can adjudicate a pole attachment complaint. Given the nature of this proceeding, the decision is solely the Commission's.

Verizon's arguments concerning the proper application of the *Cavalier* case must fail along with its erroneous assertions about the lack of FCC jurisdiction. Since section 271 commits the present pole attachment case to the Commission itself, it is entirely free to look to its own precedent to interpret the situation as set forth in this record. That precedent includes both the *Cavalier* case, the Commission's Report and Order in the *Local Competition* Docket, and the *Local Competition* Reconsideration Order. RCN has already set forth its views on what those decisions mean in the present context and will not burden the record with mere repetition.²⁶

However, since Verizon for the first time seeks to improperly narrow the teaching of the *Cavalier* case, some brief rebuttal is required. Verizon contends that the *Cavalier* case does not compel Verizon to permit boxing and implies that *Cavalier* does not compel a pole-owning utility to permit an attacher to use competent and qualified outside contractors for any required make-ready work.²⁷ But as RCN has already noted, *Cavalier* explicitly holds, citing to prior

²⁶ RCN Opposition at 20-25 and RCN Reply Comments at 19-22.

²⁷ Verizon Reply Comments at 41.

Commission language, that utilities must permit outside contractors to perform make ready work, and there is no differentiation in that holding between make ready on existing wiring or on that of the attacher.²⁸ Verizon cites the *Cavalier* decision at ¶ 19 and n.77 for the erroneous assertion that *Cavalier* actually requires utilities to permit attachments using methods "only to the extent" the utilities use these methods themselves.²⁹ But this is not at all what *Cavalier* says when read as a whole. Paragraph 19 notes that if the pole owner uses a particular method of attachment for its own wiring, it must allow others to do so as well, but also declares the broad principle that "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."³⁰

Indeed, it should be emphasized that this is the fundamental principle applicable to pole attachment obligations. As set forth in the *Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration:

We reiterate that the principle of nondiscrimination established by section 224(f)(1) requires a utility to take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs. Furthermore, before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access.³¹

²⁸ RCN Opposition at 23; RCN Reply Comments at 20-23.

²⁹ Verizon Reply Comments at 41, n.59.

³⁰ *Cavalier* at ¶ 19 quoting from the *Local Competition* Reconsideration Order at ¶ 51.

³¹ 14 FCC Rcd 18049 (1999) at ¶ 51.

IV. RCN'S ROLLOUT OF ITS COMPETITIVE SERVICES WOULD BE SUBSTANTIALLY EXPEDITED BY HAVING THE RIGHT TO BOX POLES

Verizon seeks to resist RCN's request to box poles by contending that its licensing of poles in Quincy is moving ahead rapidly and, accordingly, pole boxing is not necessary. A related contention is that only some 55 poles need replacement and less than 1% of the poles in Quincy require make ready work before licensing by Verizon.³² These contentions are thoroughly misleading and entirely miss the point. What Verizon is saying is not that no make-ready work is required in the communications space but that Verizon itself need not or will not rearrange its own wires.

As set forth in Appendices A and B hereto, the sworn Statements respectively, of Patrick Musseau and Thomas Steel, the bare licensure of a pole by Verizon does not actually do much to advance the attachment process. This is true for a number of reasons. When Verizon issues licenses to RCN, as it has been doing, before it has coordinated the necessary make-ready work in the communications space (CLEC or cable), the licensed pole is not available to RCN notwithstanding the issuance of the license. Until the make-ready work has actually been completed, there is no room for RCN on a pole which needs such work. Under the applicable Aerial License Agreement, excerpts of which are attached to Mr. Musseau's Statement, it is Verizon's responsibility to coordinate the make-ready work and the license should be issued only after that work has been done. In effect, a license issued before the make ready work has been

³² Verizon Reply Comments at 39-40; Joint Reply Declaration at ¶ 154.

completed is useless and meaningless, except, of course, that it permits Verizon to claim that it has issued a license.

