STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS
89 JEFFERSON BOULEVARD
WARWICK, RHODE ISLAND 02888

IN RE: Petition filing by New England Cable Television Association for a Show Cause Order and Declaratory Ruling

Docket No. D-01-14

INTERIM DECLARATORY RULING

1. INTRODUCTION

On July 9, 2001, the New England Cable Television Association ("NECTA") filed a petition with the Rhode Island Division of Public Utilities and Carriers ("Division") seeking a Show Cause Order and a Declaratory Ruling against Starlight Communications Holding, Inc., d/b/a Starlight Communications ("Starlight") and/or one or more related parties (individually and collectively referred to as "Starlight").

Through its petition, NECTA seeks to have Starlight appear before the Division and, after investigation, show cause why it should not be ordered to cease and desist from operating a Community Antenna Television ("CATV") System in Rhode Island until such time as it has obtained the necessary CATV certificates required under federal and State law.

Also through its petition, NECTA seeks a declaratory ruling from the Division, which addresses the issue of whether Starlight has engaged in and is continuing to engage in the operation of a CATV system without having first obtained CATV certificates required under law.

2. SUMMARY OF PETITION

NECTA contends that Starlight is operating an illegal CATV system in Rhode Island. NECTA offered several factual bases on which it opines that Starlight ought to be subject to State regulation. They are summarized below:

- According to NECTA, Starlight has commenced the provision of video programming services to approximately nine or more multi-dwelling complexes located in Warwick, Cranston, Providence and Middletown. NECTA believes that these complexes consist of between 2200 and 2700 individual units.
- According to NECTA, Starlight may offer service to 30,000 units in multi-dwelling complexes throughout the State.
- According to NECTA, Starlight has established a "headend" in Warwick, which receives video signals and from which video signals are distributed by a wire or cable system to electronic equipment at customer terminal points at multi-dwelling complexes in Rhode Island.
- NECTA contends that services being provided by Starlight are akin to the services provided by a CATV system, as defined under Rhode Island General Laws, Section 39-19-1.
- NECTA therefore asserts that Starlight ought to be required to obtain, from the Division, the requisite certificates to construct and operate a CATV system in Rhode Island, or alternatively, obtain a declaration from the Division that it is not subject to Rhode Island's cable certification statutes and regulations.

To buttress its contentions, NECTA also provided a legal analysis in its petition. At the heart of its legal analysis, NECTA disputes Starlight's assertion that it is exempt from needing CATV certificates in order to provide video programming services to multi-dwelling complexes in Rhode Island. NECTA maintains that the federal court decisions on which Starlight relies are not binding upon the Division.

NECTA, instead, asks the Division to consider Starlight's operations in the context of State law. NECTA focuses on the provisions of R.I.G.L. §39-19-1, which states that a CATV system as used in Chapter 19 shall mean and include:

> *"…the ownership or operation of a cable system which receives video or audio signals, electric impulses, or current at a central antenna or electronic control center within this state and from which it distributes or transmits such signals, impulses, or currents by a cable or wire system to electronic equipment at a customer's terminal point within this state; provided, however, that nothing contained in this chapter shall be construed to apply to a telephone, telegraph, or electric public utility".*

Relying upon the above definition, NECTA reasons that Starlight is definitely operating a CATV system in Rhode Island. As the basis for its reasoning, NECTA points to "*the limited facts currently available*", which reflect that:

> *"Starlight appears to own or operate facilities, such as headend facilities located at Bayside Village in Warwick, which receive video or audio signals, electric impulses, or currents at a central antenna or electronic control center within Rhode Island…[and that] from that headend location, it distributes or transmits such signals, impulses or currents by a cable or wire system to electronic equipment located at the customer's terminal point within Rhode Island…[and that] on information and belief, Starlight does not fall under the Section 39-19-1 exemption applicable to utilities".*

NECTA concludes that based on the limited facts known, the Division should direct Starlight to show cause why it should not be ordered to cease and desist from what NECTA maintains is a continuing violation of R.I.G.L. §39-19-1, et seq.

As part of its legal argument, NECTA asserts that even though the Division's *Rules Governing Community Antenna Television Systems* ("CATV Rules") establish two exemptions for CATV systems; these two exemptions are inconsistent with the statutory definition contained in R.I.G.L. §39-19-1, supra, and therefore invalid. The two exemptions contained in the CATV Rules, which NECTA asserts exceed the scope of the Division's authority under R.I.G.L. §39-19-1, are contained in Section 1.2(a) of the Rules. This section provides that the definition of a CATV system shall not include:

> *(1) any system which serves fewer than fifty (50) subscribers;*
>
> *(2) any system which serves only the occupants of one or more multiple unit dwellings or commercial or office buildings under common ownership, management or ownership, and*

> *which does not use public rights of way, public highways or streets, or private streets offered for public dedication for the construction and operation of its physical plant.*

NECTA contends that the Division does not have the authority to define a CATV system for purposes of the application of R.I.G.L. §39-19-1 in a manner that differs from the express legislative definition of a CATV system, or to confer additional exemptions that the Legislature did not confer when it expressly established an exemption from its own statutory definition of a CATV system.

NECTA alternatively argues, that even if the Division concludes that the exemptions contained in its CATV Rules are valid, those exemptions may not apply to Starlight. NECTA claims that to determine their applicability to Starlight's operation the Division will have to conduct an investigation to determine if Starlight's operation is consistent with the several factual criteria contained in the exemptions. For example, NECTA asserts that the Division must explore the relationship that Starlight has with Verizon-Rhode Island ("Verizon") with respect to Starlight's use of Verizon's facilities. Indeed, due to Starlight's use of Verizon's facilities, NECTA asserts that the Division must compel Verizon to participate as a party in this matter.

In anticipation of Starlight's reliance upon federal court decisions to support its position that the State's CATV laws do not govern it, NECTA offered a counter-argument. NECTA contends that the relevant federal court decisions do not exempt a video-programming provider from a state requirement to obtain cable franchises from state or local authorities.[1] NECTA further maintains that the Division is not obligated to follow these foreign precedents and is free to interpret and apply State law.

3. INITIAL REGULATORY RESPONSE

In response to NECTA'S petition, the Division conducted a procedural conference on August 6, 2001. The conference was held at the Division's offices at 89 Jefferson Boulevard, in Warwick. The following interested parties and counsel entered appearances in this matter:

For NECTA:	William D. Durand, Esq.
For Starlight:	W. James MacNaughton, Esq.
For the Department Of Attorney General:	William K. Lueker, Esq. Special Assistant Attorney General[2]

For the Division's Advocacy Section: Leo J. Wold, Esq.
Special Assistant Attorney General

For Verizon: Peter McGinn, Esq.

During the conference, Starlight raised several procedural and jurisdictional questions regarding NECTA's petition. First, Starlight questioned whether NECTA has individual standing to bring the instant petition. Starlight argued that a showing of "injury in fact" is necessary for standing and that NECTA has suffered no such injury. Starlight declared that CoxCom, Inc. ("Cox"), NECTA's largest member in Rhode Island, is really behind the instant petition and therefore would more appropriately have standing in this matter.

Secondly, Starlight questioned whether the Division possesses the authority to issue a cease and desist order in the context of a declaratory ruling proceeding.

