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verizon

January 22, 2008

BY HAND

Honorable Jaclyn A. Brilling
Secretary
New York Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: Cases 07-V-1523, 07-V-1524, 07-V-1525, and 08-V-0005

Dear Secretary Brilling:

Enclosed please find an original and 25 copies of the Petition of Verizon New York Inc. for Rehearing or, in the Alternative, Reconsideration of Orders for Confirmation Issued in Cases 07-V-1523, 07-V-1524, 07-V-1525, and 08-V-0005. Because the relevant provisions of the franchise agreements and confirmation orders are identical in all four proceedings, we have combined our requests into a single petition.

Respectfully submitted,

Joseph A. Post

cc: Ms. Mary Ann Roberts
Town Clerk
Town of Ossining
16 Croton Avenue
Ossining, New York 10562

Ms. Christine Dennett
Village Clerk
Village of Briarcliff Manor
1111 Pleasantville Road
Briarcliff Manor, New York 10510

Ms. Angela Everett
Village Clerk
Village of Sleepy Hollow
28 Beekman Avenue
Sleepy Hollow, New York 10591

Ms. Mary Ann Roberts
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Village of Ossining
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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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Petition of Verizon New York Inc. for Certificate of Confirmation for its Franchise with the Town of Ossining, Westchester County	Case 07-V-1523
Petition of Verizon New York Inc. for Certificate of Confirmation for its Franchise with the Village of Briarcliff Manor, Westchester County	Case 07-V-1524
Petition of Verizon New York Inc. for Certificate of Confirmation for its Franchise with the Village of Sleepy Hollow, Westchester County	Case 07-V-1525
Petition of Verizon New York Inc. for Certificate of Confirmation for its Franchise with the Village of Ossining, Westchester County	Case 08-V-0005

PETITION OF VERIZON NEW YORK INC. FOR REHEARING OR, IN THE ALTERNATIVE, RECONSIDERATION OF ORDERS FOR CONFIRMATION ISSUED IN CASES 07-V-1523, 07-V-1524, 07-V-1525, AND 08-V-0005

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January 22, 2008

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Petition of Verizon New York Inc. for Q Certificate of Confirmation for its Franchise with the Town of Ossining, Westchester County	**Case 07-V-1523**
Petition of Verizon New York Inc. for Q Certificate of Confirmation for its Franchise with the Village of Briarcliff Manor, Westchester County	**Case 07-V-1524**
Petition of Verizon New York Inc. for Q Certificate of Confirmation for its Franchise with the Village of Sleepy Hollow, Westchester County	**Case 07-V-1525**
Petition of Verizon New York Inc. for Q Certificate of Confirmation for its Franchise with the Village of Ossining, Westchester County	**Case 08-V-0005**

PETITION OF VERIZON NEW YORK INC. FOR REHEARING OR, IN THE ALTERNATIVE, RECONSIDERATION OF ORDERS FOR CONFIRMATION ISSUED IN CASES 07-V-1523, 07-V-1524, 07-V-1525, AND 08-V-0005

Verizon New York Inc. ("Verizon") respectfully requests rehearing or, in the alternative, reconsideration, of the confirmation orders issued in these four proceedings on January 18, 2008. Verizon's request is limited to a single issue raised by each of the four orders — the consistency of the audit provisions (§ 7.4) of the four franchise agreements with the requirements of the Commission's Rule 895.1(m).[2] For the reasons set forth below, the Commission's

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[1] At page 2 of its September 24, 2007 "Order Denying Rehearing" in Case 07-C-0233, the Commission clarified that "[u]nder [Rule 3.7(b)], rehearing is available only upon a showing 'that the commission committed an error of law or fact or that new circumstances warrant a different determination.' Reconsideration, in contrast to rehearing, is not subject to Rule 3.7(b) and may be granted as a matter of discretion . . . ." Although we believe that the Commission has committed errors of law and fact in the four orders at issue here, out of an abundance of caution we seek reconsideration as well as rehearing.

[2] 16 NYCRR § 895.1(m).

conclusion that a limitation on the audit rights created by § 7.4 violates Rule 895.1(m) is based on a misunderstanding of the intent and effect of that section (and of related subsections of Section 7 of the agreements), and misinterprets the requirements of Rule 895.1(m). Accordingly, Verizon requests that the Commission reconsider and withdraw its conclusion that § 7.4 imposes restrictions on the franchising authorities' audit rights that are contrary to the Rule. Because the relevant provisions of the franchise agreements and the confirmation orders (and, of course, the provisions of Rule 895.1(m)) are identical in all material respects in all four proceedings, we have combined our requests for rehearing or reconsideration into a single petition.

Section 7.4 addresses the conduct of audits related to the "accurate payment of Franchise Fees" by Verizon. A variety of detailed provisions are included in § 7.4, including terms related to record retention, the allocation of the expenses of an audit, the right of the Local Franchising Authority ("LFA") to receive interest when franchise fees are re-computed as a result of an audit, the frequency of audits, and compensation arrangements to ensure the impartiality of the auditor. The section begins with a phrase —

> [s]ubject to . . . the LFA's imposition of substantially similar obligations to those contained in this Section 7.4 on all cable service providers in the Service Area . . .

— that was intended to ensure that Verizon and incumbent cable providers would be treated similarly by the LFA regarding audits. The Commission found this phrase to be inconsistent with Rule 895.1(m), on the grounds that "[n]o such limitation exists" in the Rule. Accordingly, the Commission required that that portion of § 7.4 be stricken.[3]

[3] The Commission's rejection of the quoted language can be found on page 5 of each of the four orders.

