COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.E./D.T.C. 06-6 September 18, 2008

Petition of the Board of Selectmen of the Town of Middlefield, Massachusetts, pursuant to G. L. c. 159, § 24, regarding the quality of Verizon Massachusetts's telephone service

ORDER ON MOTION FOR RECONSIDERATION, MOTION TO REOPEN THE RECORD, AND MOTION FOR STAY FILED BY VERIZON MASSACHUSETTS

APPEARANCES: Board of Selectman
Town of Middlefield
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FOR: TOWN OF MIDDLEFIELD
Petitioner

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FOR: VERIZON MASSACHUSETTS
Respondent

ORDER ON MOTION FOR RECONSIDERATION

I. INTRODUCTION

On April 29, 2008, the Department of Telecommunications and Cable, formerly the Department of Telecommunications and Energy ("Department"), issued its final Order in D.T.C./D.T.E. 06-6 ("Order") concerning an investigation conducted pursuant to G. L. c. 159, § 24, regarding the quality of telephone service provided by Verizon Massachusetts ("Verizon") in the Town of Middlefield ("Middlefield"). In the Order, the Department determined that the quality of telephone service provided to Middlefield by Verizon was "unjust, unreasonable, and inadequate. . . and that Verizon's practices and equipment [were] unsafe, improper, and inadequate" (*see* Order at 1). The Order directed Verizon to undertake a comprehensive analysis of service quality and infrastructure issues in Middlefield in order to determine whether Verizon's policies, practices, and procedures for inspecting its infrastructure and equipment would require modification.[1]

On May 20, 2008, Verizon filed a Motion for Reconsideration, a Motion to Reopen the Record, and a Motion for Stay with regard to the Order issued by the Department.[2] In its Motion, Verizon seeks reconsideration arguing that: (1) the Department failed to follow required and customary procedures regarding evidentiary hearings and briefing of the issues, and

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[1] Pursuant to the Department's Order, on June 30, 2008, Verizon submitted an analysis of service quality and infrastructure in Middlefield, which enumerated a lengthy list of problems and documented Verizon's actions to address them. On August 20, 2008, Verizon and Middlefield filed a joint request asking the Department to suspend the comment period on Verizon's service quality analysis and to defer consideration of Verizon's Motion for Reconsideration, Motion to Reopen the Record, and Motion for Stay. In a companion Letter Order issued today, the Department allowed the parties' request to suspend the comment period for 90 days, but denied the request to defer consideration of Verizon's Motion for Reconsideration, Motion to Reopen the Record, and Motion for Stay.

[2] Because Verizon has already filed its service quality analysis, the Motion for Stay is moot.

therefore deprived Verizon of a reasonable opportunity to prepare and present evidence and argument; and (2) the Department's Order is flawed because its findings are based on mistaken and insufficient information that resulted from Verizon being denied certain procedural rights.

On June 20, 2008, Middlefield filed an Opposition to Verizon's Motion for Reconsideration ("Opposition"), Motion to Reopen the Record, and Motion for Stay. In its Opposition, Middlefield argues that Verizon failed to satisfy the established standards for reconsideration, reopening the record, and for stay of the Order. Middlefield also contends that reconsideration is inappropriate on procedural grounds because the Department provided Verizon with reasonable and adequate opportunity to prepare and present evidence and argument as required by law. Middlefield further argues that Verizon's failure to exercise its procedural rights under applicable state regulations should preclude reconsideration on procedural grounds.

On June 27, 2008, Verizon filed with the Department a reply letter in response to Middlefield's Opposition. In its reply letter, Verizon reiterated and defended its requests for reconsideration and reopening the record so that it could "present its case." Verizon also objected to several photographs which purportedly depict deteriorating telephone poles, deteriorating wiring, and generally antiquated equipment used by Verizon to provide telephone service to Middlefield that Middlefield submitted with its Opposition filing. With respect to these photographs, Verizon stated:

> [Verizon] write[s] only to address the fact that the Town of Middlefield has now provided yet more unidentified photographs. As with the initial set of photographs, Verizon MA requires the opportunity to review them, ask questions about them and present additional evidence about the photographs.

(Verizon Reply Letter dated June 27, 2008). The Department has not admitted photographs submitted by Middlefield in conjunction with its Opposition to the instant motion as evidence in this case.

After review and consideration, the Department determines in this Order that Verizon has failed to satisfy the standard for reconsideration by failing to prove that the Department committed procedural errors or that the Department's decision was the result of mistake or inadvertence. The Department also determines that Verizon falls short of the standard for reopening the record because Verizon failed to provide previously unknown or undisclosed information. For the foregoing reasons, Verizon's Motion for Reconsideration and Motion to Reopen the Record is denied.

II. STANDARD OF REVIEW

A. Motion for Reconsideration

The Department's Procedural Rule, 220 C.M.R. § 1.11(10), authorizes a party to file a motion for reconsideration within twenty days of service of a final Department order. The Department's policy on reconsideration is well-settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that the Department takes a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. *See North Attleboro Gas Company*, D.P.U. 94-130-B at 2 (1995); *Boston Edison Company*, D.P.U. 90-270-A at 2-3 (1991); *Western Massachusetts Electric Company*, D.P.U. 558-A at 2 (1987); *Hutchinson Water Company*, D.P.U. 85-194 at 1 (1986).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. *See Commonwealth Electric Company*, D.P.U. 92-3C-1A at 3-6 (1995); *Boston Edison Company*, D.P.U. 90-270-A at 3 (1991); *Boston Edison Company*, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first

time in the motion for reconsideration. *See Western Massachusetts Electric Company*, D.P.U. 85-270-C at 18-20 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. *See Massachusetts Electric Company*, D.P.U. 90-261-B at 7 (1991); *New England Telephone and Telegraph Company*, D.P.U. 86-33-J at 2 (1989); *Boston Edison Company*, D.P.U. 1350-A at 5 (1983).

