



THE COMMONWEALTH OF MASSACHUSETTS

Appellate Tax Board

100 Cambridge Street
Boston, Massachusetts 02114

(617) 727-3100

IN RE)
VERIZON NEW ENGLAND, INC.)
CONSOLIDATED CENTRAL VALUATION)
APPEALS)

DOCKET NO.
C273560

FY 2003, FY2004, FY2005,)
FY 2006, FY2007, FY2008)
_____)

ORDER

These 612 appeals were filed with the Appellate Tax Board ("Board") under G.L. c. 59, § 39 for Fiscal Years 2003 through 2008 by Verizon New England, Inc. ("Verizon") against the Commissioner of Revenue ("Commissioner") and various cities and towns and by certain cities and towns against Verizon and the Commissioner. A complete list of docket numbers and parties is included in Appendix A for Fiscal Years 2003 through 2007 and Appendix B for Fiscal Year 2008.

Commissioner Scharaffa heard the appeals, which were bifurcated for hearing, and he was joined in this Order by Chairman Hammond and Commissioners Egan, Rose, and Mulhern.

This Order addresses the first set of bifurcated issues, which includes the issues delineated in the Board's Order of September 7, 2007, including, but not limited to, whether poles and the wires thereon erected upon public ways are subject to central valuation and taxation under G.L. c. 59, §§ 2, 18 and 39.

On the basis of the Statement of Agreed Facts and attached exhibits introduced by the parties, and for the reasons described below, the Board finds and rules that:

1. Verizon is taxable on all of its poles and the wires thereon erected upon public ways under G.L. c. 59, § 2 and G.L. c. 59, § 18, First;
2. Only those cities and towns that filed petitions under § 39 may seek to establish that the value of Verizon's properties in their city or town was substantially higher than the value certified by the Commissioner; and
3. The Board's rulings and decisions in these appeals apply to all years at issue in these appeals, fiscal years 2003 through 2008, and cannot, as Verizon argues, be applied prospectively only.

I. POLES AND THE WIRES THEREON ON PUBLIC WAYS

The Board finds and rules that Verizon is taxable on all of its poles and the wires thereon erected upon public ways under G.L. c. 59, § 2 and G.L. c. 59, § 18, First, as well as its poles and the wires thereon erected upon private property.

Verizon and the Commissioner concede that Verizon's underground conduits, wires and pipes laid in public ways and its poles, underground conduits and pipes, together with the wires thereon or therein, laid in or erected upon private property are taxable under G.L. c. 59, § 18, Fifth, but argue that § 18, Fifth is the sole authority for taxation of poles and wires. However, in **RCN Becocom, LLC v. Commissioner of Revenue, et al**, Mass. ATB Findings of Fact and Reports, 2003-410, *aff'd* 443 Mass. 198 (2005), both this Board and the Supreme Judicial Court ("Supreme Judicial Court" or "Court") specifically rejected the taxpayer's argument that the clauses of § 18 are mutually exclusive in holding that all of the taxpayer's personal property, which included "all wires laid in or erected upon public ways," was taxable under § 18, First. **RCN**, Mass. ATB Findings of Fact and Report 2003 at 471.

In upholding the Board on all the legal issues it decided, the Supreme Judicial Court noted that "RCN concedes that its nonmachinery tangible personal property (in Newton, its wires¹ and underground conduits) is taxable under G.L. c. 59, § 18, First." **RCN**, 443 Mass. at 208.

¹ Because RCN owned no poles in Newton, neither the Board nor the Court specifically addressed the taxability of poles erected on public ways; however, the analyses of the Board and the Court in **RCN** concerning the taxability of wires under § 18, First is equally applicable to poles erected on public ways.

RCN had argued, however, that G.L. c. 59, § 18, Second governed the taxation of machinery; because, as a non-corporate entity, RCN's non-manufacturing machinery was not taxable under § 18, Second, and clauses Third through Seventh were also not applicable to it, RCN maintained that its non-manufacturing machinery was not subject to tax. After observing that its previous decisions had not addressed the issue of whether the various clauses of § 18 were mutually exclusive, the Court ruled that:

The plain text of the statute does not preclude the application of clause First to machinery that does not fall under the purview of clause Second. Thus, the board was correct in finding that all of RCN's personal property was subject to taxation.

