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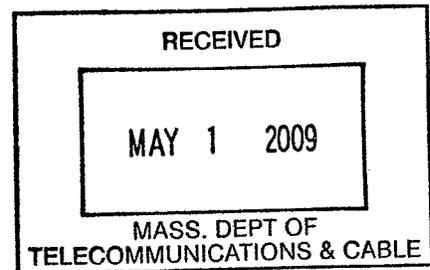
MASS. DEPT. OF
TELECOMMUNICATIONS & CABLE

William August, Esq.
Peter J. Epstein, Esq.

By hand delivered & e-filed

May 1, 2009

Catrice C. Williams
Department of Telecommunications and Cable
Two South Station, 4th Floor
Boston, MA 02110



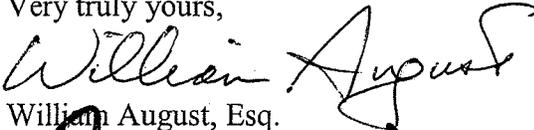
Re: DTC 08-12, Motion to Intervene and Comments of Issuing Authorities
and Access Centers

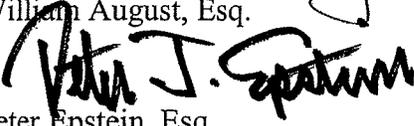
Dear Ms. Williams:

Enclosed please find the Motion to Intervene and Joint Comments of several Massachusetts cable television license Issuing Authorities, the Massachusetts Municipal Association, Access Centers and MassAccess, for entry into the record in DTC 08-12, Notice for Comment & Notice of Public Hearing – Petition by Verizon New England Inc. for Amendment of the Cable Division's Form 500 Cable Operator's Annual Report of Consumer Complaints.

Thank you for your attention to this matter. Please do not hesitate to contact us should you require additional information concerning the attached comments.

Very truly yours,


William August, Esq.


Peter Epstein, Esq.

cc: Bruce P. Beausejour
Alexander W. Moore
Commenting Parties

Before the

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

In the Matter of:)
)
Petition by Verizon New England, Inc.)
for Amendment of the Form 500)
Cable Operator’s Annual Report)
Of Consumer Complaints)

Docket No. DTC 08-12
May 1, 2009

MOTION TO INTERVENE

AND

COMMENTS OF

THE TOWNS OF ANDOVER, BRIMFIELD, BROOKLINE, CANTON, DEDHAM,
GRAFTON, LEXINGTON, MANSFIELD, MENDON, NORTH ATTLEBORO, ORANGE,
SANDWICH AND WELLESLEY, THE CITIES OF CHELSEA, EASTHAMPTON,
FITCHBURG, NEW BEDFORD, NEWTON, REVERE AND SPRINGFIELD,
MASSACHUSETTS MUNICIPAL ASSOCIATION,
ARLINGTON COMMUNITY MEDIA, BELMONT COMMUNITY TELEVISION, INC.,
BOSTON COMMUNITY ACCESS AND PROGRAMMING FOUNDATION, INC.,
BRAINTREE COMMUNITY ACCESS AND MEDIA, INC., CAMBRIDGE PUBLIC
ACCESS CORPORATION, LEXINGTON COMMUNITY MEDIA CENTER, LOWELL
TELECOMMUNICATIONS CORPORATION, SOMERVILLE COMMUNITY ACCESS
TELEVISION, INC., WELLESLEY ACCESS CORPORATION, WATERTOWN
COMMUNITY ACCESS CENTER, WORCESTER COMMUNITY CABLE ACCESS,
INC. AND MASSACCESS

I. Introduction

The Towns of Andover, Brimfield, Brookline, Canton, Dedham, Grafton, Lexington, Mansfield, Mendon, North Attleboro, Orange, Sandwich and Wellesley, Massachusetts, the Cities of Chelsea, Easthampton, Fitchburg, New Bedford, Newton, Revere, and Springfield (the “Issuing Authorities”), the Massachusetts Municipal Association, a nonprofit, tax exempt association representing Massachusetts municipalities (“MMA”), and Arlington Community Media, Belmont Media Center, Boston Community Access and Programming Foundation, Inc. (d/b/a Boston Neighborhood Network), Braintree Community Access and Media, Inc., Cambridge Public Access Corporation (d/b/a Cambridge Community Television), Lexington Community Media Center, Lowell Telecommunications Corporation, Somerville Community Access Television, Inc., Watertown Community Access Center, Wellesley Access Corporation, Worcester Community Cable Access, Inc. (the “Access Centers”) and MassAccess, the Massachusetts chapter of the Alliance for Community Media, Inc., a 501c3 association representing Access Centers (collectively “the Commenting Parties”), hereby submit: 1) a Motion to Intervene and 2) Comments in Reply to the Department of Telecommunications and

