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July 27, 2009

Catrice C. Williams, Secretary
Department of Telecommunications & Cable
Commonwealth of Massachusetts
Two South Station
Boston, Massachusetts 02110

Re: 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"

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding is the Initial Brief of Verizon New England Inc.

Thank you for your assistance in this matter.

Sincerely,

Alexander W. Moore

Enclosure
cc: Kerri J. DeYoung, Hearing Officer
Service List (electronic only)

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATION AND CABLE
CABLE DIVISION

Petition Of Verizon New England Inc. For Amendment Of The Cable Division's Form 500

INITIAL BRIEF OF VERIZON NEW ENGLAND INC.

Verizon New England Inc. d/b/a Verizon Massachusetts ("Verizon MA") submits this brief in support of its Petition for Amendment of the Cable Division's Form 500 "Cable Operator's Annual Report of Consumer Complaints," dated August 22, 2008, to eliminate the annual reporting of the number of CATV subscribers by municipality.

Verizon MA has demonstrated that the reporting and public disclosure of this information impairs Verizon MA's ability to compete with incumbent CATV providers, impedes competition generally in the Commonwealth and allows a distorted public perception of Verizon's competitive efforts nationwide. Conversely, municipal subscribership data is not essential to performance of the Department's duties under the CATV statute, G.L. c. 166A, and granting the Petition will not deprive local issuing authorities of access to that information for their respective communities. The Department does not have authority to collect this information under G.L. c. 166A and in any event should refrain from collecting it because the resulting harm to competition far outweighs its minor policy value. Moreover, the current Form 500 is at odds with the policies of every other state and federal regulatory body, none of which both collects and discloses such information. The Department should bring its policy into line with that of all

other states in light of the advent of competition in Massachusetts and amend its Form 500 as requested.

FACTS

Verizon MA provides telephone, data and related services in Massachusetts and is expanding into the cable television business. As part of this effort, Verizon MA is now bringing competitive cable television services to almost 100 cities and towns in Massachusetts and is negotiating franchise agreements with others. Nationwide, Verizon MA and affiliated Verizon entities (collectively, "Verizon") are constructing, at great expense, a "fiber-to-the-premises" ("FTTP") network of fiber optic cables that enables Verizon to offer advanced communications and cable services through fiber optic technology deployed directly to customers' residences. Prior to Verizon MA's entry into the cable market in Massachusetts in early 2006, the cable-television markets in the vast majority of Massachusetts cities and towns were not subject to effective competition.[1] RCN, Comcast's main competitor, was operating in only 13 Massachusetts communities in 2006.[2] Effective competition was otherwise limited to the handful of cities and towns with municipal cable providers. By contrast, in the past three years Verizon MA has brought its FiOS TV service to almost 100 communities in the state, introducing meaningful cable television competition to many Massachusetts cities and towns for the first time, and ending the *de facto* monopolies that incumbent cable operators enjoyed for decades. As Verizon MA and the incumbent cable companies battle to attract or retain the same

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1 *See, e.g., In the Matter of Comcast of California/Massachusetts/Michigan/Utah, Inc.; Comcast of Massachusetts/New Hampshire/Ohio, Inc; Comcast of Massachusetts III, Inc.; Comcast of Massachusetts I, Inc.; Petition for Determination of Effective Competition in Various Massachusetts Communities*, Memorandum and Opinion Order, DA 08-1507 (MB 2008) (finding effective competition existed in 18 Massachusetts towns in 2008).

2 Comments of RCN, Petition of Verizon New England Inc. for Adoption of Competitive License Regulation, Massachusetts Department of Telecommunications and Energy, Cable Television Division, Docket No. CTV-06-1 (July 13, 2006).

customers, Massachusetts residents directly benefit from the resulting service discounts and promotions, increases in innovation and quality of service, and expanding programming options.[3]

I. The Form 500.

The Cable Division adopted the Form 500 in 1999, two years after the Massachusetts Legislature amended G.L. c. 166A, § 10 to insert the annual reporting requirements. *See Order Adopting Revised Form 500,* Department of Telecommunications and Energy Cable Division (June 11, 1999) (the "Form 500 Order"). Prior to adopting the Form 500, the Department collected comments on the proposed Form 500 and held a technical conference to discuss software and other practical problems raised by the Form. The comment process focused principally on what types of complaints were required to be reported and the implementing software. *See Form 500 Order* at 2-8. Three towns and four incumbent cable operators – Cablevision Systems Corporation, Adelphia Cable Communications, Greater Media Cable, and MediaOne (now Comcast, Inc.) – submitted comments. Verizon MA did not participate in the comment process because, at that time, Verizon MA was still years away from offering competitive video service in Massachusetts.