RCN, 443 Mass. at 209.

The Court's analysis in reaching this conclusion is equally applicable to the present appeals. Section 18, First was enacted in 1918 as the "final step in the change of the principle of situs in taxing tangible personal property from the old rule of *mobilia sequuntur personam* by which the situs of all personal property was deemed to be at the domicile of the owner to the present practice of basing situs almost wholly on the physical location of the property." P. NICHOLS, TAXATION IN MASSACHUSETTS (3D ED. 1938) at 278. In contrast, § 18, Fifth, like § 18 Second at issue

in *RCN*, had already been enacted at the time § 18, Clause First was enacted. The applicable version of Clause Fifth is the result of three enactments: it was originally enacted in 1902 to tax the underground conduits, wires and pipes of corporations other than railway companies laid in public streets (St. 1902, c. 342, § 1); it was later amended, in response to *Coffin v. Artesian Water Co.*, 193 Mass. 274 (1906) (ruling that water pipes and mains located on private property were not taxable to the owner of the pipes and mains) to provide that poles, underground conduits, and pipes, together with the wires "thereon or therein, laid in or erected upon private property " were taxable to the owners of such property (St. 1909, c. 439, § 1); finally, it was amended to exclude poles and wires of street railway companies upon private rights of way not owned by the company (St. 1913, c. 458, § 1).

Because § 18, First was enacted after § 18, Fifth, it cannot be maintained in these appeals that § 18, Fifth is the exclusive provision under which Verizon may be taxable on its poles and wires; rather, as the Court ruled in *RCN*, § 18, First was enacted to tax "'all tangible personal property' not otherwise exempt in the city or town where it is situated" . . . which "presumably included personal

property not previously subject to tax." **RCN**, 443 Mass. at 208.

The attempt by Verizon and the Commissioner to distinguish the clear holding of **RCN** that all of RCN's personal property was subject to taxation, including its wires laid in or erected upon public ways, on the ground that it is a corporation is unavailing. There is nothing in G.L. c. 59, § 2 (providing in relevant part for the taxation of all personal property that is not "expressly exempt") or § 18, First that conditions taxability on the corporate or other jural status of the owner. Compare G.L. c. 59, § 5, cl. 16(1)(d) (providing that only corporate utilities, including telephone company corporations such as Verizon, qualify for property tax exemption for all property other than "real estate, poles, underground conduits, wires and pipes and machinery used in manufacture or in supplying or distributing water"). Although § 18, Fifth, like the relevant provision of § 18 Second cited by the taxpayer in **RCN**, contains a corporate requirement, Verizon, like RCN, is taxable on their poles and wires erected upon public ways under § 18, First, which has no such requirement.

As it did in **RCN**, the Board also rejects the argument by Verizon and the Commissioner that **Assessors of**

Springfield v. Commissioner of Corporations and Taxation, 321 Mass. 186 (1947) controls the decision of these appeals. In **Assessors of Springfield**, the assessors argued that certain equipment and poles and wires erected upon public ways owned by New England Telephone and Telegraph Company constituted "machinery" taxable under G.L. c. 59, § 39 and § 18, Second. The Court rejected the argument that this property was machinery, and further observed that the assessors "rightly do not contend here, as they did before the board, that the poles of the taxpayer together with the wires thereon erected upon public ways were subject to local taxation" under § 18, Fifth. **Id.** at 194. After quoting the relevant language from § 18, Fifth, the Court noted that the "statute makes no provision for the taxation of poles with the wires thereon erected upon public ways but taxes only those located on private property." **Id.**

Subsequent decisions of the Court make clear that the "statute" which the Court found did not provide for the taxation of poles and wires erected upon public ways was § 18, Fifth, and not § 18 in its entirety, and that such property is taxable under § 18, First. In two decisions dealing with the issue of whether a cable television operator was taxable on its poles and wires erected upon

public ways, the Court observed that the issue of whether such property was taxable under § 18, First had not been argued. See **Warner Amex Cable Communications Inc. v. Assessors of Everett**, 396 Mass. 239, 241, n. 2 (1985) (“Neither the board nor the assessors in their brief have relied on the introductory language of § 18 or on § 18, First, to justify the city’s right to assess Warner’s aerial distribution system located over public ways.”); **Nashoba Communications Limited Partnership v. Assessors of Danvers**, 429 Mass. 126, 127, n. 1 (1999) (“We note that, as in **Warner Amex** . . . neither the board nor the assessors have relied on the introductory language of § 18 or on § 18, First, to justify the assessors’ right to assess the property at issue in this case.”). Similarly, the issue of the taxability of such property under the introductory language of § 18 or § 18, First was not raised or decided in **Assessors of Springfield**.