In fact, Rule 895.1(m) does not mention audits at all, but simply requires that a franchise agreement contain provisions in "substantial compliance with" a reservation "to the municipality [of] the right to inspect all pertinent books, records, maps, plans, financial statements, and other like materials of the franchisee, upon reasonable notice and during normal business hours." That basic requirement, however, is fully implemented by the "Open Books and Records" provision of the franchise agreements (§ 7.1), which gives the LFA the right, upon reasonable written notice, to "inspect the Franchisee's books and records pertaining to Franchisee's provision of Cable Service in the Franchise Area . . . ." There can be no doubt that § 7.1 — together with other provisions of Section 7 — are sufficient to ensure compliance with the basic requirements of Rule 895.1(m), without regard to the additional audit rights created by § 7.4.

Taken as a whole, the provisions of Section 7 go well beyond the bare requirements Rule 895.1(m). The additional provisions of the Section — such as the audit provisions of § 7.4 — are intended to establish a detailed framework of rights and obligations to govern the record review and audit process. It is desirable that franchise agreements do more than merely implement Rule 895.1(m) in its own words, since otherwise the parties would leave the door open to disputes concerning the manner in which document reviews and audits should be conducted. It is far better that these "rules of the road" be worked out in advance to the satisfaction of both parties, rather than at some later time when their ability to reach an agreement might be impaired by the adverse positions they will have already assumed in the context of a particular dispute.

The detailed procedures that are set forth in Section 7 are neither mandated nor prohibited by Rule 895.1(m); rather, they are supplemental provisions established through negotiations between Verizon and the relevant LFA. In these four cases — as well as in other cases in which

the parties agreed to language similar to that now before the Commission — the parties were represented by counsel and their agreements were the result of hard-fought and frequently lengthy bargaining. In each case, the LFA has considerable bargaining power since Verizon requires a confirmed franchise agreement in order to provide cable service within the LFA. There is thus no basis for disturbing the detailed allocation of rights and responsibilities that the parties have agreed to.

In particular, there is no basis for disturbing the parties' decision to make the obligations of § 7.4 contingent upon the imposition of similar requirements on other cable providers. That decision cannot lead to any non-compliance with Rule 895.1(m), since the Rule does not deal with audits, and, as noted above, the requirements of the Rule are fully satisfied by provisions of Section 7 other than those in § 7.4. Moreover, even if a particular term, condition, or obligation imposed by § 7.4 (or by any other provision of Section 7) *were* actually required by Rule 895.1(m), it would necessarily be imposed on all cable providers through their own franchise agreements; thus, there will be no occasion for applying the "substantially similar obligation" language of § 7.4 in such cases. In fact, that language would be relevant *only* in connection with a substantive term or condition of § 7.4 that is *optional* (*i.e.*, not required by Rule 895.1(m)) — and that therefore might not be included in other providers' franchise agreements if the substantially similar obligation language were omitted from § 7.4.

Consider, for example, the substantive provisions of § 7.4 that relate to reimbursement of the costs of the audit. The Commission's rules do not mandate that audit rights be given to the LFA, and thus are silent on the question of reimbursement for audit costs. To the extent that an LFA insists on an audit provision that includes cost reimbursement, and Verizon agrees to it, such a provision would not conflict with Rule 895.1(m). The parties' agreement to limit that

additional, optional obligation to situations in which substantially similar obligations are imposed on other, competing cable providers is a reasonable accommodation struck as a result of arms-length negotiations. Indeed, not all of Verizon's approved franchise agreements even include an audit provision, but instead contain only the "Open Books and Records" provisions of § 7.1, which satisfy the requirements of Rule 895.1(m).[4] Such provisions contain no limitation tied to the terms that the LFA imposes on incumbent cable companies.

By striking the limiting language regarding audits, the Commission has overturned the deliberate balance struck by the parties. This is contrary to the flexibility given to parties under Rule 895.2, which expressly authorizes them to add "such additional terms and conditions as the municipality and the franchisee deem appropriate, provided such additional terms and conditions are consistent with all Federal and State laws, rules, regulations and orders." The language stricken by the Commission in these four orders cannot lead to a violation of Rule 895.1(m) because the Rule is silent on the subject that the parties addressed in § 7.4.

A provision similar to § 7.4 was included in § 6.3 of Verizon's franchise agreement with the Village of Huntington Bay, which was confirmed by the Commission on the same day as the four franchise agreements at issue here. In the Huntington Bay order, the Commission did not require that the substantially similar obligation language be stricken, but simply stated, as it has in the past with respect to similar provisions in other franchise agreements, that "this provision may involve our competitive neutrality and level playing field standards and could result in disputes arising out of the application of those standards. Therefore, any such disputes involving

[4] *See, e.g.*, the franchise agreements between Verizon and the Village of The Branch (Case 07-V-1415), the City of Peekskill (Case 07-V-1161) and the Town of Cortlandt (Case 07-V-1010).

those standards should be brought to the Commission for resolution."[5] No different treatment is warranted for § 7.4 of the agreements at issue here.

Accordingly, Verizon respectfully submits that the Commission's treatment of § 7.4 in these four confirmation orders:

- is based on an error of law, to the extent that it assumes that Rule 895.1(m) precludes provisions that specify detailed terms and conditions relating to the audit and document review process, and that make those terms and conditions subject to the imposition of substantially similar obligations upon other cable providers;
- is based on an error of fact, to the extent that it assumes that the detailed provisions set forth in § 7.4 are necessary to ensure that the LFA has the right to inspect pertinent books and records consistent with Rule 895.1(m); and
- should therefore be reconsidered and withdrawn.

Respectfully submitted,

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January 22, 2008

[5] Case 07-V-1386, "Order and Certificate of Confirmation" (issued and effective January 18, 2008), at 4-5.