Although the competitive landscape has changed drastically since 1999, the pertinent requirements of Form 500 have remained unchanged. The Form 500 requires cable licensees to disclose separately, for each city and town that they serve, the number of complaints received (broken down by category of complaint) during the reporting period, the average resolution time for the complaints, and the manner in which the complaints were resolved. In addition, notwithstanding that M. G. L. c. 166A, § 10 neither authorizes nor implies any such requirement,

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[3] *See, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5110 ¶ 19 (2007) ("Cable Competition Order") at 5110 ¶ 19.

the Form 500 mandates that the licensee disclose the total number of subscribers that it serves in each city and town in which it does business.

II. Verizon MA's Subscribership Information.

Because effective cable competition did not exist in the majority of Massachusetts cities and towns prior to Verizon MA's entry, when the Form 500 was adopted in 1999 subscribership information was of little competitive interest to incumbent cable competitors. For example the issue was not even mentioned in the Form 500 comment process nor in the *Form 500 Order.* As Verizon MA brings effective competition to Massachusetts, however, subscriber data becomes extremely valuable to incumbent operators that seek to frustrate Verizon MA's efforts to gain a foothold in the cable television market. This data paints a detailed picture of Verizon MA's market performance, including market penetration, broken down by municipality and throughout the state. Access to this data provides Verizon MA's competitors with critical insight into Verizon MA's business success within individual cities and towns – free and extremely valuable market research that they otherwise could not obtain without significant expenditure of time and resources.[4] Such free research provides the incumbents a powerful tool to more precisely target their competitive responses – including direct mail, door-to-door solicitation, local advertising and promotions and pricing strategies – to the specific communities where Verizon MA's Form

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[4] Accordingly, Verizon MA sought confidential treatment of that information. *See* Motion for Confidential Treatment dated February 1, 2007. In declining to afford such treatment, the Department placed considerable reliance on its determination that competitors could obtain the number of Verizon MA customers by municipality from other publicly available sources. *See, Ruling on Motions For Confidential Treatment Filed by Verizon New England, Inc.*, Department of Telecommunications and Cable (June 8, 2007) ("DTC June 8, 2007 Ruling") at 8-11. The Department found that competitors may be able to learn such information from individual municipalities, by imputation from Verizon MA marketing materials, and by monitoring lost customers of cable companies and direct broadcast satellite providers. *Id.* at 10. Obtaining Verizon MA's subscriber numbers through these indirect sources is expensive and time consuming, however, and the results will be inexact and difficult to monitor. Thus, by requiring Verizon MA compile the data and effectively turn it over to its competitors, the Department's policy harms Verizon MA and provides yet a further competitive advantage to incumbent providers that have an obvious interest in frustrating Verizon MA's efforts at market entry.

500 reports show Verizon MA making the most inroads on the former monopoly's customer base. An incumbent can also deploy or upgrade facilities or services in those towns or seek to tie customers down with long-term contracts, while simultaneously reducing its marketing, investments and promotions in towns with a comparatively low number of Verizon MA subscribers. The disclosure of subscribership data as currently required by Form 500 thus gives the dominant providers of cable television service in Massachusetts a competitive edge against Verizon MA. *See* Affidavit of Shawn M. Strickland, attached to the Petition as Exhibit A.

Indeed, in related contexts, Verizon MA's competitors and the National Cable & Television Association have advocated for the *protection* of similarly detailed subscriber data on the grounds that public disclosure harms competition. *See,* Petition at 7 and Petition Exhibit C.

To Verizon MA's knowledge, the Department is the only regulatory body at the federal or state level that requires cable operators to disclose municipal-level subscribership data publicly. Though California, New Jersey, New York and Rhode Island require Verizon to report detailed subscribership information at the state level,[5] those states safeguard the confidentiality of that information.[6] At the federal level, the Federal Communications Commission ("FCC") has honored Verizon's request to withhold from publication Form 325 data, which includes municipal-level subscriber information. The FCC has consistently afforded confidential treatment to subscribership data of incumbent cable operators for competitive services such as telephony and internet services.[7]

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[5] *See* Response to DTC-VZ 1-1(a); *see also*, CAL. PUB. UTIL. CODE § 5960; N.J. ADMIN. CODE 14:18-7.1(b); N.Y. COMP. R. & REGS. Tit. 16, §§ 899.80-899.82; and 90-070-012 R.I. CODE R. § 17.