II. Motion to Intervene

The above-named Issuing Authorities are responsible for cable television oversight and licensing in their respective communities. Verizon's proposed amendment would eliminate local subscriber count data that is now annually filed in the Form 500 Report on Customer Complaints. Absence of community-specific, company-specific subscriber total data would directly interfere with Issuing Authority ability to meaningfully evaluate the number of complaints reported by each company. Community-specific and company-specific subscriber counts are directly relevant to rational evaluation of consumer complaint trends. An Issuing Authority cannot quantify the significance of consumer complaints, or measure complaint trends, unless it can measure the number of complaints relative to the number of subscribers. The Issuing Authorities strenuously urge that they continue to need reliable and up-to-date subscriber counts for informed and responsible evaluation of customer complaint data and trends. The Issuing Authorities therefore are substantially and directly affected by a loss of available information necessary to their oversight activity, and therefore plainly qualify for Intervener status under 220 CMR 1.03. As the lead nonprofit association representing Massachusetts municipalities, Massachusetts Municipal Association, regularly represents municipalities in matters of interest and is substantially, directly and specifically affected by the risk of harm to its member municipalities caused by weakening of cable company complaint reporting to municipalities. In any event, given their numerous important licensing and oversight roles and responsibilities, Issuing Authorities, and the Massachusetts Municipal Association, as their representative, have routinely been granted rights of participation in rule and form change matters.

Similarly, access centers and their association are substantially and specifically affected by the proposed amendment. Access centers are directly interested in, and impacted by, subscriber complaints about picture and signal quality and other reception characteristics, and service interruptions, because viewership of their channels is directly impacted by poor reception and service interruptions. Access centers therefore are entities that are substantially affected by any impairment of the quality or usefulness of reporting of such customer complaints about signal reception and signal interruptions, information which is now found in the Form 500. Meaningful evaluation of reception and service interruption complaints is dependent on assessment of the number of complaints in proportion to the number of subscribers. The access centers also have a substantial and direct interest in possible amendments that would reduce availability of subscriber count data. The access centers, and MassAccess (their association), therefore have a substantial, specific and direct interest in continued filing of subscriber data on a municipal basis and plainly qualify for Intervener status under 220 CMR 1.03.

Verizon proposed the subject amendment under GL c. 30A, s.4 and 207 CMR 2.01, which provide for regulatory amendments through rulemaking, *not* adjudication. For this and other reasons discussed below, the Issuing Authorities and other Commenting Parties should be able to comment without filing a motion to intervene because motions to intervene and/or motions to participate are required for adjudications, not rulemakings. Verizon requested a rulemaking, which allows the Department the option of proceeding under c.30A, s.4, in rulemaking proceedings. The public interest will be better served by addressing general rule and form changes through rulemaking (not adjudication), as required by c. 30A.

The Commenting Parties urge that the public interest is disserved by denying interested persons the use of the informal notice and comment rulemaking process and replacing it with a more formal adjudicatory process, a process with more onerous rules of participation. Use of adjudication in lieu of rulemaking is a bad precedent. It appears to constitute legal error in the circumstances at hand inasmuch as use of adjudication in this matter is inconsistent with the Administrative Procedure Act wherein general rule and/or form changes are intended to be handled through rulemakings or notices of inquiry which allow broader participation. See GL c. 30A, s.4. From a policy perspective, use of adjudication in lieu of rulemaking is less conducive to the civic engagement and broad participation which are the historic objectives of the informal rules designed for rulemaking under the Administrative Procedure Act. The foregoing provides additional reason for granting the motions to intervene, in order to mitigate some of the harm from use of the adjudicatory rules in the instant proceeding. To cure this error, the Department should issue new notice and allow participation without motions to intervene, in a rulemaking, in accordance with Verizon's Petition for Amendment of the Form 500 (the "Petition"). Further procedural issues are raised below, following the substantive Comments of the Issuing Authorities, MMA, Access Centers and MassAccess. Accordingly, the Commenting Parties reserve any and all rights to object to notice-giving and rules of procedure based on treatment of this proceeding as an adjudication.