Thirdly, Starlight questioned whether the Division possesses the authority to declare Section 1.2(a) of its CATV Rules invalid or whether the Court alone possesses such authority.

Fourthly, Starlight questioned whether the Division has any authority to conduct an investigation or hearing involving Starlight, a company that is neither a CATV company nor a public utility.

Lastly, Starlight questioned the propriety of entertaining NECTA's petition in view of the Division's prior knowledge of Starlight and its apparent tacit approval of the Starlight's operations.

For the above reasons, Starlight asserted that NECTA's petition should not be docketed by the Division and that the matter ought to be summarily dismissed.

In response to the procedural and jurisdictional arguments raised by Starlight, the Division invited the parties to submit legal memoranda in support of their respective positions on this matter. The Division agreed to proceed without officially docketing NECTA's petition pending the submission of the parties' legal memoranda.

4. STIPULATION BETWEEN NECTA AND VERIZON

On September 28, 2001, the Division received a "Stipulation" from NECTA and Verizon, wherein NECTA agreed to dismiss, without prejudice, any action against Verizon with respect to the instant

matter. In exchange, Verizon agreed to cooperate with the parties "*relative to production of documents, upon request, and subject to appropriate protection to which it is entitled*" and to "*provide, upon request, a witness at a hearing before the Division to explain its tariff*".

5. DISCUSSION ON PROCEDURAL AND LEGAL ISSUES RAISED BY STARLIGHT

A. NECTA'S POSITION

i. Division's Authority to Conduct an Investigation

In its legal memorandum, NECTA contends that the Courts have recognized the propriety of fact finding in the context of declaratory relief and agency determinations of jurisdiction.[3] NECTA also maintained that it cannot respond to Starlight's claim that it [Starlight] had received "some form of permission" to operate from the Division without some related fact finding.

ii. Whether NECTA has Standing

NECTA argues that it has standing in this matter by virtue of its role as a representative of its members. NECTA cited past cases in both Connecticut and Rhode Island as evidence of its prior approved interventions.

NECTA asserts that its standing to bring the instant petition is supported under both State and federal law. Under the federal law, NECTA cites the 1975 United States Supreme Court case of *Warth v. Seldin* (cite omitted), which held that an association may bring suit on behalf of its members if the association can establish (1) that one or more of its members are "suffering immediate or threatened injury", and (2) that the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause.

NECTA states that the Supreme Court subsequently refined its observations in *Warth v. Seldin* to form a three-part test. Citing the case of *Hunt v. Washington State Apple Advertising Commission* [4], NECTA maintains that the appropriate standard for determining whether an association has standing must be based on an evaluation of the following questions: (1) whether the association's members would otherwise have standing to sue in their own right, (2) whether the interest the association seeks to protect are germane to the organization's purpose, and (3) whether neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

NECTA also noted that the Court of Appeals for the First Circuit and the United States District Court for the District of Rhode Island have both applied the standards established in *Warth* and *Hunt* to find that an association had

standing to bring suit based on injury to its members. NECTA cited several cases as examples.[5]

NECTA claimed that its standing under Rhode Island law is derived, in part, from language contained in Section 13 of the Division's Rules of Practice and Procedure ("P&P Rules"). NECTA asserts that this provision requires simply that the petitioner state its interest in the subject matter of the petition. NECTA contends that it has satisfied this requirement by stating that Starlight's operation is injurious to Cox, one of its members.

In cases involving declaratory judgments, NECTA declared that the Rhode Island Supreme Court has held that the petitioner must demonstrate a sufficient allegation of interest in order to establish the existence of an actual controversy.[6] NECTA stated that the standard set forth in Section 13 of the Division's P&P Rules is consistent with the standard established by the Court.

Regarding the "injury-in-fact" burden espoused by Starlight, NECTA argues that albeit the Division's P&P Rules require no such showing, NECTA claims that it has satisfied the burden in accordance with requirements established by the Rhode Island Supreme Court. NECTA cites the case of *East Greenwich Yacht Club v. Coastal Resource Management Council*[7] in support of its argument that an injury to one of the association's members "provides the organizational plaintiff with the essential element of an 'injury in fact'."[8] NECTA thereupon reiterated that the magnitude of Starlight's operation has caused Cox to suffer injury-in-fact resulting from the loss of cable customers and from the inequity of allowing Starlight to operate outside the scope of the regulatory requirements mandated for the State's CATV system operators. NECTA claims that this inequity has deprived Cox of the benefit of the State's "level playing field" statute.[9]

iii. Jurisdiction of the Division

NECTA contends that the Division possesses the necessary jurisdiction to issue the declaratory relief requested by NECTA and to order that Starlight cease and desist if the Division determines that Starlight is subject to the State's CATV certification requirements.

NECTA argues that R.I.G.L. §39-19-6 grants the Division extensive authority to supervise and regulate every CATV company operating in Rhode Island, '*so far as may be necessary to prevent such operation from having detrimental consequences to the public interest, and for such purpose may promulgate and enforce reasonable rules and regulations as it may deem necessary with reference to issuance of certificates…*'. NECTA also cites the Division's broad and incidental powers for protecting the public interest as further evidence of the Division's extensive authority.[10]

Predicated on these broad and incidental powers, NECTA argues that the Division "*has clear authority to investigate whether Starlight, by virtue of its current and planned conduct, is subject to the cable certification requirements of Rhode Island*".[11] NECTA further argues that the authority of the Division to conduct the type of jurisdictional investigation requested by NECTA is supported by the Rhode Island Supreme Court's decision in *Newbay Corporation v. Malachowski*.[12]

NECTA explains that in the *Newbay* case, the Court held that the State's Energy Facilities Siting Board ("EFSB") possesses the authority to '*make an inquiry in order to determine whether a proposed energy facility comes within its jurisdiction*'.[13] NECTA observed that the Court in *Newbay* rejected the argument that the EFSB's jurisdictional grant was dependent upon an application being filed with it by the proponent of an energy facility. NECTA maintains that the "same situation exists in the case of NECTA's petition", and that the Division, like the EFSB, has the authority to investigate and determine whether Starlight is subject to the State's CATV laws.[14]

NECTA also argued that the Division has express authority to issue a declaratory ruling concerning the application of Rhode Island's CATV laws to Starlight.[15] NECTA relied on two Rhode Island Supreme Court decisions to support its assertion.[16]

NECTA additionally contends that the Division has the authority to render "declaratory relief on the validity of one of its own regulations".[17] NECTA rejects Starlight's assertion that only the Court has the authority to declare an agency rule unlawful. NECTA argues that R.I.G.L. §42-35-7 contains "*express language that shows the Legislature's awareness that agencies may pass upon the validity of their own rules if requested to do so*".[18] NECTA relies on a provision in §42-35-7,

which states that the Superior Court may determine the validity or applicability of any rule in an action for declaratory judgment "*whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question*".