[6] *See* Response to DTC-VZ 1-1(b).

[7] *See* authorities collected in Petition, at 8, note 8

Moreover, the Form 500 reporting requirement and public disclosure of Verizon MA's municipal subscribership data result in a distorted perception of Verizon's competitive efforts nationwide. Competitors and public stock analysts alike use Massachusetts data in an effort to divine inevitably inaccurate conclusions about Verizon's performance elsewhere. For example, a March 2008 USB analyst report cites a number of specific data points from Verizon MA's 2007 Form 500 Report and includes a graphic representation of Verizon MA's market share in each municipality compared to time in the market. The USB Report attempts to use that information to "gain some insight into the evolving competitive dynamics of the video market." *See* USB Investment Research, *Data Provides a Few Clues to FiOS Impact* (March 28, 2008) (Petition Exhibit D); *see also*, Response to DTC-VZ 1-2.

Similarly, a February 2008 Bernstein Research analyst report lists Verizon MA's subscribership data by municipality, shows change over time and compares that to Comcast's analogous figures. The Bernstein report tries to use that information to "provide a window into the broader Verizon FiOS roll-out" and determine that the results "run contrary to expectations about TelCo entry into the TV market" and "belie the consensus expectation that Verizon's gains will inevitably mean steep losses for cable incumbents." *See* Bernstein Research, *Verizon, Comcast: FiOS TV in Massachusetts – VZ Takes Share, CMCSA Holds Subscribers Steady* (Feb. 6, 2008) (Petition Exhibit E); *see also* Response to DTC-VZ 1-2.

Massachusetts, however, is only one jurisdiction for Verizon, and analysts' attempts to extrapolate national conclusions from data concerning a single state market distorts public perceptions of Verizon's cable offering nationwide, thereby significantly increasing the risk of detrimental effects on Verizon's stock price, its ability to raise capital at competitive rates and the company's business plans and investment decisions. That distortion and the resulting risk of

harm are made possible solely by the Department's unique regulatory reporting requirement. *See* Response to DTC-VZ 1-4. This is harmful to both Verizon's competitive position as a new market entrant and the public's interest in the promotion of consumer choice.

ARGUMENT

I. The Department Has No Authority To Require Cable Operators To Report Municipal-Level Subscribership Data To The Department.

A. The Department Lacks General Authority under G.L. c. 166A To Require Submission Of Municipality Subscriber Information.

The Department possesses only those powers, duties and obligations expressly conferred upon it by statute and such powers as are reasonably necessary to carry out the purpose for which it was established. *See* Petition at 9-10 and cases cited. The authority granted to the Department by Chapter 166A is specific and for a limited purpose. *Compare* G. L. c. 159 (granting the Department general authority to enforce Chapter 159 and "general supervision and regulation of, and jurisdiction and control over" common carrier services) *with* G. L. c. 166A (granting the Department specific authority to hear licensee appeals, investigate licensees, regulate rates and prescribe certain forms). The Department does not have "general authority" under G. L. c. 166A to require carriers to provide information solely on the basis that it is of interest to the Department. While the Department may collect data that is "necessary to carry out" its limited purposes, it may not require the reporting of information that is entirely collateral to that purpose, such as municipal subscribership data.

There is no merit to the claims of the City of Boston ("Boston") and the Towns of Andover, Brimfield *et al.* ("Joint Commenters") that the Department has "broad rulemaking authority" and may require carriers to report municipal subscribership data. *See* Boston