B. Request to Reopen the Proceeding

Similarly, the Department's policy on reopening a proceeding is well-established. The Department's procedural rule, 220 C.M.R. § 1.11(8) states that "[n]o person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause." Good cause for purposes of reopening has been defined as a showing that the proponent has previously unknown or undisclosed information regarding a material issue that would be likely to have a significant impact on the decision. *See New England Telephone*, D.T.E. 01-20-Part A-C at 9 (2004); *Machise v. New England Telephone and Telegraph Company*, D.P.U. 87-AD-12-B at 4-7 (1990); *Boston Gas Company*, D.P.U. 88-67-Phase II, at 7 (1989); *Tennessee Gas Pipeline Company*, D.P.U. 85-207-A at 11-12 (1986).

III. POSITIONS OF THE PARTIES

A. Verizon

The crux of Verizon's argument on reconsideration is that the Department failed to follow required and customary procedures regarding evidentiary hearings and briefing of the issues, which thereby deprived Verizon of a reasonable opportunity to prepare and present evidence and argument (*see* Verizon Motion at 3). In support of its position, Verizon states that

under the terms of the Massachusetts Administrative Procedure Act (G. L. c. 30A) and the Department's procedural regulations (220 C.M.R. § 1.00 *et seq.*), a case decided in accordance with G. L. c. 159, §§ 16, 24, such as this action, "implicates a panoply of due-process rights" (*see id*. at 4). Verizon states that this panoply of rights includes the right to notice of the issues involved; the right to call, examine, and cross-examine witnesses; the right to submit rebuttal evidence; the right to discovery; and the right to file briefs (*see id*. at 4-5). Verizon contends that it was denied its procedural rights because the Department failed to conduct an evidentiary hearing, and did not provide the parties with an opportunity to file briefs, or give notice of the closing of the record or of the Department's intent to issue a final order, as required by law (*see id*. at 5, 8-9).

As a result of the Department's failure to conduct an evidentiary hearing, Verizon argues that it was denied the opportunity to file testimony on its own behalf and to rebut the testimony and evidence submitted by Middlefield. Moreover, Verizon contends that the Department promised the parties the opportunity to file briefs and that by failing to allow for briefing, the Department denied Verizon an opportunity to present its case. Finally, Verizon urges that the Department's failure to provide notice of the close of the record and of its intent to issue a final Order deprived Verizon of an opportunity to request a new procedural schedule.

Next, Verizon takes issue with the Department's substantive findings in the Order which Verizon believes were based on insufficient and mistaken information caused by the Department's alleged denial of its procedural rights (*see id*. at 11). Specifically, Verizon argues that the Department: (1) misconstrued the history and changes regarding the service quality reporting mechanisms; (2) impermissibly relied on unidentified and untested photographs submitted by Middlefield; and (3) mistakenly concluded that there would be no substantial

financial impact on Verizon relating to fixing the problems Middlefield identified (*see id*. at 11-12). Verizon argues that it should have been given the opportunity to rebut testimony and address the issues with testimony and briefs so that the Department could base its conclusions on a complete record (*see id*.).

Verizon requests that the Department reopen the record so that it could present evidence, issue discovery requests on Middlefield, and file briefs regarding service quality and infrastructure issues (*see id*. at 13). Lastly, Verizon requests that the Department stay the effect of the Order pending reconsideration of the decision on the premise that complying with any corrective measures directed under the Order at this stage may be premature and possibly unnecessary (*see id*.).

B. Town of Middlefield

In its Opposition,[3] Middlefield contends that Verizon failed to satisfy the established standards for reconsideration, reopening the record, and staying the effect of the Order, and therefore, Verizon's requests should be denied in full. Contrary to Verizon's position, Middlefield contends that the Department provided Verizon with ample opportunity to prepare and present evidence and argument as required by Massachusetts laws and regulations (*see* Opposition at 3). Specifically, Middlefield asserts that Department regulations provided Verizon with a "full scope of procedural due process protections" which Verizon, on the whole, failed to exercise, including the right to: (1) file a reply in the form of their answer (220 C.M.R. § 1.04 (2)); (2) both serve and respond to discovery (220 C.M.R. § 1.06(6)(c)); (3) file any motions which Verizon deemed appropriate (220 C.M.R. § 1.04(5)); (4) file a motion to take deposition (220 C.M.R. § 1.06(6)(c)(6)); (5) file a motion to request an extension of time (220 C.M.R. §

[3] Because Middlefield did not paginate its Opposition, the Department has paginated it in order to more easily reference Middlefield's arguments. The Opposition, excluding the attached exhibits, spans 15 pages in length (starting with the caption page as page 1).

1.02(5)); (6) request a site view (220 C.M.R. § 1.06)(6)(c)(7)); (7) request production and view of objects (220 C.M.R. § 1.10(10)); and (8) request to file briefs (220 C.M.R. § 1.11) (*see id.* at 3).

Middlefield also argues that although Verizon did pursue the opportunity to file written comments in response to concerns raised at the hearing and to respond to Department information requests, it largely ignored many opportunities provided by the Department to present its case (*see id*. at 5). For example, Middlefield states that Verizon failed to respond to the Department's requests for additional information in its fourth and fifth sets of requests concerning Verizon's protocols for reporting and repairing equipment (*see id.* at 5). Middlefield also points to Verizon's failure to object to the Department's motion to admit certain exhibits and documents into the record as another example of an unclaimed opportunity to present its case (*see id*. at 6).

In addition, Middlefield contends that the arguments made by Verizon in its Motion are contradictory and inconsistent with its earlier position. Middlefield states that although Verizon asserted in its written comments that the complaints raised at the hearing had either been resolved or were never the responsibility of Verizon, Verizon later asserted in its Motion that it was unable to fully assess the concerns raised (*see id.* at 6). This inconsistency, states Middlefield, is additional evidence of Verizon's "cavalier" attitude toward Middlefield and its residents (*see id*. at 6).[4]

[4] The Department, however, does not find Verizon's position contradictory because at the time Verizon filed its initial written comments, the pictorial evidence was not yet on the record. As a result, Verizon's initial comments did not address the photographs. Nevertheless, the Department notes that Verizon could have raised its concerns about the photographs in its responses to information requests or by objecting to their admission into the record.

