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May 12, 2009

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

Re: DTC 08-12– Petition of Verizon MA to Amend Form 500

Dear Secretary Williams:

Attached please find the Reply Comments of Verizon MA for filing in the above proceeding. These Reply Comments address comments served on Verizon MA or posted on the Department's website as of the afternoon of May 5, 2009. Yesterday, Verizon MA learned that additional comments, not served on Verizon MA, were posted on the Department's website subsequent to May 5. Verizon MA has not yet had the opportunity to review or respond to those comments and accordingly reserves its rights to reply to such comments at a later time.

Because the Department has opened this proceeding as an adjudicatory proceeding under M.G.L. c. 30A and has indicated that it will hold a public hearing on May 15, 2009 (Notice of March 27, 2009, at 3), Verizon MA reserves its procedural rights with respect to this proceeding.

Generally, public hearings conducted as part of adjudicatory proceedings before the Department have not included sworn testimony or cross-examination of witnesses. Essentially, the public hearing has been an opportunity for non-parties to express their views on the matter before the Department. The Department then convenes a procedural conference to establish a schedule for the adjudication of the matter. The Notice in this case indicates that the procedural conference will immediately follow the scheduled public hearing. Typically at a procedural conference, Verizon MA and the other parties will work to propose a procedural schedule and indicate whether they request the rights to a full adjudicatory proceeding, including the rights to conduct discovery, to submit testimony and evidence, to cross examine witnesses, to file briefs,

etc. The Department then establishes a procedural schedule for the case commensurate with the scope of the issues and the procedural rights asserted by the parties.

Verizon MA has the right to fully prepare for and conduct cross-examination of any witness who presents sworn testimony, either at the public hearing or an evidentiary hearing. Verizon MA hereby reserves its right to conduct discovery and to summon any witness who presents sworn testimony at the public hearing to appear for cross-examination at a later hearing. Of course, any party to the proceeding must be required to respond to any discovery requests and to make its witnesses available for cross examination.

By explaining Verizon MA's position we hope to avoid any misunderstandings while ensuring a full and fair adjudication of this proceeding. Verizon MA intends to work with the Department and the parties at the procedural conference to develop an appropriate procedural schedule that will properly protect the rights of the parties and provide for an efficient adjudication of the case.

Sincerely,

Alexander W. Moore (via)
Alexander W. Moore

Enclosure

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

Petition Of Verizon New England Inc. For Amendment Of The Cable Division's Form 500 "Cable Operator's Annual Report of Consumer Complaints"	D.T.C. 08-12

REPLY COMMENTS OF VERIZON MA

Verizon New England Inc., d/b/a Verizon Massachusetts ("Verizon MA") petitioned the Department to cease collecting municipal subscribership data on its Form 500 because the public disclosure of that information impairs Verizon MA's ability to compete with the incumbent CATV providers, impedes competition generally in the Commonwealth and allows a distorted public perception of Verizon's competitive efforts nationwide. Conversely, municipal subscribership data is not essential to performance of the Department's duties under the CATV statute, G.L. c. 166A. Verizon MA has demonstrated that the Department does not have authority to collect this information, *see* Petition at 9-13, and that the Department should refrain from collecting and disclosing this data in any event because the resulting harm to competition far outweighs its minor policy value. *See* Petition at 13-16. In this regard, the current Form 500 is at odds with the policies of every other state and federal regulatory body, none of which both collects and discloses such information. The Department should take this opportunity to bring its policy in line with those of all other states and amend its Form 500 as requested.

Verizon MA appreciates the concerns expressed by the municipalities and municipal organizations that have filed comments in this proceeding, but nothing in those comments alters

the above analysis or provides grounds for the Department to continue to collect municipal subscribership data on the Form 500.

I. Municipal Subscribership Data Will Continue To Be Available To Each LFA If The Petition Is Granted.

The chief concern of the commenters is that if allowed, the Petition would eliminate their access to subscribership data for their city or town, which they allegedly use for a number of purposes such as assessing the significance of the number of complaints against a carrier, negotiating renewal of license agreements and verifying the amount of the annual license fee paid pursuant to G.L. c. 166A, § 9, and PEG access fees. *See* Comments of the Towns of Andover, *et al.* ("Andover"), at 5, 6; Comments of The City of Boston ("Boston") at 6; Comments of Shrewsbury Electric and Cable Operation ("SELCO") at 2. The Petition, however, seeks to end the reporting of this data *to the Commonwealth only*. LFAs would continue to have access to it because, as some commenters have acknowledged, the annual license fee that a carrier pays each LFA is $0.50 per subscriber in that community. Thus an LFA can easily calculate the number of subscribers served by a given provider by multiplying the amount of its payment by two.[1]

