COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 08-12 October 16, 2009

Petition of Verizon New England Inc. for Amendment of the Cable Division's Form 500 "Cable Operator's Annual Report of Consumer Complaints"

FINAL ORDER

APPEARANCES:

Alexander W. Moore, Esq.
Verizon Massachusetts
185 Franklin St., 13th Floor
Boston, MA 02110
FOR: VERIZON NEW ENGLAND INC.,
d/b/a VERIZON MASSACHUSETTS
Petitioner

Martha Coakley, Attorney General
By: Sandra Callahan Merrick
Ronald Ritchie
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
FOR: OFFICE OF THE ATTORNEY GENERAL
Intervenor

Mike Lynch, Director
Mayor's Cable, Video & Web
City of Boston IT
43 Hawkins Street
Boston, MA 02114
FOR: CITY OF BOSTON
Intervenor

Williams Hewig, III, Esq.
Kopelman and Paige, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110
FOR: TOWNS OF TYNGSBOROUGH AND WATERTOWN
Intervenors

Robert J. Munnelly, Jr., Esq.
Murtha Cullina LLP
99 High Street
Boston, MA 02110-2320
FOR: NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION, INC.
Intervenor

William August, Esq.
Peter Epstein, Esq.
Epstein & August, LLP
101 Arch Street, 9th Floor
Boston, MA 02110
FOR: 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, MASSACHUSETTS; THE MASSACHUSETTS MUNICIPAL ASSOCIATION; ARLINGTON COMMUNITY MEDIA; BELMONT MEDIA CENTER; 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.; WATERTOWN COMMUNITY ACCESS CENTER; WELLESLEY ACCESS CORPORATION; WORCESTOR COMMUNITY CABLE ACCESS, INC.; AND MASSACCESS
Intervenors

Somerset Board of Selectmen
By: Dennis F. Luttrell, Town Administrator
Town Office Building
140 Wood Street
Somerset, MA 02726
FOR: TOWN OF SOMERSET
Intervenor

Wilbraham Board of Selectmen
By: Patrick J. Brady, Chairman
David W. Barry, Selectman
James E. Thompson, Selectman
240 Springfield Street
Wilbraham, MA 01095
FOR: TOWN OF WILBRAHAM
Intervenor

Kenneth M. Barna, Esq.
Karla J. Doukas, Esq.
Rubin and Rudman, LLP
50 Rowes Wharf
Boston, MA 02110
FOR: SHREWSBURY ELECTRIC AND CABLE OPERATIONS
Limited Participant

TABLE OF CONTENTS

I. INTRODUCTION 1

II. PROCEDURAL HISTORY 1

III. STATEMENT OF FACTS 5

IV. ANALYSIS AND FINDINGS 9

A. INTRODUCTION 9

B. ADJUDICATORY PROCEEDING 9

C. THE DEPARTMENT HAS THE AUTHORITY TO REQUIRE CABLE OPERATORS TO REPORT THE NUMBER OF SUBSCRIBERS BY MUNICIPALITY 12

1. The Department Has Authority Pursuant to G. L. c. 166A 13

2. The Department Has Specific Authority Pursuant to G. L. c. 166A, § 10 21

3. Department's Prior Decision Not Arbitrary and Capricious 27

D. POLICY CONSIDERATIONS DO NOT WARRANT AMENDMENT OF THE FORM 500 30

1. Incumbent Provider Practices and the Cable Market 31

2. Actions by Other Regulatory Bodies 37

3. Public Stock Analyst Actions 39

V. VERIZON'S MOTIONS FOR PROTECTIVE TREATMENT PENDING OUTCOME OF DOCKET D.T.C. 08-12 40

VI. ORDER 41

APPENDIX A: "Public Comments by Date Received"

I. INTRODUCTION

In this Order, the Department of Telecommunications and Cable ("Department")[1] denies the petition of Verizon New England d/b/a Verizon Massachusetts ("Verizon") to amend the Department's Form 500 "Cable Operator's Annual Report of Consumer Complaints" ("Form 500") by eliminating the municipal-level subscribership number reporting requirement. Verizon alleges that the Department lacks the statutory authority to require municipal-level subscribership number reporting on the Form 500. Verizon further alleges that the Form 500 municipal-level subscribership number reporting requirement harms competitive cable providers like itself and impedes competition within Massachusetts. The Department is not persuaded by Verizon's arguments and finds that it has authority pursuant to G. L. c. 166A to require municipal-level subscribership number reporting on the Form 500. In addition, the Department finds that Verizon has not provided persuasive evidence of competitive harm warranting the requested amendment to the Form 500. Therefore, Verizon's petition is denied.

II. PROCEDURAL HISTORY

On August 22, 2008, Verizon filed a regulatory amendment request pursuant to G. L. c. 30A, § 4, and 207 C.M.R. §§ 2.01 and 2.03 seeking to amend the Department's Form 500. *See* Verizon Petition ("VZ Pet.") at 1. On January 30, 2009, Verizon filed with its Form 500 a motion requesting that the Department temporarily withhold from public disclosure the number of subscribers by municipality of Verizon's FiOS TV service provided in its annual Form 500 filing "until such time as the Department enters a final order in docket DTC 08-12." *Motion for*

---

[1] Pursuant to Governor Patrick's Reorganization Plan, Chapter 19 of the Acts of 2007, the Department of Telecommunications and Energy ("D.T.E.") ceased to exist, effective April 11, 2007. The Department of Telecommunications and Cable has assumed the duties and powers previously exercised by the D.T.E.'s Cable Division under General Laws, Chapter 166A. For administrative ease, "Department" as used herein

Protective Treatment Pending Outcome of Docket DTC 08-12 at 2 (January 30, 2009) ("January 30 Motion for Protective Treatment"). On March 13, 2009, Verizon filed a similar motion for protective treatment requesting that the Department temporarily withhold from public disclosure the amount of their state cable television license fee pending resolution of the instant proceeding "until such time as the Department enters a final order in docket DTC 08-12." *Motion for Protective Treatment Pending Outcome of Docket DTC 08-12* at 2 (March 13, 2009) ("March 13 Motion for Protective Treatment"). On March 27, 2009, the Department issued a Request for Comment and Notice of Public Hearing ("March 27 Notice") as well as an Order of Notice in response to Verizon's petition. In the March 27 Notice, the Department scheduled a Public Hearing and Procedural Conference, sought comment from interested parties, and specified that if it granted the relief requested by Verizon, then the amendment to the Form 500 would apply to all cable licensees. *See* March 27 Notice at 1-3. The Department also specified that it docketed the instant proceeding "as a formal adjudicatory proceeding conducted under G. L. 30A and 220 C.M.R. § 1.00 *et seq*. of the Standard Adjudicatory Rules of Practice and Procedure," and not as a rulemaking for its cable regulations, as Verizon requested, pursuant to G. L. 30A, § 4, and 207 C.M.R. §§ 2.01 and 2.03.[2] *Id*. at 3.

---

[2] The Department's Order of Notice directed Verizon to publish the Department's March 27 Notice in the *Boston Globe* and to serve a copy of that Notice:

> on all cable providers operating in Massachusetts, to local franchising authorities in all Massachusetts municipalities, and [to] all parties who participated in the proceedings arising from *Annual Report of Verizon New England Inc. of Complaints Received Regarding FiOS TV Service: MA Form 500 Complaint Report*, 2006, Verizon New England Inc.'s Motion for Confidential Treatment, D.T.E. (Feb. 1, 2007).

Order of Notice at 1. On April 13, 2009, Verizon filed a Proof of Notice with the Department in accordance with 220 C.M.R. § 1.06(5)(d), whereby Verizon notified the Department that notice of the Public Hearing was published in the *Boston Globe* on April 3, 2009, and that Verizon served copies of the March 27 Notice upon all local franchising authorities in Massachusetts and all parties who participated in the proceedings arising from *Annual Report of Verizon New England Inc. of Complaints Received Regarding FiOS TV Service: MA Form 500 Complaint Report*. *See* Proof of Notice at 1.

Prior to the scheduled Public Hearing and Procedural Conference, the Department received initial and reply comments from numerous interested parties opposing Verizon's request.[3] The Department also received several intervention requests. On May 1, 2009, the Towns of Tyngsborough and Watertown, the City of Boston, and the New England Cable and Telecommunications Association, Inc. ("NECTA"), each filed petitions to intervene in this proceeding; Shrewsbury Electric and Cable Operations ("SELCO") filed a petition for limited participant status; and a group of municipalities and cable access providers ("Joint Commenting Parties"), collectively filed a motion to intervene.[4] On May 12, 2009, the Department received a request for intervener status from the Town of Somerset's Board of Selectmen. On May 13, 2009, the Department received a Motion to Intervene from the Town of Wilbraham's Board of Selectmen.

On May 15, 2009, the Department conducted the duly noticed Public Hearing and Procedural Conference. During the Public Hearing, the Hearing Officer heard and admitted testimony from John Clorite, on behalf of the Town of Somerset Board of Selectmen; Jeff Hansell, on behalf of the Town of Belmont's Board of Selectmen and Cable Advisory Committee and the Belmont Media Center; and from Robert S. Kelly, Chairman of MassAccess. *See* Transcript ("Tr.") at 21-32. During the Procedural Conference conducted immediately following the Public Hearing, the Hearing Officer granted all requests for intervention and

---

[3] The list of commenters is attached as Appendix A to this order.

[4] The "Joint Commenting Parties" include 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; the Massachusetts Municipal Association ("MMA"); Arlington Community Media; Belmont Media Center; 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.; Watertown Community Access Center; Wellesley Access Corporation; Worcester Community Cable Access, Inc.; and MassAccess.

limited participant status.[5] *See* Tr. at 60-61. In addition, as a result of ensuing discussions with attendees, the Hearing Officer agreed to allow anyone who filed unsworn written comments prior to the Public Hearing and Procedural Conference the opportunity to submit to the Department by June 12, 2009, signed affidavits attesting to the truth of any factual statements made in those comments.[6] Tr. at 62-63. The Department subsequently received affidavits from Michael Lynch, Director of the City of Boston's Mayor's Office of Cable, Video & Web;[7] Mary Clare Higgins, Mayor of the City of Northampton; Jane B. Allen, Chair of the Town of Williamstown Board of Selectmen; Anne R. Skinner, Chair of the Town of Williamstown Cable Advisory Committee; and Deborah Dane, Executive Director of WilliNet, Community Television for Williamstown. The Department later received affidavits submitted by the Joint Commenting Parties from Michael Tautznik, Mayor of the City of Easthampton; Geoffrey Beckwith, Executive Director of MMA; Robert Kelly of MassAccess; and Susan Fleischmann, Executive Director of the Cambridge Public Access Corporation.