In its final comments on this issue, NECTA stated that if the Division concludes that it cannot issue a declaratory ruling regarding the validity of one of its own rules, then NECTA will request that the Division initiate a rule-making proceeding to amend Section 1.2(a) of its CATV Rules to remove the exceptions to the definition of a CATV system, that are not contained in the statutory definition and exceed the Division's authority.[19]

NECTA lastly addressed the issue of whether the Division has the authority to issue a cease and desist order. On this issue, NECTA argued that if the Division determines that Starlight is subject to its jurisdiction, then the Division must take appropriate steps to bring Starlight into compliance with the law. Toward this end, NECTA contends that the Division has the enforcement power to issue a cease and desist order in order.[20]

B. STARLIGHT'S POSITION

Starlight couched its legal memorandum in the form of a P&P Rule 18 protest, and for the reasons stated below, asserted that the petition ought to be returned without docketing to NECTA pursuant to P&P Rule 9(f).

i. The Division does not Have the Authority to Issue the Cease and Desist Order Sought by NECTA.

Starlight argues that it is well settled in Rhode Island law that the power to issue a declaratory ruling does not include the authority to levy sanctions or issue injunctions.[21] Starlight also argues that a declaratory judgment action is not the proper vehicle to litigate an alleged statutory violation that entails criminal and civil penalties.[22]

Starlight asserts that it is well established that the Division must have expressed statutory authority to issue any kind of cease and desist order to Starlight.[23] Starlight maintains that the Division lacks such authority.

ii. The Division does not Have the Authority to Order Discovery From Starlight in this Proceeding.

Starlight contends that since the Division does not have authority to issue a cease and desist order, it necessarily follows that the Division does not have the authority to compel Starlight to produce any evidence that could be used for the fact finding necessary to support such a cease and desist order. Starlight further contends that the declaratory judgment procedure under P&P Rule 13 does not provide for the kind of discovery NECTA seeks.

Starlight maintains that there are only three procedures by which the Division can conduct discovery: (1) an Informal Inquiry or Complaint pursuant to P&P Rule 6; (2) a Formal Complaint under P&P Rule 7; or (3) a Division Investigation under P&P Rule 8. Based on this understanding, Starlight argues that none of these procedures would apply to Starlight because all of these procedures apply exclusively to discovery from a "public utility". Starlight declares that it is not a "public utility" but rather a "communications carrier". It, therefore, asserts that NECTA "cannot invoke any of these procedures as a matter of law".[24]

iii. The Division Does Not Have the Authority to Invalidate the Rules Defining CATV Systems.

Like NECTA, Starlight also raises "*serious questions about the efficacy of Section 1.2(a)*". However, Starlight raises a much different concern. Starlight claims that the definition of a "cable system" contained in Section 1.2(a) of the Division's CATV Rules is inconsistent with the definition contained in recent amendments to the relevant federal law. For this reason, Starlight suggests that the Division should, "*at the appropriate time and in the appropriate proceeding, consider updating Rule 1.2(a) to bring it in line with the current federal definition of a 'cable system'*".[25] Starlight vehemently argues that the instant petition is not the proper procedural vehicle for that review.

Starlight maintains that if the Division concludes that amending Section 1.2(a) of the CATV Rules is appropriate, it must effectuate the amendment through a rulemaking proceeding, in accordance with the requirements of R.I.G.L. §42-35-3. Starlight argues that only the Court can declare that an existing rule is invalid.[26]

iv. NECTA Does Not Have Standing to Obtain a Declaratory Ruling.

Starlight argues that in Rhode Island, standing requires an allegation of injury in fact.[27] Starlight contends that mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is insufficient by itself to render the organization adversely affected or aggrieved.[28]

Starlight argues that NECTA's interest in this matter is limited to "*an interest in the manner in which the Division applies and enforces federal and Rhode Island statutes and regulations to Starlight*".[29] Starlight asserts that this 'mere interest in a problem' does not rise to the level of injury in fact. Starlight argues that to have standing NECTA must demonstrate an adverse affect on its property and/or income.[30]

Starlight declares that while Cox "could conceivably be affected by Starlight's activities" Cox's interest in Starlight does not extend to NECTA.[31] Starlight observes that a declaratory judgment proceeding is traditionally used to obtain a declaration of the petitioner's rights, not the rights of a third party.[32] Starlight acknowledged that the Courts have permitted one party to assert the rights of another. However, Starlight contends that such standing is only permitted upon a showing that the party whose rights are being asserted cannot, as a practical matter, assert its own rights in the proceeding.[33] Starlight contends that because there is no allegation in the petition that Cox is unable to assert its own claims arising out of Starlight's allegedly illegal behavior, NECTA has failed to establish its standing in this matter.

v. <u>The Petition Should be Returned to NECTA without Acceptance for Filing.</u>

Starlight observes that P&P Rule 9(f) permits the Division to reject the petition without accepting it for docketing when it is determined that the petition is 'not in substantial compliance' with the Division's rules and Rhode Island statutes. Starlight argues that NECTA's petition substantially fails to comply with the law for the following reasons:

1. It requests a cease and desist order which the Division is not able to grant; and
2. It requests discovery which the Division is not authorized to conduct; and
3. It requests the Division to invalidate Rule 1.2(a) which the Division cannot do; and

4. The Petitioner's statement of its interest in obtaining a ruling on the legitimacy of Starlight's business is insufficient on its face to give NECTA standing.

For these reasons, Starlight asserts that the Division should return the petition to NECTA, pursuant to P&P Rule 9(f).

C. ATTORNEY GENERAL'S POSITION

i. Should the Matter be Docketed

The Attorney General believes that the NECTA petition satisfies the requirements of P&P Rule 9, supra, and therefore, must be treated as a formal complaint within the meaning of P&P Rule 7. The Attorney General observes that P&P Rule 7 thereupon establishes a two-part test for determining whether or not a formal complaint should be docketed.

The Attorney General notes that the P&P Rule 7 test requires the Division to first determine whether the complaint states a cause of action within the jurisdiction of the Division. If it does, the Attorney General contends that the Division must then determine whether or not probable cause exists for the complaint. The Attorney General maintains that if the Division determines that it has jurisdiction over the complaint, and if probable cause exists for the complaint, then the matter must be docketed.[34]

The Attorney General next turned to the issue of jurisdiction. The Attorney General observes that P&P Rule 7 applies only to complaints filed against a "public utility". After a thorough analysis of the definition of "public utility", as contained in R.I.G.L. §39-1-2(20), the Attorney General concluded that Starlight is not a public utility.[35]

The Attorney General maintains, however, that P&P Rule 7 and R.I.G.L. §39-1-2(20) are not the only possible sources of jurisdiction for the Division over Starlight. The Attorney General opines that the Division would have jurisdiction over Starlight if the Division finds that Starlight is a CATV system, within the definitions of R.I.G.L. §39-19-1 and CATV Rule 1.2(a).

After examining the aforementioned definitions, the Attorney General stated that "*one might… conclude that the Division has jurisdiction*" with respect to the definition contained in R.I.G.L. §39-19-1, based "*arguably*" on an interpretation that a CATV company "*does not require any degree of property interest in the cable or wire system connecting the CATV to the customer's terminal point*".