Middlefield also maintains that Verizon's Motion is an attempt to reargue issues already decided and therefore fails to meet the standard of review for reconsideration (*see id*. at 12). Middlefield further argues that the motion to reopen is unwarranted as Verizon failed to present any previously unknown or undisclosed facts (*see id.* at 2). In conclusion, Middlefield argues that the Department should deny Verizon's Motion and reaffirm the Order[5] (*see id*. at 14).

IV. Procedural History

For purposes of analyzing Verizon's motions, it is necessary to set forth the procedural record in greater detail than it was documented in the original Order. On March 27, 2006, pursuant to notice duly issued, the Department held a public hearing in Middlefield (*see* Order at 2). At the hearing, eleven Middlefield residents offered sworn statements (*see* Tr. A at 5-44). In response and at the hearing, Verizon elected to provide unsworn statements concerning recent upgrades made to the Verizon network in Middlefield (*see id*. at 6-7). Verizon also made unsworn statements addressing some of the telephone service quality issues raised in the Board of Selectmen's Petition (*see id*. at 7-8). Immediately following the public hearing, the Hearing Officer convened a procedural conference and established the following procedural schedule:

April 18, 2006:	Filing of Verizon MA's Responses to Public Comments
April 25, 2006:	All discovery issued
May 9, 2006:	All discovery received
May 16, 2006:	Initial Briefs (if needed)
May 23, 2006:	Reply Briefs (if needed).

(*See id.* at 45-48).

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5 Middlefield also requests the following: (1) an opportunity to review and comment on any proposed plan presented by Verizon; (2) an opportunity to present evidence of damages; (3) damages plus interest costs and fees; and (4) any additional relief the Department deems just and equitable (*see* Opposition at 14).

On March 30, 2006, the Department issued a procedural notice confirming the above schedule (*see* D.T.C. 06-6, Procedural Notice, (March 30, 2006)). In accordance with the procedural schedule, Verizon filed written comments addressing concerns raised at the public hearing on April 18, 2006 (*see* Order at 2). In response to the issue of service outages in Middlefield, Verizon stated that its recent fiber optic cable upgrade, costing approximately $325,000.00, in the Town of Beckett would improve telephone service quality in Middlefield (*see* D.T.C. 06-6, Verizon Comments, (April 18, 2006)). In reply to residents' testimony regarding difficulties reporting service problems to Verizon in connection with another party's telephone line, Verizon indicated that its practices and procedures permit a third party to report an out-of-service condition on another customer's telephone line (*see id.*). Verizon explained that its practices require its customer service representatives to advise the calling party that related service charges will apply if the out-of-service condition is not caused by a telephone cable failure, and speculated that some customers might be reluctant to complete the trouble report because of the possible charge (*see id.*). Next, Verizon asserted that Western Massachusetts Electric Company is responsible for the maintenance and repair of the poles in Middlefield (*see id.*). Verizon also stated that a recent cable upgrade resolved the service quality issues raised at the hearing. In addition, Verizon made assurances that it would continue to monitor its trouble reports in Middlefield in the normal course of business (*see id.*).

On April 21, 2006, the Department issued its first set of information requests to Verizon. On May 9, 2006, Verizon responded to the first set of information requests. On May 11, 2006, the Department issued to the parties a memorandum announcing its intent to conduct a second round of discovery, postponing the May 16th deadline for filing briefs, if briefs were deemed necessary (*see* D.T.C. 06-6, Procedural Notice, [May 11, 2006]). The Department subsequently

issued four additional sets of information requests to Verizon on the following dates: May 24, June 20, November 16, 2006, and February 5, 2007. Verizon responded to each information request in a timely manner.

Meanwhile, on March 19 and March 20, 2006, Middlefield resident Suzanne C. Lemieux and Middlefield business Abyss Distribution each submitted a letter describing their complaints about Verizon. On May 25, 2006, Middlefield submitted a letter in support of its petition and photographs depicting, among other things, instances of low and unsupported wires; and double-poles.[6] On May 8, 2007, the Department issued its first set of information requests to Middlefield. On May 21, 2007, Middlefield responded in a timely fashion (*see* Exhs. DTE-MI 1-1 through DTE-MI 1-2).

In total, the evidentiary record in this matter consisted of responses by Verizon to thirty-seven information requests, responses by Middlefield to two information requests, one hundred sixty-seven exhibits presented by Middlefield including over one hundred photographs and three letters (a letter from Middlefield resident Suzanne C. Lemieux, a letter from Middlefield company Abyss Distribution, and a letter from the Board of Selectmen). No parties provided a brief in this matter (*see* Order at 2).

On May 25, 2007, the Department informed the parties by electronic mail that upon its own motion, it would admit all the above documents and exhibits into the record if there were no objections from the parties by June 4, 2007 (*see* D.T.C. 06-6, Procedural Notice, (May 25,

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6 G. L. c. 164, § 34B requires utility companies to remove old telephone poles within 90 days of the installation of the new pole. The issue of double poles was addressed in a comprehensive manner in a separate proceeding, *Double Pole Report*, D.T.E. 03-87 (2003) (*see* Order at 16, n.10). Pursuant to the *Double Pole Report*, utility companies are required to file semi-annual reports detailing their double pole inventory and removal efforts (*see id.*). As such, the Department declined to address the issue of double poles in its April 29, 2008 Order.

2007)) [attached as Appendix A]. Neither Verizon nor Middlefield objected. Accordingly, the Department admitted all the above-referenced documents and exhibits into evidence.[7]

V. ANALYSIS AND FINDINGS

A. Motion for Reconsideration

1. Introduction

On review, the Department must determine whether Verizon has satisfied the standard for reconsideration by demonstrating that the Department's decision was the result of mistake or inadvertence so as to require reversal. *See Massachusetts Electric Company*, D.P.U. 90-261-B at 7. For the reasons set forth below, the Department concludes that Verizon has failed to satisfy the standard for reconsideration because: (1) the Department provided Verizon with a sufficient opportunity to prepare and present evidence and argument and (2) the Department's decision was based on substantial evidence. Therefore, Verizon's Motion for Reconsideration is denied.