Comments at 3-4; Joint Commenter Comments at 5.[8] As Verizon MA demonstrated in its Reply Comments, at 5-6, this theory finds no support in the cases cited by Boston. The Department's authority to make rules and regulations "as appropriate to carry out the purpose of this chapter" under G.L. c. 166A, § 16, does not mean that its rulemaking authority is expansive. A grant of statutory authority to promulgate rules says nothing about the allowed scope of those rules, which depends instead on the substantive duties assigned to the agency by its statute. The Joint Commenters acknowledge that, "An agency's powers are shaped by its organic statute taken as a whole." *Commonwealth v. Cerveny*, 373 Mass. 345, 354 (1977). As explained above, chapter 166A grants the Department authority over specific CATV matters only, as opposed to general supervisory authority over common carriers granted to the Department by G. L. c. 159. The legislature assigned much of the interaction with cable operators to LFAs, not the Department, through the negotiation and issuance of licenses. "State law charges municipal officials with the duty of implementing the licensing process ... [and] with respect to cable licensing, the role of the local Issuing Authority is 'paramount.'" Joint Commenters Comments, at 4 (citations omitted). Thus, the Department's authority to make regulations governing cable operators is limited.

B. Section 10 Does Not Authorize The Department To Require Carriers To Report Municipal Subscribership Data.

In its June 8, 2007 Ruling, at 12-13, the Department found that reporting of subscribership data by municipality is not only warranted under M. G. L. c. 166A, § 10 but that keeping that information confidential "would undermine the statutory mandate contained in

[8] Although given the opportunity by the Department, the City of Boston did not file an affidavit verifying the facts alleged in its comments, and as a result the Department cannot consider those comments in making a determination in this proceeding. Verizon MA nevertheless responds here to certain legal arguments made by Boston in its Comments. The same applies to Shrewsbury Electric Light Company ("SELCO"), which did not verify the facts alleged in its comments.

Section 10." The plain language of Section 10, however, confirms that the Legislature neither authorized nor contemplated the collection or public disclosure of this information. As the Supreme Judicial Court has held, the primary source of insight into the Legislature's intent in enacting a law is the language of the statute itself. *Anderson St. Assocs. v. City of Boston*, 442 Mass. 812, 816 (2004) (citation omitted). Section 10 provides:

> [t]he issuing authority and the division shall be notified by the licensee on forms to be prescribed by the division not less than annually, of the complaints of subscribers received during the reporting period and the manner in which they have been met, including the time required to make any necessary repairs or adjustments.

The plain and unambiguous language of Section 10 is conclusive as to the Legislature's intent regarding the permissible bounds of the Form 500. *See Commerce Ins. Co. v. Comm'r of Ins.*, 447 Mass. 478, 481 (2006). By specifically setting forth the information required to be submitted, the Legislature precisely defined what information the Department is authorized to collect. Had the Legislature intended to require the submission of municipal-level *subscribership* data, in addition to *complaint* data, it easily could have done so expressly. *Anderson St. Assocs. v. City of Boston*, 442 Mass. 812, 817 (2004); *Commonwealth v. Russ R.*, 433 Mass. 515, 522 (2001).

The theory that § 10 somehow mandates the collection of subscribership data in order to allow the Department or LFAs to measure the relative performance of different CATV systems (by creating a rate reflecting the number of complaints per hundred customers in a system) or to compare that performance to an absolute standard,[9] is simply not supported by the language of the statute, which does not say a word about submission of subscribership data. In other words,

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[9] *See e.g.* Joint Commenters Comments at 5 (claiming that subscribership data is necessary "to allow Issuing Authority evaluation of complaints as a percentage of total subscribers"); Boston Comments at 5; SELCO Comments at 2

§ 10 evidences no statutory "scheme" or "design" which would justify the mandatory reporting of municipal subscriber information to the Department.[10] The sole purpose of Section 10 was to ensure that the relevant issuing authority and the Department are provided with basic information regarding the complaints logged with cable carriers and the effectiveness of their responses. Thus, the Cable Division's decision to collect such data was not authorized by statute and was arbitrary and capricious.[11] *See Salisbury Nursing & Rehab. Ctr., Inc. v. Div. of Admin. Law Appeals*, 448 Mass. 365, 371 (2007) (*citing Beth Israel Hosp. Ass'n v. Rate Setting Comm'n*, 24 Mass. App. Ct. 495, 505 (1987) (standard of review for non-adjudicatory, regulatory decisions of an administrative agency is whether such decisions "are illegal, arbitrary or capricious."). The Department should correct that error now.