[36] However, the Attorney General states that CATV Rule 1.2(a) "*appears to specifically exclude operations such as Starlight's so long as Starlight limits its operations to buildings under common 'management or ownership'*".[37]

In closing, the Attorney General noted that the definition of a CATV system contained in CATV Rule 1.2(a) is consistent with the definition of a "cable system" under the federal law.[38] Predicated on the totality of the State and federal definitions noted above, the Attorney General reached the following conclusion with respect to the Division's jurisdiction over Starlight:

> *…there is no reason to believe that Starlight is operating in such a way that it would be viewed as either a CATV system or a cable system under Federal or state law or regulation subject to the Division's jurisdiction. There are no grounds for finding that the Division has jurisdiction over Starlight, and therefore a docket should not be opened. The Division should advise NECTA in writing that it has determined that it has no jurisdiction in this matter and that the matter is closed.*

ii. Can the Division Issue a Cease and Desist Order in a Declaratory Judgment Proceeding

The Attorney General prefaced its argument on this issue by first observing that "[*I]f the Division does not have jurisdiction over Starlight in the first place, this question is moot*".[39]

The Attorney General then opined that even if the Division determines that it does have jurisdiction over Starlight, and that there is sufficient probable cause to proceed with docketing the matter, the Division "*probably does not have authority to issue and enforce a cease and desist order*". [40]

The Attorney General states that the Division could issue a declaratory ruling that finds that Starlight is operating a CATV system. The Attorney General also believes that the Division could issue an order directing Starlight to comply with the relevant laws, and even try to impose penalties under R.I.G.L. §42-35-9. Similarly, the Attorney General believes that the Division could probably even issue a letter advising Starlight to cease and desist its illegal operations. But in the end, the Attorney General maintains that the Division would not be able to enforce a cease and desist order on

it own.[41] For enforcement measures, the Attorney General contends that the Division would need to seek judicial assistance.[42]

iii. Can the Division Declare Section 1.2(a) of its CATV Rules Invalid

The Attorney General asserts that in the absence of specific authority in its enabling legislation, the Division does not have the power to declare one of its own rules invalid.[43] The Attorney General maintains that the statutory authority granted agencies in the Administrative Procedures Act ("APA") to issue declaratory rulings extends only to determining the applicability of any rule or order of the agency, not to the validity of that rule or order.[44] The Attorney General contends that the proper forum for attacking the validity of

CATV Rule 1.2(a) would be at the Superior Court.[45]

iv. Does NECTA Have Standing

The Attorney General supports NECTA's claim of standing. The Attorney General maintains that NECTA, by virtue of its status as a corporation, has standing to file a complaint under the provisions contained in P&P Rule 13(c) and R.I.G.L. § 39-4-3.

v. Must Cox Communications Be a Party

The Attorney General declares that the proper course of action in a

declaratory judgment proceeding would be to ensure that all indispensable parties are joined. The Attorney General asserts that this would clearly include Cox, and to the extent that Starlight may be potentially operating in the Service Areas of Full Channel TV, Inc. and Block Island Cable TV, Inc., they too could be joined as parties.[46]

The Attorney General argues that if the Division decides to proceed in this matter, the Division should require all of the State's CATV operators to participate in the docket. The Attorney General reasons that joining these parties now will mitigate the possibility of additional future administrative hearings and duplicative litigation.[47]

vi. Does the Division Have Jurisdiction over Starlight as a non-CATV Company

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On this issue, the Attorney General reiterated its earlier legal conclusions that Starlight is neither a "public utility" nor a "CATV system" under State or federal law. Accordingly, the Attorney General remains steadfast in its conclusion that Starlight's operations are outside the scope of the Division's jurisdiction.

D. ADVOCACY SECTION'S POSITION

i. Whether this Matter Should be Docketed

The Advocacy Section suggests that the instant petition be docketed unless the matter can be resolved "informally".[48]

ii. Whether the Division Possesses Jurisdiction to Issue a Cease and Desist Order in Connection with NECTA's Petition

The Advocacy Section contends that this issue relates to whether NECTA's petition is construed to seek only declaratory relief, under R.I.G.L. §42-35-8. If so, the Advocacy Section maintains that the Division would have the authority "*to review the matter generally but a cease and desist remedy would be outside the Division's jurisdiction*".[49]

The Advocacy Section alternatively argued that if the petition is construed more broadly, and the Division determines that Starlight is a CATV system within the meaning of State and federal law, then the Division would have the authority to issue a cease and desist order.[50]

iii. Whether the Division has Jurisdiction over Starlight

The Advocacy Section contends that the Division would only have jurisdiction over Starlight if it is determined that Starlight is a CATV company or operator under State and federal law.

The Advocacy Section recommended that the question of Starlight's status as a possible CATV company be resolved by propounding "*a set of data requests carefully tailored to ascertain whether facilities of the company serve subscribers without using any public right-of-way under State and federal law*".[51] The Advocacy Section also recommended that additional data requests be forwarded to Verizon in order to ascertain the demarcation point between Starlight and Verizon's facilities. The Advocacy Section stated that after the data responses have been provided, the Division will then know whether a formal hearing is warranted.[52]

iv. **Whether the Division Possesses the Power to Declare one of its own Rules Invalid**

On this issue, the Advocacy Section deferred to the findings of the Hearing Officer on whether the Division has the authority to declare a Division rule invalid.[53]

v. **Whether NECTA Possesses Standing to Pursue its Petition before the Division**

The Advocacy Section noted that the Division has permitted NECTA to participate in proceedings in the past without addressing this issue. The Advocacy Section contended that even if the Division finds that NECTA cannot demonstrate 'injury in fact', the Association should still be allowed standing to bring its petition. In support of this position, the Advocacy Section notes that NECTA "*can provide the Division with valuable assistance (industry information, technological and legal trends, etc.) in connection with cable dockets*".[54]

6. FINDINGS

The Division has identified six procedural and jurisdictional issues that have been raised by Starlight in response to the petition filing by NECTA. The parties have now briefed these issues. The issues and the Division's findings thereon are reflected below.

A. Does NECTA have Standing?

The Division has previously permitted NECTA to intervene in CATV-related dockets.[55] These interventions were authorized, in part, based upon NECTA's role as the principal trade association for cable operators and their telecommunications affiliates in all six New England states. NECTA has two member CATV companies in Rhode Island, CoxCom, Inc., d/b/a Cox Communications and Block Island Cable TV, Inc. NECTA's interventions were also authorized based on its interest in ensuring that its Rhode Island members are treated fairly and in conformance with the State's "level-playing-field" statute.[56] It is also worth noting that NECTA's standing to intervene has heretofore never been challenged.

In the instant matter, Starlight contends that NECTA lacks standing because its has failed to demonstrate that it has suffered any real injury. NECTA, the Attorney General and the Advocacy Section all reject this argument and argue in favor of NECTA's standing.

The Division finds that NECTA has satisfied the "injury in fact" test and, consequently, has standing to seek a declaratory ruling and show cause order against Starlight. The Division bases this finding primarily on the Rhode Island Supreme Court's holding in *East Greenwich Yacht Club v. Coastal Resources Management Council*.[57] In the East Greenwich Yacht Club case, the Court decided that the city of Warwick, the town of East Greenwich, Save the Bay, Inc., and the East Greenwich Yacht Club all had standing, on behalf of their respective citizens or members, to seek a Court reversal of a CRMC decision that authorized the construction of a high rise apartment building on an island in Warwick. For Save the Bay, Inc., and the East Greenwich Yacht Club, the Court determined that "*use by and injury to its members provides the organizational plaintiff with the essential element of an 'injury in fact'*".[58]

In the instant matter, NECTA has filed a petition alleging that Starlight's operations in Rhode Island are having an inimical impact on its two Rhode Island members. In essence, NECTA claims that Starlight is able to provide video-programming services at less cost to its subscribers than NECTA's members can provide because Starlight is evading the costly regulatory requirements mandated for CATV system operators in Rhode Island.[59] The Division finds marked similarities between the standing issues presented in this case and the East Greenwich Yacht Club case.