Stated differently, the issuance of licenses by Verizon without having coordinated the make-ready work simply ignores the need to do such work either in the communications space, or, even worse, shifts the work to the wiring on the electrical spaces on the pole. Verizon can therefore say correctly that only one percent of the poles for which RCN has applied to it require make ready because it is referring only to its own wiring in the communications space on the pole, and by refusing to address the rearranging of others' existing wiring in the communications space, Verizon simply shifts the burden back to RCN to find space in the communications segment or in other sectors of the pole. In any case the make ready work remains to be done. Again, if Verizon would simply allow RCN to box in the communications space, no make ready work would be required either in the communications or any other assigned spaces on the pole. Moreover, and crucially, as Mr. Steel notes in App. B, Verizon will not allow RCN to attach to any pole co-owned by Verizon until the make ready work has been done, even if that make ready work must occur in the segments of the pole not directly controlled by Verizon. This is called a shell game.

While make ready work is not inexpensive, the real issue for RCN is not the cost, but the delay in getting to market. Coordination of make ready work among the joint pole owners and the preexisting attachers can be very time consuming — amounting to many months. Accordingly, the bare fact that Verizon has now issued more than half of the requisite licenses in

Quincy is of little relevance to the continuing delay in attaching to the poles in Quincy. Similarly, the suggestion that RCN's attachment problems in Quincy can be reduced to the replacement of some 55 poles is simply absurd. The fact remains, as Mr. Musseau noted earlier, that RCN has been unable to attach to a single pole in Quincy after some 16 months of engagement in the attachment process.³³ Moreover, if the poles needing replacement are scattered in various areas, as is usually the case, the inability to attach to those poles can make attaching to any other poles in that line operationally difficult and pointless. The wiring, to be useful as a distribution medium, has to go all the way from origin to destination; it cannot carry optical or electric impulses over the gaps which are created by the odd pole that must be replaced.

Even as a matter of common sense Verizon's contention is not persuasive. Why would RCN have expended the resources to battle with Verizon over pole boxing if the replacement of only some 55 poles could solve its attachment problems? It would not have objected either to the process or to the cost, if the change out of these poles had permitted RCN to initiate its competitive service offering in Quincy or anywhere else.³⁴ For these reasons the number of poles

³³ See also App. B to RCN's Opposition at 3 in which Mr. Musseau addressed the licensing shell game practiced by Verizon.

³⁴ In Appendix A hereto, Mr. Musseau indicates that the cost of replacing a pole is in the range of \$1500 to \$2500. See App. A at 2. While these costs are not trivial, they are relatively insignificant when compared to the overall costs of designing and building out a broad band network in a community like Quincy (or any other such community). Mr. Musseau also indicates that make ready work, while it varies more widely than pole replacement costs, is in the range of \$1,000. *Id.* at 2. Boxing averages about \$100. per pole and is therefore on average far

which need to be physically replaced and the costs of doing so are totally irrelevant. Verizon well knows that these factors are irrelevant; its reliance on them in its Reply Comments can only be intended to obfuscate the real issue.

Verizon also introduces the suggestion that if RCN is not able to attach to the jointly owned poles in Quincy, it is because Mass Electric, the co-owner of virtually all of those poles, has not issued a license, and that the absence of such licensure is strictly attributable to RCN.³⁵ This is yet another red herring. As Mr. Musseau notes, in cases of joint pole ownership both the Aerial License Agreement and the IOA ("Intercompany Operating Procedures Agreement") obligate an attacher to receive a license from each joint owner. Mass Electric, however, has a communications subsidiary which has provided wiring to RCN's competitors (other than Verizon) in Quincy, so it too has a motive to delay, complicate, and burden the issuance of licenses.³⁶

Verizon's emphasis on the need to replace only 55 poles in Quincy or to do make ready work on Verizon's own wiring in the communications space only on one percent of the poles, even if it were not totally misleading (which it is), simply does not address the fundamental

less expensive. But more important than the relative costs is that either of the other procedures is very time consuming and complex because each of the parties owning wiring on the pole must be consulted and must cooperate in the construction work. Again, the time factor is more important than the costs.

³⁵ Verizon Reply Comments at 39, n. 57.

³⁶ App. A at 1- 2.

issue, which is that RCN is entitled, by Commission precedent, to box poles if pole boxing would expedite its access to poles and is otherwise consistent with sound attachment practice. RCN has demonstrated that the latter is in fact the case. Pole boxing can be done quickly and at very little cost, as Mr. Musseau states and as Verizon well knows. In its Reply Comments it admits that boxing is not in principle barred by its operational manual, although it claims that it is somehow an inferior method of attaching wiring.³⁷ As RCN demonstrated in its initial Opposition, the pole construction industry in general endorses boxing and Verizon practices it widely in other states. It is strange indeed that in Massachusetts, where RCN would be a major competitor in the Boston and suburban Boston market for telephone, ISP and DSL services, boxing suddenly becomes a seriously deficient attachment method and must be approached with extreme caution.