Further, the Court in **RCN** specifically relied on § 18, First in ruling that the “the board was correct in finding that all of RCN’s personal property was subject to taxation.” **RCN**, 443 Mass. at 209. Accordingly, while **Assessors of Springfield** stands for the proposition that poles and wires erected upon public ways are not taxable under § 18, Fifth, **Warner Amex**, **Nashoba**, and **RCN** clearly

indicate that § 18, First is an independent source of authority for the taxation of such poles and wires.

The Board's ruling that Verizon is subject to property tax on its poles and wires erected upon public ways is consistent with the statutory provisions dealing with the taxation of telephone company property. First, G.L. c. 59, § 39 provides that the following property is to be centrally valued by the Commissioner and taxed by local boards of assessors: "machinery, poles, wires and underground conduits, wires and pipes." By specifically providing for the valuation and assessment of poles and wires under § 39, the clear legislative intent is to subject such property to taxation. Further, the legislative purpose of § 39 was to "ensure consistency and competence in the valuation of a Statewide system" and to remedy problems faced by the various local board's of assessors "in attempting to value a portion of a system that crossed municipal boundaries and the resulting disparate valuations for affected companies." **RCN**, 443 Mass. at 198. Section 39 is rendered essentially meaningless, and the purpose behind its enactment left largely unfulfilled, if only poles and wires erected upon private property were subject to tax.

Second, the corporate utility exemption under G.L. c. 59, § 5, clause 16(1)(d), which applies to corporations such as Verizon but not to non-corporate entities such as RCN, specifically carves out from the corporate utility exemption "real estate, poles, underground conduits, wires and pipes, and machinery used in manufacture or in supplying or distributing water." Again, it makes little sense to specifically provide that poles and wires are not exempt, and are therefore taxable, if only poles and wires erected upon private property were subject to tax.

Finally, G.L. c. 59, § 2 provides that all personal property within the commonwealth is subject to tax, unless it is expressly exempt. There is nothing in § 5, clause 16(1)(d) or elsewhere that exempts poles and wires erected upon public ways from tax. Section 18, First provides the place where and the person to whom poles and the wires thereon erected upon public ways are to be assessed. **RCN** 443 Mass. at 209. Accordingly, the Board finds and rules that Verizon is taxable on all of its poles and the wires thereon erected upon public ways under G.L. c. 59, § 2 and G.L. c. 59, § 18, First.

II. VALUATION HIGHER THAN THAT CERTIFIED BY COMMISSIONER

The Board finds and rules that, in order for it to establish a valuation higher than that certified by the Commissioner, a city or town must have filed an appeal with the Board for the relevant fiscal year. G.L. c. 59, § 39 authorizes the Board to establish a substantially higher or substantially lower valuation than that certified by the Commissioner provided that: "in every such appeal, the **appellant** shall have the burden of proving that the value of the machinery, poles, wires, and underground conduits, wires, and pipes is substantially higher or substantially lower, as the case may be, than the valuation certified by the Commissioner." (emphasis added).

Therefore, it is the appellant that bears the burden of proving that the value of § 39 property is substantially higher than the value certified by the Commissioner; where a city or town is only an appellee -- that is, where it has filed no appeal itself -- § 39 provides no mechanism for the Board to find a value substantially higher than that certified by the Commissioner. Accordingly, the Board rules that only those cities and towns that filed petitions under § 39 may seek to establish that the value of Verizon's properties in their city or town was

substantially higher than the value certified by the Commissioner.

The Board notes that Verizon filed 585 § 39 appeals against various cities and towns and the Commissioner for the Fiscal Years 2005 through 2008. However, only 27 § 39 appeals were filed by cities or towns as appellants against Verizon and the Commissioner for the Fiscal Years 2003 through 2008.