On May 22, 2009, the Hearing Officer issued a Procedural Notice and Issuance of Supplemental Procedural Ground Rules ("Procedural Notice").[8] On June 19, 2009, the Department issued Information Requests to Verizon, the City of Boston, the Joint Commenting

---

[5] Also, on May 18, 2009, the Department received a Notice of Intervention from the Office of the Attorney General of the Commonwealth of Massachusetts ("Attorney General").

[6] At the Public Hearing, the Hearing Officer explained to attendees that statements could not be made a part of the evidentiary record unless the statements were made under oath, in accordance with the Department's established practice and 220 C.M.R. § 1.10(1) (stating that "… [a]ll unsworn statements appearing in the record shall not be considered as evidence on which a decision may be based"), but further specified that the Department would consider and listen with equal attentiveness to any unsworn statements. *See* Tr. at 11-13, 18-19. The Hearing Officer further clarified that this requirement also extended to any written comments previously received by the Department. *See* Tr. at 19.

[7] Verizon asserts that it did not receive a copy of the City of Boston's affidavit, although it addresses certain legal arguments made in the City of Boston's comments. *See* VZ Br. at 8, n.8.

[8] The Procedural Notice was issued, in part, to memorialize determinations made at the Procedural Conference, including the procedural schedule. *See* Procedural Notice at 1. The Procedural Notice also included a list of all of the public comments and intervention requests received by the Department prior to the Public Hearing and Procedural Conference, listed as Exhibit No. D.T.C.-1. *See* Procedural Notice at 1, Attachment.

Parties, SELCO, and the Towns of Tyngsborough and Watertown.[9] The Department received responses to those requests from Verizon, the City of Boston, the Joint Commenting Parties, and the Towns of Tyngsborough and Watertown on July 6, 2009. The Towns of Tyngsborough and Watertown filed supplemental responses to those requests on July 22, 2009. On July 27, 2009, Verizon, the Joint Commenting Parties, and the Towns of Tyngsborough and Watertown filed initial briefs; and NECTA filed a letter in lieu of an initial brief.[10] Finally, on August 10, 2009, the Department received reply briefs from Verizon, the Attorney General, and the Towns of Tyngsborough and Watertown.[11] The Department did not conduct an evidentiary hearing.[12]

III. STATEMENT OF FACTS

Massachusetts law requires cable operators to file an annual complaint form with the Department and with each applicable municipality from which the company has been granted a

---

9 None of the intervening parties or Verizon filed information requests.

10 Hereinafter, citations to these filings will be made as "Verizon Br."; "Joint Commenting Parties Br."; "Tyngsborough/Watertown Br."; and "NECTA Letter".

11 Hereinafter, citations to these filings will be made as "Verizon Rep."; "AG Rep."; and Tyngsborough/Watertown Rep.".

12 The evidentiary record includes Verizon's initial petition with associated attachments, as well as comments filed by the Town of Williamstown Cable Advisory Committee on April 22, 2009 (dated April 17, 2009) ("Williamstown Committee Comments"); comments filed by Mary Clare Higgins, Mayor of the City of Northampton, on April 28, 2009 (dated April 21, 2009) ("Northampton Comments"); comments filed by the Joint Commenting Parties on May 1, 2009 ("Joint Commenting Parties Comments"); comments filed by the City of Boston on May 1, 2009 ("City of Boston Comments"); comments filed by Deborah Dane, WilliNet Executive Director, on May 4, 2009 (dated April 30, 2009) ("WilliNet Director Comments"); a letter filed by the Town of Williamstown Board of Selectmen on May 11, 2009 (dated April 15, 2009) ("Williamstown Board Letter"); reply comments filed by Verizon on May 12, 2009 ("Verizon Reply Comments"); a letter filed by the Town of Somerset Board of Selectmen on May 13, 2009 (dated April 29, 2009) ("Somerset Letter"); and reply comments filed by the Towns of Tyngsborough and Watertown on May 14, 2009 (dated May 12, 2009) ("Tyngsborough/Watertown Reply Comments"). All of the comments above were supported by signed affidavits attesting to the truth of their contents. In addition, the evidentiary record includes the transcript of the Public Hearing and Procedural Conference conducted on May 15, 2009 ("Tr."). The evidentiary record also includes responses to the Department's information requests filed by Verizon ("D.T.C.-Verizon 1-1 through 1-6"); filed by the City of Boston ("D.T.C.-Boston 1-1 through 1-3"); filed by the Joint Commenting Parties ("D.T.C.-Joint Commenters 1-1 through 1-3"); and filed by the Towns of Tyngsborough and Watertown ("D.T.C.-Tyngsborough 1-1 through 1-4" and "D.T.C.-Watertown 1-1 through 1-4"). Finally, the evidentiary record includes the supplemental responses to the Department's information requests filed by the Towns of Tyngsborough and Watertown ("Tyngsborough Supp." and "Watertown Supp.").

cable license. *See* G. L. c. 166A, § 10. This form is to be "prescribed" by the Department and is to specify "the complaints of subscribers received during the reporting period and the manner in which they have been met." *Id*. In 1999, after public hearing and comment, the Department adopted the current Form 500 "as the prescribed form" required under G. L. c. 166A, § 10, and pursuant to 207 C.M.R. § 2.03(3), specifying that the form was "designed to collect complaint data that is useful to operators, municipalities, and the [Department] in measuring cable operators' performance."[13] *Order Adopting Revised Form 500*, D.T.E. Cable Division, at 1 and 4 (June 11, 1999). Cable providers operating in Massachusetts have filed the current Form 500 with the Department since 2000. *See Order Adopting Revised Form 500* at 10.

With the adoption of the current Form 500, the Department streamlined complaint data reporting requirements and eliminated the cable subscriber complaint forms previously required by the Department since 1973, namely, Forms 500A (Licensee Complaint Form), 500B (Quarterly Complaint Form),[14] and 500C (Significant Service Interruption). *See Order Soliciting Comments – Revised Form 500*, D.T.E. Cable Division, *Order Soliciting Comments*, at 2 (September 1, 1998) ("*1998 Order Soliciting Comments*"); *Order Adopting Revised Form 500* at 1. In addition, the Department implemented subscribership data reporting for each municipality. *See Order Adopting Revised Form 500* at Attachment A at Section II, Step 2(B) and Attachment B at Part A(3). The Department explained that the revised Form 500 was "designed to collect complaint data that is useful to operators, municipalities, and the [Department] in measuring cable operators' performance." *Id.* at 4. *See also In Re Proposed Rulemaking: 207 C.M.R. § 11.00*, D.T.E. Cable Division Docket No. R-26, *Order*, at 10 (June 28, 2000) ("*2000 Rulemaking*

---

[13] The public hearing and comments were in response to the Department's *1998 Order Soliciting Comments*. *See Order Adopting Revised Form 500* at 2.

[14] Prior to 1997, G. L. c. 166A, § 10, required that cable operators file the forms quarterly. The Legislature amended Section 10 in 1997 to make this an annual requirement. *See* St.1997, c. 164, § 274 (approved Nov. 25, 1997).

Order") (stating that the Department "revised the Form 500 in 1999 to provide a better understanding of subscriber complaints and to provide more meaningful information to the [Department] and to Issuing Authorities").

The Department's *1998 Order Soliciting Comments* was not the first time the Department proposed to implement municipality subscribership data reporting with complaint data. In 1990, the Department previously proposed to amend the Forms 500A, 500B, and 500C after several municipalities requested "more reliable and specific data on aggregate and individual subscriber complaints." *In the Matter of Complaints, Service Visits and Customer Service Standards*, Community Antenna Television Commission Docket No. R-20, Notice of Proposed Rulemaking, at 1 (December 19, 1990) ("*1990 NPRM*").[15] The proposed Form 500B was amended to include, among other things, a reporting of the number of subscribers within each municipality in which the provider did business. *Id.* at 10. Neither the records from this docket (Docket No. R-20) nor, later, in response to the Department's *1998 Order Soliciting Comments* indicate any concerns or objections raised by providers or other participants with regard to municipal-level subscribership data reporting on the Form 500.[16]

In addition to complaint data reporting, Massachusetts law also requires cable operators to remit an annual license fee of $0.80 per subscriber to the Commonwealth and $0.50 per subscriber to each municipality in which it serves. *See* G. L. c. 166A, § 9. Cable operators have been required to pay an annual per-subscriber fee to both the Commonwealth and to each

[15] The Department later terminated this proceeding after a dramatic reduction of subscriber complaints received by the Department following a public hearing and receipt of testimony on the proposed changes. *In the Matter of Complaints, Service Visits and Customer Service Standards*, Community Antenna Television Commission Docket No. R-20, *Report and Order*, (September 8, 1992). The Community Antenna Television Commission was a predecessor agency of the D.T.E.'s Cable Division.

[16] In fact, none of the comments received in response to the *1998 Order Soliciting Comments* addressed the requisite municipal-level subscribership data reporting, nor did RCN, then entering the marketplace in Massachusetts as a competitive cable provider, file any comments or raise any concerns with regard to the Form 500.

municipality in which they serve since this statute's enactment in 1971. *See* St.1971, c. 1103, § 1, amended by St.1975, c. 674, § 8, and St.1977, c. 552, §1.