But in reality, there is no mystery here: Verizon is acting anticompetitively to slow down RCN's growth in the market so as to give itself as much of a head start as it possibly can. Indeed, the Verizon Reply Comments contain at least one hint about Verizon's motives. Verizon

³⁷ Verizon Reply Comments at 40-41. Given the alleged inferiority of boxing as an attachment method, it is curious that in Medford, another Boston suburb, some 45% of Verizon's poles are boxed. *See App. A* at 2. Moreover, Att. S to Verizon's Joint Reply Declaration, at 4-7 lists, "generally speaking... in order of preference" five methods to make additional space available on a pole. Item 2, a "B bolt or backslide hanger," is essentially the same as boxing. Replacing the pole with one of an appropriate height is listed as the fifth, or least desirable method. Apparently, as RCN has previously indicated in its Opposition and Reply Comments, boxing is a fully adequate approach technically where Verizon wishes to box, but is operationally questionable where it does not. This sort of situational ethics is indicative of disingenuousness, if not of something worse.

indicates that if it allowed RCN to freely box poles, the company might be unable in the future to permit boxing for other attachers.³⁸ Whether or not this is true – and there is not a shred of evidence in the record that boxing poles more than once is necessarily imprudent – it is a wholly illegitimate reason to deny boxing privileges to an attacher who is ready, willing, and able to establish its network by boxing. If Verizon’s motive is to reserve space for itself, that is a violation of its obligations as a pole owning utility under section 224 of the Act and Commission policy unless it has a reasonable and specific bona fide development plan.³⁹ If its motive is to reserve space for some unknown future attacher, there is no justification for such an approach and it should be affirmatively discredited by the Commission. Clearly Verizon’s refusal to allow a potentially significant competitor to attach to its poles will inhibit the development of competition and is functionally unbounded. This vague concern about future circumstances should not be allowed to stand as an adequate justification to keep RCN off its poles.

Verizon’s Reply Comments also reiterate the MDTE’s conclusions in its Evaluation that Verizon is compliant with the 14 point checklist, including checklist item # 3. RCN has already responded to the MDTE’s views in its Reply Comments. It is worth noting, however, that Verizon unfortunately indulges in selective argumentation and mischaracterization of the record in order to minimize the significant concern expressed by the Department of Justice in its

³⁸ Joint Reply Declaration at ¶ 157.

³⁹ See *Local Competition Reconsideration Order* at ¶ 54 and RCN’s Opposition at 24-5.

Evaluation.⁴⁰ Verizon thus claims that with respect to checklist items, including # 3, the DOJ "expresses no concerns"⁴¹ and "agrees in virtually all respects with the DTE's assessment, with only one notable exception regarding Verizon's performance in providing xDSL-capable loops."⁴²

IV. CONCLUSION

Before the MDTE RCN alleged that Verizon was deficient in its checklist #3 obligations in numerous respects. In the FCC's proceeding RCN has chosen to emphasize its need to box Verizon's poles so as to focus sharply on that single issue. RCN understands that pole attachments are not the most glamorous aspect of competitive entry. To RCN, however, they are absolutely crucial. For residential subscribers in the Boston metropolitan area RCN is the best hope for meaningful competitive entry across telecommunications and broadband video markets. Pole boxing, which is routinely practiced throughout the industry, would substantially accelerate RCN's entry into the Massachusetts market so that it can compete with Verizon. Although RCN has noted repeatedly that Verizon discriminates against it because Verizon has already boxed 20% of the poles in Quincy, that historical fact is not even the main point: this Commission has

⁴⁰ See DOJ Evaluation at 7 n. 28 (RCN's pole attachment allegations "deserve careful attention.")

⁴¹ Verizon Reply Comments at 23.