2. Procedures

Regarding Verizon's claim of due process violations, the Department previously addressed the issue of what procedures are statutorily required in a proceeding initiated pursuant to G. L. c. 159, § 24. *See Petition of over twenty customers of New England Telephone and Telegraph Company d/b/a NYNEX, pursuant to G. L. c. 159, § 24, regarding telephone rates on*

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[7] The Department admitted the following exhibits into evidence: 1) Verizon's responses to information requests DTE-VZ 1-1 through DTE-VZ 1-14, DTE-VZ 2-1 through DTE-VZ 2-7, DTE 3-1 through DTE 3-14, DTE-VZ 4-1, DTE-VZ 4-2, and DTE-VZ 5-1 through DTE-VZ 5-4; 2) Middlefield's responses to information requests as DTE-MI 1-1 through DTE-MI 1-2; 3) Letter provided by Suzanne C. Lemieux dated March 19, 2006, as Exh. MI 1; 4) Letter provided by Abyss Distribution dated March 20, 2006, as Exh. MI 2; 5) Letter provided by Middlefield Board of Selectmen regarding physical inspection dated May 25, 2006, as Exh. MI 3; and 6) Photographs provided by the Town of Middlefield as Exhs. MI 5 through MI 27; MI 31 through MI 66; MI 69 through MI 73; MI 75 through MI 80; MI 83 through MI 89; MI 92 through MI 99; MI 101 through MI 108; MI 110 through MI 134; MI 137 through MI 153; MI 157 through MI 163; and MI 167.

Cuttyhunk Island [hereinafter cited as *Cuttyhunk II*], D.P.U. 94-35-A, (1996). In *Cuttyhunk II*, the Department denied reconsideration on procedural grounds, finding that it had satisfied the procedural due process requirements for a proceeding initiated under G. L. c. 159, § 24, where it held a public hearing and accepted written testimony and responses to Department information requests filed by NYNEX[8] into evidence, but did not conduct an evidentiary hearing or allow for the filing of briefs from the parties. *See id.* at 4.

In that case, twenty NYNEX customers had petitioned the Department to investigate telephone service quality-related problems on the Island of Cuttyhunk as well as the high telephone rates that NYNEX had been charging Cuttyhunk residents. *See Petition of over twenty customers of New England Telephone and Telegraph Company d/b/a NYNEX, pursuant to G.L. c. 159, § 24, regarding telephone rates on Cuttyhunk Island* [hereinafter cited as *Cuttyhunk I*], D.P.U. 94-35 (1996) at 2. The Department focused its investigation on evidence taken at the public hearing and written testimony and responses to information requests provided by the parties. The Department did not conduct an evidentiary hearing nor did the Department request briefs from the parties. On this evidentiary record, the Department rendered a judgment against NYNEX, finding that it was unreasonable and unjust for NYNEX to assess special construction fees to the Cuttyhunk customers. *See id*. at 5.

Shortly thereafter, NYNEX sought reconsideration, arguing that the Department departed from customary Department procedures by failing to conduct an evidentiary hearing, provide NYNEX with an opportunity to move exhibits into evidence or to file a brief, and inform NYNEX about the close of the record in the case. *See Cuttyhunk II* at 3. To decide NYNEX's Motion, the Department looked to the language of G. L. c. 159, § 24 providing in pertinent part:

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[8] NYNEX was a predecessor corporation to Verizon in Massachusetts.

> Upon written complaint, relative to the service or charges for service in, to or from any city or town as rendered or made by any company engaged therein in the transmission of intelligence by electricity, by the mayor or selectmen, or by twenty customers of the company, the department shall grant a *public hearing*, first giving to the complainants and the company reasonable written notice of the time and place thereof.

(G. L. c. 159, § 24 [emphasis added]).

The Department determined that by the statute's plain terms, and absent any explicit statements to the contrary, an evidentiary hearing is not required in a proceeding initiated under G. L. c. 159, § 24. *See Cuttyhunk II* at 3. The Department further noted that "the APA [Administrative Procedure Act] [G. L. c. 30A] does not require 'evidentiary' hearings per se, but rather states that when the legal rights, duties or privileges of a person are involved, there must be an opportunity for an agency hearing." *See Cuttyhunk II* at 9, n.7. Based on an interpretation of the relevant statutory authority, the Department concluded that:

> [T]he Department fulfilled the requirements under the statute, the APA, and Department regulations by (1) holding the requisite statutory public hearing, and (2) making a decision based upon a record consisting of: (a) sworn testimony from the Cuttyhunk Customers; (b) testimony from NYNEX;[9] (c) exhibits submitted by the Company at the public hearing; and (d) responses to Department information requests that the Department subsequently admitted into the record.

(*Cuttyhunk, II* at 4).

a. Evidentiary Hearing

Contrary to Verizon's assertion, the Department has held that an evidentiary hearing is not required under G. L. c. 159, § 24. *See Cuttyhunk II* at 3. Under G. L. c. 159, § 24, the Department has determined that only a public hearing is required to meet its due process obligations. In this case, pursuant to the statutory requirement, the Department conducted a

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9 After the public hearing, the Department directed NYNEX to file testimony responding to each of the concerns discussed at the hearing. In response, NYNEX submitted the direct written testimony of its staff director of regulatory/issues management in the Company's law and government affairs department. *See Cuttyhunk I* at 2.

public hearing on March 27, 2006. After the hearing, Verizon had the opportunity to file written comments in response to concerns raised by Middlefield. Verizon also had the opportunity to further explain its position and state its objections. By right, Verizon was permitted to state its objections to the Department's five sets of information requests, including any information regarding the financial impact of corrective measures and any objections to the Department's use of town-specific RPHL reports. Moreover, Verizon was permitted to object to any materials that were admitted into the record, including the photographs submitted by Middlefield. However, Verizon raised no objections to the information requests or the evidentiary record. Verizon only requested an evidentiary hearing after the Department issued its Order in favor of Middlefield.

b. Opportunity to File Briefs

Next, Verizon argues that the Department deprived Verizon of an opportunity to file a brief, as required under the Department's regulations. This argument is without merit. As the Department held in *Cuttyhunk II*, Department regulations [*i.e.* 220 C.M.R. § 1.11(3)] allow for the filing of briefs, but do not require the opportunity to file briefs. *See Cuttyhunk II*, D.P.U. 94-35-A at 9, n.8. Therefore, the opportunity to file briefs falls within the Department's discretion and is not a procedural right of the parties. 220 C.M.R. § 1.11(3) states:

> Briefs may be filed by a party either before or during the course of a hearing, or within such time thereafter as the presiding officer shall designate. Failure to file a brief shall in no way prejudice the rights of any party. The order of filing briefs after the hearing, including reply briefs, will be designated by the presiding officer.