Verizon entered the Massachusetts cable market in 2006 as a competitive provider and first filed the Form 500 on January 31, 2007. *See* VZ Pet. at 2, 4; VZ Br. at 2; Tyngsborough/Watertown Br. at 2. Verizon filed a motion requesting confidential treatment for its Form 500 subscribership data on February 1, 2007. *See Annual Report of Verizon New England Inc. of Complaints Received Regarding FiOS TV Service: MA Form 500 Complaint Report*, Verizon's Motion for Confidential Treatment, D.T.E. Cable Division (Feb. 1, 2007) ("Motion for Confidential Treatment"); VZ Pet. at 4; VZ Br. at n.4. On March 15, 2007, Verizon filed a second motion requesting confidential treatment for similar information contained in its Annual License Fee filing provided to the Department. *See Annual Report of Verizon New England Inc. of Complaints Received Regarding FiOS TV Service: MA Form 500 Complaint Report*, Ruling on Motions for Confidential Treatment Filed by Verizon New England, Inc., D.T.C., at 1 (rel. June 7, 2007) ("*Department 2007 Confidentiality Ruling*"). Verizon asserted that the municipality subscribership data was competitively sensitive information and constituted a trade secret under Massachusetts law. *See* Motion for Confidential Treatment at 1; *Department 2007 Confidentiality Ruling* at 1. The Department subsequently denied both of Verizon's confidentiality requests, determining that Verizon had not satisfied its burden to establish that confidential treatment was warranted under the statutory standard set forth in G. L. c. 25C, § 5.[17] *See Department 2007 Confidentiality Ruling* at 13-14; VZ Pet. at 5; VZ Br. at n.4; Tyngsborough/Watertown Br. at 2.

---

[17] In pertinent part, G. L. c. 25C, § 5 states :

> the [D]epartment may protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the

As discussed below, Verizon now petitions the Department for an amendment of the Form 500 that eliminates the municipal-level subscribership number reporting requirement. *See* VZ Pet. at 1, 9-12; VZ Reply Comments at 1, 4-7; VZ Br. at 1-2, 3-4,7-12; VZ Rep. at 1-3.

IV. ANALYSIS AND FINDINGS

A. INTRODUCTION

The Department must examine whether it has the authority to require the reporting of municipal-level subscriber numbers on the Form 500. As set forth below, the Department finds that it has statutory authority pursuant to G. L. c. 166A to require municipal-level subscribership data reporting on the Form 500. Following the discussion of its statutory authority, the Department then will examine Verizon's substantive and policy claims for amending the Form 500 to exclude the required information. The Department finds that Verizon has failed to provide any persuasive arguments or evidence to support its requested relief. As a result, the Department denies Verizon's petition seeking amendment of the Department's Form 500.

B. ADJUDICATORY PROCEEDING

Before addressing the merits of the Parties' arguments, the Department briefly addresses a procedural issue raised by the Joint Commenting Parties and NECTA. Specifically, the Joint Commenting Parties and NECTA express concern over the Department's decision to docket the instant proceeding as a formal adjudicatory proceeding rather than an informal rulemaking. *See* Tr. at 14-16; Joint Commenting Parties Comments at 7; Joint Commenting Parties Br. at 11; NECTA Letter at 2-3. NECTA specifically states that it is "troubled by statements from the

---

> information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

bench that appeared to imply that this proceeding had to be conducted either as an adjudication or, alternatively, a formal rulemaking." NECTA Letter at 2. The Joint Commenting Parties assert that a more informal notice and comment process allows and encourages "public participation in generalized rulemakings through simple and informal filings of comments." Joint Commenting Parties Comments at 7; Joint Commenting Parties Br. at 11. Both Parties cite to precedent established by the Department's predecessor in its past treatment of proposed amendments to cable forms, whereby the Department sought informal notice and comment on any proposed amendments to cable forms. *See* Tr. at 15 (Joint Commenting Parties attorney statement that "it is somewhat of a procedural change of course to treat form changes in an adjudication"); NECTA Letter at 2-3 (citing *In Re: Revision of Financial Reporting Forms*, D.T.E. Cable Division, *Order Adopting Revised Annual Financial and Statistical Data Forms*, at 1 (Feb. 8, 2001), where the Department's predecessor stated that the previous removal of the financial forms from its formal regulations allowed it "greater flexibility in making revisions to the Financial Forms and the Uniform Reporting System because [it] need not invoke the formal rulemaking process"). Both Parties urge the Department to continue informal notice and comment proceedings on a going-forward basis. *See* Joint Commenting Parties Br. at 11; NECTA Letter at 3. Verizon, however, did not object to the Department's decision to docket this matter as an adjudicatory proceeding.[18]

[18] While the Department docketed the instant proceeding as an adjudicatory proceeding, the Department acknowledges that Verizon initially sought amendment of the Form 500 through the Department's established rulemaking authority for cable regulations (i.e., pursuant to G. L. § 4, and 207 C.M.R. §§ 2.01 and 2.03). *See* VZ Pet. at 1; Joint Commenting Parties Br. at 11. Through no fault of Verizon's, this particular request is problematic because the Form 500 is not a part of any Department regulation since "**[f]orms … by their nature are not regulations and should not be part of a regulation.**" *The Regulations Manual – September 2008*, Office of the Secretary of the Commonwealth, at 7, available at http://www.sec.state.ma.us/spr/sprpdf/manual.pdf (last viewed on Oct. 16, 2009). *See also In Re: Amendment of 207 C.M.R. 2.00 – 10.00*, Cable Television Commission Docket No. R-25, *Report and Order*, at 32 (rel. December 27, 1996) ("*1996 Report and Order*"). As NECTA points out, this policy permits agencies greater flexibility in making revisions to forms without needing to invoke a formal rulemaking process, and Department policy has been to seek public input when revising its cable forms.

The Department is sensitive to the concerns raised by the Joint Commenting Parties and NECTA. However, the Department distinguishes the instant proceeding from past proceedings involving the amendment of its cable forms. In the past, the Department sought comment on proposed form amendments on its own motions, and none of those proceedings generally fell under the purview of a formal rulemaking. *See, e.g., 1998 Order Soliciting Comments*, at 1; *In Re: Revision of Financial Reporting Forms*, D.T.E. Cable Division, *Order Requesting Comments on Proposed Annual Financial and Statistical Data Forms* (July 18, 2000) ("*2000 Order Requesting Comments on Financial Forms*"); *Investigation of the Cable Television Division of the Department of Telecommunications and Energy on its Own Motion to Review the Form 100*, D.T.E. Cable Division Docket No. CTV 03-3, *Order Opening a Notice of Inquiry to Review the Form 100, the License Application* (Aug. 11, 2003). By contrast, the instant proceeding arose from a cable provider request (i.e., Verizon) asserting, in part, that the subscribership reporting requirement causes it a specific, competitive harm. *See* VZ Pet. at 1, 6-9, 13-16; VZ Reply Comments at 1, 7-10; VZ Br. at 1-2, 4-7, 14-19; VZ Rep. at 4. As the Hearing Officer specified during the Public Hearing, the Department docketed the instant proceeding as an adjudicatory proceeding because of Verizon's assertion of a specific harm. *See* Tr. at 10-11. While the Department may utilize a more informal process for matters of general application and future effect, the allegation of a specific harm precludes that approach in this proceeding. *See, e.g.,* G. L. c. 30A, § 1(1) (an adjudication is required when "the legal rights, duties or privileges of

---

See NECTA Letter at 2-3; *see also 1996 Report and Order* at 32 ("Following the issuance of our new regulations, we intend to conduct a careful review of all our current forms and, as appropriate, to update them to reflect changes in the information needs of the Commission. During this review, the Commission will seek input on any proposed revisions from interested parties, including both cable operators and issuing authorities"); *1998 Order Soliciting Comments* at 4; *Order Adopting Revised Form 500* at 1-2; *2000 Order Requesting Comments on Financial Forms* at 1. Since there is no regulation at issue, the Department declined to docket the instant matter as a formal rulemaking.

specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing").

The Department now turns to the merits of the Parties' arguments and whether amendment of the Form 500 is warranted.

C. THE DEPARTMENT HAS THE AUTHORITY TO REQUIRE CABLE OPERATORS TO REPORT THE NUMBER OF SUBSCRIBERS BY MUNICIPALITY

In this proceeding, Verizon contends that the Department lacks the statutory authority to require submission of municipality-by-municipality subscriber information on its Form 500. *See* VZ Pet. at 9; VZ Br. at 7. First, Verizon argues that the Department lacks the general authority under G. L. c. 166A since such data is not "reasonably necessary to carry out the purpose for which [the Department] was established." VZ Pet. at 10; VZ Br. at 7-8. Next, Verizon asserts that since G. L. c. 166A, § 10 ("Section 10"), does not expressly require the submission of subscribership data, the Legislature neither authorized nor contemplated the collection or public disclosure of this data. *See* VZ Pet. at 10-11; VZ Br. at 8-11. Verizon contends that, as a result, the Department's decision 10 years ago to require subscribership data was "arbitrary and capricious" relative to the purpose of Section 10 so the Department should "correct that error now." VZ Pet. at 11-13; VZ Br. at 9-11.

Tyngsborough and Watertown, the Joint Commenting Parties, and the Attorney General counter that G. L. c. 166A grants to the Department broad general authority over cable television regulation within the state, and that when Section 10 is read in the context of the statute as a whole, the Department has clear authority to require municipal-level subscribership data reporting. *See* Tyngsborough/Watertown Br. at 3-6; Joint Commenting Parties Br. at 6-7; AG Rep. at 1-2. The Joint Commenting Parties and the Attorney General point to G. L. c. 166A, §

16, when coupled with Section 10, as further evidence of the Department's broad rulemaking authority to require subscribership data reporting. *See* Joint Commenting Parties Br. at 6-7; AG Rep. at 1-2. Tyngsborough and Watertown and the Attorney General also assert that subscribership data reporting on the Form 500 is a power "reasonably implied" from the express authority granted to the Department by Section 10 (Tyngsborough/Watertown Br. at 4-9; AG Rep. at 2), and they argue, along with the Joint Commenting Parties, that the complaint data from the Form 500 is only useful when it is coupled with subscribership numbers. *See* Tyngsborough/Watertown Br. at 8-9; Joint Commenting Parties Br. at 8; AG Rep. at 2. Verizon responds that the intervening Parties' reading of the Department's authority under G. L. c. 166A, generally, and Section 10, specifically, is "expansive … [and] not supported by the terms of the statute." VZ Rep. at 1.

As discussed below, the Department rejects Verizon's arguments and determines that it does have the general authority under G. L. c. 166A as well as specific authority under Section 10 of G. L. c. 166A to require such data reporting, and that its prior decision to require municipal subscribership data reporting on the Form 500 was not arbitrary or capricious.

1. *The Department Has Authority Pursuant to G. L. c. 166A*

The Department must determine whether it has the general statutory authority to require reporting of subscriber data by cable providers. The Department concurs with the arguments of intervening Parties and concludes, as set forth below, that it has the general authority pursuant to G. L. c. 166A to require subscribership data reporting and that such reporting is "reasonably necessary" to carry out the purpose for which the Department was established. Tyngsborough/Watertown Br. at 4-9; AG Rep. at 2.