⁴² Verizon Reply Comments at 4. Verizon also claims that DTE's findings "are supported unequivocally by independent auditor KPMG... ." *Id.* at 1, when, of course, KPMG never addressed most of the checklist items.

indicated that utilities like Verizon have an affirmative, proactive, good faith obligation to assist competitors in gaining access to their poles. If Verizon had never boxed one pole in Quincy it would still have that affirmative duty, and it has failed to provide this Commission with a single defensible reason for not allowing RCN to box poles.

Instead, its Reply Comments argue that RCN is somehow ignorant of the status of its pole applications in Quincy, is too inept to know the basic facts in Quincy or indeed its own business, and, for some undisclosed reason, commits time and resources to an issue which simply does not exist, *i.e.*, that a mere 55 poles in the Quincy universe of 9,300 poles need to be replaced and make ready work in the communications space is required on only one percent of the poles. These arguments would be persuasive only if RCN were astonishingly incompetent. In fact they are designed to mislead the Commission because they ignore the practical reality that make ready work required by CLECs or cable operators in the communications space or on any portion of a pole, including that segment not controlled by Verizon, would enormously delay attachment. They also ignore the simple point which RCN seeks to emphasize: boxing would permit attachment without having to coordinate essentially any make ready work.

Verizon has contended at various stages of the proceeding before the MDTE that pole boxing violated industry codes or was unsafe but later abandoned these contentions when challenged to justify them. It now admits that boxing may be allowable on an "exception" basis but says that it doesn't want to allow boxing because it needs to reserve the boxing option for some unspecified future attacher (who may be Verizon itself). The shifting arguments and the

inability to provide a single sound objection to freely permitting boxing should confirm what RCN has been saying all along: boxing is a standard, and fully viable option which the FCC has fully and indeed forcefully endorsed and Verizon is resisting it because boxing would permit RCN to become a meaningful competitor more quickly if it were freely allowed to box. A more naked, and a more simple, assertion of anticompetitive conduct would be difficult to imagine. The application must be denied on this ground alone.

Respectfully submitted,

RCN BECOCOM, L.L.C.

By:



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Counsel to RCN BECOCOM, L.L.C.

November 14, 2000

APPENDIX A

STATEMENT OF PATRICK W. MUSSEAU

My name is Patrick W. Musseau. I have previously supplied formal statements to the FCC in connection with Verizon's section 271 application and my qualifications are a matter of public record.

Despite VZ-MA's claims that only 55 poles require make ready work in Quincy, the truth is that almost all of the poles in Quincy require some degree of make ready work. When VZ-MA claims that only "a tiny fraction" of the poles requested by RCN require make ready work (Joint Reply Declaration at paragraph 154), they refer only to make ready work on their own wiring, and do not address any other make ready issues pertaining to other existing attachments. Over 6,000 poles in Quincy contain clearance or safety violations due to neglect by the pole owners in enforcing NESC and Bluebook construction practices. When VZ-MA issues licenses to RCN before all such make ready work has been completed, the licenses are virtually worthless. In addition, VZ-MA's unwillingness to lower its existing attachments forces RCN to seek extensive make ready work in the segment of the pole controlled by Mass Electric. That is, Mass Electric must raise its wiring to make space available for RCN in accordance with NESC separation standards. The movement of electric facilities costs up to three times more than moving communications attachments, due to the safety procedures necessary when working in the Electric Supply Space, and this work takes longer to complete than moving communications facilities. RCN has asked VZ-MA to lower their wiring to create the required separations for RCN. This would have lowered make ready costs and accelerated the licensing process. VZ-MA has consistently refused to do so. I note that in its recently submitted Joint Reply Declaration, Att. S, VZ-MA lists as an approved method to make space available for additional pole attachments raising or lowering the existing attachments. See page 4.

