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*ADMITTED IN DC ONLY

September 8, 2014

**Via Electronic Mail and Federal Express**

Catrice C. Williams
Secretary
Department of Telecommunications and Cable
1000 Washington Street, Suite 820
Boston, Massachusetts 02118

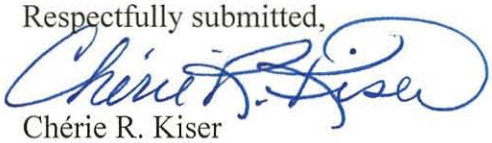
**Re: D.T.C. 11-16, Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in Massachusetts**

Dear Secretary Williams:

Global Tel*Link Corporation ("GTL"), by its attorneys, respectfully submits its Reply in Support of its Motion to Compel Responses to Discovery Requests. Three (3) copies of this submission have been sent to the Hearing Officer, and one copy has been sent to each Department staff member listed on the service list per the Procedural Order issued February 27, 2014.

If you have any questions concerning this matter, please contact the undersigned.

Respectfully submitted,



Chérie R. Kiser

Counsel for Global Tel*Link Corporation

Enclosures

cc: Service List

**Before the**
**COMMONWEALTH OF MASSACHUSETTS**
**DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

| | | |
|---|---|---|
| **Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in Massachusetts Seeking Relief from the Unjust and Unreasonable Cost of such Calls** | ) ) ) ) | **D.T.C. 11-16** |

# GLOBAL TEL*LINK CORPORATION'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL RESPONSES TO DISCOVERY REQUESTS

Global Tel*Link Corporation ("GTL"), by its attorneys, hereby respectfully submits this Reply in further support of its May 30, 2014 Motion to Compel, which requested the Massachusetts Department of Telecommunications and Cable ("Department") to issue an order (1) compelling the Petitioners who did not respond to GTL's First Set of Information Requests to Petitioners to respond within five business days and (2) compelling Petitioner Prisoners' Legal Services ("PLS") to produce within five business days certain documents it withheld from its production in response to GTL's First Set of Information Requests.[1] In further support of its Motion to Compel, GTL states the following:

## I. Many Petitioners Still Have Not Responded to GTL's Discovery Requests

1. As of May 30, 2014 when GTL filed its motion to compel, twenty-one Petitioners had not responded to GTL's First Set of Information Requests to Petitioners, which was served and filed on March 10, 2014. On June 25, 2014 – the same day PLS responded to GTL's motion – PLS filed a Third Supplemental Response, attaching responses from only nine (less than half) of the missing Petitioners. It also informed the Department and GTL that one of the Petitioners

[1] This Reply is timely filed. On July 30, 2014, the Department issued its Order on Petitioners' Assented to Motion for Leave to Reply, which set September 8, 2014 as the deadline for the parties to file replies in support of their respective motions to compel discovery.

had died in 2011 and another had decided not to pursue the matter, although PLS has not filed a notice of withdrawal or substitution.

2. Since June 25, PLS has not served any further discovery responses on GTL.

3. It has now been almost six months since GTL served its First Set of Information Requests on March 10, 2014, and GTL still has not received responses (or notices of withdrawal/substitution) for the following Petitioners:

1. Frank D. Camera;
2. John G. Darrell;
3. Michael DiGioia;
4. Frank H. Spillane;
5. Leonardo Alzarez-Savageau;
6. Shirley Jay MacGee;
7. Stephen Metcalf;
8. Christina Rapoza;
9. Gerardo Rosario;
10. Shirley Turner;
11. James S. Murphy (potential withdrawal); and
12. Kenneth Moccio (deceased).

4. PLS does not deny that these Petitioners are delinquent and have not complied with the Department's *Procedural Order,*[2] which required responses to the first set of discovery requests to be served by April 22, 2014, a date later extended on motion to April 29, 2014.[3] Instead, PLS offers vague, insufficient reasons why the Department should excuse this delinquency.