To reinforce this finding, the Division also relies on the United States Supreme Court decision in *Hunt v. Washington State Apple Advertising Commission*, supra. The three-prong test provided in Hunt is easily satisfied in the instant case. Specifically, the first prong is satisfied because both of NECTA's Rhode Island members could have filed the petition in issue themselves. The second prong is satisfied because protecting the financial viability of NECTA's members is clearly consistent with its organizational purpose. Finally, the third prong is satisfied because the relief that NECTA's seeks, a declaratory ruling and show cause order, does not require the individual participation of NECTA's two Rhode Island members.

B. Did the Division's Prior Knowledge of Starlight's Operation in Rhode Island Constitute a Constructive Decision by the Division that Starlight is not a CATV System Operator under State Law?

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Frankly, the Division is amazed and confounded that Starlight is asserting that the Division has already sanctioned its operations in Rhode Island.

The Division will take administrative notice that no formal investigation was ever conducted regarding Starlight's operations in Rhode Island. The Division will also take administrative notice that Starlight has never requested a declaratory ruling from the Division concerning the applicability of the statutes and rules discussed herein relative to its operations in Rhode Island. Therefore, the Division finds Starlight's claim of prior regulatory acceptance to be specious.

C. Does the Division Possess the Authority to Declare its Rules Invalid?

The Division finds that it does not possess the authority to declare its rules "invalid". While it is true, that the Division may seek to amend or repeal its rules pursuant to the provisions of the APA, specifically R.I.G.L. §42-35-3, the Division finds no such statute that would authorize the Division to effectuate a de facto repeal by simply declaring a rule invalid.

The Division does not accept NECTA's argument that R.I.G.L. §42-35-7 permits the Division to declare one of its rules invalid. R.I.G.L. §42-35-7 provides as follows:

> *The validity or applicability of any rule may be determined in an action for declaratory judgment in the superior court…when it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.*

NECTA maintains that the last sentence in the section suggests legislative intent to permit agencies to declare their rules invalid. The Division disagrees with this interpretation.

The Division finds that R.I.G.L. §42-35-7 simply provides a legal mechanism through which individuals may seek a declaratory judgment on the validity or applicability of a rule before the Superior Court. The sentence on which NECTA bases its argument only indicates that the individual need not exhaust his or her administrative remedies before the agency as a precondition of filing an action in Superior Court.

Regarding those administrative remedies, there are two available to anyone seeking a determination of applicability or validity of a given rule. For someone seeking a determination of "applicability", the individual would pursue a declaratory ruling in accordance with the provisions of R.I.G.L. §42-35-8. This section requires agencies to:

> …provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency.

It is clear from the language in the aforementioned section that determinations under this section are limited to issues of "applicability".

For someone seeking a determination of "validity", the individual would need to file a petition under R.I.G.L. §42-35-6, which provides that: "*Any interested person may petition an agency requesting the promulgation, amendment, or repeal of any rule*". Presumably, the individual would be questioning the validity of the rule in the context of a petition for "repeal". In response to such a petition, the law requires that the Division "*…within thirty (30) days… either deny the petition in writing…or initiate rule-making proceedings…*".

Predicated on a combined reading of R.I.G.L. §§42-35-6, 7 and 8, the Division finds that there are only two courses of action available to an individual questioning the "validity" of an agency rule. The individual may file a R.I.G.L. §42-35-6 petition with the agency, or file a R.I.G.L. §42-35-7 action with the Superior Court. These remedies constitute two distinct and independent avenues for an individual to seek a decision on the validity of a rule.

In conclusion, the Division cannot agree with NECTA that R.I.G.L. §42-35-7 authorizes the Division to declare Section 1.2(a) of its CATV Rules invalid. Instead, the Division finds that this section merely provides that an individual need not file a R.I.G.L. §42-35-6 petition with the Division before seeking relief from the Superior Court. Accordingly, NECTA could have, and may still, pursue such a declaration from the Superior Court on the "validity" of Section 1.2(a) of the Division's CATV Rules.

D. <u>Does the Division Possess the Authority to Investigate Starlight's Operation?</u>

and

E. Does the Division Possess the Authority to Issue a Cease and Desist Order in the Context of a Declaratory Ruling?

The answer to both of these questions hinges upon a determination of whether Starlight is a CATV system operator under Rhode Island law, and if so, whether the federal law differs from and preempts state regulation.

Based on discussions that took place at the August 6, 2001 procedural conference, the Division understands that Starlight is providing video programming services over a broadband cable infrastructure located in the public right of way that is owned and controlled by Verizon. It is also the Division's understanding that Starlight relies solely upon Verizon's broadband cable network to carry its transmissions and is paying for this service pursuant to approved rates contained in Verizon's "*Supertrunking Video Service*" tariff. This particular tariff is approved by and on file with Federal Communications Commission ("FCC").[60] For purposes of evaluating and deciding the two above-identified issues, the Division will provisionally consider the above-described service arrangement between Starlight and Verizon to be factual.

Under State statutory law, a CATV system is defined as follows:

> *…shall mean and include the ownership or operation of a cable television system which receives video or audio signals, electrical impulses, or currents at a central antenna or electronic control center within this state and from which it distributes or transmits such signals, impulses or currents by a cable or wire system to electronic equipment at a customer's terminal point within this state; provided, however, that nothing contained in this chapter shall be construed to apply to a telephone, telegraph, or electric public utility company*.[61]

The Division's CATV Rules restate the above-cited statutory CATV definition,[62] but further refine the definition to exclude two types of CATV systems, namely:

> *(1) any system which serves fewer than fifty (50) subscribers;* [and]
>
> *(2) any system which serves only the occupants of one or more multiple unit dwellings or commercial or office buildings under common ownership, management or ownership* [sic], *and which does not use public rights of way, public highways or streets, or private streets offered for*

> *public dedication for the construction and operation of its physical plant.*[63]

Unfortunately, because there is no case law in Rhode Island that interprets these definitions in the context of the type of service provided by Starlight, the Division is faced with what appears to be a true issue of first impression in this state. The Division's determination on whether Starlight is a CATV system, under Rhode Island law, must therefore rely exclusively upon the Division's interpretation of the definitions identified above.

In its petition, NECTA describes Starlight's business operations in Rhode Island as consisting of "*the provision of video programming services to approximately nine or more multi-dwelling complexes located in Warwick, Cranston, Providence and Middletown*".[64] Additionally, in view of the exceptions contained in the Division's CATV Rules, supra, NECTA questioned whether the multi-dwelling complexes that Starlight serves are actually under common ownership or management.