In any case, until the make ready work has been done on the electric supply portion of the poles, Mass Electric will not issue a license to RCN, and under the terms of Articles VI and VII of the Aerial Licensing Agreement, RCN cannot attach to any pole before having received a

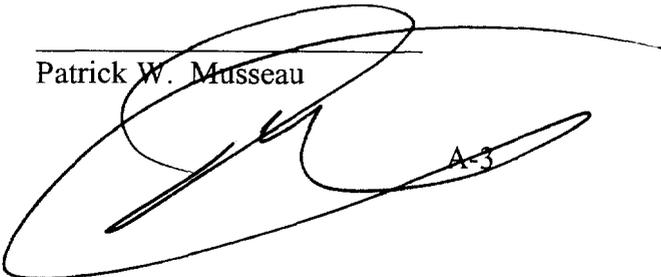
license from both VZ-MA and Mass Electric. RCN understands that the terms of the Intercompany Operating Procedures Agreement between VZ-MA and Mass Electric similarly require that no license be issued until all required make ready work, wherever it must be done on a pole, has been performed. The licenses issued by VZ-MA to RCN are therefore not in accord with its Aerial License Agreement with RCN or with its Intercompany Agreement with Mass Electric. I note also that Mass Electric, through a communications subsidiary, has constructed a distribution network in Quincy for an entity with which RCN will be competitive when its system is built.

Article V (Specifications), paragraph A in the VZ-MA/RCN Aerial Licensing Agreement states that "Licensee's attachments shall be placed and maintained in accordance with the requirements and specifications of the latest editions of the Manual of Construction Procedures (Blue Book), Electric Company Standards, the National Electrical Code (NEC), the National Electrical Safety Code (NESC) and rules and regulations of the Occupational Safety and Health Act (OSHA) or any governing authority having jurisdiction over the subject matter. Where a difference in specifications may exist, the more stringent shall apply." Because boxing complies with all the foregoing requirements, VZ-MA's refusal to permit boxing on any suitable pole is a violation of the Aerial Licensing Agreement between VZ-MA and RCN.

VZ-MA suggests that boxing is not the attachment method of choice. In this respect, the Commission should know that 45% of the poles jointly owned by VZ-MA in Medford, a Boston suburb, are already boxed. The replacement of a pole with a new, usually taller, pole varies in cost depending on the attachments on the pole being replaced, its height, the height of the new pole, and a variety of other factors including the location of the pole and the subsurface material into which it must be placed. On average, however, the cost of setting a new pole is in the range of \$1500. To \$2500. While make ready work can also vary widely, on average the cost is about \$1000 per pole. Boxing, on the other hand, if done by a crew working along a group of poles to be boxed, would cost on average about \$100 per pole.

Attached hereto are relevant excerpts from the Aerial Licensing Agreement with RCN.

Under penalty of perjury, I declare the foregoing to be true, complete and correct to the best of my knowledge, information, and belief.



Patrick W. Musseau

November 14, 2000

ARTICLE VI- Legal Requirements, Section (a)

" Licensee shall be responsible for obtaining from the appropriate public and/or private authority any required authorization to construct, operate and/or maintain its attachment on public and private property at the location of Licensor's poles which Licensee uses and shall submit to Licensor evidence of such authority before making attachments on such private and/or private property."

ARTICLE VII- Issuance of Licenses, Section (a)

"Before Licensee shall attach to any pole, Licensee shall make application for and have received a license therefor in the form of Appendix III, Forms A-1 and A-2.

ARTICLE VIII- Pole Make Ready Work, Section (c)

"In the event Licensor determines that a pole to which Licensee desires to make attachments is inadequate or otherwise needs rearrangement of the existing facilities thereon to accommodate the attachments of Licensee in accordance with the specifications set forth in Article V, Licensor will indicate on the Authorization for Pole Make-Ready Work (Appendix III, Form B2) the estimated cost of the required make-ready work and return it to Licensee.

ARTICLE VIII- Pole Make Ready Work, Section (d)

"Any required make-ready work will be performed following the receipt by Licensor of completed Form B2. Licensee shall pay Licensor for all make-ready work completed in accordance with the provisions of APPENDIX I, and shall also reimburse the owner(s) of other facilities attached to said poles for any expense incurred by it or them in transferring or rearranging such facilities to accommodate Licensee's pole attachments. Licensee shall not be entitled to reimbursement of any amounts paid to Licensor for pole replacements or for rearrangement of attachments on Licensor's poles by reason of the use by Licensor or other authorized user(s) of any additional space resulting from such replacement or rearrangement.

APPENDIX B

STATEMENT OF THOMAS K. STEEL JR.