As discussed above, our regulations do not require parties to file briefs. Here, the Department did not at any point request briefs from the parties or promise the parties an opportunity to file briefs so as to create any potential procedural rights or expectations of the parties. At the outset of the case, the Hearing Officer stated that briefs were not required, and would only be allowed if

she deemed them necessary (*see* Tr. A at 45-48; Procedural Notice, [March 30, 2006]). Moreover, Verizon never objected to the Procedural Notice or affirmatively requested the opportunity to file briefs despite having ample time to do so. The Procedural Notice was issued on March 30, 2006 and the final Order in this case was issued on April 29, 2008, thereby giving Verizon over two years in which to request the opportunity to file briefs.

At the procedural conference, the Hearing Officer strongly indicated that the filing of briefs would be requested only *if necessary*. At the conference, the Hearing Officer stated, "And then *it's possible* that we'll have briefs after that, ten business days after that, so Tuesday the 16th, *if we need briefs*" (*see* Tr. A at 46-47) (emphasis added). The Hearing Officer Memorandum, which revised the procedural schedule, also noted that the matter could be decided without briefs:

> At the procedural conference held on March 26, 2006, a deadline for filing briefs, if needed, was set for May 16, 2006. The Department of Telecommunications and Energy intends to issue a second round of discovery, therefore, briefs will not be necessary at this time. Following this second round of discovery, *the deadline for filing briefs, if needed*, will be established.

(Hearing Officer Memorandum dated May 11, 2006) (emphasis added).

The Department consistently represented to the parties that briefs might not be necessary. Consequently, the parties should have reasonably expected that briefs may not be filed in this case.[10] Therefore, Verizon's argument regarding the filing of briefs is meritless.

c. <u>Notice</u>

Verizon argues that state law and regulation required the Department to provide formal notice of the close of the record and its intent to "rely exclusively on the responses to discovery

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[10] Likewise, as Middlefield notes in its Opposition, the May 11th memorandum never articulated that the Department would establish a new procedural schedule (*see* Opposition at 9).

questions in deciding the case" (Verizon Motion at 7), its intent not to establish a further procedural schedule, and its intent to issue a final order. These arguments are unpersuasive.

As an initial matter, the Department disagrees with Verizon's narrow characterization of the evidentiary record and the manner in which this case was decided. The Department did not, as Verizon implies, exclusively rely on responses to information requests. Rather, the Department carefully considered a well-developed record including statements taken at the public hearing, written comments filed by Verizon, and 167 exhibits submitted by Middlefield in deciding this case. Furthermore, Verizon has not cited any direct authority -- statute, Department regulation, or case law -- in support of its position. Our own review of the relevant statutes, regulations, and case law do not disclose such notice requirements.

The Department rejected the same argument in *Cuttyhunk II* where NYNEX argued that a failure to provide notice of the close of the record constituted reversible error. *See Cuttyhunk II* at 3. Although NYNEX did not receive formal notice about the close of the record, the Department determined that NYNEX was given ample opportunity and time to present its case. *See id*. That proceeding began on February 24, 1994, and the Department issued its order nearly twenty months later on October 20, 1995. In comparison, this proceeding had a similar timeline, beginning on January 17, 2006 and ending about twenty-four months later on April 29, 2008. The Department further stated in *Cuttyhunk II* that in accordance with 220 C.M.R. § 1.06(6)(c)(5), NYNEX was under a continuing obligation throughout the proceeding to amend any of its responses if they were incomplete or no longer accurate. *Id.* Thus, any of the inadequacies in the record and proceeding alleged by NYNEX could be attributed to NYNEX's failure to satisfy this duty to amend its responses. The Department concluded that the procedures

employed "did not prohibit, or otherwise impede NYNEX from presenting the information necessary for it to make its case." *See Cuttyhunk II* at 4. In its Order, the Department stated:

> During the proceeding NYNEX was given the opportunity to address all issues. Further, during the course of this proceeding NYNEX was under the continuing obligation to amend any of its responses if they were incomplete or no longer accurate. 220 C.M.R. § 1.06(6)(c)5. While NYNEX was not formally notified of the close of the record in this case, there was adequate time for NYNEX to exercise its duty to amend any of its responses. In addition, all substantive documentation submitted by NYNEX in this case was admitted into evidence. Therefore, we find that the procedures followed by the Department did not prohibit, or otherwise impede NYNEX from presenting the information necessary for the Company to make its case.

(*Cuttyhunk II* at 3-4 (footnote omitted)).

Similar to *Cuttyhunk I*, during the course of this proceeding, Verizon had adequate time to exercise its duty to amend any of its responses.[11] Verizon could have presented any information it deemed necessary to make its case by amending its responses. However, it failed to do so. As in *Cuttyhunk I*, all of the documents submitted by Verizon in this case were admitted into evidence. The procedures in this case are nearly identical to those employed in *Cuttyhunk I*, which the Department found to be sufficient. *See Cuttyhunk II* at 4. Consistent with our precedent, and absent any direct authority to the contrary, the Department finds that Verizon's arguments concerning notice are unavailing and insufficient grounds for reconsideration.

d. <u>Customary Procedures</u>

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[11] Verizon had time to amend any of its responses as necessary because the Order was not issued until April 29, 2008, fourteen months after Verizon submitted its response to the Department's fifth set of information requests on March 2, 2007. In comparison, approximately twelve weeks passed in *Cuttyhunk I* between the date of NYNEX's response to the Department's final information requests and the date the Department issued its order. *See id.* at 9.

