VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

Re: Grassroots Cable Systems of Vermont, Inc.
Declaratory Ruling #254

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision, dated March 4, 1992, pertains to a petition for a Declaratory Ruling filed by Grassroots Cable Systems of Vermont, Inc. (the Petitioner) on August 5, 1991. The Petitioner seeks a ruling that the construction of 21 cable television service systems will not require a permit pursuant to 10 V.S.A. Chapter 151 unless they are constructed on more than one acre in towns without permanent zoning and subdivision bylaws and on more than 10 acres in towns with permanent zoning and subdivision bylaws.

A prehearing conference was convened by Board Chair Elizabeth Courtney on September 30, 1991, and a prehearing conference report was issued on October 29. On November 26 the Petitioner submitted a stipulation to a statement of facts dated August 2, 1991, and a supplemental statement of facts dated November 25, 1991. The Board convened a public hearing on December 4, 1991, for the purpose of hearing oral argument, with Acting Chair Charles F. Storrow presiding. The following parties participated:

The Petitioner by Peter Zamore, Esq.
Department of Public Service (DPS) by Robert Simpson, Esq.

The Board deliberated concerning this matter on December 4 and December 19, 1991. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

I. ISSUES

The Petitioner agrees that an Act 250 permit will be required for the construction of headends that occurs on tracts of land of more than one acre in municipalities that do not have permanent zoning and subdivision bylaws and more than ten acres in municipalities that do have permanent zoning and subdivision bylaws. The Petitioner contends, however, that installation of cable within existing rights-of-way is exempt under Appendix A of the Environmental Board rules. The Petitioner also contends that construction of headends on land of less acreage than the one or ten acre thresholds will not require an Act 250 permit because the rights-of-way cannot be considered in computing the acreage

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of involved land because they are exempt and because the Petitioner has insufficient ownership interest in or control of the rights-of-way.

The Board must resolve the following issues:

1. Whether the installation of cable television distribution lines within existing utility rights-of-way is exempt under Appendix A of the Environmental Board rules.

2. Whether, even if the distribution lines are exempt from review, the rights-of-way should be included in computing the acreage of land involved with the headend construction so that headend construction on more than one or ten acres of involved land requires an Act 250 permit.

II. FINDINGS OF FACT

1. The Petitioner intends to install cable television in 89 towns in Vermont by means of 21 separate systems. Each system will consist of a receiving site ("headend") and coaxial and/or fiber optic cables, amplifiers, and associated equipment connecting the headend to the individual subscribers.

2. The headend consists of an equipment storage building and a set of antennae located on towers which receive television signals off the air by microwave and from satellites.

3. The distribution cables for the most part will be installed on existing utility poles and, where utility service is underground, the cable will be installed underground. Of the 1,500 miles of lines required to provide service, the Petitioner estimates that approximately 1,491 miles will be overhead and nine miles will be underground. The work required on a pole to accommodate the cable is called "makeready."

4. The fiber optic cable will be 3/8 inch in diameter and the coaxial cable will be 1/2 inch in diameter, with a 1/8-inch support cable.

5. On overhead installations, safety codes require that the television cable be located at least twelve inches above telephone cable and at least forty inches below electric cable. Where the existing poles are too short to provide the required clearance, modifications will

be necessary, including adjusting the'height of existing utility cables and installing crossarms or outriggers. In some instances, a taller pole will be installed with the minimum additional height necessary to accommodate the cable television cable. No relocation of utility poles outside the existing rights-of-way is proposed, and no rights-of-way will be expanded.

6. For underground installations, television cable will be installed in a trench within the existing utility right-of-way, approximately 24 to 30 inches deep. After installation, the trench will be backfilled and returned to its previous condition.

7. Pedestals similar to existing telephone and electric pedestals, approximately 6" x 6" x 24" in size, will also be located within the right-of-way.

8. The utilities permit cable television companies to attach overhead cable by means of either a standard pole attachment contract or tariff. The contract or tariff contains standards on makeready, identifies the rental fees, and generally defines the relationship between the utility and the cable company.

9. A typical agreement between a cable company and a utility is the New England Telephone & Telegraph Company (NET) pole attachment tariff. Under the tariff, the cable company's interest in the right-of-way is very limited. The cable company obtains a license authorizing the attachment of cable facilities to the utility pole, but no ownership or property rights are conveyed. The cable company cannot assign its interest in the agreement without the utility's consent. The cable company's ability to use the poles is also strictly limited. The utility specifies the point of attachment, and reserves the right to locate poles to best meet the utility's service requirements. All makeready work is performed by the utility.

10. The manner of attaching the cable to the poles is dictated by the National Electric Safety Code as well as by various utility and cable television industry specifications. The Petitioner will have no right to remove poles or to determine when or where the cables will be attached.