My name is Thomas K. Steel, Jr., I am Vice President of RCN with responsibility for facilitating construction of RCN-BecoCom, L.L.C.'s fiber optic facilities-based network in Massachusetts. I have been with RCN since 1997. I served as Commissioner of the Massachusetts Cable Television Commission from 1980 - 1984 and as Deputy Director in the Communications Division of the New York Public Service Commission in 1996. In between I worked as a Vice President and General Counsel of the New England Cable Television Association.

I have reviewed Verizon's Reply Comments filed in FCC Docket No. CC 00-176 and the accompanying attachments insofar as they relate to the boxing of utility poles in Massachusetts. I make this statement in response to Verizon's assertion that it has licensed some 50% of the poles in Quincy and that very little make ready work is required.

The reason RCN is the only CLEC contesting Verizon's pole attachment procedures is that RCN is the only company seeking access to some 60,000 poles in twelve communities where Verizon owns and controls access to the poles. RCN is the only company bringing competitive cable and telephone facilities based services to every home in each community that it serves. This requires an attachment to every single pole. No other CLEC is in this category.

Verizon is trying to have it both ways. The pole owning utility significantly delays RCN's entry into the marketplace and makes itself look pro-competitive while doing so. Verizon is able to accomplish this feat by routinely refusing to adjust its own wires to facilitate RCN's attachment. Verizon moved its wires on only 17 of some 9,500 poles in Quincy. The pole owning utility's position is that the communications space is its own and RCN must rely on other attachers to move to make space available. This triggers make-ready to be done by the electric utility at three times the cost to RCN that otherwise would be incurred if make-ready were limited to the communications space. Delay is also a factor, which is exacerbated when RCN must also wait for the cable operator to move its wire. This is all caused by Verizon's refusal to

adjust its wires or allow boxing. If Verizon permitted RCN to box on any pole, subject to technical industry standards, the need for electric, CLEC, and cable make-ready would be eliminated. This would speed the advent of competition by a factor of two to three times.

Instead, Verizon prefers inaction. Verizon washes its hands of make-ready, issues a license and sends RCN off to the electric utility, CLEC, and cable operator who are already on its poles. The license is meaningless at this point in the process because Verizon will not allow RCN to actually attach until all other make-ready work is done. In effect, Verizon does no make-ready on its own but creates the need for make-ready by others with its refusal to allow boxing in the communications space on the pole. The delay and increased costs are significant.

RCN needs to attach to at least 60,000 poles. Verizon can act to facilitate competition by working with RCN to create space on the pole in the communications space. Verizon can act to change its position of steadfast refusal to ever lower its wires even when to do so would greatly mitigate make-ready. Verizon can act to allow RCN to box in the communications space subject to industry standards. Any or all of these actions would be pro-competitive. The present inaction and refusal to adapt to RCN's timely demands for access to 60,000 poles can only be construed as anti-competitive.

In addition, Verizon can heavily influence the actions of the co-owner of the poles, Mass Electric. Faced with a daunting amount of make-ready work, Mass Electric was willing to discuss alternatives with RCN to expedite access to the poles. One approach was allowing attachment at roughly the same spot on the pole in the supply space that RCN uses in the service area of its partner BecoCom. This method would allow RCN to build out a city the size of Quincy in a year. This has proven to be a safe and effective means of attachment consistent with the National Electric Safety Code as amended in 1992. Apparently, Verizon has stood fast on the restrictive provisions of a twenty year old joint pole ownership agreement with Mass Electric, and Mass Electric has backed away from such discussions. This attitude and approach of Verizon is quietly but highly effective in securing delays in RCN's construction plans. Yet

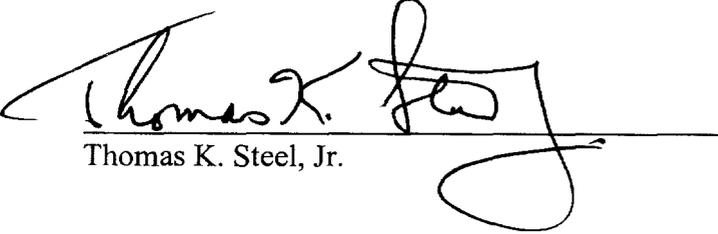
Verizon again has it both ways because Verizon can tout the fact that its make-ready work is done and stress that any delay is caused by Mass Electric.