In the event the Department declines our recommendation to continue this matter as a rulemaking, the undersigned hereby request that this filing serve as the Appearance of Counsel in the above-captioned matter, if and to the extent that an Appearance of Counsel is needed for such an adjudication.

III. Substantive Comments of the Issuing Authorities and Access Centers

State law charges municipal officials with the duty of implementing the licensing process as license "Issuing Authorities." MGL c. 166A, s.1. Municipal officials have actual and extensive experience with local cable licensing, and know first hand what is required for a responsible and reasonable licensing process. Moreover, the Department's own precedents (interpreting GL c. 166A) repeatedly emphasize that with respect to cable licensing, the role of the local Issuing Authority is "paramount." United Cablevision Funding, LP v. Townsend, CATV Docket No. A-45, p.6 (November 6, 1984). Accordingly, the comments and lessons learned from municipal officials in decades of prior licensing should be afforded significant weight in these deliberations. In this context it is important for the Department to take seriously the strong opposition of municipal officials to amendments that would take away and/or weaken municipal ability to know how many of their constituents are receiving cable service within their communities and the customer service/complaint ramifications thereof. In the following sections, we have outlined numerous important reasons to maintain the subscriber count reporting in the Form 500 and on the municipal level.

As detailed below, the changes proposed in Verizon's petition are against the public interest as measured by numerous criteria, would be a radical change of course for the agency, and Verizon's legal arguments for the amendment are seriously flawed.

A. The Department has Clear Legal Authority to Require Community-Specific Subscriber Count Data

Verizon challenges the Department's authority to require subscriber count data, arguing that

c. 166A does not specifically mention Department authority to require such data. This argument is inconsistent with long-established principles of Massachusetts administrative law and omits reference to governing law.

MGL c. 166A, Section 16 shows legislative intent for the Department to have broad rulemaking authority to issue regulations and standards beyond those items expressly listed in c. 166A as subjects for regulation. Section 16 provides that the Department may "... issue such standards and regulations as it deems appropriate to carry out the purpose of this chapter for which purpose it may employ such expert assistants as it deems necessary." Thus the General Court expressly gives the Department authority to adopt regulations and standards for such purposes as the Department "deems appropriate," which negates Verizon's argument that the Department's authority is more constrained.

The very broad scope of rulemaking authority under c. 166A was affirmed by the courts in NECTA v. Community Antenna Television Commission, Superior Court Civil Action No. 70134 (1984), upholding adoption of security deposit regulations notwithstanding that c. 166A was silent on security deposit regulation, emphasizing:

"Further, as long as a regulation is consistent with the "scheme" or "design" of the chapter, it need not be traced to a specific section of the statute." (citing Cambridge Electric Light Co. v. Dept. of Public Utilities, 363 Mass. 474, 494 (1973).) *Id.* at 3.

In NECTA v. CATV Commission, *supra*, the Court goes on to observe that other courts have found that c. 166A confers broad regulatory authority over cable television, to deal with an entire area of activity, and this allows even greater scope for rulemaking:

"Where as here, the Legislature has granted an agency broad authority to deal with an entire area of activity, less scrutiny is required than where there is no such broad mandate." *Id.*