III. FISCAL YEARS AFFECTED BY BOARD'S RULING

The Board's rulings and decisions in these appeals apply to all years at issue in these appeals, fiscal years 2003 through 2008, and cannot, as Verizon argues, be applied prospectively only.

There is simply no support for Verizon's suggestion that the Board's ruling should be applied only prospectively. The Board is required to render a decision in cases before it. See G.L. c. 59, § 39 (requiring Board to "hear and decide" appeals from Commissioner's valuation of telephone company property, including poles and wires) and G.L. c. 58A, § 13 (requiring Board to make decision in each appeal heard by it). There is nothing that gives the Board the authority to render advisory opinions or declaratory judgments. Rather, the Board must render

decisions regarding the valuations raised in the subject appeals.

In addition, Verizon's argument that prospective application of a Board ruling that poles and wires erected upon public ways is required because such a ruling would amount to an unanticipated "change in policy" and an "overruling" of *Assessors of Springfield* is without merit. First, the Commissioner's determination that poles and wires erected upon public ways need not be included in Verizon's return under G.L. c. 59, § 41 is inconsistent with the underlying statutes and is therefore entitled to no deference. *Massachusetts Hospital Association, Inc. v. Department of Medical Security*, 412 Mass. 340, 346 (1992). Further, the Court in *RCN* rejected the taxpayer's claim, like Verizon's claim here, that it had the right to rely on the Commissioner's prior practices:

Most significantly, neither [*Commissioner of Revenue v. BayBank Middlesex*, [421 Mass. 736 (1996)]] nor any other cases cited by RCN as precedent to bind the commissioner involved a third party with its own statutory right of appeal which would be harmed by the application of the commissioner's past practice. In this matter, G.L. c. 59, § 39 specifically affords the assessors an independent right to challenge the commissioner's valuation of a telephone company's statutory property.

RCN, 443 Mass. at 207.

In addition, as described above, the Board ruling in these appeals does not "overturn" **Assessors of Springfield**. The Board's ruling that poles and wires erected upon public ways are taxable is not based on either § 18, Second or § 18, Fifth, the two statutes addressed by the Court in **Assessors of Springfield**. Rather, the ruling is based on § 18, First, a statutory basis left open by the Court in **Warner Amex** and **Nashoba**, and finally adopted by it in **RCN**. Accordingly, the Board's ruling is applicable for all fiscal years at issue in these appeals.

IV. FURTHER PROCEEDINGS

A pre-trial conference to establish a hearing date and discovery cutoff date concerning the remaining issues in these appeals, including valuation, is scheduled for Thursday, March 27, 2008 at 10:00 am.

APPELLATE TAX BOARD

_____ Chairman
_____ Commissioner
_____ Commissioner
_____ Commissioner
_____ Commissioner

Attest: _____
Clerk of the Board

Date:
(Seal)

**CASES AND DOCKET NUMBERS PERTAINING TO
VERIZON NEW ENGLAND, INC. FOR FY03 TO FY07**

Verizon New England, Inc. v.
Commissioner of Revenue and Various Cities and Towns*
C273560 – C273626 (FY2005)
C279452 – C279565 (FY2006)
C285247 – C285362 (FY2007)

Board of Assessors of the City of Billerica v. Commissioner of Revenue and
Verizon New England, Inc.
C285482 (FY2007)

Board of Assessors of the City of Boston v. Commissioner of Revenue and
Verizon New England, Inc.
C273728 (FY2005)
C279581 (FY2006)
C285613 (FY2007)

Board of Assessors of the Town of Canton v. Commissioner of Revenue and
Verizon New England, Inc.
C285639 (FY2007)

Board of Assessors of the Town of Framingham v. Commissioner of Revenue and
Verizon New England, Inc.
C266140 (FY2003)

Board of Assessors of the Town of Harwich v. Commissioner of Revenue and
Verizon New England, Inc.
C285628 (FY2007)

Board of Assessors of the Town of Hatfield v. Commissioner of Revenue and
Verizon New England, Inc.
C285796 (FY2007)

Board of Assessors of the Town of Mashpee v. Commissioner of Revenue and
Verizon New England, Inc.
C285486 (FY2007)

* See attached list of Cities and Towns at page 17.