The thrust of Verizon's argument is that the Department departed from customary procedures in a manner which violated its procedural due process rights, and therefore reconsideration and reopening the record are appropriate. This argument fails.

To the contrary, the Department employed procedures in this case that are consistent with the way it has conducted similar proceedings. *See Cuttyhunk I*, D.P.U. 94-35 (1996); *Investigation of the Department of Telecommunications and Energy, on its own motion, pursuant to G. L. c. 159, § 16, into the practices, equipment, appliances and service of Verizon-Massachusetts in the Towns of Athol, Petersham, Phillipston, Royalston and Franklin County*, D.T.E. 99-77 (2001); *Nynex-Great Barrington*, D.P.U. 94-163 (1995).[12] The Department employed nearly identical procedures in another service quality proceeding also initiated under G. L. c. 159, § 24. *See Athol*, D.T.E. 99-77 (2001).[13] In *Athol*, the Department conducted a public hearing where it accepted written comments and held a procedural conference before issuing three sets of information requests to Verizon. *See id.* at 1. After the Department granted intervention, several additional towns submitted reply comments in regards to Verizon's responses to Department information requests. *See id.* at 2. The Department neither conducted an evidentiary hearing in *Athol* nor did it give the parties an opportunity to file briefs. Based on this evidentiary record, the Department determined that Verizon had met the required service quality standards. Although the Department employed the same procedures in *Athol* as in this case, neither party in *Athol* ever complained or alleged that the Department's procedures were deficient and/or inadequately safeguarded their procedural due process rights.

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[12] As Middlefield correctly points out, Verizon is a sophisticated and experienced party that is familiar with the Department's procedures. In fact, Verizon (or its predecessor, NYNEX) was a party in all three procedurally similar service quality cases cited.

[13] *Athol* was the most recent Section 24 case the Department decided before *Middlefield*.

Similarly, in *Cuttyhunk I*, the Department decided the case based primarily on testimonial evidence taken at a public hearing and the parties' responses to Department information requests. *See Cuttyhunk I* at 2. As with the instant case, the Department neither held an evidentiary hearing nor requested briefs in *Cuttyhunk I* or in *Athol*. Notwithstanding NYNEX's arguments that the Department's failure to hold an evidentiary hearing and provide notice of close of the record requires reconsideration, the Department denied reconsideration on the grounds that NYNEX had ample opportunity to present evidence and argument. *See Cuttyhunk II* at 4.[14] The Department determined that the procedures employed in *Cuttyhunk I* had sufficiently protected the parties' procedural rights to make their case. *See Cuttyhunk II* at 3.

Verizon uses *CTC Communications Corp.*, D.T.E. 98-18-A (1998) to support its argument for reconsideration on procedural grounds.[15] Verizon's reliance on *CTC* is misplaced. In *CTC*, the Department granted reconsideration on the grounds that the Department failed to

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[14] The Department also upheld its decision on substantive grounds, noting that it was based on substantial evidence. *See Cuttyhunk II* at 4.

[15] Verizon implicitly argues that *CTC* established a new standard for granting reconsideration. Verizon asserts that reconsideration may also be based on procedural grounds when the Department determines that the parties did not have a reasonable opportunity to prepare and present evidence and argument (*see* Verizon Motion at 4, n.2). The Department previously rejected that argument. *See Investigation by the Department on its Own Motion into the Propriety of the Resale Tariff of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, filed with the Department on January 16, 1998, to become effective February 14, 1998*, D.T.E. 98-15 (Phase I-A) at 6 (1999) (clarifying that *CTC* did not create a new ground for approving motions for reconsideration but rather "reaffirmed the long-standing principle that parties be given notice of the issues involved and accorded a reasonable opportunity to prepare and present evidence and argument"); *Complaint filed by John K. Ober, pursuant to G.L. c. 93, §§ 108 et seq., with the Department of Telecommunications and Energy claiming that his local service was switched to Verizon New England, Inc., d/b/a Verizon Massachusetts, without authorization*, D.T.E. 05-SL-10-A at 6 (2007) (reaffirming that *CTC* was consistent with precedent holding that a motion for reconsideration may be granted on the ground that the Department's treatment of an issue was the result of mistake or inadvertence.). Thus, the Department continues to address Verizon's arguments by applying the standard of review set forth in Section II.A., above.

provide Bell Atlantic with adequate notice and opportunity to present evidence and argument before issuing a final order. *See CTC* at 9. The Hearing Officer made specific statements at the procedural conference which could have led Bell Atlantic to believe that the Department would issue an order on the scope of the proceeding before ruling on the merits of CTC's claim. *See id.* In particular, the Hearing Officer stated that he was first trying to determine the scope of the proceeding (*see* Transcript at 70). The parties may have understood this to mean that, once the scope of the proceeding was determined, additional briefs and/or evidentiary hearings would be contemplated before a final Department decision. Of his briefing questions, the Hearing Officer said, "I'm not saying that this is an exhaustive list for purposes of actually resolving and coming to a final decision by the Department on the entirety of the case" (*see id.*). His statements implied that the Department would not make a final decision without at least issuing further briefing questions. Thus, the Department found that:

> … a fair reading of the transcript of the March 26 procedural conference indicates that Bell Atlantic and its counsel could reasonably have believed that the Department would issue an order on the scope of the proceeding before reaching the merits of CTC's claims. [] Further, Bell Atlantic could have reasonably relied on this belief in limiting the depth or breadth of its responses to the Department's briefing questions, or in foregoing the opportunity to request that the Department conduct an evidentiary hearing before rendering a final order in the matter.

