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EX PARTE OR LATE FILED
December 11, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
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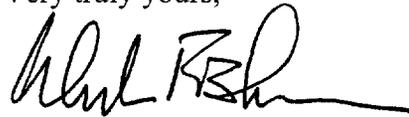
EX PARTE

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:

The attached letter from Mr. Scott Burnside of RCN-BecoCom, LLC was provided today to Chairman Kennard and, as indicated, to other Commissioners and staff members. Any questions in connection with the foregoing should be directed to the undersigned.

Very truly yours,



William L. Fishman

Attachment

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December 11, 2000

Honorable William E. Kennard
Chairman
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445 12th St., S.W.
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*Re: Application of Verizon New England Inc., et al, for Authorization to
Provide In-Region InterLATA Services in Massachusetts, Docket No. 00-176*

Dear Mr. Chairman:

I am writing to correct the grossly misleading statement in Verizon's ex parte letter to you of December 1, 2000 to the effect that "there is no serious dispute that Verizon satisfies at least 13 and one-half points of the 14 point checklist." Verizon seeks to leave the impression that only its compliance with its DSL obligations is seriously disputed. With all due respect to Verizon, RCN BecoCom, LLC ("RCN"), seriously disputes that Verizon is in compliance with checklist item number 3, that is, the provision of nondiscriminatory pole access on terms and conditions that are just and reasonable.

The record in Docket No. 00-176 demonstrates that, while Verizon itself resorts to pole boxing whenever it wishes, it refuses to allow RCN to employ pole boxing techniques when RCN wishes to do so. The record also demonstrates that there is no substantial justification based on capacity or safety for such denial, even though these are the only statutorily acceptable criteria. Such denial of access and discriminatory treatment is a clear violation of sections 251 and 224 of the Communications Act and preclude grant of Verizon's section 271 application. To date, RCN has addressed checklist item number 3 in its Initial Comments (styled as an opposition), ex parte meetings with the Commission's staff, Reply Comments, and, at the staff's request, a filing styled Supplemental Ex Parte Comments.

In the aggregate RCN's three written filings occupy well over 100 pages of text and include eight sworn statements focusing almost exclusively on the pole attachment issue. The Justice Department's Evaluation of Verizon's application noted that a serious issue exists in respect to RCN's allegations: "RCN's allegation that Verizon is not providing nondiscriminatory access to its poles... deserves careful attention because the alleged failure, if true, could

substantially delay the emergence of an additional facilities-based provider."¹ To characterize the record, therefore, as devoid of any "serious dispute" about checklist item number 3 is the height of arrogance, totally misleading, and should perhaps serve as a warning about the degree of confidence the Commission can repose in Verizon's statements as a whole.

In light of Verizon's false assertion, I offer some further details on the dispute. Because RCN has addressed the pole attachment issue at some length in its filings, I will only summarize the issue here. RCN is operating in the Boston metropolitan area as a bundled service provider, *i.e.*, we offer both traditional telephone and cable service combined with high speed internet access. Because our business plan contemplates providing service to residential subscribers (unlike most CLECs), we need access to some 60,000 utility poles in various communities which RCN has been certificated and franchised to serve. Pole attachment, which is part of checklist item number 3, is governed by section 224 of the Act, and specifically the very broad mandate of that section compelling pole-owning utilities to provide nondiscriminatory access to their poles for cable and telecommunications attachers.²

The attachment of wires to existing poles is, fundamentally, a very simple procedure: the wiring is affixed to the pole with a variety of attachment techniques, allowing a certain amount of vertical distance between various attachers' wires and segregating the wiring into sections by function. Electric wiring is generally at the top of the pole separated from communications wiring which is below it. There are numerous industry codes of good practice, including national electrical codes, OSHA regulations, and the Bellcore Blue Book. In the first instance wiring is generally placed on the street side of poles for ease of access and repair, but when that side of the pole becomes congested there remains space on the non-street, or field side of the pole and wiring may be affixed to that side of the pole. When wiring appears on both sides of the pole, the industry describes the practice as "pole boxing."