That the Form 500 had been in place for nine years before the subscribership reporting requirement was challenged does not shelter it from a finding that it is inconsistent with G.L. c. 166A, § 10. Section 7 of G.L. c. 30A, the Administrative Procedures Act, provides for judicial review of agency regulations, and neither it nor any rule of administrative law immunizes a regulation from challenge solely on account of its age. Indeed, the United States Supreme Court has found to the contrary, invalidating a federal regulation of 60 years' standing as inconsistent with its governing statute. *See Brown v. Gardner*, 513 U.S. 115; 115 S. Ct. 552 (1994). In *Brown*, a veteran sought recovery under federal statute for the results of a surgery performed at a

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[10] *See* Boston Comments at 4; Joint Commenters Comments at 5.

[11] The Cable Division's error is understandable, given that effective cable competition was virtually nonexistent in the Massachusetts when the Division adopted the Form 500. At that time, the Division did not consider whether the submission of subscribership data was appropriate, or whether it could cause competitive harm. Indeed, the commenters in the 1999 proceeding – towns and incumbent cable operators that were operating *de facto* cable monopolies – had no economic incentive to consider or object to the provision of municipal-level subscribership data, and they provided no comments on the issue. *See Form 500 Order* at 3-5 (describing in detail the comments submitted to the Division but making no mention of any comments on the subscribership data reporting requirement).

VA hospital. The VA denied him relief pursuant to a regulation (38 C.F.R. 3.358(c)(3)) which purported to limit relief to harm resulting from the VA's negligence. The Supreme Court affirmed a lower court ruling in favor of the plaintiff, finding that the regulation was inconsistent with the statute, which imposed no fault limitation. *Id.* at 116. The Court also rejected the VA's argument that the regulation deserved judicial deference "due to its undisturbed endurance for 60 years," holding that, "[a] regulation's age is no antidote to clear inconsistency with a statute, and the fact, again, that § 3.358(c)(3) flies against the plain language of the statutory text exempts courts from any obligation to defer to it." *Id.* at 122. The court also noted that the regulation had been Congressionally-insulated from judicial review until 1988, six years before the decision was rendered. In the instant proceeding, the age of the Form 500 municipal subscribership reporting requirement does not entitle it to deference or preclude a finding that it is inconsistent with the governing statute. Moreover, the fact that the reporting requirement has not been challenged until now says nothing about its validity, since the incumbent monopolist providers had little incentive to challenge the rule, as explained above.

II. The Department Should Refrain From Collecting Municipal-Level Subscribership Data, Because The Statewide Compilation Of That Data Has Little Policy Value But Its Disclosure Harms Verizon MA And The Ability Of New Entrants to Compete In The Market.

Even if the Department had authority to require cable operators to report municipal-level subscribership data to the Department on Form 500, sound policy considerations counsel restraint in this area, and that the Department should refrain from requiring such disclosure.

A. Statewide collection of municipal subscriber data has minimal policy value.

Subscribership data has little policy value on a statewide basis, but its public disclosure harms Verizon MA and impedes competition in the cable market in the Commonwealth. Subscribership data is not essential or even relevant to performance of the Department's limited

duties under Chapter 166A. As explained above, it is not required and does not further the purpose of Section 10 of the statute, and the statute does not give the Department general oversight over carriers' quality of service.

The Joint Commenters, Boston and SELCO identify a number of local policies and practices that make use of municipal subscribership data,[12] but they do not explain how this data is necessary or even relevant to *the Department's* duties under the statute or why it should be compiled at the state level. The Joint Commenters also argue that, "[o]ne of the overriding goals of regulatory policy is to encourage competition...," but it then quixotically concludes that, "[c]ontinuing access to this data is essential for Department regulators to do their jobs -- evaluate the existence, growth or lack of competition." Joint Commenters Comments at 6. Nothing in Chapter 166A, however, assigns the Department the task of evaluating the existence and growth of competition in the CATV market generally, apart from addressing the matter should it arise in a proceeding before it. Moreover, Verizon MA has demonstrated that the collection and public disclosure of municipal subscribership data by the Department *harms* competition, by arming monopolist incumbents with valuable commercial information to better target their marketing activities and impede competition by newcomers such as Verizon MA. The Department can best encourage competition by protecting this valuable information from disclosure.