(*Id.*)

The Department decided *CTC* on specific factual circumstances which are distinguishable from this case. In contrast to *CTC*, the statements made by the hearing officer in this case were clear and unambiguous. As previously noted, the Hearing Officer indicated that an evidentiary hearing or briefs might not be necessary to decide this case. Furthermore, the Hearing Officer neither promised the opportunity for an evidentiary hearing or briefs nor did the procedural schedule contemplate the opportunity for an evidentiary hearing. (*See* Tr. A at 45-48; Procedural

Notice, (March 30, 2006). Given these factual dissimilarities, CTC is distinguishable from this case. *See CTC Communications Corp.,* D.T.E. 98-18-A (1998) (holding that hearing officer distinctly contemplated the possibility of evidentiary hearing). Moreover, *CTC* was not a Section 24 case, but an intercarrier dispute which typically involves greater process. *Compare Complaint of DSCI Corporation for Declaratory Orders to Ensure Verizon-Massachusetts Compliance with Resale Obligations with Respect to Customer Specific Pricing Contracts*, D.T.E. 05-28 (2006) (providing public hearing, procedural conference, evidentiary hearing, briefs and reply briefs); *Complaint of Verizon New England, Inc. d/b/a Verizon Massachusetts concerning customer transfer charges imposed by Broadview Networks, Inc.*, D.T.E. 05-4 (2006) (affording public hearing, written testimony, briefs, and reply briefs); *and Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., Brooks Fiber Communications of Massachusetts, Inc., AT&T Communications of New England, Inc., MCI Telecommunications Company, and Sprint Communications Company, L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between Bell Atlantic-Massachusetts and the aforementioned companies,* D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-N (1999) (providing evidentiary hearings, opportunity to file briefs and reply briefs), *with Athol,* D.T.E. 99-77 (2001) (Section 24 proceeding providing public hearing; and opportunity to comment and respond to information requests), *and Cuttyhunk I*, D.P.U. 94-35 (1996) (Section 24 proceeding providing public hearing; and opportunity to comment and respond to information requests). Thus, the Department does not find that the *CTC* case advances Verizon's argument.

Based on the following, the Department finds that Verizon was provided with numerous opportunities to present evidence, make arguments, and generally address all the issues during

the proceeding. First, the Department held a public hearing where Verizon had an opportunity to comment on the petition (*see* Notice of Public Hearing, [March 2, 2006]; Tr. A). At the hearing, Mr. John Conroy, Vice President of Regulatory Affairs for Verizon, who attended on behalf of the Company,[16] elected to make an unsworn statement[17] (*see* Tr. A at 6-8).

Additionally, the Hearing Officer notified the parties during the procedural conference that the issues in the case potentially could be resolved on the basis of testimony taken at the public hearing, written comments filed by Verizon, and the parties' responses to information requests without briefs or an evidentiary hearing (*see* Tr. A at 46-48; Procedural Notice, [March 30, 2006]). At no time did Verizon object to the procedural schedule or request an opportunity to file briefs.

Furthermore, Verizon had ample opportunity to make its case through responses to five sets of information requests issued by the Department. Not only did the Department provide Verizon with the opportunity to respond to the issues raised in information requests, but the

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16 The Department notes that although Verizon did not send legal counsel to the public hearing, the Department did not prevent or impede Verizon from doing so.

17 As Verizon's Motion correctly noted, the evidentiary record does not include unsworn statements in accordance with 220 C.M.R. § 1.10(1). The unsworn statements made by Mr. Conroy regarding the monthly average and nature of trouble reports in Middlefield during 2005 and Verizon's fiber optic cable upgrade from the Becket central office (*see* Tr. A at 6-8) therefore were not part of the evidentiary record. Verizon, however, took the opportunity to file written comments which were admitted into evidence (*see* Verizon Letter in Response to the Comments Made at the Public Hearing [April 18, 2006]). Verizon's comments appeared substantially similar to statements made by Mr. Conroy at the public hearing. In fact, the written comments reiterate and refer to Mr. Conroy's public hearing statements regarding trouble reports in Middlefield and cable upgrades. The written comments also addressed concerns raised by Middlefield residents at the hearing, including difficulties reporting service problems and the issue of pole maintenance and repair (*see* Verizon Letter in Response to the Comments Made at the Public Hearing (April 18, 2006)). Thus, any argument by Verizon that it was unable to present evidence at the public hearing is allayed by the fact that the Department admitted Verizon's subsequent written comments, covering the content of Mr. Conroy's statements as well as additional information, into evidence.

Department also explicitly asked Verizon to "provide complete and detailed discussion" in DTE 5-1 to DTE 5-5 of the improvements necessary to resolve service quality issues in Middlefield and the financial impact on Verizon of such measures (*see* Exhs. DTE 5-1 – DTE 5-5). The information requests explicitly instructed Verizon to provide supporting documentation to the extent necessary to fully respond to Department information requests DTE 5-1 to DTE 5-3. Verizon responded to the information requests, but failed to submit any documents to support its responses.

Finally, the Department, by written notice, informed the parties that it would admit certain documents and exhibits into the record if there were no objections from either party (*see* Procedural Notice, (May 25, 2007)). In its written notice, the Department listed specific documents and exhibits it sought to include in the record and gave the parties two weeks to file objections (*see id*.). Because Verizon and Middlefield did not file any objections, the Department moved the specified materials into the record. Verizon could have raised an objection and asked for further process (*i.e.*, evidentiary hearings) then, but it failed to do so. As Middlefield correctly points out, Verizon also neglected to exercise many of the rights it was afforded under the Department's regulations (*e.g.*, file motions, request a site view).

Based on the foregoing, the Department finds that the procedures employed in this case were adequate and consistent with Department precedent and practice. Therefore, any procedural deficiencies alleged by Verizon as grounds for reconsideration are unavailing.

3. Validity of the Department's Decision

The Department's finding that its procedures were adequate render Verizon's argument that allegedly inadequate procedures resulted in Department decisions based on inadvertent mistakes powerless. Thus, the issue does not merit extended discussion. A complete review of

the record demonstrates that the Department decided this case based on substantial evidence, consisting of sworn testimony from Verizon's customers, written comments from Verizon, exhibits submitted by Middlefield, and responses to Department information requests. The Department finds each of Verizon's three claims regarding the comprehensiveness of the evidence to be unsupported.