Verizon asserts that the Department only has those "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." VZ Pet. at 9-10, citing *Saccone v. State Ethics Comm'n*, 395 Mass. 326, 335 (1985); VZ Br. at 7. Additionally, Verizon contends that the Department "does not have the 'general authority' under G. L. c. 166A to require carriers to provide *any* information solely on the basis that it is of interest to the Department." VZ Pet. at 10 and Br. at 7. Verizon further asserts that "[s]ubscribership data is not essential or even relevant to performance of the Department's limited duties under Chapter 166A." VZ Br. at 11-12.

Contrary to Verizon's position, the intervening Parties contend that G. L. c. 166A grants to the Department broad general authority over cable television regulation within the state, and that when Section 10 is read in the context of the statute as a whole, the Department has clear authority to require municipal-level subscribership data reporting. *See* Tyngsborough and Watertown Br. at 3-6; Joint Commenting Parties Br. at 6-7; AG Rep. at 1-2. Furthermore, the intervening Parties argue that one purpose of the Department's regulation of cable television is to ensure that consumer interests are protected and that the collection of municipal-level subscriber data on the Form 500 furthers this important public interest. *See* Joint Commenting Parties Br. at 7; AG Rep. at 1-2.

Consistent with the intervening Parties' arguments and relevant precedent, the Department finds that the protection of consumer interests is a part of the "general authority" granted to the Department, and it is relevant to the Department's duties listed under G. L. c. 166A. *See In Re: Billing and Termination of Service Regulations*, Community Antenna Television Division Docket No. R-16*, Report and Order*, at 5-6 (June 11, 1986) ("*B&T Order*") (specifying that G. L. c. 166A "establishes clear authority in the [Department] to promulgate

regulations to protect the consumer's interest in cable television"). As discussed more fully below, subscribership data reporting relative to subscriber complaints allows the Department to fulfill its mandate to protect consumer interests. *See infra* at pp. 19-21. Furthermore, as set forth below, the Department finds that its broad authority to regulate cable operators pursuant to G. L. c. 166A includes assisting local issuing authorities and evaluating cable operator performance. *See infra* at pp. 15-19. Contrary to Verizon's assertions, the required reporting of subscribership data is "reasonably necessary" to carry out these important interests. VZ Pet. at 10; VZ Br. at 7-8. Therefore, the Department finds that Verizon's general authority arguments have no merit.

The Department's general authority stems from both federal and state delegation of authority. The Cable Communications Policy Act of 1984 ("Cable Act"), later amended by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[19] and subsequently further amended, defines the scope of authority that local governmental authorities can exercise over cable television operations. *See* Cable Act, Pub.L. No. 98-549, 98 Stat. 2779; 1992 Cable Act, Pub.L. No. 102-385, 106 Stat. 1460; *B&T Order* at 5. For instance, Congress placed strict limitations on the licensing authority's ability to regulate rates for cable services and on its ability to require specific programming services. *See* 47 U.S.C. §§ 531, 532, and 543; *B&T Order* at 5. Congress was just as clear, however, that consumer protection falls within the general police powers of the state and, more specifically, falls within the purview of permissible local regulations, so long as the regulations are not "specifically preempted" or "inconsistent" with the Cable Act, as amended. *See* 47 U.S.C. §§ 552(d)(1) and 556(c); *B&T Order* at 5.

The State Legislature established the Department in 1971 to regulate the provisioning of cable services in Massachusetts with dual authority granted to the state's cities and towns. *See*

[19] The stated purposes of the 1992 Cable Act are "to provide increased consumer protection and to promote increased competition in the cable television and related markets, and for other purposes." Cable Television Consumer Protection and Competition Act of 1992, pmbl., Pub.L. No. 102-385, 106 Stat. 1460.

St. 1971, c. 1103, pmbl.;[20] *B&T Order* at 6. In conjunction with the Cable Act, as amended, G. L. c. 166A as a whole establishes clear authority in the Department to promulgate regulations to protect the consumer's interest in cable television. *See B&T Order* at 6; Tyngsborough/Watertown Br. at 4-5. Moreover, the Department's authority has been recognized by the Supreme Judicial Court ("SJC"):

> … [T]he Legislature has granted broad agency authority to deal with an entire area of activity, e.g. *Warner Cable of Mass. Inc. v. Community Antenna Television Commission*, 372 Mass. 495 (1977) (regulation of cable television throughout the Commonwealth).

Grocery Manufacturers of America, Inc. v. Department of Public Health, 379 Mass. 70, 75 (1979) ("*Grocery Manufacturers*"). *See also B&T Order* at 6 (discussing the Department's broad authority). This broad authority extends to the required reporting of municipal-level subscribership data, because the data is necessary to further the Department's interest in protecting consumer interests, evaluating cable operator performance, and assisting local issuing authorities.

The Department's authority under G. L. c. 166A is also clear from the many specific provisions authorizing the Department to regulate operator practices. *See B&T Order* at 6 (discussing the Department's specific grants of statutory authority). Consistent with the Department's findings in the *B&T Order*, Tyngsborough and Watertown correctly explain that the powers and responsibilities given to the Department under G. L. c. 166A include *not only* receiving complaints from consumers about cable systems and the establishment and collection of annual forms regarding the subscriber complaints received by license holders, but also numerous other regulatory powers. G. L. c. 166A, § 10. *See also B&T Order* at 6; Tyngsborough/Watertown Br. at 5. These additional regulatory powers include: (1) investigative

[20] Available at http://archives.lib.state.ma.us/actsResolves/1971/1971acts1103.pdf (last viewed on Oct. 16, 2009).

powers (Section 2A); (2) the ability to incorporate specific terms and conditions into license provisions (Section 3(e)); (3) the ability to determine which type of information an operator must provide in applying for, renewing or transferring a license (Sections 4, 7 and 13); (4) establishment and review of financial and ownership statements, which are filed annually with the Department (Section 8); (5) revocation of licenses (Section 11); (6) the ability to take legal action to ensure compliance with the statutes and regulations (Section 12); (7) the power to visit cable facilities, examine their records to ensure compliance and issue subpoenas (Section 17); and (8) the authority to represent the interests of the citizens of the Commonwealth before the Federal Communications Commission and to certify the performance of the cable operators under its jurisdiction to appropriate federal, state and local authorities (Section 16).[21] *See B&T Order* at 6; Tyngsborough/Watertown Br. at 5. Furthermore, the Department has broad authority under Section 16 to "issue such standards and regulations which it deems necessary to carry out the purposes of this chapter." G. L. 166A, § 16. *See also B&T Order* at 6; Joint Commenting Parties Br. at 6; AG Rep. at 1.

As several intervening Parties correctly highlight, Massachusetts courts have consistently upheld regulations promulgated by the Department under its general, or "broad," authority. *See* Joint Commenting Parties Br. at 6-7 (citing *New England Cable Television Association et al. v. Community Antenna Television Commission*, CA No. 84-70134 (Suffolk Sup. Ct. Dec. 12, 1984) ("*NECTA v. CATC*")); Tyngsborough/Watertown Br. at 3-4 (citing *Warner Cable of Massachusetts v. Community Antenna Television Commission*, 372 Mass. 495 (1977) ("*Warner v. CATC*")). In *NECTA v. CATC*, the Court upheld Department rules designed to safeguard

[21] Verizon states that "[m]ost of the provisions" cited by Tyngsborough and Watertown "concern duties assigned to individual [local franchising authorities], not the Department," pointing to G. L. c. 166A, §§ 3, 5-7, 11, and 13. Verizon Rep. at 2. Verizon overlooks the express grants of Department authority set forth in each of the cited statutory provisions.

consumers' security deposits, which were promulgated under the Department's general statutory authority. *See B&T Order* at 6. *See also* Joint Commenting Parties Br. at 6-7. The Court recognized the Department's mandate to regulate the area of cable television and held the security deposit regulations to be "rationally related to and in harmony with G. L. c. 166A generally and Section 16 of that chapter specifically." *B&T Order* at 6, citing *NECTA v. CATC*.

In *Warner v. CATV*, the SJC upheld Department rules authorizing a "two-step procedure" for ratemaking, which rules the SJC considered to be a part of the Department's "broad power to make reasonable rules and regulations to facilitate the operation of [G. L. c. 166A, § 15]." Tyngsborough/Watertown Br. at 3, citing *Warner v. CATC*, 372 Mass. 505. *See also Grocery Manufacturers*, 379 Mass. 75 (recognizing the Department's broad statutory authority to regulate cable television services throughout the Commonwealth).

Consistent with this precedent and the findings in the *B&T Order*, the Department finds that its broad authority to regulate cable operators includes protecting consumer interests, evaluating cable operator performance, and assisting local issuing authorities. *See B&T Order* at 5-6 (stating G. L. c. 166A "establishes clear authority in the [Department] to promulgate regulations to protect the consumer's interest in cable television"). *See also* Department mission statement: "Our mission is to support competition in … cable services in Massachusetts and to protect the public interest by ensuring that customers of these services are treated consistently with our regulations."[22] This broad authority extends to the required reporting of municipal-level subscriber data, because the data is necessary to further the Department's interest in protecting consumer interests, evaluating cable operator performance, and assisting local issuing authorities. Accordingly, the Department rejects Verizon's assertion that "the number of cable subscribers a carrier may have in a city or town is not relevant to the limited functions and

[22] Available at www.mass.gov/dtc (last viewed on Oct. 16, 2009).

responsibilities assigned to the Department in Chapter 166A." VZ Pet. at 10; *see also* VZ Br. at 11-12.