The chief concern of the commenters is that if allowed, the Petition would eliminate their access to subscribership data for their city or town, which they allegedly use for a number of purposes such as assessing the significance of the number of complaints against a carrier, negotiating renewal of license agreements and verifying the amount of the annual license fee

[12] *See* SELCO Comments at 2 (town has interest in subscribership data on Form 500 to verify amount of annual license fee payment under G.L. c. 166A, § 9); Boston Comments at 6 (subscriber count is necessary to assure municipality of full payment of § 9 fees and PEG support and fulfillment of carrier's line extension and build-out obligations.)

paid pursuant to G.L. c. 166A, § 9, and PEG access fees. *See* Joint Commenters Comments at 5, 6; Boston Comments at 6; SELCO Comments at 2; *see also* Responses to DTC-Boston 1-2, Responses to DTC-Watertown 1-2 and Responses to DTC-Tyngsborough 1-2 (explaining how LFAs use this data). The Petition, however, seeks to end the reporting of this data *to the Commonwealth only*. LFAs would continue to have access to it because, as some commenters have acknowledged, the annual license fee that all carriers must pay to each of their LFAs is $0.50 per subscriber in that community, as established by G.L. c. 166A § 9. Thus an LFA can easily calculate the number of subscribers served by a given provider by multiplying the amount of its payment by two.[13]

In addition, LFAs will still be able to verify the accuracy of the annual license fee payment even in the absence of subscribership data on the Form 500. First, a number of CATV licenses in Massachusetts include a provision requiring the carrier periodically to provide to the LFA the number of its subscribers in the service area. *See e.g.* Supplemental Response to DTC-Watertown 1-1. Allowance of the Petition would not affect these license provisions.[14] Second, CATV licenses in Massachusetts typically grant the LFA audit rights, by which the LFA can obtain data from the carrier to verify the amount of the statutory license fee payment. Indeed, the mere possibility of a formal audit likely enables the LFA to obtain this information from the carrier without ever reaching the point of performing the audit.

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[13] The Joint Commenters also note that subscribership information must continue to be available "on a local level" in order to implement legislation Verizon MA has proposed regarding allocation of PEG funding responsibilities among carriers serving a given community. *See* Joint Commenters Comments at 7. Verizon MA does not disagree, but as explained in the text, LFAs will continue to have access to that information even if the Department no longer collects it. The Department, however, has no need for such data, since neither the current statute nor the pending legislation affords the Department any role in apportioning such obligations among carriers.

[14] Some CATV licenses in Massachusetts appear to require the licensee to file a copy of its annual Form 500 with the LFA. *See e.g.* Response to DTC-JC 1-1. Those licenses, however, do not purport to preclude the Department from revising the Form.

Moreover, Verizon MA repeats its pledge that should the Department amend the Form 500 as requested, Verizon MA will provide with its annual statutory license fee payment to each of its LFAs a statement of the number of Verizon MA cable subscribers in the community as of the end of the prior calendar year, to allow the LFA to verify the amount of the payment. Verizon MA cannot speak for other cable operators in Massachusetts, but they have not indicated any reluctance to provide such information to the Department, and their trade Association, NECTA, opposed Verizon MA's request for confidential treatment of that information by the Department in 2006, so presumably they would not object to continuing to provide that data in annual statements to their LFAs.[15]

Because LFAs will continue to receive carrier-specific and community-specific municipal subscribership data, the Department need not be concerned that allowing the Petition would affect or interfere with the ability of LFAs to enforce their statutory or contractual rights or to manage cable service in their communities. Thus, there is little to be gained from statewide reporting of municipal subscribership information.

B. Statewide collection and public disclosure of municipal subscriber data harms Verizon MA and impedes cable competition in the Commonwealth

In contrast, subscribership data is extremely probative and valuable to incumbent cable monopolies, which have a strong incentive to prevent entry by new providers.[16] As explained

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[15] Mayor Higgins of Northampton has suggested that if the Department eliminates the municipal subscriber count data from the Form 500, a separate form should be created for carriers to report this data to the LFA with the annual statutory fee payment. *See* Comments of Mayor Higgins, dated April 21, 2009. Verizon MA would object to any additional forms, but as discussed in the text, the idea that carriers should report this data to the relevant LFA represents a reasonable accommodation of the interests of the LFAs and of Verizon MA and other cable operators.

[16] *See Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide a Fixed Service in the*

above, detailed subscribership data broken down by municipality enables the incumbent carriers to target their own competitive responses to Verizon MA – including direct mail, door-to-door solicitation, local advertising and promotions and pricing strategies – to the specific communities where Verizon MA most threatens the incumbents' dominant position while minimizing its marketing, investments and promotions in towns with a comparatively low number of Verizon MA subscribers. *See* Strickland Affidavit. Thus, collection and disclosure of municipal subscribership information allows incumbents to better resist Verizon MA's entry into the market and to impede competition.