Similarly, the Supreme Judicial Court has stated "...indeed there is a presumption that ... regulation does not exceed the statute which is as strong as the presumption that a statute squares with the constitution" White Dove, Inc. v. Director of Division of Marine Fisheries, 380 Mass. 471, 477 (1980). The Supreme Judicial Court has likewise emphasized that "[a]n agency's powers to promulgate regulations are shaped by its organic statute taken as a whole and need not necessarily be traced to specific words." Commonwealth v. Gerveny, 373 Mass. 345, 354 (1977). It is difficult to imagine a better example of an agency requirement that carries out the Department's purposes than the Form 500 requirement for information about how many subscribers are served per community. There is a clear rational relationship between the subscriber count information and complaint reporting implemented by the Form 500. It would be impossible to evaluate whether total complaints are quantitatively significant without knowing the total subscriber base, to allow Issuing Authority evaluation of complaints as a percentage of total subscribers. For example, if two cities had 100 Verizon complaints each, as reported on the Form 500, but one city had 10,000 Verizon subscribers and the other city had only 200 Verizon subscribers, the cities could not meaningfully assess the seriousness of the complaint data without knowing what proportion it was of total local subscriber count. (Just as medical reports measure infant mortality relative to local population, not isolated from underlying population data.) Thus the requirement that Verizon provide subscriber count data directly complements and facilitates Issuing Authority review of the other complaint data in the Form 500. Requiring such information is plainly within the scope of the Department's authority.

B. Strong Policy and Customer Service Benefits from Subscriber Count Data

1) The Amendment Would Reduce the Usefulness of the Form 500 Complaint Summary

Just as there is no real question about the Department's authority to require subscriber count data, there can be no question about the importance of community-specific subscriber count data for cable oversight and licensing activity. The central purpose of complaint data reporting is to provide issuing authorities with a meaningful picture of complaints and cable company performance. Such performance can be measured by reviewing complaint data. However, complaint data is worthless if not viewed in relation to cable company community-specific subscriber counts. For example, if a company has increasing complaint totals, but also has increasing subscriber totals, the complaint situation may not be getting worse, but may be staying the same in proportion to total subscriber count. Such trends can only be ascertained by creating a ratio of complaints in proportion to total subscriber population. Conversely, if a company has increasing complaints, but steady or decreasing subscriber totals, then the complaint and performance situation is deteriorating, as measured by the ratio of complaints to subscribers. It is obvious that it is impossible to have useful complaint total data without the ability to view the data in proportion to total subscriber base within the community of service. (*See above.*) Since company-specific subscriber count numbers are changing on a regular basis, Issuing Authorities need current figures, and the Form 500 provides a convenient, accurate and meaningful source of this data as the form is filed annually.

2) Quantification of Competition is a Good Thing

One of the overriding goals of regulatory policy is to encourage competition and to redress market failure evidenced by lack of effective competition. Accordingly, the general public and the Department all benefit from knowledge of actual competition levels in various cable markets. Subscriber count data provides real information about the extent of competition, or lack thereof, in individual, community markets. Continuing access to this data is essential for Department regulators to do their jobs—evaluate the existence, growth or lack of competition.

3) The Proposed Amendment Would Interfere with Other Issuing Authority Functions

Community-specific, company-specific subscriber count data is also essential for other important cable license Issuing Authority functions. For example, Issuing Authorities routinely perform an informal audit of cable company PEG Access payments by multiplying the number of total community subscribers by the average per subscriber revenues, multiplied by the percentage fee prescribed in the cable license for PEG Access. This is an almost universal approach for informal verification of annual payments, and is beneficial to both Issuing Authorities and cable operators inasmuch as it obviates the need for more formal audit procedures. Similarly, community-specific subscriber count data is used to calculate franchise related costs (FRCs), by dividing franchise costs by the number of local subscribers. This process of estimating FRCs in relation to local subscriber count likewise is a longstanding and essential municipal cable licensing function, made necessary for any responsible Issuing Authority cognizant of the mandate of 47 USC 546 to negotiate license

terms with due consideration of the costs thereof. The foregoing Issuing Authority functions require availability of reliable community-specific subscriber counts.

Legislation recently filed by Verizon before the General Court, if adopted, would require that capital payments for public, educational and government access and Institutional Networks be paid in proportion to subscriber levels in the community of service (not to exceed the per subscriber payments of incumbents). Accordingly, subscriber count data would have to continue to be available on a local level even to consider the possibility of acceptance of any such legislative proposal, as per subscriber payment parity could not be calculated without local subscriber count information. (Many of the Commenting Parties strongly oppose Verizon's pending legislation and in no way suggest it warrants any support. The point here is that Verizon's legislation is predicated on the availability of local subscriber count information, the very information it seeks to delete from the Form 500.)