To the contrary, subscribership data reporting as it relates to subscriber complaints under Section 10 is inextricably tied to the Department's specific grants of authority listed elsewhere in G. L. c. 166A. For instance, if the Department is concerned by the level of consumer complaints relative to the number of subscribers regarding a particular cable operator or a particular region or municipality within Massachusetts, then the Department may initiate an investigation pursuant to Section 2A and target its investigation to the specific region or Massachusetts municipality.[23] Additionally, consistent with the Department's authority pursuant to Sections 3, 4 and 13, the Department has noted that "[s]ince municipal officials rely on complaint records as one method of measuring an operator's performance during the [license] renewal process, the need for accurate and complete complaint records becomes even more compelling." *1990 NPRM* at 3. The Department has further determined that municipalities may utilize the Form 500 data in order to help them determine the future interests and needs of their communities when reviewing cable operator renewal license petitions.[24] *See* 207 C.M.R. § 3.06(1)(b). *See also Cable Television License Renewal Process: A Practical Guide*, Prepared by the D.T.E. Cable Division,

---

[23] In fact, the Department previously clearly specified that it is "available to subscribers, municipalities and cable operators to resolve disputes as they arise and to order appropriate remedies on a case-by-case basis" and that it monitors subscriber complaints in order to "address persistent and pervasive customer service issues as they arise." *2000 Rulemaking Order* at 11.

[24] In fact, municipalities may utilize the Form 500 data from other municipalities in order to help determine whether or not to grant a license to, or to impose conditions on, a new entrant. *See* Northampton Comments at 1; Joint Commenting Parties Comments at 6-7 and Br. at 9. Furthermore, commenting cities and towns have made it clear to the Department that they utilize the Form 500 subscribership data when carrying out other issuing authority functions, such as verifications of annual license fees remitted to the cities and towns under G. L. c. 166A, § 9, and calculation of public, educational and government ("PEG") access support payments and other franchise-related costs. *See, e.g.*, Joint Commenting Parties Comments at 6-7 and Br. at 9; City of Boston Comments at 6; Northampton Comments at 1; Williamstown Committee Comments at 1; Williamstown Board Letter at 1; WilliNet Director Comments at 1; Somerset Letter at 1; D.T.C.-Boston 1-2; D.T.C.-Joint Commenters 1-2; D.T.C.-Tyngsborough 1-2 and 1-3; D.T.C.-Watertown 1-2 and 1-3.

at 5 (May 2005).[25] Furthermore, in order for the Department to certify a cable operator's performance, as required by Section 16, the Department would utilize, for example, the information compiled, in part, from the Form 500.

In the examples provided, the Form 500 complaint data would not be as useful without the municipal-level subscribership data – subscribership numbers are necessary to fully evaluate and analyze subscriber complaints in each city and town. Commenters and intervening Parties in the instant proceeding make a similar observation. *See, e.g.*, Joint Commenting Parties Comments at 5 and Br. at 7 (asserting that 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"); Tyngsborough/Watertown Br. at 4 (asserting that "the collection of subscriber numbers is an essential element of evaluating and digesting the meaning of the complaint information"); City of Boston Comments at 5-6 (stating "[b]y itself, the number of subscriber complaints reveals very little about a cable system's operations … by requiring the cable operator to provide the denominator in this [complaint data] ratio, the Department's Form 500 requirement provides important context"); Northampton Comments at 1 (stating "subscriber count information … enables municipalities to estimate the true consumer impact of cable license requirements spread across the subscriber base"). In addition, as NECTA has previously asserted, any "level of concern raised by complaint results reported on Form 500 data is inextricably tied to subscriber levels, and cannot be properly analyzed by municipalities, consumers or other public interest entities [such as the Department] in their absence." NECTA Comments, *Annual Report of Verizon New England Inc. of Complaints Received Regarding FiOS TV Service: MA Form 500 Complaint Report – Verizon New England Inc.'s Motion for Confidential Treatment*, at 7 (March

[25] Available at http://www.mass.gov/Eoca/docs/dtc/catv/renewalguidefnl.pdf (last viewed Oct. 16, 2009).

22, 2007). "Twenty complaints in a single complaint category or 20 service interruptions within a given year may denote excellent performance in a system with 20,000 subscribers but a disastrous one in [a] system with a few hundred subscribers." *Id.*

2. *The Department Has Specific Authority Pursuant to G. L. c. 166A, § 10*

In addition to finding that the Department has general authority pursuant to G. L. c. 166A to mandate municipal-level subscriber reporting, the Department also finds that it has specific authority under G. L. c. 166A, § 10 to require subscriber reporting. In particular, the Department agrees with Tyngsborough,Watertown and the Attorney General that subscribership data reporting on the Form 500 is a power "reasonably implied" from the express authority granted to the Department by Section 10. *See* Tyngsborough/Watertown Br. at 4-9, referencing *Grocery Manufacturers*, 379 Mass. at 74; AG Rep. at 2. As discussed below, the Department further agrees with the Joint Commenting Parties and the Attorney General that when Section 10 is read in conjunction with other sections of G. L. c. 166A (specifically, Sections 9 and 16), it provides further evidence of the Department's specific authority to require municipal-level subscribership data reporting. *See* Joint Commenting Parties Br. at 6-7; AG Rep. at 1-2.

According to Verizon, the SJC has specified that a source of insight into the legislature's intent is the language of the statute itself. *See* VZ Pet. at 11 and Br. at 9, citing *Anderson St. Assocs. v. City of Boston*, 442 Mass. 812, 816 (2004) ("*Anderson*"). The Department generally agrees with this claim, but questions Verizon's further contention that the "plain and unambiguous language of Section 10 is conclusive as to the Legislature's intent regarding the permissible bounds of the Form 500." VZ Pet. at 11 and Br. at 9, citing *Commerce Ins. Co. v. Comm'r of Ins.*, 447 Mass. 478, 481 (2006) ("*Commerce*").

While it is true that the SJC in *Anderson* provided that "[w]here the language of a statute is plain, it must be interpreted in accordance with the usual and natural meaning of the words,"[26] the SJC in *Commerce* also made clear that "time and again we have stated that we should not accept the literal meaning of the words of a statute without regard for that statute's purpose and history."[27] In addition, the SJC has established that "[a]n express grant [of authority] carries with it by implication all incidental authority required for the full and efficient exercise of the power conferred, and that the Legislature need not enumerate or specify, definitely and precisely, each and every ancillary act that may be involved in the discharge of an official duty." *Town of Holden v. Wachusett Regional School Dist. Committee*, 445 Mass. 656, 664 (2005) ("*Town of Holden*") (citations omitted). Furthermore, while "the principal source of insight into Legislative purpose" is the statute itself, it is important to "bear in mind that [a]n agency's powers are shaped by its organic statute taken as a whole … and that the [p]owers granted include those necessarily or reasonably implied." *Massachusetts Hosp. Ass'n, Inc. v. Department of Medical Sec.*, 412 Mass. 340, 342 (1992) ("*Mass. Hosp. Ass'n*") (citations omitted). *See also Levy v. Board of Registration and Discipline in Medicine*, 378 Mass. 519, 524 (1979) ("*Levy*") (stating "[a]n agency's powers are shaped by its organic statute taken as a whole and need not necessarily be traced to specific words"); Joint Commenting Parties Br. at 7, citing *Commonwealth v. Gerveny*, 373 Mass. 345, 354 (1977) ("*Gerveny*") (stating "[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").

First, the Department finds that the language of Section 10 standing alone permits the Department to require municipal-level subscribership data reporting. In particular, the language

---

26 *Anderson*, 442 Mass. at 816 (citations omitted).

27 *Commerce*, 447 Mass. at 481(citations omitted).

of Section 10 provides that cable providers must submit "forms to be prescribed by the [Department] … of the complaints of subscribers received[.]" G. L. c. 166A, §10. Applying the SJC's determination in *Anderson*, it is clear that the "usual and natural meaning of the words"[28] of Section 10 grants to the Department the express authority to prescribe a subscriber complaint form. Pursuant to that authority, the Department's predecessor agency prescribed the current Form 500 nearly ten years ago.[29] In addition, applying the SJC's ruling in *Town of Holden* to the instant proceeding, the "incidental authority required for the full and efficient exercise of the power conferred"[30] to the Department enables the Department to establish the scope and context of the municipal-level subscriber complaint data to be filed. Requiring municipality subscribership numbers on the Form 500 pursuant to Section 10 falls within that scope and context and permits not only the Department to carry out "the full and efficient exercise of the power conferred," but also assists municipalities themselves, since, as specified above, subscribership complaint numbers for each municipality would be essentially meaningless without the associated subscribership data. *See supra* at pp. 19-21.

Next, the Department considers its authority under Section 10 when considered in the context of G. L. c. 166A taken as a whole. Upon consideration, the Department finds that when Section 10 is coupled with the Department's "organic statute taken as a whole" (i.e., G. L. c. 166A),[31] the Department has further statutory authority to require municipal-level subscribership data on the Form 500. This authority derives from the Department's authority "reasonably

---

28 *Anderson*, 442 Mass. at 816.

29 *Levy*, 378 Mass. at 524.

30 *Town of Holden*, 445 Mass. at 664.

31 *See, e.g.*, *Mass. Hosp. Ass'n*, 412 Mass. at 342; *Levy*, 378 Mass. at 524; *Gerveny*, 373 Mass. at 354.

implied"[32] from other specific statutory sections under G. L. c. 166A, namely Sections 16 and 9 when they are read in conjunction with Section 10. *See* G. L. c. 166A, §§ 9, 10, and 16.

Specifically, Section 16 expressly permits the Department after a hearing to "issue such standards and regulations as it deems appropriate to carry out the purpose of this chapter." G. L. c. 166A, § 16. One "purpose" of the Department is to protect consumer interests in cable television. *See B&T Order* at 5. In the instant case, the "standards and regulations" giving rise to the Form 500 are set forth in the Department's *Order Adopting Revised Form 500* and 207 C.M.R. § 2.03(3).[33]

At the time the Form 500 was initiated, cable providers tacitly approved the municipal-level subscribership reporting requirement. The Department's *1998 Order Soliciting Comments* included a copy of the proposed revised Form 500. *See 1998 Order Soliciting Comments* at Attachment C. This proposed form included a box in which the number of subscribers for that town are to be listed. *Id.* All interested parties were invited to comment on the proposed Form 500 as a whole and participate in the technical session for that proceeding. *Id.* at 1. No party protested the municipal-level reporting requirement. Consistent with the procedural requirements under Section 16 for adopting "standards and regulations" after a hearing, the Form 500 was adopted after a notice and comment period and a public technical conference. *Order Adopting Revised Form 500* at 2. Verizon concedes this point. VZ Pet. at 3-4 and Br. at 3. Verizon contends that "the commenters … [i.e.] towns and incumbent providers … had no economic incentive to consider or object to the provision of municipal-level subscribership

---

[32] *Mass. Hosp. Ass'n*, 412 Mass. at 342; *Grocery Manufacturers*, 379 Mass. at 70.