In addition, because Massachusetts is the only state where municipal-level subscriber data is publicly available, its compilation and disclosure by the state allow competitors and public stock analysts to misuse this data as an indicator of Verizon's cable penetration nationwide. *See,* USB Investment Research, *Data Provides a Few Clues to FiOS Impact* (March 28, 2008), Petition Exhibit D; Bernstein Research, *Verizon, Comcast: FiOS TV in Massachusetts – VZ Takes Share, CMCSA Holds Subscribers Steady* (Feb. 6, 2008), Petition Exhibit E. Drawing such broad conclusions from Verizon's nascent Massachusetts market distorts public perception of Verizon's cable offering and creates a substantial risk of harm to Verizon's business and the public. The distortion of Verizon's performance in the video market could affect its stock price, its ability to raise capital and its business plans and investment decisions, improperly suppressing shareholder value. The Department should not enable this significant risk of market distortion and harm to Verizon merely because the Form 500 has always required reporting of municipal subscriber information without objection from the incumbents.

12.2-12.7 GHz Band, ET Docket No. 98-206, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9679-80 ¶164 (2002).

A few of the commenters seek to minimize the risk of harm to Verizon MA and to competition in the cable market resulting from the reporting and public disclosure of municipal subscribership data, but these arguments lack merit.

For example, the City of Watertown and the Town of Tyngsborough argue in their "Reply" Comments, at 3, that the release of municipal subscribership information cannot be particularly harmful given that other cable operators have not sought protective treatment of their own subscribership numbers. That incumbent cable monopolies have been willing to provide and allow the Department to disclose their subscribership numbers, however, in no way implies that the number of subscribers that a *new entrant* has managed to win in a city or town is not competitively sensitive and commercially valuable. The FCC has recognized that "incumbent and competitive [cable] operators are not on the same footing" and, in many cases, requirements that apply to incumbent providers would be harmful as applied to new entrants.[17] Unlike an incumbent facing no competition, "new cable entrants must compete with entrenched cable operators and other video service providers," facing "'steep economic challenges' in an 'industry characterized by large fixed and sunk costs,' without the resulting benefits incumbent cable operators enjoyed for years as monopolists in the video services marketplace."[18] Recognizing the fundamental difference between incumbents and competitors in the video marketplace, the FCC held that "terms and conditions that may have been sensible under th[e] circumstances [of a monopoly provider] can be unreasonable when applied to competitive entrants."[19] The reporting of subscribership data is precisely such a requirement – it has a significantly different

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[17] *Cable Competition Order* at 5125 ¶ 48.

[18] *Id.* at 5143 & 5163, ¶¶ 88 & 138.

[19] *Id.* at 5125 ¶ 48.

competitive impact when applied to new entrants. Because cable incumbents have generally completed their network build-out and have a high level of penetration throughout their service areas, publicly reporting their subscribership counts on a community-by-community basis reveals little useful information to competitors. Mandating that competitive providers report such data, however, hands the incumbents useful information that they could use in targeting their offerings and investment in order to entrench themselves by taking steps to foreclose or delay competitive entry. Requiring disclosure of Verizon MA's sensitive subscriber information – to consumers and competitors alike – thus significantly impedes Verizon MA's ability to bring the benefits of competition to Massachusetts consumers in the face of opposition by the incumbent monopolies.[20]

Boston claims that Verizon MA has overstated the competitive harm caused by disclosure of its municipal subscribership data, on the ground that incumbents already know when Verizon MA has obtained a franchise. *See* Boston Comments at 6. Merely knowing that Verizon MA has received authority to compete in a particular community, however, tells an incumbent nothing about how successful Verizon MA has been in that competition, unless the incumbent also spends significant time and money to gather and assess relevant data from the field. The current Form 500 allows incumbents to avoid these costs by compiling this information for them, allowing them to pinpoint their own marketing efforts in response. That is the competitive advantage that the current policy bestows on incumbent operators, and how it impedes the growth of competition in Massachusetts.