¹ Evaluation, p.7 n. 24. The DOJ goes on to note that it could not fully evaluate the issue because "Verizon did not address [it] fully in its application." *Id.* This failure to address a known dispute is a clear violation of the Commission's prior directive to section 271 applicants to address all known disputes in their applications. *See Memorandum Opinion and Order, Bell Atlantic-New York Section 271 Application To Provide In-Region InterLATA Service in the State of New York*, 15 FCC Rcd 3953, ¶ 36, (1999), *affirmed sub. nom. AT&T v. FCC*, 230 F.3d 607 (D.C. Cir. 2000) (BOC must address in its initial application all facts it can reasonably anticipate will be at issue).

² 47 U.S.C. § 224(f)(1). Section 271 applicants are required to demonstrate compliance with section 224 by the terms of section 271(c)(2)(B)(iii), 47 U.S.C. § 271(c)(2)(B)(iii).

Because so many poles in the Boston metropolitan area are already laden with numerous wires, the normal process of rearranging such wiring to create space for RCN, known as "make-ready" has proven to be very slow and cumbersome. Until that process is complete, however, unless RCN is allowed to box the necessary poles it cannot offer competing CLEC or cable services in areas where RCN's partner BecoCom does not jointly own local poles or right of way. When there is a substantial amount of make-ready, pole boxing is a fully acceptable alternative technique which is faster and less expensive. In the Boston area, RCN's local exchange CLEC service competes with Verizon's. RCN's ISP service competes with Verizon's ISP and DSL service. RCN's cable modem service competes with Verizon's ISP and DSL service. And RCN's interLATA service will be competitive with Verizon's if its section 271 application is granted. To expedite the roll-out of its services, therefore, RCN sought to avoid the cumbersome make-ready task by boxing Verizon's poles. Verizon has declined to permit RCN to do so. In effect, by restricting RCN's ability to box poles, Verizon materially slows RCN's entry into local competitive markets in the Boston area.

The record as it currently stands shows the following:

- Boxing is far faster than rearrangement of the wiring on poles, and costs about \$100 per pole, as compared with the \$1000 cost, on average, to rearrange existing wiring on a pole.
- Verizon has boxed some 20% of its poles in Quincy and 45% of its poles in Medford, but will not allow RCN to box any poles which are not already boxed;
- There is no standard industry code of good practice which bars boxing or even characterizes it as an undesirable attachment technique;
- Boxing is widely practiced in the U.S. by a variety of pole-owning utilities;
- Verizon boxes or permits boxing on substantial percentages of its poles in other states;
- Verizon offers no justification to limit boxing other than that it might, conceivably, foreclose the opportunity to a future attachor to box a pole or lead to some unspecified increase in the cost of repairing or replacing a boxed pole;

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- Whereas Verizon claimed that there were very few poles in the representative town of Quincy which should even be considered as candidates for boxing because they required make-ready, in fact some two thirds of the poles in that community are currently out of industry specifications and do in fact require such rearrangement if boxing is to be disallowed;

From the legal perspective, if boxing is an acceptable industry practice – which the record demonstrates it is – Verizon is legally bound to accept it. The Commission has on several occasions indicated that utilities have an affirmative, proactive duty under section 224 of the Communications Act to find ways and means to make pole space available to attachers:

- 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."³

- In the same *Reconsideration Order* the Commission said that with respect to non-electrical utilities' denials of access:

"[T]he issues will be very carefully scrutinized, particularly when the parties concerned have a competitive relationship. Thus, non-electrical utilities generally must accommodate requests for access, except for reasons of capacity, safety, reliability and generally applicable engineering purposes that cannot reasonably be ameliorated by modification."⁴

³ 14 FCC Rcd 18049 (1999) at ¶ 51.

⁴ *Id.* at ¶ 11 (footnotes omitted).

- More recently, in *Cavalier Telephone Company, LLC v. Virginia Electric and Power Co*, the Cable Services Bureau said the following:

"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."⁵ *Cavalier* also emphasizes that a pole owner must allow others to use any particular method of attachment which it uses for its own wiring.⁶ *Cavalier* further notes that a pole owner "may only deny access for the reasons stated in the Pole Attachment Act."⁷ These reasons are those related to capacity or safety.⁸
- These principles have been reiterated by the Commission in its recent decision expanding the scope of its inside wiring rules:

"In the *Local Competition Pole Attachments Reconsideration Order*, we reiterated 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 attachments just as it would expand capacity to meet its own needs."⁹ In the same decision the Commission described section 224(f) of the Act as "a mandatory access provision... ."¹⁰

⁵ 15 FCC Rcd 9563 ¶ 19 (CSB, 2000) *app. for rev'w. pending*.