[33] The Department's regulation provides the Department "shall prescribe a complaint form, to be filed by the licensee … pursuant to M.G.L. c. 166A, § 10." 207 C.M.R. § 2.03(3). The Form 500 is itself not a regulation. *See supra* at n.18.

data." VZ Pet. at n.9 and Br. at n.11. Whether or not interested parties, including RCN,[34] decided to comment on the municipal-level subscribership data reporting was their own decision, and, unlike Verizon, the Department will not speculate as to their reasons for not commenting. Furthermore, there is no record or evidence to support Verizon's hypothesis.

In addition to Section 16, the Department's authority to require municipal-level subscribership reporting under G. L. c. 166A Section 10 is "reasonably implied" from Section 9 of the statute. Pursuant to Section 9, cable operators are required to remit an annual license fee of $0.80 per subscriber to the Commonwealth of Massachusetts and $0.50 per subscriber to each municipality in which it serves. *See* G. L. c. 166A, § 9. As a result, subscriber totals per municipality can be easily deduced through simple arithmetic by dividing each license fee check by $0.50. *See Department 2007 Confidentiality Ruling* at n.4; VZ Reply Comments at 2; VZ Br. at 13; Tyngsborough/Watertown Br. at 9-10.

Since, as intervenors contend, the amount paid by cable operators for municipal license fees is publicly available at the state and local level under Section 9 and the state's public records laws, Section 9 offers additional support for the Department to require subscribership data reporting pursuant to Section 10 on its Form 500. *See* Tyngsborough/Watertown Br. at 9-13.[35] Tyngsborough and Watertown point out that the Department is expressly permitted to suppress from public disclosure trade secrets or competitive information pursuant to G. L. c. 4, § 7, cl. 26(a) and G. L. c. 25, § 5D, but specify that they were unable to identify a similar exemption applicable to municipalities. *See* Tyngsborough/Watertown Br. at 10-11. Tyngsborough and

---

[34] RCN, a competitive cable provider in Massachusetts, was entering the cable market in Massachusetts at this time and did not offer any comment in that proceeding.

[35] *See also* G. L. c. 4, § 7, cl. 26 ("public records" are "all … documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any … department … division or authority of the commonwealth, or of any political subdivision thereof … unless such materials or data fall within … exemptions"); 18 Mass. Prac., Municipal Law and Practice § 8.4 (5th ed.) (incorporating and restating state public record obligations as they apply to municipalities).

Watertown assert, however, that this inquiry need not be made since the statutory exemption for "trade secrets or commercial or financial information" under public records law expressly precludes confidentiality of information submitted as required by law (i.e., the annual license fees submitted by cable providers pursuant to Section 9).[36] *See* Tyngsborough and Watertown Br. at 11. Therefore, the intervenors conclude, any interested person could easily approximate the number of subscribers by dividing the amount of the check by the municipality's license fee of $0.50 per subscriber paid pursuant to Section 9. *See* D.T.C.-Joint Commenters 1-3; Tyngsborough/Watertown Br. at 9-10.

Verizon "does not dispute that a member of the public could determine the number of a carrier's subscribers in a given town by obtaining from the town clerk the amount of the annual fee paid by that carrier pursuant to M.G.L. c. 166A, § 9."[37] VZ Rep. at 4. Instead, Verizon's contention is that "the issue of whether municipal subscribership data is entitled to confidential treatment … [is] not relevant to this proceeding." *Id.* Verizon suggests that, despite the fact that Section 9 annual filing fees are publicly available and can be collected and compiled by interested parties, the Department should not compile subscribership data via the Form 500 filing requirement for these interested parties due to policy considerations. *Id. See also* VZ Br. at 11 (asserting that the Department should not require submission of subscribership data "particularly when a collateral consequence of the required disclosure is … thwarting the advance of nascent

---

[36] *See also* G. L. c. 4, § 7, cl. 26(g) (exempting from public disclosure "trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law").

[37] In fact, a good starting point for those interested in Verizon's subscribership data would be to contact the appropriate town officials for the Massachusetts municipalities listed through Verizon's link "FiOS TV Towns" available at http://www22.verizon.com/about/community/ma/ (last viewed Oct. 16, 2009). Verizon's September 2009 list of Massachusetts communities in which it provides service is available at http://www22.verizon.com/about/community/ma/files/matvtowns_sep09.pdf (last viewed Oct. 16, 2009).

competition"). Verizon's filings do not further delve into the applicability or relevancy of Section 9 when coupled with Section 10.[38]

The Department disagrees with Verizon and determines that whether Section 9 data is entitled to confidential treatment is directly relevant to the instant proceeding. As Tyngsborough and Watertown point out, Verizon seeks to eliminate a reporting requirement pertaining to information that is available through other public sources. Through Section 10, the Legislature directed the Department to prescribe forms relating to subscriber complaints to be filed annually with the Department and municipalities, and, through Section 9, the Legislature required cable operators to pay annual fees to both the Department and municipalities based on the number of subscribers. *See* G. L. c. 166A, §§ 9 and 10. Because neither of these types of filings is subject to confidentiality by municipalities, this fact further supports the Department's conclusion that its authority to require municipal-level subscribership reporting under Section 10 is "reasonably implied" from Section 9. *See* Tyngsborough/Watertown Br. at 10-13.

3. Department's Prior Decision Not Arbitrary and Capricious

The Department finds that any "arbitrary and capricious" allegations against the Department's *Order Adopting Revised Form 500* should have been made by participating parties in a timely-filed appeal 10 years ago. *See* G. L. c. 166A, § 2 (1997) (specifying "[a]ppeals of any decision, order, or ruling of the director [of the Cable Division] may be brought within 14 days of the issuance of said decision to the full body of the commissioners of the [D]epartment

[38] Verizon did file a motion for temporary protective treatment of its annual filing fee payment to the Department pending resolution of the instant proceeding "until such time as the Department enters a final order in docket DTC 08-12." March 13 Motion for Protective Treatment at 2. In this Motion, Verizon stated that if the Department granted its petition to eliminate the reporting of municipal-level data, then Verizon "intends to renew its motion for confidential treatment on the grounds that unlike municipal data, that information is not readily available from other public sources and therefore is confidential and competitively sensitive." *Id.*

… Except as otherwise provided in this chapter, appeals taken from orders of the department shall be governed by section 5 of chapter 25"), *amended by* St.2002, c. 45, §§ 4 and 5 (approved Feb. 28, 2002); St.2007, c. 19, § 50 (eff. Apr. 10, 2007); and St.2008, c. 522, § 22 (eff. Apr. 15, 2009). *See also* G. L. c. 25, § 5 (specifying "[a]n appeal as to matters of law from any final decision, order or ruling of the [Department] may be taken to the supreme judicial court by an aggrieved party in interest … Such petition for appeal shall be filed … within twenty days after the date of service of the decision, order or ruling"). Because such an appeal did not occur, the Department need not address the general allegation made by Verizon now. *See, e.g.*, *Attorney General v. Dept. of Public Utilities*, 453 Mass. 191, 198 (2009), citing *Eastern Energy Corp. v. Energy Facilities Siting Bd.*, 419 Mass. 151, 152, 154-155 (1994) (stating "where board notified utility and other parties of its final decision and their appeal rights under G. L. c. 25, § 5, and utility understood [that the] final decision had entered, failure to file notice of appeal within twenty days required dismissal of appeal"). However, even if Verizon's argument were timely made, the argument fails as a matter of law.

Verizon asserts that "[t]he 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 [Department's] decision to collect such data was not authorized by statute and was arbitrary and capricious." VZ Pet. at 12 and Br. at 10. Verizon therefore contends that "[t]he Department should correct that error now." VZ Pet. at 12 and Br. at 10.

In support of its position that the Department's 10-year old decision was "arbitrary and capricious," Verizon cites to *Salisbury Nursing & Rehab. Ctr., Inc. v. Rate Setting Law Appeals*

("*Salisbury*"), as the appropriate legal standard. 448 Mass. 365 (2007). In *Salisbury*, the SJC established the following strict standard:

> The plaintiff has the burden of showing that the regulation is invalid or illegal…To do so, the plaintiff must establish the "absence of any conceivable ground" upon which the regulation may be upheld…This is because [w]e accord to a regulation, including a rate regulation, the same deference we extend to a statute…See *Druzik v. Board of Health of Haverhill,* 324 Mass. 129, 138, 85 N.E.2d 232 (1949) (regulation stands on same footing as authorizing statute, and court must make all presumptions in favor of validity). In conducting our review, we must apply all rational presumptions in favor of the validity of the administrative action and not declare it void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate.

Salisbury, 448 Mass. at 371-372 (citations omitted). Furthermore, a "court should cast about to discover, if possible, some ground which reasonable men might deem proper on which the action can rest." *Cotter v. City of Chelsea* 329 Mass. 314, 318 (1952). *See also Dowell, et al., v. Commissioner of Transitional Assistance*, 424 Mass. 610, 612 (1997) (stating "[w]e note at the outset that a party who attacks the facial validity of a regulation bears the heavy burden of proving on the record the absence of any conceivable ground upon which [the rule] may be upheld … That burden cannot be carried by arguing that the record does not affirmatively show facts which support the regulation." (citations omitted)).

The Department determines that Verizon fails to satisfy the standard set forth in *Salisbury*. 448 Mass. at 371-372. The question that needs to be answered is whether there is an "absence of any conceivable ground" for requiring submittal of subscribership data on the Form 500, or, in the alternative, whether requiring the data is a "reasonable construction" that can be "interpreted in harmony with the legislative mandate." *Salisbury*, 448 Mass. at 371-372. The answer to the former question is in the negative, and the answer to the latter question is in the affirmative. The Department determines that its incorporation of subscribership data in the Form

500 was reasonable in light of the general and specific authority granted to it under G. L. c. 166A, and satisfies the general purpose of Section 10, which is to collect meaningful subscriber complaint data (the data becomes meaningful, or "useful," when linked to the number of subscriber complaints received). *See Department 2007 Confidentiality Ruling* at 12-13. Therefore, the Department rejects Verizon's claim that the municipal-level subscriber reporting requirement in the *Order Adopting Revised Form 500* was arbitrary and capricious.