5. PLS admits at page 2 of its Opposition that it does not know where certain Petitioners (which it does not identify) are located. It claims that it is now using an unidentified "professional service" to try to find them after unidentified staff members driving "all over the

[2] D.T.C. 11-16, *Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in Massachusetts Seeking Relief from the Unjust and Unreasonable Cost of such Calls*, Procedural Order (Feb. 27, 2014) ("*Procedural Order*").

[3] D.T.C. 11-16, *Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in Massachusetts Seeking Relief from the Unjust and Unreasonable Cost of such Calls*, Order on Motion for Extension of Time (April 18, 2014).

Commonwealth" failed to locate these unidentified Petitioners. However, the fact that PLS does not know how to locate its clients does not excuse the missing Petitioners from their obligations under the *Procedural Order*.

6. PLS also claims that other (unnamed) Petitioners "need additional time" to respond to the requests, although they have already had almost six months to respond. If these unnamed Petitioners truly needed more time, they should have submitted a request to the Department to revise the *Procedural Order* (as was done when the discovery deadline was extended to April 29) and not taken it upon themselves to ignore this Department's order and their obligations thereunder.

7. Finally, PLS argues that it should be allowed to "supplement" discovery responses until the close of discovery.[4] This is a red herring. GTL has never objected to a Petitioner supplementing its responses. GTL objects to Petitioners who never respond. PLS cannot "supplement" something that does not exist. While PLS (which wears two hats as both Petitioner and counsel) may represent the other Petitioners in this proceeding, the fact remains that each Petitioner has his or her own individual obligations and many of them have failed to meet those obligations and should be held accountable.

8. GTL is cognizant of, and sympathetic to, the difficulties faced by PLS and the individual Petitioners, but that does not excuse their delinquency, particularly when they initiated this proceeding.

## II. PLS Improperly Claimed Work Product Protection

9. In its response to GTL's request DTC-GTL 1-17, PLS identified certain correspondence between PLS and this Department's predecessor agency, the Telecommunications Division of the Massachusetts Department of Telecommunications and

[4] Petitioners' Opposition to Respondents' Motion to Compel at 1-4.

Energy, as relevant and responsive to GTL's requests. PLS, however, refused to produce those documents, claiming they contain work product, which is exempt from disclosure. PLS is wrong.

10. PLS claims that Massachusetts courts have held that documents that would otherwise be public records can be withheld from production despite the absence of a specific statutory exemption.[5] PLS is wrong. In support of its argument, PLS cites to four lower court cases from 1997 and 1998.[6] The reason PLS only cites to old cases is clear. In 1999, the Massachusetts Supreme Judicial Court vacated in relevant part one of the cases cited by PLS, overruling this line of reasoning. *General Electric Co. v. Department of Environmental Protection*, 429 Mass. 798, 711 N.E.2d 589 (Mass. 1999), *vacating in part and affirming in part*, *General Electric Co. v. Massachusetts Department of Environmental Protection*, 8 Mass. L. Rptr. 417, 1998 Mass. Super. LEXIS 91 (Mass. Super. Ct. 1998).[7] PLS did not inform the Department that this case had been vacated in relevant part.

11. In *General Electric*, the Massachusetts Supreme Judicial Court held that materials are not protected from disclosure as work product under the public records statute "unless those materials fall within the scope of an express statutory exemption." 429 Mass. at 801. According to the court, "[t]he plain language of the statute manifests a legislative intent to provide broad public access to government documents subject only to limited exceptions." *Id.* at 802. "We agree with the observation that the Legislature 'clearly did not intend to exempt documents involved in litigation from the mandatory disclosure requirements of the [public records statute].'" *Id.* at 803. "There is no ambiguity in the statute's explicit mandate that the public

[5] Petitioners' Opposition to Respondents' Motion to Compel at 5-6.
[6] *Id.* at p. 5, n.7 and p. 6, n.8.
[7] Petitioners' Opposition to Respondents' Motion to Compel incorrectly identified the docket number of this case as No. 98-1769-3. It is No. 98-1769-B.