III. CONCLUSIONS OF LAW

A land use permit is required prior to commencing construction on a development or commencing development without a permit. 10 V.S.A. § 6081(a). "Development" is defined at 10 V.S.A. § 6001(3), in pertinent part, as:

> the construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land'within a radius of five miles of any point on any involved land, for commercial or industrial purposes ... [and] the construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality which has not adopted permanent zoning and subdivision bylaws.

There is no dispute that construction of the headends meets the definition of development, and where they are to be constructed on more than the jurisdictional threshold of one acre or ten acres, an Act 250 permit will be required.

The Petitioner contends that installation of distribution lines, including makeready work at the poles, is exempt from the permit requirements because of Appendix A of the Board rules, which states, in pertinent part:

> RULE A-3. SCOPE
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> (c) Exemptions:
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> Subject to the provisions of Rule A-4 below the following transmission facilities shall be exempt from the permit requirements of the Rules and Regulations of the environmental board and this Appendix A:
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> . . . .
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> (iii) an under or on ground transmission facility within a right-of-way, including a public highway, existing, cleared, and in use, as of the effective date of these rules or having a permit under 10 V.S.A., chapter 151 provided that such

installation will not require widening or changing the character of the existing right-of-way or as may be specified in a permit; or

(iv) an above ground transmission facility in a right-of-way existing, cleared, and in use, as of the effective date of these rules, excepting rights-of-way for public highways, where such installation does not require widening or changing of the character of the right-of-way; or

(v) an above ground transmission facility to be located on existing, and in use, transmission facilities.

Rule A-2 defines "transmission facilties" as any wire, conduit, and physical structure or equipment related thereto whether above, below, or on ground used for the purpose of carrying, transmitting, distributing, storing, or consuming of electricity or communications ....

The Board concludes that installation of the cable on poles and underground within existing utility rights-of-way falls under the exemptions of Appendix A, and that a permit is therefore not required for such work. The cable will be placed on or next to the existing, above or below ground electric and telephone distribution systems. All new cable will be located within existing utility rights-of-way. All underground rights-of-way will be returned to their condition prior to construction. Any overhead construction will be minor. Installation of the very thin cables will not change the character of the rights-of-way. No utility poles will be relocated outside the right-of-way, nor will any rights-of-way be expanded.

The Board must also determine, notwithstanding the exemption, whether the rights-of-way are "involved land" with the headend construction, within the meaning of 10 V.S.A. § 6001(3) and Board Rule 2(F), so that the acreage of the rights-of-way is included in computing the amount of land involved with the headend construction.

"Involved land" is defined at Rule 2(F) as:

(1) The entire tract or tracts of land upon which the construction of improvements for commercial or industrial purposes occurs; and

(2) Those portions of any tract or tracts of land within a radius of five miles owned or controlled by the same person or persons, which is incident to the use of the project; and

(3) Those portions of any tract or tracts of land within a radius of five miles owned or controlled by the same person or persons, which bear some relationship to the land actually used in the construction of improvements, such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reason of that relationship,.

The Board concludes that the rights-of-way are not land involved in the headend construction. The first definition of involved land does not apply because the Board has already determined that the construction in the rights-of-way is exempt. The second and third definitions do not apply because the rights-of-way are not owned or controlled by the Petitioner.

The Petitioner has no ownership interest in the riqhts-of-way or in the utility poles on which the cable will be attached, but will have a contractual right to attach cable to the utility poles. The manner of attachment will be dictated by the National Electric Safety Code as well as by various utility and cable television industry specifications. The utility specifies the point of attachment, and reserves the right to locate the poles to best meet the utility's service requirements. All makeready work is performed by the utility.

The Board concludes that, based upon the facts presented, the Petitioner does not have a sufficient level of control over the rights-of-way to consider the riqhts-of-way land involved with the headend construction. Although control need not be exclusive, it seems that the Petitioner lacks any control except the decision whether to seek a license to install cable. This falls far short of any of the standards for control articulated by the Board and the Supreme Court in prior decisions. See, e.g., In re Eastland, Inc., 151 Vt. 497 (1989); In re Vitale, 151 Vt. 580 (1989).

IV. ORDER (Revised)

No Act 250 permit is required for the Petitioner's construction of headends except on a tract of land of more than ten acres or on a tract of land of more than one acre of land in a municipality which has not adopted permanent zoning and subdivision regulations. No Act 250 permit is required for the Petitioner's installation of cable in existing utility rights-of-way.

Dated at Montpelier, Vermont this 12th day of March, 1992.

ENVIRONMENTAL BOARD

Charles Storrow

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