City of Newton v. Commissioner of Revenue and

Verizon New England Inc.

C265966 (FY2003)

C269574 (FY2004)

C273836 (FY2005)

C279719 (FY2006)

C285500 (FY2007)

Board of Assessors of the City of Quincy v. Commissioner of Revenue and

Verizon New England, Inc.

C285563 (FY2007)

City of Springfield v. Commissioner of Revenue and

Verizon New England, Inc.

C273887 (FY2005)

C280591 (FY2006)

C285242 (FY2007)

Town of Watertown v. Commissioner of Revenue and

Verizon New England Inc.

C273859 (FY2005)

Board of Assessors of the City of Worcester v. Commissioner of Revenue and

Verizon New England, Inc.

C273019 (FY2005)

C285502 (FY2007)

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CITIES AND TOWNS

1. Acton
2. Agawam
3. Amherst
4. Andover
5. Arlington
6. Ashby
7. Ashfield
8. Ashland
9. Attleboro
10. Barnstable
11. Bedford
12. Belmont
13. Beverly
14. Billerica
15. Boston
16. Bourne
17. Braintree
18. Brewster
19. Bridgewater
20. Brockton
21. Brookline
22. Burlington
23. Cambridge
24. Canton
25. Chelmsford
26. Chelsea
27. Chester
28. Chicopee
29. Colrain
30. Concord
31. Conway
32. Cummington
33. Danvers
34. Dartmouth
35. Dedham
36. Dennis
37. Dracut
38. East Longmeadow
39. Easton
40. Edgartown
41. Everett
42. Fairhaven
43. Fall River
44. Falmouth
45. Fitchburg
46. Foxborough
47. Framingham
48. Franklin
49. Gloucester
50. Grafton
51. Granville
52. Greenfield
53. Hardwick
54. Haverhill
55. Hingham
56. Hinsdale
57. Holden
58. Holland
59. Holyoke
60. Hopkinton
61. Hubbardston
62. Huntington
63. Kingston
64. Lawrence
65. Leominster
66. Lexington
67. Lowell
68. Lynn
69. Malden
70. Mansfield
71. Marblehead
72. Marlborough
73. Marshfield
74. Mashpee
75. Medford
76. Melrose
77. Methuen
78. Middleborough
79. Milford
80. Milton
81. Nantucket
82. Natick
83. Needham
84. New Bedford
85. Newburyport
86. Newton
87. North Andover
88. North Attleboro
89. North Reading
90. Northampton
91. Norton
92. Norwood
93. Otis
94. Peabody
95. Petersham
96. Pittsfield
97. Plymouth
98. Quincy
99. Randolph
100. Raynham
101. Reading
102. Revere
103. Rockland
104. Salem
105. Sandisfield
106. Sandwich
107. Saugus
108. Shrewsbury
109. Somerset
110. Somerville
111. Southborough
112. Springfield
113. Stoughton
114. Sudbury
115. Taunton
116. Tewksbury
117. Wakefield
118. Walpole
119. Waltham
120. Wareham
121. Watertown
122. Wellesley
123. West Springfield
124. Westborough
125. Westfield
126. Westford
127. Westport
128. Westwood
129. Weymouth
130. Wilbraham
131. Wilmington
132. Winchester
133. Woburn
134. Worcester
135. Yarmouth
136. Hatfield

**CASES AND DOCKET NUMBERS PERTAINING TO
VERIZON NEW ENGLAND, INC. FOR FY2008**

Verizon New England, Inc. v.
Commissioner of Revenue and Various Cities and Towns*
C289452 – C289739 (FY2008)

Board of Assessors of the Town of Belmont v. Commissioner of Revenue and
Verizon New England, Inc.
C290472 (FY2008)

Board of Assessors of the City of Boston v. Commissioner of Revenue and
Verizon New England, Inc.
C290511 (FY2008)

Board of Assessors of the Town of Brookline v. Commissioner of Revenue and
Verizon New England, Inc.
C290197 (FY2008)

Board of Assessors of the Town of Natick v. Commissioner of Revenue and
Verizon New England, Inc.
C290539 (FY2008)

Board of Assessors of the City of Newton v. Commissioner of Revenue and
Verizon New England Inc.
C290518 (FY2008)

Board of Assessors of the City of Springfield v. Commissioner of Revenue and
Verizon New England, Inc.
C290494 (FY2008)

* See attached list of new communities added to prior list of Cities and Towns.