have access to all government documents and records except those that fall within the scope of an express statutory exception." *Id.* at 805. "That part of the judgment declaring that the defendant 'was not incorrect, as a matter of law, to assert . . . that it may withhold documents requested under G.L. c. 66, § 10 . . . if they fall within the scope of the common-law work-product privilege' is vacated." *Id.* at 807. *See also Kent v. Commonwealth*, 12 Mass. L. Rptr. 165, 2000 WL 1473377, at *1 (Mass. Super. Ct. 2000) ("To the extent that defendants rely on work product privilege as the only reason for nondisclosure, the reliance is obviously misplaced in light of the court's decision in *General Electric Co. v. Department of Envt'l Protection*, 429 Mass. 798, 801-06, 807 (1999). Any such documents must be produced."); *Suffolk Construction Co., Inc. v. Division of Capital Asset Management*, 449 Mass. 444, 455, 870 N.E.2d 33, 43 (Mass. 2007) (citing *General Electric* and stating "We concluded, in relevant part, that the statute and its history expressed the Legislature's intent to abrogate the broad attorney work-product privilege, and instead to provide to attorney work product the narrower, time-limited protection afforded under G.L. c. 4, § 7, Twenty-sixth (*d*), the so-called 'deliberative process' exemption.")

12. In a case addressing the question of whether a Massachusetts state agency can agree that a report submitted to it would be kept confidential as work product, the court stated: "Mass Mutual sees something nefarious in the Secretary [of the Commonwealth of Massachusetts] refusing to agree to hold the Report confidential should it be produced. This court does not . . . because a public employee has no authority to override, by means of a promise of confidentiality, the General Court's determination that any document 'made or received' by a public employee shall be available to the public unless one of the legislatively enacted exemptions applies." *Galvin v. Massachusetts Mutual Life Insurance Co.*, 20 Mass. L.

Rptr. 533, 2006 WL 340246, at *8 (Mass. Super Ct. 2006). The court further stated that "Mass Mutual' s purported ability to arrive at 'mutually acceptable ground rules' with other agencies, if true, may suggest that not every state employee is as careful as the Secretary to safeguard the public's right of access to public records." *Id.* at *9. According to the court, there is "no exemption in the Public Records Act for work product. A Massachusetts state employee may not, by characterization of records as 'work product,' withhold documents whose production is otherwise mandated under the terms of the Act." *Id.* citing *General Electric Co.* 429 Mass. 798, 801-807, 711 N.E.2d 589 (1999). This is entirely consistent with the waiver cases GTL previously cited.

13. In short, PLS's statement that Massachusetts courts have held that documents that would otherwise be public records can be withheld from production despite the absence of a specific statutory exemption is no longer good law. Therefore PLS's attempt to piggyback on a non-existent common law exemption must fail.

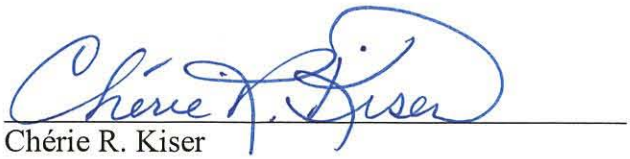
14. Because PLS unjustifiably withheld documents that it identified as responsive to GTL's Information Requests and certain Petitioners have completely disregarded their obligations to Respondents and the Department, GTL respectfully requests that the Department grant GTL's Motion to Compel and order Petitioners to comply with GTL's First Set of Information Requests within five (5) business days as originally contemplated by the *Procedural Order*.

## III. <u>Telephonic Hearing Should Address All Motions to Compel</u>

15. On June 25, 2014, Petitioners requested that a telephonic hearing be held on their motion to compel. GTL does not object to Petitioners' request, but respectfully requests that any such hearing address all outstanding motions to compel.

Respectfully submitted,

**GLOBAL TEL*LINK CORPORATION**



Dated: September 8, 2014

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CERTIFICATE OF SERVICE

I, Angela Fleming, certify that on this 8th day of September 2014, I served a copy of the foregoing Motion to Compel Responses to Discovery Requests on the following via the method indicated:

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