Boxing is widely practiced in the pole construction industry, is safe, and is a standard technique throughout the country. Even Verizon widely boxes its poles in Massachusetts and in other states, as RCN has already proven in this proceeding. Boxing is a much faster attachment method than virtually all others because it takes advantage of existing unused space on the field, or non-street side of an already wired pole. Verizon has not been able to provide a single defensible or legitimate reason to refuse RCN the right to box poles.

Although its grounds for refusing shift over time, the underlying result is that we have been delayed materially in building out our network and are therefore far behind our original construction goals. Where we cannot compete with Verizon because they will not allow us to access their poles by boxing, the public loses the benefits of our lower rates and broader, integrated service offerings.

It is true that in order to be "fully" licensed and authorized to attach to a jointly owned pole in Massachusetts, RCN would need a license from the co-owner of the pole, Mass Electric, as well as from Verizon. On a properly boxed pole the RCN attachment would be in the communications space which is in the Verizon portion of the pole. There would be no reason for Mass Electric as the co-owner to deny or delay a license attachment grant to RCN.

I have reviewed the foregoing Ex Parte Supplemental Comments and declare, under penalty of perjury that, to the extent I am personally acquainted with the facts set forth therein, they are true, complete, and correct to the best of my knowledge, information, and belief.


Thomas K. Steel, Jr.

November 14, 2000



APPENDIX C

Verizon Pennsylvania, Inc.
Outside Plant Engineering
180 Sheree Blvd.
Exton, Penna. 19341



November 11, 2000

Marvin Glidewell
Director, Engineering & Construction
R.C.N.
850 Rittenhouse Road
Trooper, Pa. 19403

Dear Marvin,

Thanks for your letter of October 13; I am more than happy to review and hopefully clarify Verizon-Pa.'s requirements for Third Party Attachment. I will take each of the bullet-points from your letter and add a few additional items not mentioned.

1. As you know, Verizon-Pa. requires all third party companies to use the Telcordia manual of construction procedures, #SR-1421, also known as the "Blue Book". In December of 1998 the minimum allowable clearance from the top of the pole on a non joint-use pole was changed from 4 to 10 inches. For existing structures, the facilities on the structure need not be modified if the installation was in compliance with the rules that were in effect at the time of the original installation.
2. Poles identified as requiring replacement, either from a formal inspection or through internally generated reports, are typically tagged and reported to Engineering. Engineering issues a work order to construction for replacement. Cycle time for construction start to complete depends on safety issues, 60-day notification, joint utility coordination and available work force. Pole replacement is driven by the need to bring the pole up to standards. Third party attachments to poles previously identified as requiring replacement but not yet replaced, will be dealt with on an individual basis.
3. Verizon's process for dangerous poles starts with the placement of a danger tag and/or notification to both the Engineering and Construction offices. Under no circumstances are attachments of any kind allowed. Poles determined to be unsafe by test or observation may not be climbed or worked on until they are made safe.
4. Verizon will permit the use of pole top pins when it has been determined that a pole top pin is the appropriate make ready solution. This decision is based on the PECO Energy standards number S-1136 and S-1138 which were forwarded to Verizon by R.C.N. in mid-August, 2000. The only use of pole top pins on Verizon poles will be by the Power Company in power space.

Also, please share the additional requirements below in an attempt to become more efficient and eliminate confusion in the field.

- No fiberglass pole top extensions (PTE)
- No extension arms of any length to gain clearance.
- No cable moves on dip poles.
- No bolt extenders

- Maintain a 40” clearance between power and communications attachments on pole.
- B-Bolt or “Boxing” type construction by any 3rd party will be considered and approved/rejected on a per attachment basis. A reminder that all application, make ready and licensing procedures will apply.

Please communicate this memo to your team. Any questions can be referred to me at 610-280-5525.

Jesse Guarneri
Manager – O.P.E.-EA PA/DE
Verizon-Pa. Inc.

Cc: Norm Parish
Alan Young

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2000, a copy of the foregoing Supplementary Ex Parte Comments of RCN-BecoCom, L.L.C. was served on the following parties via messenger or, if marked with an asterisk, by first class postage-paid U.S. mail:

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Federal Communications Commission
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Washington, D.C. 20554

Susan Pié
Policy and Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
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Verizon Massachusetts 271 Application
Supplementary Ex Parte Comments of RCN
November 14, 2000

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Odessa Bolton
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