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By hand delivered & e-filed

July 27, 2009

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

Re: DTC 08-12, Brief of Joint Commenters

Dear Ms. Williams:

Enclosed please find the Brief of the Joint Commenting Parties, including several Massachusetts cable television license Issuing Authorities, the Massachusetts Municipal Association, Access Centers and MassAccess, for entry into the record in DTC 08-12, 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: 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)	Docket No. DTC 08-12
Of Consumer Complaints)	July 27, 2009

INITIAL BRIEF 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

Respectfully Submitted,

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July 27, 2009

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Before the
COMMONWEALTH OF MASSACHUSETTS
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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

INITIAL SEPARATE BRIEF OF THE TOWN OF OXFORD

I. INTRODUCTION

The Department of Telecommunications and Cable (hereinafter the "Department") has before it the Petition of Verizon New England, Inc. ("Verizon") for Amendment of the Cable Division's Form 500 "Cable Operator's Annual Report of Consumer Complaints," filed August 22, 2008 (hereinafter the "Petition"). The Petition of Verizon seeks to eliminate the Form 500 requirement that cable operators report the total number of their subscribers.

The Department held a hearing on Verizon's Petition on May 15, 2009 at the offices of the Department, followed by a procedural conference.

In this Brief, the Joint Commenting Parties* present substantial and compelling evidence that Verizon’s proposal to terminate decades-old reporting of cable subscriber totals would be antithetical to the public interest and would harm direct and substantial interests of consumers, local and state government and the general public. In particular, reporting of cable subscriber totals improves monitoring and effective remediation of customer service complaints and other consumer issues, as explained by many commenting parties and as detailed further below.

In addition, the Joint Commenting Parties propose that the Department consider bolstering or increasing cable company reporting of community-specific subscribership totals, as more detailed data would promote new federal, state and municipal initiatives to pinpoint which neighborhoods are underserved or unserved. In connection with the foregoing, the Department should take judicial notice of the fact that subsequent to the hearing and filing of comments in this matter, the NTIA released broadband deployment grant guidelines making explicit that data on subscribership totals should be used to identify which communities and neighborhoods are underserved or unserved and eligible for broadband deployment economic stimulus funds. Thus subscribership data should be increased, and not eliminated, perhaps to include zip code specific subscribership data, and thus promote Governor Deval Patrick’s and the President’s policies of identifying and addressing the existence of underserved neighborhoods.

* The Joint Commenting Parties are: 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”), 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 Alliance for Community Media, Inc., a 501c3 association representing Access Centers (collectively “the Joint Commenting Parties”).

As detailed below, and as set forth in the May 1, 2009 Comments of the Joint Commenting Parties, the changes proposed in Verizon's petition are against the public interest as measured by numerous criteria, and Verizon's legal arguments for the amendment are seriously flawed.

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

Verizon has challenged the Department's authority to require subscriber count data, arguing that c. 166A does not specifically enable the Department to require such data. As explained in the legal analysis within the previously filed Comments of the Joint Commenting Parties, Verizon's argument is inconsistent with long-established principles of Massachusetts administrative law and omits reference to governing law. Our statement of the law on this threshold issue was detailed in the Comments and is set forth below.

MGL c. 166A, Section 16 shows legislative intent to delegate broad rulemaking authority to the Department to issue regulations and standards, including regulations and standards beyond those items expressly listed in c. 166A. 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 clear that the Form 500 requirement for information about how many subscribers are served per community carries out the DTC’s long-established purpose of providing oversight in complaint reporting and consumer protection. Chapter 166A evinces legislative intent to have the agency assist with consumer protection matters and complaint reporting in particular (c. 166A, s. 10) and 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. Requiring such information therefore is plainly within the scope of the Department’s authority.

III. Strong Policy and Customer Service Benefits from Subscriber Count Data Warrant Continuation of the Form 500 Reporting of Total Subscriber Numbers

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

Complaint reporting and monitoring of complaints has been an important state goal as made clear by the codification of company complaint reporting in M.G.L. c. 166A, s. 10. The central purpose of complaint data reporting is to provide both the state and 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 statistically meaningless if not viewed in relation to cable company community-specific subscriber counts. As explained in the previously filed Comments, complaint trends can only be ascertained by looking at the number of complaints in proportion to total subscriber population. 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. Both the Department and Verizon frequently make public statements about the importance of competition. Basic principles of common sense and good management suggest that we maintain tools to measure whether objectives are being met, including measuring the objective of promoting competition. 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

As explained in the May 1, 2009 Joint Comments, community-specific, company-specific

subscriber count data is useful in other local government 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 a common 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.

4) Federal and State Interests in Identifying Underserved and Unserved Areas and Economic Stimulus Broadband Grant Programs Would Benefit From Requiring More Reporting of Subscribership Data

The Joint Commenting Parties propose that the Department consider bolstering or increasing cable company reporting of community-specific subscribership totals, as more detailed data would promote federal, state and municipal initiatives to pinpoint which neighborhoods are underserved or unserved. In connection with the foregoing, the Department should take judicial notice of the fact that subsequent to the hearing and filing of comments in this matter, National Telecommunications and Information Administration and the Department of Agriculture released broadband deployment grant guidelines making explicit that data on subscribership totals should be used to identify which communities and neighborhoods are underserved or unserved and eligible for broadband deployment economic stimulus funds. See e.g., Broadband Technology Opportunities Program, Federal Register/Vol.74, No. 130 (July 9, 2009), making broadband grants to states and local governments available based on areas being “underserved” and one definition of “underserved area” is “The rate of broadband subscribership for the proposed funded service area is forty percent of households or less.” *Id.* at p. 33109. Thus subscribership data reporting should be augmented, and not eliminated, to include zip code specific subscribership data to identify underserved neighborhoods, and thus promote Governor Deval Patrick’s and the President’s policies of identifying and addressing the existence of underserved neighborhoods.

IV. Further Procedural Rulemaking Issues

As emphasized in our May 1, 2009 Comments, Verizon's Petition in this matter was for a rulemaking (not an adjudication) to amend rules pursuant to 30A, s. 4; and 207 CMR 2.01. The Department initiated the requested rulemaking as an adjudication, and the Department rejected the Joint Commenting Parties request to conduct the proceeding as a rulemaking in accordance with Verizon's Petition. The Department proceeded to treat this matter as an adjudication despite Verizon's assent to the request of the Joint Commenting Parties to proceed as a rulemaking. 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). Looking to the future, we are hopeful that petitions for rulemaking be processed through rulemaking, not adjudication, when appropriate, to promote civic engagement and participation. The Joint Commenting Parties believe that use of the adjudicatory framework in this matter has already been a substantial detriment to the Joint Commenting Parties, as the Department struck and deleted extensive and relevant public hearing testimony of legal counsel for the Joint Commenting Parties, basing this decision on the Department's stated position that adjudicatory rules do not allow testimony of legal counsel at an adjudicatory public hearing. We believe such exclusion of our testimony would never have occurred during a rulemaking, and was in any event unfair and inconsistent with good administrative law public policy, and we note same for the record.

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 effectively 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 jobs of identifying underserved areas and measuring competition, growth of competition, or lack of competition in specific local cable markets. 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 or enhancement, 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.
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July 27, 2009

CERTIFICATE OF SERVICE

I, William August, Esq., hereby certify that a copy of the above Brief was served by first class U.S. mail to Alexander Moore, Esq., Verizon New England, Inc. and to Catrice Williams, Secretary, Department of Telecommunications and Cable, Two South Station, Boston, MA 02110 with copies filed electronically to all other parties.

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