D. POLICY CONSIDERATIONS DO NOT WARRANT AMENDMENT OF THE FORM 500

Verizon asserts that, as an alternative argument, if the Department does have the authority to require subscribership data reporting, then it should refrain from doing so due to "[s]ound policy considerations." VZ Pet. at 13 and Br. at 11. The "sound policy considerations" that Verizon alleges are two-fold. According to Verizon: (1) "collection of municipal data has minimal policy value" on a statewide basis, since that data "is not essential or even relevant to performance of the Department's limited authority duties under Chapter 166A … [and] 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" (VZ Pet. at 13-14 and Br. at 11-12); and (2) "[s]tatewide collection and public disclosure of municipal subscriber data harms Verizon … and impedes cable competition" within the state. VZ Pet. at 13 and Br. at 11 and 14. In particular, Verizon contends that "subscribership data has little policy value on a statewide basis, but its public disclosure harms Verizon … and impedes competition": (1) due to incumbent operators' "competitive responses" since incumbent and competitive providers are on unequal footing; (2) due to the fact that no other regulatory body "requires cable operators to disclose municipal-level subscribership data publicly;" and (3) because filing and public

disclosure of this data with the Department "distorts public perception of Verizon's cable offering … [and] *could* affect its stock price, its ability to raise capital and its business plans and investment decisions, improperly suppressing shareholder value." VZ Pet. at 6-9 and 13-16 and Br. at 4-6 and 14-19 (emphasis added).

As discussed more fully below, the Department finds Verizon's arguments to be unpersuasive and, therefore, rejects them.

1. Incumbent Provider Practices and the Cable Market

Verizon's first contention is that subscribership data "has little policy value on a statewide basis" and that disclosure "harms Verizon … and impedes competition" in the Massachusetts cable market through incumbents' anti-competitive marketing practices. VZ Pet. at 13 and Br. at 4 and 11. Verizon contends that competitive harm arises from disclosure of the Form 500 subscribership data, since competitive and incumbent providers are not on the same footing and disclosure of the subscribership data is "free research" for incumbent cable operators that allows those operators "to target their … competitive responses to Verizon … [through] direct mail, door-to-door solicitation, local advertising and promotions and pricing strategies … to … specific communities … while minimizing … marketing, investments and promotions in towns with a comparatively low number of Verizon … subscribers." VZ Pet. at 6-7, 13-14, and Exhibit A at ¶ 3; VZ Br. at 4-5, 14-15. Verizon claims that incumbents may also "deploy or upgrade facilities in those towns [where Verizon has a stronger presence] or seek to tie customers down with long-term contracts." VZ Pet. at 6-7, and Exhibit A at ¶ 3; VZ Br. at 5.

As support for its position, Verizon cites to filings made by the National Cable & Television Association ("NCTA") and incumbent cable providers (Comcast, Cablevision and Cox), where those parties opposed disclosure of detailed subscriber information in unrelated

cases. *See* VZ Pet. at 7 and Exhibits B and C; VZ Br. at 5. Verizon also points to past determinations made by the Federal Communications Commission ("FCC") that "incumbent and competitive [cable] operators are not on the same footing" and "terms and conditions that may have been sensible under th[e] circumstances [of a monopoly provider] can be unreasonable when applied to competitive entrants." VZ Pet. at 14 and Br. at 16, citing *In the Matter of 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*, FCC, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180, at ¶ 48 (rel. March 5, 2007) ("*R&O and FNPRM*").[39]

In response to Verizon's assertions, NECTA states:

> [i]n a dynamic competitive marketplace where participants can pay close attention to sales and disconnection figures, deployment of marketing resources and promotional pricing strategies, disclosure of subscriber numbers up to a year following the launch of competitive services in a given area has little if any value to an incumbent operator seeking to devise strategies to defend its core business.

NECTA Letter at 2. Similarly, the Attorney General states that Verizon has failed to provide evidence that "the reporting of subscriber counts on the Form 500 impedes its ability to compete in Massachusetts or will otherwise negatively impact competition," and further specifies that targeted marketing by Verizon's competitors need not rely on the Department's Form 500 and, in fact, such "targeted marketing could well enhance (rather than impede) competition." AG Rep. at 2, 5. Finally, Tyngsborough and Watertown opine that if Verizon's market competitors "tailor their competitive marketing and promotional initiatives to Verizon's growth patterns [then this] is nothing more than the logical consequence and foreseeable effects of a free market" and, further, if Verizon's data is of "inestimable competitive value," then Verizon's competitors are

[39] Available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-06-180A1.pdf (last viewed Oct. 16, 2009).

likely to seek that same data directly from the municipalities. Tyngsborough/Watertown Rep. at 2-3.

The Department is not persuaded by Verizon's claims regarding incumbents' potential marketing practices or the harm Verizon would suffer if the data is disclosed. Concerning arguments about competitive responses to public disclosure of the Form 500 data, the Department substantially addressed the same issue in its 2007 ruling rejecting Verizon's motions for confidentiality. *See generally Department 2007 Confidentiality Ruling*. There, the Department concluded that "subscriber numbers are either generally known to the industry or easily acquired through appropriate means, [therefore] the number of subscribers Verizon serves in a particular community is not a trade secret warranting protection from disclosure." *Id*. at 11. Verizon has not raised any new arguments or presented any new evidence that would warrant a change in the Department's position on this issue. Since subscribership data is readily available through alternate sources (i.e., at the municipal level), and already in the public domain, Verizon's arguments fail. If, as Verizon claims, the data is valuable to competitors, then whether the Department discloses it, the alleged potential harm already exists due to competitors' ability to obtain the information from the municipalities.[40]

With regard to potential marketing practices by incumbent cable providers, the Department finds that if, in fact, improper customer retention practices, predatory pricing, or other discriminatory or anticompetitive practices are occurring, then Verizon needs to address

[40] In fact, it is difficult for the Department to recognize any harm suffered by Verizon, specifically, or to competition in the cable market, generally, when Verizon has been granted cable licenses in at least 100 of Massachusetts' 351 communities over the past four years. *See* "Video Franchising Reform," Verizon webpage statements, available at http://www22.verizon.com/about/community/ma/public_policy/ma_cable_choice.html (last viewed Oct. 16, 2009). During that four year period, Verizon's Form 500 filings have been publicly available. It would appear to be beyond dispute that the availability of the municipal-level subscribership numbers has not impeded Verizon's growth in the state. Thus the evidence, as it relates to Verizon, does not support Verizon's claim.

those issues in the appropriate forum under state and federal law.[41] As the other major Massachusetts competitive cable provider, RCN, pointed out in 2007, the "solution to this problem [of instances of discriminatory, anti-competitive targeted marketing and discount pricing practices by large incumbents]…is…to address unfair pricing and marketing practices directly, if they occur." RCN Comments, *Motions for Confidential Treatment Filed by Verizon New England*, at 1 (February 7, 2007). For instance, in response to such anti-competitive conduct, Verizon may file a complaint with the Department.[42]

Furthermore, Verizon's cited authority does not persuade the Department, since those cases are distinguishable from the facts in the instant proceeding. First, the information disclosures in dispute for NCTA, Comcast, Cablevision and Cox were far more detailed and in-depth as compared to the basic subscribership numbers required on the Form 500. *See* Brief of NCTA as Amicus Curiae supporting Defendant, *Ctr. For Pub. Integrity v. FCC*, 505 F. Supp.2d 106 (D.D.C. 2007) (Civ. Action No. 06-1644) ("*Ctr. For Pub. Integrity*") (VZ Pet., Exhibit B); Emergency Motion For a Stay of NCTA at Declaration ("Decl.") of Thomas R. Nathan, Comcast Cable Commc'ns ("Comcast Declaration"), Decl. of Joseph Massa, Cablevision Sys. Corp. ("Cablevision Declaration"), and Decl. of Robert C. Wilson, Cox Commc'ns, Inc. ("Cox Declaration"), *United Church of Christ Office of Commc'ns, Inc., et. al. v. FCC*, Nos. 08-3245, 08-3369, 08-3370, 08-3450, 08-3452 (6th Cir. 2008) ("*United Church*") (VZ Pet., Exhibit C).

---

41 The Department notes that there are other avenues of recourse available to parties alleging improper customer retention practices or predatory pricing. For instance, Verizon filed a petition for declaratory ruling with the FCC regarding certain cable operators' retention marketing activities. *See Petition of Verizon for Declaratory Ruling Confirming That Incumbent Cable Companies Must Accept Subscriber Cancellation Orders When Delivered by Competitive Multichannel Video Programming Distributors as Lawful Agents* (filed March 26, 2008), as cited in *In the Matter of Bright House Networks, LLC, et al., Complainants, v. Verizon California, Inc., et al., Defendants*, Enforcement Bureau Recommended Decision, File No. EB-08-MD-002, DA 08-860, ¶ 27 and n.64 (rel. April 11, 2008), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-08-860A1.pdf (last viewed Oct. 16, 2009).

42 Further, the Department notes that no other cable provider within Massachusetts has protested the municipal-level reporting requirement, including other competitive cable providers such as RCN, Braintree Electric Light Department, and Norwood Light Broadband.

Furthermore, the Department is not currently seeking to *expand* its reporting requirements or disclose information deemed by the Department to be confidential. *Id.*

Unlike the instant situation in which the data is already publicly available, in *Ctr. For Pub. Integrity v. FCC*, the NCTA opposed the Center for Public Integrity's petition for public disclosure of the FCC's Form 477 data, portions of which had already been deemed confidential by the FCC. VZ Pet. at 7; Exhibit B. In terms of the data required to be filed, the Form 477 requirements are much more in-depth than the Department's Form 500 requirements. Form 477 data is separated between broadband services and local telephone services and is filed separately for each state in which a provider operates. VZ Pet., Exhibit B at 3. Further, broadband service providers are required to report "the total number of connections they provide to end users for various types of broadband technology;" the different percentages of residential versus business customers "provided at various different data speeds"; and each Zip Code in which the services are provided.[43] *Id.* Local telephone service providers are required to report "the total number of lines provided to end users, the percentage provided to residential customers, and the percentage that use various technologies and business arrangements" as well as Zip Code breakdown. *Id.* at 3-4. In short, these filing requirements are considerably more detailed than the requirements at issue in this proceeding.