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|----------------------|----------------------|---------------------|
| 1. Abington | 56. Hanson | 111. Plympton |
| 2. Acushnet | 57. Harvard | 112. Provincetown |
| 3. Adams | 58. Harwich | 113. Rehoboth |
| 4. Amesbury | 59. Hatfield | 114. Rochester |
| 5. Aquinnah | 60. Holbrook | 115. Rockport |
| 6. Ashburnham | 61. Holliston | 116. Rowley |
| 7. Athol | 62. Hopedale | 117. Rutland |
| 8. Auburn | 63. Hudson | 118. Salisbury |
| 9. Avon | 64. Hull | 119. Scituate |
| 10. Ayer | 65. Ipswich | 120. Seekonk |
| 11. Barre | 66. Lakeville | 121. Sharon |
| 12. Becket | 67. Lancaster | 122. Sheffield |
| 13. Belchertown | 68. Lee | 123. Shelburne |
| 14. Bellingham | 69. Leicester | 124. Sherborn |
| 15. Berkley | 70. Lenox | 125. Shirley |
| 16. Berlin | 71. Lincoln | 126. South Hadley |
| 17. Bernardston | 72. Littleton | 127. Southampton |
| 18. Blackstone | 73. Longmeadow | 128. Southbridge |
| 19. Bolton | 74. Ludlow | 129. Southwick |
| 20. Boxborough | 75. Lunenburg | 130. Spencer |
| 21. Boxford | 76. Lynnfield | 131. Sterling |
| 22. Boylston | 77. Manchester | 132. Stockbridge |
| 23. Brimfield | 78. Marion | 133. Stoneham |
| 24. Carlisle | 79. Mattapoisett | 134. Stow |
| 25. Carver | 80. Maynard | 135. Sturbridge |
| 26. Charlemont | 81. Medfield | 136. Sutton |
| 27. Charlton | 82. Medway | 137. Swampscott |
| 28. Chatham | 83. Mendon | 138. Swansea |
| 29. Chilmark | 84. Merrimac | 139. Templeton |
| 30. Clinton | 85. Middleton | 140. Tisbury |
| 31. Cohasset | 86. Millbury | 141. Topsfield |
| 32. Dalton | 87. Millis | 142. Townsend |
| 33. Deerfield | 88. Millville | 143. Truro |
| 34. Dighton | 89. Monson | 144. Tyngsborough |
| 35. Douglas | 90. Montague | 145. Upton |
| 36. Dover | 91. Nahant | 146. Uxbridge |
| 37. Dudley | 92. New Marlborough | 147. Ware |
| 38. Dunstable | 93. Newbury | 148. Warren |
| 39. Duxbury | 94. Norfolk | 149. Wayland |
| 40. East Bridgewater | 95. North Adams | 150. Webster |
| 41. Eastham | 96. North Brookfield | 151. Wellfleet |
| 42. Easthampton | 97. Northborough | 152. Wenham |
| 43. Erving | 98. Northbridge | 153. West Boylston |
| 44. Essex | 99. Northfield | 154. W. Bridgewater |
| 45. Freetown | 100. Norwell | 155. W. Newbury |
| 46. Gardner | 101. Oak Bluffs | 156. W. Stockbridge |
| 47. Georgetown | 102. Oakham | 157. West Tisbury |
| 48. Great Barrington | 103. Orange | 158. Westminster |
| 49. Groton | 104. Orleans | 159. Weston |
| 50. Groveland | 105. Oxford | 160. Whitman |
| 51. Hadley | 106. Palmer | 161. Williamsburg |
| 52. Halifax | 107. Paxton | 162. Williamstown |
| 53. Hamilton | 108. Pembroke | 163. Winchendon |
| 54. Hampden | 109. Pepperrell | 164. Winthrop |
| 55. Hanover | 110. Plainville | 165. Wrentham |