As a preliminary conclusion, the Division finds that Starlight's operation does appear to fall under the definition of a CATV system as defined in the State's statutory law. Turning next to the definition contained in the Division's CATV Rules, the question of whether the multi-dwelling complexes that Starlight serves are under common ownership or management is a key piece of information in deciding the underlying issue of whether Starlight is a CATV system operator under State law. The answer to this question would assist the Division in determining whether Starlight is an exempt CATV system operator under the provisions of the Division's CATV Rules.[65] Similarly, in order to confirm the exemption, the Division would also need to determine whether Starlight has limited the provision of its video programming services to "*only the occupants of…multiple unit dwellings or commercial or office buildings*".[66]

If the answer to both of this questions is yes, and if the Division is correct in its understanding that Starlight does not own or operate any plant or facilities on public property or in the public right of way, then the Division must find that Starlight is not a CATV system under current Rhode Island law. Conversely, if the answer to either of these questions is no, or if the Division's understanding that Starlight does not own or operate any plant or facilities on public property or in the public right of

way is incorrect, the Division must find that Starlight is a CATV system under current Rhode Island law.

Before going further with the State law discussion, and before deciding whether a formal investigation and hearing are necessary, the Division believes that a review of the federal law on this matter is essential. At the federal level, the Division will examine statutory law, the FCC's decisions on the subject and relevant Federal Court decisions.

During the Division's research into the federal law's definition of a "cable system" the Division discovered that the definition contained in the Division's CATV Rules had its genesis in the federal law that existed in 1981, the year that the Division's CATV Rules were promulgated. In that year, the federal law also defined a "cable system" to exclude systems with fewer than fifty subscribers as well as systems that serviced multiple unit dwellings under common ownership, control, or management.[67] This definition was changed, however, in 1984 as a result of the passage of the *1984 Cable Communications Policy Act*.[68] The definition was changed again in 1996 after Congress passed the *Telecommunications Act of 1996* (the "1996 Act").

Since 1996, the federal law definition of a "cable system" has been as follows:

> *The term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621 (c)) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 653 of this title; or (E) any facilities of any electric utility used solely for operating its electric utility systems.*[69]

Under the 1996 Act, Congress removed the prior requirement that a system serve "multiple unit dwellings under common ownership, control, or management" in order to benefit from the private

cable exemption. Instead Congress simply declared that companies that do not cross public rights-of-way are beyond the reach of the federal law. Unfortunately, however, Congress has not provided a definition for the term “using any public right-of-way”.

The FCC first considered the meaning of the term “using any public right-of-way”, in the context of a private cable system using a telephone company’s wires to cross public rights of way, in 1998. In a case remarkably on point, the FCC determined that “satellite master antenna television systems” or “SMATV” companies, who transmit from an antenna to multiple buildings, not necessarily commonly owned, via unaffiliated telephone wires, are not “cable systems” under the federal law.[70]

The SMATV cable system involved in the FCC’s 1998 decision, Entertainment Connections, Inc. (“ECI”), received signals through its own satellite master antenna television facility, or “headend”. ECI’s headend was placed on top of an apartment building. ECI transmitted its video programming services from its headend to both its customers in the building on which the antenna was located and to those in other buildings via fiber optic and coaxial cables that were located in the public right-of-way that were owned and operated by Ameritech, an unaffiliated telephone company. To obtain Ameritech services, ECI subscribed to Ameritech’s Supertrunking Video Service, for which it paid a monthly tariff. In reaching its decision on the “using any public right-of-way” issue, the FCC relied on a number of factors, which defined the relationship between ECI and Ameritech. These factors included; a finding that there was an absolute separation of ownership between ECI and Ameritech and that there was nothing more than the carrier-user relationship between them; that ECI’s facilities were located entirely on private property; that Ameritech provided service to ECI pursuant to a tariffed common carrier service; that Ameritech had no editorial control over the content of ECI’s programming; that the facilities primarily used by Ameritech to provide service to ECI were not constructed at ECI’s request; that there was capacity to serve several other programming providers; and that ECI had committed to make its drops available to other programming providers. The Division notes that the business relationship that currently exists between Starlight and Verizon appears to be indistinguishable from the business relationship that existed in 1998 between ECI and Ameritech.

The FCC's ECI decision was subsequently appealed to the United States Court of Appeals for the Seventh Circuit. In a holding affirming the FCC's decision, the Court found that ECI was not a cable system under the 1996 Act because it was not "using" the public right-of-way.[71] In its holding, the Court agreed with the FCC's reasoning and found that ECI was not "using" the public right-of-way, and accordingly was exempt from local franchising requirements.

The Court based its decision fundamentally on the same facts relied upon by the FCC, but was especially persuaded by the following six factors: (1) that Ameritech provided the service to ECI as tariffed common carrier service, (2) that ECI paid for the service, (3) that ECI did not control where the lines went or the path over which the signal was sent, (4) that , for the most part, the lines were not constructed at ECI's request, (5) that other programmers could also use Ameritech's cables, and (6) that Ameritech, as a telecommunications provider, is regulated under title II of the Communications Act.[72]

The Division's research of the federal law on SMATV-related matters turned up no cases that present a contrary view to the aforementioned ECI case, given substantially similar facts. Accordingly, the Division finds that under the federal law, unless it can be shown that Starlight actually owns and/or controls facilities in the public right-of-way, or that its relationship with Verizon is substantively distinguishable from the relationship that ECI maintained with Ameritech, Starlight would not be a "cable system" under the federal law definition.

In view of the federal law definition of a "cable system", and in particular the exceptions contained therein, the Division must query whether the State's definition of a "CATV system", and the open questions remaining, are relevant with respect to Starlight's operations in Rhode Island. Indeed, the Administrator of the Division ought to consider amending the definition of "CATV system", as contained in the Division's CATV Rules, insofar as necessary to make the State's definition consistent with the definition contained in the 1996 Act.

Under the Communications Act of 1934 (the "Act"), as amended by the 1984 Cable Communications Policy Act, the 1992 Cable Act, and the Telecommunications Act of 1996, Congress has made it very clear that states and local franchising authorities may not impose regulatory requirements that are inconsistent with the provisions contained in the Act. Specifically, the Act

provides that *"…any provision of law of any state, political subdivision, or agency thereof, or franchising authority, which is inconsistent with this Act shall be deemed to be preempted and superceded*".[73]

It would appear, therefore, that the questions remaining from the State law analysis above, namely, (1) whether the multi-dwelling complexes that Starlight serves are under common ownership or management and (2) whether Starlight has limited the provision of its video programming services to "*only the occupants of…multiple unit dwellings or commercial or office buildings*", are irrelevant relative to the question of whether Starlight is a "cable system" subject to the State's CATV franchising laws. Clearly, under the federal law, if Starlight is not "using" the public right-of-way in Rhode Island, Starlight is not a cable system. Further, because the Rhode Island definition of a "CATV system" is inconsistent with the federal law definition, Rhode Island's definition must be deemed preempted and superceded by the definition contained in the Act.

