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December 11, 2009

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

RE: D.T.C. 09-1, In Re Verizon Service Quality in Western Massachusetts

Dear Ms. Williams:

Enclosed please find the Attorney General's and IBEW's Motion to Strike Certain Discovery by Verizon and Certificate of Service in the above referenced matter. The Attorney General spoke with counsel for IBEW and received counsel's consent to add their name to the motion.

Sincerely,

A handwritten signature in cursive script that reads "Sandra C. Merrick".

Sandra Callahan Merrick
Assistant Attorney General

Enclosures

cc: Kalun Lee, Hearing Officer
Service List
Jessica Atwood, WesternMA Connect



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

In Re Verizon Service Quality)
In Western Massachusetts)

D.T.C. 09-1

**ATTORNEY GENERAL'S and IBEW'S MOTION TO STRIKE VERIZON'S
DISCOVERY ISSUED AGAINST NON-PARTIES ON NOVEMBER 24, 2009**

I. INTRODUCTION

On November 24, 2009, Verizon Massachusetts issued discovery relating to statements made at a public hearing in this matter on June 23, 2009 by Jessica Atwood on behalf of Western Massachusetts Connect, Inc. ("WesternMA Connect") The Attorney General hereby moves to strike the November 2, 2009 Information Requests issued to WesternMAConnect because the Department's rules and procedures do not provide Verizon with the ability to issue discovery to non-parties that submit comments through the public hearing process. Further, allowing discovery to be issued to individuals or corporate entities as the result of participation in the public hearing process will discourage participation in public hearings.

II. ARGUMENT

As part of its investigation into Service Quality in Western Massachusetts, the Department held public hearings in Greenfield, Florence, Pittsfield, Westfield and Chester, Massachusetts. Through public notices, members of the public and elected officials were invited to attend the hearings and comment. D.T.C. 09-1, Notice of Public Hearing, June 4, 2009, p. 2; D.T.C. 09-1 Notice of Public Hearing and Extension of

Deadline for Written Comments and Petitions for Leave to Intervene, July 8, 2009, p. 2. Twenty-two members of the public provided comments at these public hearings, including WesternMAConnect, a small, non-profit organization with a five member, volunteer board of directors. See <http://www.pioneervalleyconnect.org/>

In its comments, which are also contained in a letter submitted to the Department on August 3, 2009, WesternMA Connect cited to the following concerns regarding Verizon's service quality in Western Massachusetts. See Western Massachusetts Connect letter to Department of Telecommunications and Cable (August 3, 2009) attached.

- WesternMA Connect has heard of many experiences of individuals in regards to poor telephone service quality. *WesternMA Connect, Inc.* letter to Catrice C. Williams, August 3, 2009, p. 1.

- “The service complaints conveyed have included an insufficient number of quality phone lines available for existing and new residents, as well as static, clicking, humming, and noise during periods of wet weather.” *Id.*
- “The Connect believes that many of these complaints are indicative of the deteriorating copper cable plant in the region.” *Id.*
- The Connect experienced outages primarily due to problems with the T1 circuit at the vendor level during its nearly 18-month Beta Test program period from 2007 through 2009. *Id.*
- The Connect believes the T1 outages occurred due to the incumbent infrastructure. *Id.* at 2.
- The Connect stated that in some cases of these T1 outages, “tickets reporting the outage were not opened because the service was anticipated to be returned, once the inclement weather stopped and the infrastructure dried out.” *WesternMA Connect, Inc.* letter to Catrice C. Williams, August 3, 2009, p. 2.

In response to the letter and comments at the Public Hearing, Verizon issued a set of information requests to Western Massachusetts Connect on November 24, 2009 by electronic and first class mail. The information requests seek all documents concerning any communication between WesternMA Connect and any individuals describing poor telephone service quality; documents and facts supporting the belief of WesternMA Connect supporting their statement that complaints are indicative of the deteriorating copper cable plant in the region; a description of WesternMA Connect’s outages with a

T1 circuit; a further description of the outages with a T1 circuit and whether Western MA Connect reported the outage to Verizon MA. *DTC 09-1 Regional Service Quality Investigation, Verizon's First Set of Information Requests to Western MA Connect, Inc.* (November 24, 2009).