⁶ *Id.*

⁷ *Id.*, ¶ 14.

⁸ *See* 47 U.S.C. § 224(f)(2).

⁹ *First Report and Order and Further Notice of Proposed Rulemaking* in WT Docket No. 99-217, *Fifth Report and Order and Memorandum Opinion and Order* in CC Docket No. 96-98 and *Fourth Report and Order and Memorandum Opinion and Order* in CC Docket No. 88-57, FCC 00-366, *rel.* Oct. 25, 2000, ¶ 67, quoting from *Local Competition First Report and Order, Order on Reconsideration*, 14 FCC Rcd 18049 at ¶ 51. *See also First Report and Order* at n. 22.

¹⁰ *Id.* at ¶ 145.

If anything in the pole attachment arena is clearly and forcefully articulated in the Commission's recent precedent, it is that pole-owning utilities have a duty to do everything consistent with capacity and safety concerns to facilitate attachment to their poles.¹¹ Yet in bold contradiction of these mandates, Verizon approaches pole boxing in the most crabbed and negative way possible: searching for any excuse, however lame, to deny RCN the right to box poles. And why? Because, like RCN, Verizon well understands that boxing is fast, efficient, and effective. If RCN were allowed to box freely it could accelerate its competitive offering and provide more meaningful and earlier competition to Verizon.¹²

RCN certainly agrees that DSL issues have occupied the great bulk of the parties' attention in this proceeding. Pole attachments are not technologically forward-looking; they are not exciting and they are not very complicated. In fact they are based on technology more than a century old. But for RCN, which seeks to serve ordinary retail subscribers by building its own fiber optic network throughout residential areas, it is the humble pole attachment issue which is resoundingly important. Indeed, it is crucial. If Verizon can achieve immediate entry into the interLATA market while denying RCN use of the most effective and efficient pole attachment methodology, the public in Massachusetts will be the loser. In its recent Petition for a Writ of Certiorari seeking Supreme Court review of *Gulf Power Co. et al. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), the Commission described the proper interpretation and implementation of the Pole

¹¹ In its pleadings RCN emphasized that Verizon had boxed some 20% of the poles in Quincy merely to illustrate that boxing is a technique used by Verizon and that denying RCN the right to box the other 80% was discriminatory. But in fact if Verizon had never boxed a single pole its refusal to allow RCN to do so, unrelated as that refusal is to considerations of engineering or safety, is simply unlawful.

¹² It is true that the Massachusetts DTE has approved Verizon's pole attachment practices. See DTE Evaluation at 224-250. In doing so, the DTE disregarded the recommendation of its own state Attorney General who concluded that Verizon was not in compliance with checklist item number 3 (Mass. Attorney General Comments, at 6-7). RCN respectfully suggests that the DTE is simply misreading the applicable law when it concludes that, so long as Verizon denies the boxing privilege to all CLECS or cable companies wishing to rely on it, Verizon complies with the nondiscriminatory obligations in the Communications Act. RCN remains of the view that since Verizon has boxed poles seemingly wherever it wished to do so it cannot deny the privilege to others, even if it denies it equally to all others.

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Attachment Act¹³ as one of "exceptional national significance."¹⁴ Similarly, if Verizon can delay RCN's entry into the CLEC, cable, and high speed internet markets by denying RCN nondiscriminatory access to its poles, the fundamental national policy embodied in the Telecommunications Act of 1996 is frustrated at the outset. Because the record demonstrates overwhelmingly that Verizon is not offering RCN nondiscriminatory access to its poles on just and reasonable terms and conditions as required by section 271(c)(2)(B)(iii), its application for InterLATA authority in Massachusetts must be denied.

Very truly yours,



Scott Burnside

cc: Office of Commissioner Ness
Office of Commissioner Tristani
Office of Commissioner Furtchgott-Roth
Office of Commissioner Powell
Dorothy Attwood, Common Carrier Bureau
Eric Einhorn, Common Carrier Bureau
Suzon Cameron, Common Carrier Bureau
Francis Marshall, U.S. Department of Justice
Cathy Carpino, Massachusetts DTE
Karlen Reed, Office of the Attorney General of Massachusetts

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¹³ 47 U.S.C. § 224.

¹⁴ Petition of the FCC and the United States in *FCC and U.S. v. Gulf Power Company, et al.*, Case No. 00-832, filed November 22, 2000, at 17.