As noted earlier in this ruling, the Division understands that Starlight does not own or control any facilities on public property or in the public right-of-way, but instead provides its video programming services over a broadband cable infrastructure located in the public right of way that is owned and maintained by Verizon. It is also the Division's understanding that Starlight does not exercise any control relative to Verizon's cable network; that, for the most part, the Verizon facilities used by Starlight were not constructed at Starlight's request; that Starlight is paying for this service pursuant to approved rates contained in Verizon's "*Supertrunking Video Service*" tariff; and that other programmers can use Verizon's cables. If this understanding is correct, the Division finds that Starlight, like ECI before it, is not "using" the public right-of-way in a manner that would make it a "cable system" under the federal law, and therefore, the State is precluded from regulating Starlight as a CATV system under State law.

The Division finds that in order to verify the reality of the Division's understanding of Starlight's relationship with Verizon, and the location of Starlight's facilities entirely on private property, the Division will require Starlight and Verizon to submit a written response(s), in affidavit form, that addresses these issues. If the parties confirm the Division's understanding of their relationship, and particularly the fact that neither Starlight nor its principals own or control facilities

on public property or in the public right-of-way, the Division finds that no additional action on NECTA's petition will be necessary and that a final declaratory ruling will summarily issue.

In the final analysis, predicated on the above-discussed findings, the Division has concluded that addressing the underlying issues of whether the Division possesses the authority to investigate Starlight's operation and issue a cease and desist order in the context of a declaratory ruling are unnecessary at this time. These questions may be revisited at a future time if and when the Division discovers that the relationship between Starlight and Verizon is inconsistent with the Division's understanding expressed herein.

F. Should this Matter be Docketed?

The Division finds that NECTA has a right to seek a declaratory ruling from the Division pursuant to R.I.G.L. § 42-35-8 and Section 13(c) of the Division's P&P Rules. The Division has reached an interim declaratory ruling on the applicability of the State's CATV laws relative to Starlight's video programming services in Rhode Island. A final declaratory ruling will be issued after Starlight and Verizon provide the written response(s) described and discussed herein and after the Division determines whether a formal investigation and hearing are appropriate or necessary.

So that the Division may officially record the instant interim declaratory ruling (and concomitant "order" number), and to also establish a regulatory foundation on which the Division may issue future rulings in this matter, the Division finds that docketing NECTA's petition for a declaratory ruling is apposite and in the public interest.

7. CONCLUSION

The Division has concluded that the definition of "cable system" is the linchpin in this entire Starlight matter. The preemptive nature of the federal law definition of a "cable system" effectively ends the Division's inquiry into Starlight's operations in Rhode Island because it makes clear that Starlight is not a cable system. The only remaining inquiry is to confirm that Starlight is not "using" the public right-of-way in a manner inconsistent with the federal law cited herein.

The Division cannot agree with NECTA's assertion that the Division must rely exclusively on the definition of a CATV system contained in R.I.G.L. § 39-19-1 on which to base its jurisdictional authority over Starlight. The various federal "Cable" Acts incorporated into the

Communications Act of 1934, and the FCC's decisions there under, establish the regulatory parameters under which the states may certify and administer the operations of cable operators and cable systems in this country. Indeed, as noted above, the definition of a "CATV system" contained in Division's current CATV Rules was modeled after the federal law that was in effect in 1981. Unfortunately, albeit the Division's CATV Rules have not kept up with the dynamic evolution of cable regulation at the national level, the Division is still compelled to recognize controlling law.

Further, the Division cannot agree with NECTA's assessment that federal court decisions do not exempt video programming providers like Starlight from state CATV franchising laws. NECTA has offered no legal support for this claim. NECTA has failed to identify any federal court decisions that reached a contrary holding to the holding reached by the Seventh Circuit in the ECI case. Yes, while it is true that the Division is not bound to the holdings of the Seventh Circuit, the Division remains bound to the applicable federal statutory law and the related decisions of the FCC. Moreover, by virtue of NECTA's failure to proffer a contrary federal court holding, the Division is free to reach a finding predicated on the persuasiveness of the Seventh Circuit's decision in the ECI case.

On a related issue, NECTA, as an alternative request, has petitioned the Division to begin a rulemaking proceeding pursuant to R.I.G.L. § 42-35-6 for the purpose of amending Section 1.2(a) of the CATV Rules. NECTA urges the Division to remove the "exceptions" from the definition of a "CATV system" as contained in the Rule, in order to be consistent with the broader definition contained in R.I.G.L. § 39-19-1. As stated above, the Division has historically modeled its definition of a "cable/CATV system" on the controlling federal law. For this reason, the Division must deny NECTA's petition for a rulemaking proceeding.[74]

The Division can appreciate NECTA's concern and frustration over the unregulated operations of Starlight in Rhode Island and the resulting adverse economic impact to NECTA's members created by Starlight's ability to compete without the imposition of costly regulatory mandates. The Division acknowledges that the fine distinction associated with Starlight's "use" of the public right-of-way, through Verizon, vis à vis the proprietary cable infrastructure used by NECTA's members offers little solace in understanding why Starlight is not required to construct and maintain an Institutional/Industrial network and public access studios for its subscribers. Clearly, in view of the

fact that both Starlight and Cox (NECTA's largest member in Rhode Island) provide relatively indistinguishable video programming services in Rhode Island, NECTA is justified in questioning why these regulatory obligations and costs must be provided and borne by Cox and not by Starlight, a fact that invariably facilitates Starlight's ability to sell its services at a discounted rate.

Based on the ostensible competitive advantage that Starlight possesses over the State's currently regulated CATV operators, the Division welcomes and encourages NECTA to petition the FCC for clarification and/or an equivalent request for a declaratory ruling on the issue of whether Starlight's activities in Rhode Island can be distinguished from the factual particulars concomitant with the ECI case. Furthermore, as several years have passed since the FCC's ECI decision, and considering the fact that there was a strong dissenting opinion from Commissioner Gloria Tristani, which, inter alia, declared that the majority's decision "undermines the vital franchising role that [the federal law] reserves for local governments", NECTA may find that the FCC may be willing to revisit and perhaps reverse its previous policy on SMATV cable operators.

If NECTA agrees to challenge Starlight's operations in Rhode Island before the FCC, the Division will participate, in an amicus role, in order to convey our conviction that supervising and regulating all cable service operators in Rhode Island is in the public interest.

Now, therefore, it is

(**16791**) ORDERED:

1. That the Division hereby issues this "Interim Declaratory Ruling" in response to the New England Cable Television Association's July 9, 2001 petition for a Declaratory Ruling.
2. That based on the findings discussed herein, the Division declares on an interim basis, that Starlight Communications Holding, Inc. is not operating as a CATV system in Rhode Island, and accordingly, is not subject to the State's CATV franchising laws.
3. That the Division's will issue a final declaratory ruling in this matter after it has received and evaluated the written responses from Starlight Communications Holding, Inc. and Verizon- Rhode Island, infra.

4. That Starlight Communications Holding, Inc. and Verizon-Rhode Island are hereby directed to submit written responses to the Division, in affidavit form, which address the details of their business relationship and also the following issues:

   (A) Whether Starlight Communications Holding, Inc. or any of its principals own and/or control facilities on public property or in the public right-of-way?

   (B) Whether Starlight exercises any control relative to Verizon's cable network?

   (C) Whether, the Verizon facilities used by Starlight were constructed at Starlight's request?

   (D) Whether Starlight is paying for the service it receives from Verizon pursuant to approved rates contained in Verizon's "*Supertrunking Video Service*" tariff; and

   (E) Whether other programmers may use the Verizon cables that are being used by Starlight?