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[20] The failure of RCN, the sole, non-municipal competitive cable provider in Massachusetts before the entry of Verizon MA, to contest the reporting requirement of Form 500 is of no moment. Whatever RCN's reasons for its conduct, the failure of one company to appreciate the harm caused by this requirement does not show that the harm does not exist, nor does the failure of RCN to assert its rights act as a waiver of Verizon MA's right to compete fairly in the market without regulatory assistance to its competitors.

Boston again misses the point in asserting that, "the cable market is anything but competitive," apparently on the sole ground that Verizon MA has not yet obtained a franchise for Boston. *See* Boston Comments at 7. The lack of a Verizon MA franchise in Boston says nothing about the state of competition in the rest of the state, where Verizon MA is competing against established incumbents to win CATV customers in almost 100 communities. Nor does the lack of a Verizon MA franchise in Boston imply in any way that Verizon MA is not harmed by disclosure of its subscribership data to its competitors in those communities.

SELCO asserts that Verizon MA's concern that its competitors will use its municipal subscribership data to gain a competitive advantage over Verizon MA "is entirely speculative." SELCO Comments at 3; *see also* Watertown-Tyngsborough Comments at 2. These commenters, however, point to no authority for their assumption that the Department can act to prevent competitive harm only on a showing of actual harm, and there is no such authority. To the contrary, the Department is allowed to, and regularly does, draw reasonable inferences of potential harm in determining motions for confidential treatment, upon consideration of the factors outlined in law. *See e.g.,* Interlocutory Order on Verizon MA's Appeal of Hearing Officer Ruling Denying Motion For Protective Treatment, D.T.E. 01-31, August 29, 2001 (confidential treatment granted for identity of wire centers where disclosure would allow other carriers to target Verizon MA's customers, to those carriers' competitive advantage). *See also, Appeal from Denials of Motions for Protective Treatment by AT&T Communications of new England, Inc., and Teleport Communications Group*, D.T.E./D.T.C. 06-57, Order on Appeal of General Counsel Rulings Denying Motions for Protective Treatment, August 6, 2008, at 10 (name of CSP customer afforded confidential treatment where a requirement of disclosure "does not take account of the possibility that a customer may be able to negotiate more favorable terms

if potential providers of telecommunications services do not possess detailed knowledge of the customer's current contract.") The harm that Verizon MA seeks to avoid here by eliminating the subscribership reporting requirement of Form 500 is no more "speculative" than the harms the Department avoided by providing confidential treatment in these prior cases.

As noted above, other jurisdictions have recognized the competitive harm that may result from disclosure of similar, detailed subscribership information and the minimal need to disclose that information. Consequently, no federal or state regulatory body other than the Department requires cable operators to disclose municipal-level subscribership data publicly. The FCC has honored Verizon's request to withhold from publication Form 325 data, which includes municipal-level subscriber information. The few states that collect such detailed information (California, New Jersey, New York, and Rhode Island) do not require Verizon to make it publicly available. Indeed, the California PUC protects this data from disclosure by rule, which provides that, "The Commission will afford this information confidential treatment . . . because disclosure would put a franchisee at an unfair business disadvantage." *See* California Public Utilities Commission, General Order 169, *Implementing the Digital Infrastructure and Video Competition Act of 2006 (DIVCA)*, Part VII.C.1. *See also* Response to DTC-VZ 1-1(b)

The Department should bring Massachusetts policy more in line with that of every other federal and state regulatory body that has considered the matter by eliminating the municipal-level subscribership reporting requirement from the Form 500.[21]

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[21] This would also bring the Department's cable reporting policy into line with reporting polices for other competitive utility markets within Massachusetts. For example, in the area of competitive power generation, companies are not required to report detailed subscribership numbers, and in telecommunications, the reported data is maintained by the agency as confidential (*e.g.,* Verizon MA's annual competitive profile of landline telecommunications services).

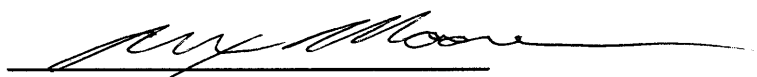
CONCLUSION

For the foregoing reasons, Verizon MA respectfully requests that the Department amend its Form 500 "Cable Operator's Annual Report of Consumer Complaints" to eliminate any requirement for annual reporting of subscribership numbers at the municipal level.

Respectfully submitted,

VERIZON NEW ENGLAND INC.

By its attorney,



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Dated: July 27, 2009