First, Verizon's argument that its interests were harmed by the Department's reliance on allegedly unverified pictorial evidence is undermined by its own failure to object to the inclusion of these photographs into the record. Verizon had the opportunity to object to placing the photographs into the record upon receipt of the May 25, 2007 Procedural Notice (*see* Procedural Notice, (May 25, 2007)). Furthermore, Verizon had the opportunity to object to the Department's consideration of the photographs and its reliance on them (*see* Exhs. DTE 3-2 through DTE 3-10, DTE 3-12, DTE 4-2, DTE 5-2). In addition, contrary to Verizon's assertions, the Department did not rely solely upon the photographs submitted by Middlefield to determine that Verizon's "practices, and equipment are unsafe, improper and inadequate" (Order at 11-16). Rather, the Department relied on all the evidence in the record, including testimony from the public hearing, Verizon's testimony, and letters from Middlefield and its residents regarding service problems.[18]

Second, Verizon's claims that the Department misconstrued the history and changes regarding service quality reporting mechanisms and misapplied the 4.0 Reports per Hundred Lines ("RPHL") threshold standard to Middlefield (*see* Motion for Reconsideration at 11) are equally without force. The fact that Verizon had argued the issue of the applicability of trouble

[18] The Department notes that Middlefield submitted additional photographs along with its Opposition to the instant motion. The Department did not admit these photographs into evidence and, accordingly, these photographs were never considered by the Department for any purpose in this case.

report standards in its responses to information requests (*see* Exh. DTE-VZ 5-1) defeats its assertion that the Department's allegedly mistaken conclusions stemmed from a lack of argument. In its Order, the Department specifically addressed Verizon's argument on this issue and explained why it disagreed with its interpretation of reporting standards:

> Verizon, however, argued that the Department's statewide service quality standards do not require that a particular municipality's trouble reports not exceed the 4.0 RPHL threshold in any month, and that reporting on less than a wire center basis is not required nor appropriate (*see* Exh. DTE-VZ 5-1). The Department finds it is appropriate to apply the 4.0 RPHL threshold on a more granular town basis for two reasons.
>
> First, aggregated RPHL data (*e.g.*, Becket RPHL rates) provide an inaccurate assessment of the quality of service in the Town of Middlefield. ...
>
> Second, the statewide SQI is not capable of addressing service quality issues on a granular, town level. The trouble reporting mechanism based upon the RPHL, on the other hand, is designed specifically to identify and correct service quality problems at a granular level.

(Order at 11-12). Thus, the Department acknowledged Verizon's argument about the trouble reporting standard but disagreed with Verizon's position. On reconsideration, Verizon does not point to any new fact or genuine mistake in repeating their trouble reporting standard argument.

Third, Verizon's claim that the Department's conclusion regarding the financial impact of corrective measures was not based on sufficient evidence is discredited by Verizon's own failure to comply with the Department's request. The Department gave Verizon the opportunity to argue its position regarding the financial impact of carrying out improvements when it requested the following information:

> Please provide a complete and detailed discussion of Verizon's financial ability to carry out the improvements discussed in Information Requests DTE 5-1, 5-2, and 5-3, above, and the effect of its compliance therewith, upon its financial ability to make such other changes, if any, as may be necessary in the performance of the service which the carrier has professed to render to the public. *See* G. L. c. 159, § 16.

(Exh. DTE-5-4). The Department's request was specific and clear. Verizon does not claim to have been confused about this request. Rather, Verizon responded that it was unable to quantify costs because the Department had not made a finding as to whether there was inadequate service or what would need to be done to correct it. Verizon has misinterpreted the standard. G. L. c. 159, § 16 states in pertinent part:

> If the [D]epartment is of the opinion, after a hearing… that the regulations, practices, equipment, appliances or service of any common carrier are unjust, unreasonable, unsafe, improper or inadequate, the [D]epartment shall determine the just, reasonable, safe, adequate, and proper regulations and practices thereafter to be in force and to be observed, and the equipment, appliances and service thereafter to be used, and shall fix and prescribe the same by order to be served upon every common carrier to be bound thereby….
>
> *Before making such order*, the [D]epartment shall consider the relative importance and necessity of the changes in any specific regulations, practices, equipment and appliances proposed to be included therein and of any other changes which may be brought to its attention in the course of the hearing, the financial ability of the carrier to comply with the requirements of the order, and the effect of the carrier's compliance therewith upon its financial ability to make such other changes, if any, as may be deemed by the [D]epartment of equal or greater importance and necessity in the performance of the service which the carrier has professed to render to the public.

(Emphasis added). Therefore, the Department must consider the financial impact *prior* to making its decision regarding the adequacy of the service. Although Verizon failed to provide specific information about the financial impact of correcting the service-related problems, Verizon asserted that it seeks to maintain service quality standards and that it would work with Middlefield to remedy any specific issues (*see* Exh. DTE-VZ 5-4). Because Verizon did not provide information about the financial impact, the Department reasonably concluded that the financial impact would not be substantial, or else Verizon would have so indicated (*see* Order at

20). Accordingly, the Department finds that its decision was not the result of mistake or inadvertence.

In sum, the Department determines that Verizon has failed to satisfy the standard for reconsideration. The Department concludes that because the Department (1) gave Verizon sufficient opportunity to present evidence and argument and (2) based its decision on a complete record, Verizon's Motion for Reconsideration shall be denied.

B. Motion to Reopen the Record

The Department must also decide whether Verizon has demonstrated good cause to reopen the proceeding. The Department determines that Verizon failed to demonstrate good cause because, as determined above, Verizon did not show that it has previously unknown or undisclosed information regarding a material issue that would be likely to have a significant impact on the decision. Accordingly, the Department denies Verizon's Motion to Reopen.

VI. ORDER

Accordingly, after due consideration, it is hereby

ORDERED: That the Motion for Reconsideration, Motion to Reopen the Record, and Motion for Stay[19] filed by Verizon Massachusetts on May 20, 2008, is DENIED.

By Order of the Department,

_____

Sharon E. Gillett, Commissioner

[19] Because Verizon already filed the service quality analysis pursuant to the Order, the Motion for Stay is denied as moot. The Department has not yet ruled on whether the analysis complies with the Order.

RIGHT OF APPEAL

Appeals of any final decision, order or ruling of the Department of Telecommunications and Cable may be brought pursuant to applicable state and federal laws.