In addition, unlike the instant situation where the Department is not seeking expansion of operator reporting requirements on the Form 500, Comcast, Cablevision and Cox in *United*

---

[43] The Department is aware that the FCC recently changed the Zip Code reporting requirement to a Census Tract reporting requirement for broadband providers, which is a more granular reporting requirement. *See In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol ("VoIP") Subscribership*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, FCC 08-89, at ¶¶ 2, 10-15 (rel. June 12, 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-89A1.pdf (last viewed Oct. 16, 2009).

Church were opposing an *expansion* of the FCC's cable reporting requirements regarding leased access channels and certain in-depth disclosures to prospective leased access programmers. VZ Pet., Exhibit C, Comcast Declaration at ¶¶ 29-32, Cablevision Declaration at ¶¶ 20-23, Cox Declaration at ¶¶ 29-32.

Verizon's reliance on the *R&O and FNPRM is* equally unpersuasive when the portion of the Order that Verizon cites to is read in context with the entire paragraph and viewed in the context of the Order. The entire paragraph reads:

> The record demonstrates that local level-playing-field mandates can impose unreasonable and unnecessary requirements on competitive applicants. As noted above, level-playing-field provisions enable incumbent cable operators to delay or prevent new entry by threatening to challenge any franchise that an [local franchising authority or "LFA"] grants. Comcast asserts that MSOs are well within their rights to insist that their legal and contractual rights are honored in the grant of a subsequent franchise. The record demonstrates, however, that local level-playing-field requirements may require LFAs to impose obligations on new entrants that directly contravene Section 621(a)(1)'s prohibition on unreasonable refusals to award a competitive franchise. In most cases, incumbent cable operators entered into their franchise agreements in exchange for a monopoly over the provision of cable service. ***Build-out requirements* and other terms and conditions that may have been sensible under those circumstances can be unreasonable when applied to competitive entrants. NATOA's argument that *level-playing-field requirements* always serve to ensure a competitive environment and provide for an equitable distribution of services and obligations ignores that incumbent and competitive operators are not on the same footing.** LFAs do not afford competitive providers the monopoly power and privileges that incumbents received when they agreed to their franchises, something that investors recognize.

R&O and FNPRM at ¶ 48 (emphasis added). The purpose of this Order was to address and to create rules to prohibit LFAs from "unreasonably refusing to award competitive franchises" through "level-playing field requirements," for instance, such as "build-out requirements," during the cable licensing process. *Id*. at ¶¶ 1 and 5. This Order does not address annual filing requirements -- the issue at dispute in the instant proceeding -- which are known in advance to

any entity seeking to obtain a cable license. Furthermore, the FCC limited its findings and regulations to actions or inactions *at the local level* – the FCC did not address the "reasonableness of demands made by state level franchising authorities [such as the Department] …which may need to be evaluated by different criteria than those applied to the demands of local franchising authorities."[44] *R&O and FNPRM* at n.2. While certain "terms and conditions that may have been sensible under th[e] circumstances [of a monopoly provider] can be unreasonable when applied to competitive entrants" during the licensing process, the Department finds that subscribership data reporting as it exists on the Form 500 is not one of those circumstances under the referenced FCC precedent that would be unreasonable "when applied to competitive entrants" such as Verizon. *Id.* at ¶ 48.

2. *Actions by Other Regulatory Bodies*

Verizon's second contention with regard to competitive harm is that, since other regulatory bodies do not publicly disclose certain filing information, then the Department should refrain from requiring subscribership data reporting on the Form 500. *See* VZ Pet. at 7-8 and 15; VZ Br. at 5, 15, and19. According to Verizon, "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." VZ Br. at 19. Verizon points to filing requirements by regulatory agencies in California, New Jersey, New York, and Rhode Island and at the FCC and shows that these other agencies have either (1) granted confidentiality of the

[44] While the Department is not a state local franchising authority in regards to final license grants in municipalities, it does share oversight and certain licensing responsibilities with the municipalities. Per statutory grant, the Department instituted rules regarding annual filings to be filed at the state *and* municipal level; rules regarding licensing (initial, renewal, and transfer); rules regarding billing and termination of cable service; and rules regarding basic service tier rate regulation. *See generally* Title 207 of the C.M.R., available at http://www.mass.gov/Eoca/docs/dte/catv/documents/207cmr.pdf (last viewed Oct. 16, 2009).

requested information upon request (New York, Rhode Island, and FCC); or (2) granted confidentiality automatically due to previous regulatory determinations (California).[45] *See* VZ Pet. at 15; D.T.C.-VZ 1-1(b); VZ Br. at 5 and 19.

The Attorney General responds by arguing that this fact, if true, "does not in and of itself make such disclosure poor policy" and "[d]ifferent states have different policies and regulate cable television in vastly different ways." AG Rep. at 3.

The Department is not convinced that confidentiality determinations made in other states warrant amendment of the Form 500. First, the Department concurs with the Attorney General's observation that "[t]he Form 500 requirement should be considered in the context of the Massachusetts statutory scheme for the licensing and regulation of cable television services which involve both the Department and local cities and towns." *Id.* In fact, the Department once already considered the Form 500 subscribership reporting requirement in the context of the Massachusetts scheme when it denied Verizon's 2007 motion for confidentiality of that data. *See Department 2007 Confidentiality Ruling* at 14. Second, the Department finds that Verizon's argument actually supports the Department's conclusion. Since other regulatory bodies clearly do require some form of subscribership data reporting, such evidence supports the Department's requirement that the data be reported and that such reporting furthers the Department's regulatory interests. Simply because the Department requires public disclosure of this information is no basis to do away with the reporting requirement itself. Statutory safeguards exist in Massachusetts to permit the Department to grant exemptions to public disclosure

[45] Neither Verizon's statements nor the New Jersey filing information indicate whether the filings were granted confidentiality upon request to the New Jersey Board of Public Utilities ("BPU") or whether confidentiality was automatically granted due to statutory requirement or due to previous BPU determinations. *See* D.T.C.-VZ 1-1(b) (stating that the data was "filed as confidential information exempted from public disclosure under the New Jersey Open Public Records Act"). *See also* Attachment D.T.C.-VZ 1-1(d).

requirements, <u>if a party meets the statutory burden to warrant confidentiality</u>. *See* G. L. c. 4, § 7, cl. 26 and G. L. c. 25C, § 5. Again, the Department has previously determined that Verizon did not meet this burden in 2007.

3. *Public Stock Analyst Actions*

Verizon's final contention with regard to competitive harm is the risk of harm arising from the alleged misuse of the Form 500 data by public stock analysts. VZ Pet. at 8-9 and 15-16; D.T.C.-VZ 1-4; VZ Br. at 6 and 15. According to Verizon, these analysts use this data to estimate and make inaccurate determinations of Verizon's nationwide cable penetration rates, which "distorts public perception" of its cable offering and "*<u>could</u>* affect its stock price, its ability to raise capital," and improperly suppress its shareholder value. VZ Pet. at 8-9 and 16; VZ Br. at 6 and 15 (emphasis added). However, Verizon concedes that "[t]he stock price of any publicly traded company such as Verizon and the ability of such a company to raise capital are affected by any number of factors." D.T.C.-VZ 1-4.

The Attorney General responds that "[t]he fact that some may misinterpret information is not a reason to prevent the disclosure of such information." AG Rep. at 5. Further, the Attorney General asserts that if analysts draw inaccurate conclusions of Verizon's performance, then "[t]he solution … is more discourse and discussion regarding the data."[46] *Id.*

The Department is not persuaded by Verizon's claims. Instead, the Department agrees with the Attorney General that "[t]he fact that some may misinterpret information is not a reason to prevent the disclosure of such information." *Id.* Verizon has failed to demonstrate that the Department's collection and disclosure of the municipal-level Form 500 data, data that is

---

[46] Indeed, Verizon indicates that it has followed this approach. *See* D.T.C.-VZ 1-2(c). According to Verizon, after one analyst's report of Verizon's subscribership data was released, Verizon discussed the report with that analyst's staff "in order to correct" the conclusions made and object to "the use of Massachusetts data to make broad inferences with Verizon's cable performance nationwide." *Id.*

otherwise publicly available at the municipal level, directly or indirectly harms Verizon's business interests, given that there are any number of factors that can affect the public perception and stock prices of a company and its ability to raise capital. *See* D.T.C.-VZ 1-4. Verizon's own public statements are one such example. *See, e.g.* Verizon FiOS Fact Sheet (stating that the second quarter of 2009 "was one of the best quarters ever for FiOS TV";[47] Verizon Communications 2008 Annual Report, Chairman's Letter to Shareholders, at 3 (stating that FiOS features "have helped [Verizon] to achieve 25 percent market share for FiOS Internet and 21 percent for FiOS TV in four short years").[48]

V. VERIZON'S MOTIONS FOR PROTECTIVE TREATMENT PENDING OUTCOME OF DOCKET D.T.C. 08-12

On January 30, 2009, Verizon filed with its Form 500 a motion requesting that the Department temporarily withhold from public disclosure the number of subscribers by municipality of Verizon's FiOS TV service provided in its annual Form 500 filing, "until such time as the Department enters a final order in docket DTC 08-12." January 30 Motion for Protective Treatment at 2. On March 13, 2009, Verizon filed a similar motion for protective treatment requesting that the Department temporarily withhold from public disclosure the amount of their state cable television license fee "until such time as the Department enters a final order in docket DTC 08-12." March 13 Motion for Protective Treatment at 2. The Department has not yet ruled on these motions but finds that, with the issuance of this Order, the motions are moot and are hereby dismissed.

---

47 Available at http://newscenter.verizon.com/kit/fios-symmetrical-internet-service/all-about-fios.html (last viewed Oct. 16, 2009).

48 Available at http://investor.verizon.com/financial/quarterly/pdf/08_annual_report.pdf (last viewed Oct. 16, 2009).

VI. ORDER

After review and consideration, it is

ORDERED: That Verizon's Petition is hereby DENIED; and it is

FURTHER ORDERED: That Verizon's Motions for Protective Treatment Pending Outcome of Docket D.T.C. 08-12 are hereby DISMISSED.

By Order of the
Department of Telecommunications and Cable

/s/ Geoffrey G. Why
Geoffrey G. Why
Commissioner

Dated: October 16, 2009

RIGHT OF APPEAL

An appeal as to matters of law from any final decision, order or ruling of the Department may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Department be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Department within twenty days after the date of service of the decision, order or ruling of the Department, or within such further time as the Department may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. G. L. c. 166A, § 2; G. L. c. 25, § 5.