5. The written responses identified in paragraph "4", above, shall be submitted within 60 (sixty) days from the issue date of this ruling.

6. The Division shall reserve judgment on deciding the issues of whether a formal investigation and hearing are appropriate or necessary and/or whether the Division possesses the authority to issue a cease and desist order in this matter.

7. The New England Cable Television Association's petition for the initiation of a rulemaking proceeding for the purpose of amending Section 1.2(a) of the Division's CATV Rules is hereby denied.

8. That the New England Cable Television Association is encouraged to pursue the instant Starlight issue before the Federal Communications Commission. In the event the Federal Communications Commission determines that Starlight's operation in Rhode Island is distinguishable from the factual bases surrounding the ECI decision, for local regulatory

purposes, the Division will entertain a motion from the New England Cable Television Association to revisit the matter.

Dated and Effective at Warwick, Rhode Island on December 12, 2001.

_____
John Spirito, Jr., Esq.
Chief Legal Counsel

_____
Thomas F. Ahern
Administrator

[1] Relying on the case of City of Chicago v. FCC, 199 F.3d 424,428-429 (7th Cir. 1999).

[2] The Department of Attorney General filed a motion to intervene in this matter on July 30, 2001. Albeit Mr. Lueker was not able to appear at the procedural conference conducted on August 6, 2001, he has been an active participant in this matter.

[3] Relying on the cases of Eastern Van Lines d/b/a Acushnet Van & Storage, Inc. v. Norberg, Tax Administrator, 114 R.I. 110 (1974); and Newbay Corporation v. Malachowski, 599 A.2d 1040 (1991).

[4] 432 U.S. 333 (1977).

[5] Playboy Enters. v. Public Serv. Commission of Puerto Rico, 906 F. 2d 25 (1st Cir. 1990); Cotter v. Mass. Assoc. of Minority Law Enforcement Officers, 219 F.3d 31 (1st Cir. 2000); Camel Hair and Cashmere Institute of America, Inc. v. Assoc. Dry Goods Corp., 799 F.2d 6 (1st Cir.1986; and Rhode Island Medical Society v. Whitehouse, 66 F. Supp. 2d 288 (D. R.I. 1999).

[6] Citing Millett v. Hoisting Engineers' Licensing Division of the Dept. of Labor, 377 A.2d 229 (1977).

[7] 118 R.I. 559 (1977).

[8] Id., at 564,565.

[9] R.I.G.L. §39-19-3.

[10] Citing: R.I.G.L. §§39-1-38 and 39-1-1(2); the Rhode Island Supreme Court case of Berkshire Cablevision of Rhode Island, Inc. v. Burke, 488 A.2d 676 (1985); and the Division's CATV Rules.

[11] NECTA legal memorandum, pp. 15-16.

[12] 599 A.2d 1040 (1991).

[13] Id., at 1041.

[14] NECTA legal memorandum, pp. 16-17.

[15] Citing R.I.G.L. §42-35-8 and Section 13 of the Division's CATV Rules.

[16] Citing City of East Providence v. Public Utilities Commission, 566 A.2d 1305 (1989) and Pawtucket Power Associates Limited Partnership v. City of Pawtucket, 622 A.2d 452 (1993).

[17] NECTA legal memorandum, p.19.

[18] Id.
[19] NECTA legal memorandum, p. 20.

[20] Citing R.I.G.L. §39-19-6 and the Berkshire Cablevision case, supra.
[21] Citing Chase v. Moss, 448 A.2d 1221 (1982).
[22] Id.
[23] Citing F. Ronci Company, Inc. v. Narragansett Bay Water Quality Management District Commission, et al., 561 A.2d 874 (1989).
[24] Starlight Protest, p.3.
[25] Id., p.5.
[26] Citing R.I.G.L. §42-35-7.
[27] Citing, Blackstone Valley Chamber of Commerce, et al v. Public Utilities Commission, 452 A.2d 931, 933 (1982).
[28] Id.
[29] Starlight Protest, p.6.
[30] Citing Newport Electric Corporation v. Public Utilities Commission, 454 A.2d 1224,1225 (1983).
[31] Starlight Protest, pp. 6-7.
[32] Citing Ambeault v. Burrillville Racing Assoc., 373 A.2d 807,809 (1977).
[33] Citing Powers v. Ohio, 499 U.S. 400, 411 (1991).
[34] Attorney General legal memorandum, p.2.
[35] Id.
[36] Id., p.3.
[37] Id.
[38] Citing 47 U.S.C.A §522(7).
[39] Attorney General legal memorandum, p.3.
[40] Id.
[41] Id.
[42] The Attorney General cites R.I.G.L. §§39-4-23 and 39-3-31 as statutory vehicles through which the Division may seek such enforcement.
[43] Citing Eastern Van Lines v. Norberg, 329 A.2d 197,199 (1974); and Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910 (1970).
[44] Citing R.I.G.L. §42-35-8.
[45] Attorney General legal memorandum, p.4.
[46] Full Channel TV, Inc. and Block Island Cable TV, Inc., along with Cox, constitute all the CATV systems currently certificated to do business in Rhode Island.
[47] Attorney General legal memorandum, pp. 5-6.

[48] Advocacy Section legal memorandum, p.1.
[49] Id., p. 2.
[50] Citing R.I.G.L. §§39-19-6 and 39-19-8.1, CATV Rule 1.3(a) and P&P Rule 8(a) and (b).
[51] Advocacy Section legal memorandum, p.2.
[52] Id.
[53] Id., pp.2-3.
[54] Id., p.3.

[55] See Division Docket Nos. D-00-C-3 and D-00-C-5.

[56] R.I.G.L. §39-19-3.

[57] 376 A.2d 682, 118 R.I. 559 (1977).

[58] Id., at 685.

[59] NECTA identifies the costs associated with public access studios and industrial/institutional networks as examples.

[60] See Verizon's TARIFF F.C.C. NO. 11.

[61] R.I.G.L. §39-19-1.

[62] CATV Rule 1.2(a).

[63] CATV Rule 1.2(a) (1) and (2).

[64] NECTA Petition, p. 2.

[65] CATV Rule 1.2(a)(2).

[66] Id.

[67] The Division notes that there appears to be a mistake in Section 1.2 (a) (2) of the Division's CATV Rules in that the word "ownership" is used twice, rather than paralleling the then federal equivalent of using the words "ownership" and "control".

[68] Codified at 47 U.S.C. §§ 521, et seq.

[69] 47 U.S.C. 522 (7).

[70] *In re Entertainment Connections, Inc. Motion for Declaratory Ruling*, FCC 98-111, 13 FCC Rcd 14277 (1998).

[71] City of Chicago, et al. v. FCC, 199 F.3d 424, at 432.

[72] Id.

[73] 47 U.S.C. 556 (c).

[74] The Division notes that it has undertaken preliminary steps toward a comprehensive evaluation and updating of the Division's current CATV Rules. In August of 2001 the Division established an eleven member "Cable Rules Study Committee" to begin the process of evaluating and discussing possible amendments to the Division's existing CATV Rules. This Committee meets monthly and will continue to meet until it finalizes proposed amendments for the Administrator's consideration.