One of our priorities is that the Department, Verizon and other cable operators confirm that community-specific, company-specific subscriber totals will be made available to Issuing Authorities for all of the foregoing purposes. Notwithstanding the foregoing, our primary goal (outlined above) is maintaining the usefulness of the Form 500 as a meaningful report on subscriber complaint data.

IV. Further Procedural Rulemaking Issues

We note for the record that the Request for Comment and Notice characterizes the proceeding as adjudicatory, and requires motions to intervene or motions to participate consistent with rules of adjudication. We respectfully note that Petitioner Verizon's Petition in this matter was for amendment of rules pursuant to 30A, s. 4; and 207 CMR 2.01, which contemplate regulatory rulemakings, not adjudications. This proceeding to amend forms is more in the nature of a public notice and comment rulemaking or notice of inquiry, and not an adjudication, as the Petitioner is requesting general changes to a form, and is not seeking an adjudication of the rights of named parties. Comment should have been allowed without motions to intervene or to participate, and the notice of adjudication therefore appears to be inapposite and defective.

More importantly, there are public interest principles that warrant the use of informal rulemaking proceedings, as intended by the Administrative Procedure Act, MGL c. 30A, in lieu of adjudications. The Administrative Procedure Act created rulemaking as an informal notice and comment process, to allow and encourage public participation in generalized rulemakings through simple and informal filing of comments (initial and reply comments). Adjudication, on the other hand, is subject to more formal rules, including filing of a motion to intervene, and these rules typically reduce the degree of public participation. Also, the APA provides for agency notice of rulemakings to "interested persons", which is not provided in an adjudication. Accordingly, we challenge the use of formal adjudication to determine general rules. Our opposition is based on the benefits of promoting public participation and civic engagement through use of the more informal notice and comment rulemaking system. Because notice in this proceeding was notice of an adjudication, and we believe it should have been notice of a rulemaking, we reserve the right to challenge said notice if and as needed.

V. Conclusion

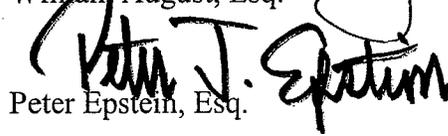
The Commenting Parties urge that community-specific and company-specific subscriber counts are plainly relevant to rational evaluation of customer complaints. An Issuing Authority cannot quantify the significance of customer complaints, or measure complaint trends, unless it can measure the number of complaints relative to the number of subscribers. The Issuing Authorities strongly urge that they continue to need reliable and up-to-date subscriber counts for informed and responsible evaluation of customer complaint data and trends. Similarly, customer count totals are necessary for regulators to perform their job measuring competition, growth of competition, or lack of competition in specific local cable markets, and customer count totals are routinely used by Issuing Authorities for numerous oversight and consumer protection tasks as detailed above. The public interest requires the continuation, not the suppression, of community-specific, company-specific subscriber count information.

Respectfully submitted by:

The Town of Andover
The Town of Brimfield
The Town of Brookline
The Town of Canton
The City of Chelsea
The Town of Dedham
The City of Easthampton
The City of Fitchburg
The Town of Grafton
The Town of Lexington
The Town of Mendon
The City of New Bedford
The City of Newton
The Town of North Attleboro
The Town of Orange
The City of Revere
The Town of Sandwich
The City of Springfield
The Town of Wellesley
Massachusetts Municipal Association
Arlington Community Media
Belmont Media Center
Boston Community Access and Programming Foundation, Inc.
Braintree Community Access and Media, Inc.
Cambridge Community Television, Inc.
Lexington Community Media Center
Lowell Telecommunications Corp.
Somerville Community Access Television
Watertown Community Access Center
Wellesley Access Corporation
Worcester Community Cable Access, Inc.
MassAccess

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May 1, 2009

CERTIFICATE OF SERVICE

I, William August, Esq., hereby certify that a copy of the above Motion to Intervene and Comments was served by first class U.S. mail to legal counsel for Verizon New England, Inc., Bruce P. Beausejour and Alexander W. Moore, and to Catrice Williams, Secretary, Department of Telecommunications and Cable, Two South Station, Boston, MA 02110


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