There is no Department rule, precedent or procedure providing for discovery to be issued to non-parties or individuals making statements at public hearings. Nor do the Department's ground rules in this proceeding provide for discovery to non-parties. As WesternMA Connect is not a party in this case, it is under no obligation to answer the questions submitted by Verizon. Moreover, discovery has traditionally been limited by the Department to parties that have submitted pre-filed testimony. *Consolidated proceeding reopening the record in Dispatch Communications of New England d/b/a/ Nextel Communication, Inc.*, D.P.U. 95-59-B, 95-80, 95-112, 96-13 (July 25, 1997). Considering the limitations that exist for discovery as applied to parties in a case, there are no procedural or jurisdictional grounds for issuing discovery to non-parties or individuals that provide statements or comments at Department public hearings.

Allowing discovery or other process to be issued to participants at a public hearing will discourage participation in the public comment process. An individual or corporate citizen may choose to forgo their ability to inform the Department of their experience with the Company for fear of having to answer formal discovery or be questioned by the Company through other compulsory means which may be both burdensome and cause them to incur unnecessary legal expense. Significantly, at no time were participants informed by the Department in its written notice or at the hearing that their participation may subject them to discovery or other compulsory process by the

Company.¹ Public comment and participation in the hearing process is important to fully inform the Department and other parties of how a company petition may impact them, or, as is the case here, how a company's service has impacted their lives or business. Statements made by members of the public, legislators and others at public hearings, including non-profit entities, are "intended as an opportunity for the community to share their experience." DTC 09-1, Tr. June 23, 2009, p. 4. The Department has a responsibility to ensure that its public forums are free from barriers to participation and encourage robust participation. Subjecting a small non-profit or any other commenter at a public hearing to formal discovery or other compulsory process will largely defeat the purpose behind these hearings and stifle future participation.

The format of public hearings generally does not contemplate cross examination of commenters. They are by design, a more informal process for the Department to obtain information directly from the public. Like this case, public hearings are not the only process by which the Department gathers information for its record and public hearings are generally coupled with more formal evidentiary hearings with the full panoply of procedural due processes. While G.L. c. 30A provides all parties in a hearing to a full and fair hearing, Verizon does not have a right (or the ability) to examine witnesses providing evidence through the public hearing process through the Department's discovery process or by cross examination at the hearing. As a result, statements given through public hearings that are not subject to cross examination may have different evidentiary value to the Department. It will ultimately be up to the Department to weigh

¹ The Company's statements at the public hearing that it reserved its "right to cross-examine any sworn testimony offered tonight at another time if and when there is an evidentiary hearing later on in the case" is not a substitute for Department notice to participants at the public hearing making statements. D.T.C. 09-1, Volume A Tr. p. 7 (June 23, 2009).

the value of this evidence and determine whether it can rely upon this portion of the administrative record to provide evidentiary support to its decision in this matter.

Finally, Verizon likely has other options including the use of a subpoena to compel testimony from WesternMA Connect under the Department's Rules and G.L. c. 30A § 1 and 220 C.M.R. 1.10(9). The Department will then have the opportunity, if the witnesses object to the subpoena, to vacate or modify a subpoena issued in the Department's name pursuant to G.L. 30A, § 12. Because the issuance of a subpoena to an individual or entity participating in a public hearing raises the same concerns regarding the impact on the public hearing and comment process, Verizon should have to identify that the evidence sought through compelled testimony is "necessary to the establishment of a complete and accurate record, and not otherwise readily obtainable." *Consolidated proceeding reopening the record in Dispatch Communications of New England d/b/a/ Nextel Communication, Inc.*, D.P.U. 95-59-B, 95-80, 95-112, 96-13 at p. 12. Indeed, Verizon as the owner of the infrastructure at issue in this case and that is the subject of the comments of WesternMA Connect may be in the best position to refute or rebut these complaints through its own records and testimony. At the very least, the Department should weigh the necessity of the evidence, the potential impact on the public hearing process and the potential burden on a member or the public, individual or corporation, to comply with a subpoena.

III. CONCLUSION

For the foregoing reasons, the Department should strike from the record Verizon's discovery served upon Ms. Jessica Atwood and Western Massachusetts Connect, Inc. and should clarify that discovery may not be issued against non-parties in this case. Further, the Department should clarify that subpoenas shall not be issued to non-party, members of the public providing comments through the public hearing phase of this case unless it can be demonstrated that the evidence sought is necessary to the establishment of a complete and accurate record, and not otherwise readily obtainable

Respectfully submitted,

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By:



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DATED: December 11, 2009

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

In Re Verizon Service Quality)
In Western Massachusetts)
_____)

D.T.C. 09-1

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding, dated at Boston this 11th day of December, 2009.



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