

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

Investigation of Verizon Service Quality in Western Massachusetts -- D.T.C. 09-1

TOWN OF LEVERETT COMMENTS RE DISCOVERY ISSUES

Five questions were posed by the Hearing Officer at the conclusion of a conference call with the parties on November 3, 2009, requesting comments regarding certain discovery issues.

Following are the questions and Leverett's comments.

Q 1) Does a municipality require representation by an attorney in this particular investigation?

Comments:

a) M.G.L. Ch. 159, s. 24 provides that “the department shall grant a public hearing” upon written complaint by “the mayor or selectmen, or by twenty customers” of a city or town. No mention is made of the need for representation by an attorney.

b) In this particular investigation, the Leverett petition to intervene was unopposed and no concerns or objections were raised by the Department or any party regarding the presence or absence of formal representation by an attorney. ¹

¹ In an interesting case from the Southern District of New York, the court said: “[G]overnment representatives must be presumed authoritatively to act in the name of their government or agency, and thus in the name of the people whom they represent.” In a note, the court added, “Requiring outside counsel to present a government's case because of concern about incongruity of interests would question the representative's legitimacy, and thus second-guess the status and operation of that government. Such injection of this Court into political affairs is needless. It may be true for most associations that their 'very nature as a collection of individuals necessarily and by definition precludes [their] appearance pro se by one individual,' *New Hampshire v. Settle*, 129 N.H. 171 (1987), but application of the same statement to governments would border on anarchism.” *Fraass Survival Systems, Inc. v. Absentee Shawnee*, 817 F.Supp. 7, 10-1.

Q 2) May the Select Board designate a member to speak for the Board?

Comments:

a) By the nature of town government in Massachusetts, the Board of Selectmen (in Leverett, styled as the Select Board), exercises the executive authority of the town. In the course of exercising its powers and duties, the Select Board may appropriately act through its chair or a designee, whose authority and actions are derived from and act for the Board.

b) To the extent that an attorney's presence might be needed to appropriately draft pleadings, the Select Board is acting through a member-designee who is admitted to practice law in New Mexico and who has appeared *pro hac vice* in Massachusetts, including before the Court of Appeals and the Supreme Judicial Court. ²

Q 3) Will the Leverett Select Board waive a claim of attorney-client privilege in order to appear through its Select Board designee?

Comment:

Yes, the Select Board, after considering the unavailability of Town Counsel in regard to this intervention, decided to proceed through its designee and understands and accepts that no privilege of attorney-client confidentiality attaches to the relationship between the Board and its designee.

² The suggestion that the designee might file a formal appearance as attorney is inappropriate on ethical grounds. An attorney should not formally represent a board of which s/he is a member. The presentation of the Board's authority as its designee is not in the same category of relationship.

Q 4) How would cross-examination be conducted at a hearing without formal attorney representation?

Comment:

The Leverett Select Board will participate in any such procedure by and through its designee.

Q 5) Is there any impact on the schedule of the Department's investigation by reason of the Leverett Select Board appearing through its designee?

Comment:

There is no impact on the schedule. During the conference call, Verizon attorneys twice specifically asserted they have no problem responding to Leverett's discovery requests for information already filed and not yet answered. It may be noted that if Leverett's intervention under the statute had been sought by "twenty customers," the investigation might have been subject to separate *pro se* appearances, with impact on the schedule.

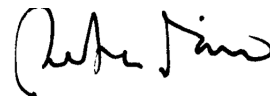
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by email as an attached PDF file upon each person designated in the Notification for the November 3, 2009, Conference Call sent by the Hearing Officer in this proceeding.

Dated at Leverett this 6th day of November 2009.



Peter d'Errico
Leverett Select Board
Town Hall

Leverett, MA 01054