In addition, LFAs will still be able to verify the accuracy of the annual license fee payment in a number of ways even in the absence of subscribership data on the Form 500. First, a number of CATV licenses in Massachusetts include a provision requiring the carrier periodically to provide to the LFA the number of its subscribers in the service area. Allowance

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[1] Andover also notes that community-specific and carrier-specific subscribership information must continue to be available "on a local level" in order to implement legislation Verizon MA has proposed regarding allocation of PEG funding responsibilities among carriers serving a given community. *See* Andover Comments at 7. Verizon MA does not disagree, but as explained in the text, LFAs will continue to have access to that information even if the Department ceases collecting it on the Form 500. The Department, however, has no need for such data, since neither the current statute nor the pending legislation affords the Department any role in apportioning such obligations among carriers.

of the Petition would not affect these license provisions. Second, CATV licenses in Massachusetts typically grant the LFA audit rights, by which the LFA can obtain data from the carrier to verify the amount of the statutory license fee payment. Indeed, the mere possibility of a formal audit likely enables the LFA to obtain this information from the carrier without ever reaching the point of performing the audit.

Verizon MA, for one, pledges that should the Department amend the Form 500 as requested, Verizon MA will provide with its annual statutory license fee payment to each of its LFAs a statement of the number of Verizon MA cable subscribers in the community as of the end of the prior calendar year, to allow the LFA to verify the amount of the payment. Verizon MA cannot speak for other cable operators in Massachusetts, but they have not indicated any reluctance to provide such information to the Department, and their trade Association, NECTA, opposed Verizon MA's request for confidential treatment of that information by the Department in 2006, so presumably they would not object to continuing to provide that data in annual statements to their LFAs.[2]

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

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

II. The Comments Do Not Demonstrate That The Department Has Authority To Require Cable Operators To Report Municipal-level Subscribership Data To The Department.

Verizon MA demonstrated in its Petition that the Department's authority over CATV pursuant to Chapter 166A is specific and for limited purposes and thus that while the Department may collect information necessary to carry out those limited purposes, it may not require the disclosure of information entirely collateral to those purposes. *See* Petition at 9-10. Moreover, because § 10 of the statute expressly sets forth the types of information the Department may require on Form 500 but does not require reporting of municipal subscribership data, the Department cannot require such disclosure. *See id.* at 10-11. The purpose of § 10 is to ensure that the relevant LFA and the Department receive basic information regarding consumer complaints and the carriers' responses. It is not intended to assist consumers in choosing a cable operator, and therefore reporting of municipal subscribership data to the Department does not further the purpose of the statute. *See id.* at 12-13.

Boston and Andover argue nevertheless that the Department has "broad rulemaking authority" encompassing the requirement that carriers report municipal subscribership data to the Department. *See* Boston Comments at 3-4; Andover Comments at 5. This argument is without merit. Contrary to the claim of these municipalities, the Department's authority to make rules and regulations "as appropriate to carry out the purpose of this chapter" under G.L. c. 166A, § 16, does not mean that its rulemaking authority is necessarily expansive. A grant of statutory authority to promulgate rules says nothing about the allowed scope of those rules, which depends instead on the substantive duties assigned to the agency by its statute. As Andover acknowledges, "An agency's powers are shaped by its organic statute taken as a whole."

Commonwealth v. Cerveny, 373 Mass. 345, 354 (1977). Verizon MA demonstrated in its Petition that Chapter 166A grants the Department authority over specific CATV matters only, such as the authority to hear appeals, investigate licenses, regulate basic rates and prescribe certain forms, as opposed to the kind of general supervisory authority over common carriers granted to the Department by G. L. c. 159. The legislature assigned much of the interaction with cable operators to LFAs, not the Department, through the negotiation and issuance of licenses. "State law charges municipal officials with the duty of implementing the licensing process ... [and] with respect to cable licensing, the role of the local Issuing Authority is 'paramount.'" Andover Comments, at 4 (citations omitted). Thus, the Department's authority to make rules regulating cable operators is limited.

Boston asserts that the Supreme Judicial Court "has recognized that the Department has broad powers to regulate in this field of cable television," Boston Comments at 3, but the cases it cites -- *Grocery Manufacturers of America v. Dept. of Public Health*, 379 Mass. 70 (1979) and *Warner Cable v. Community Antenna Television Commission*, 372 Mass. 495 (1977) -- do not support this conclusion. In *Warner*, the court held only that the Department has broad power to make regulations governing its cable ratemaking processes, not broad authority to regulate the entire field of cable television. *See Warner*, 372 Mass. at 504. The *Warner* court's assessment was based on the specific language of § 15 of the statute, which expressly authorizes the Department to study the desirability of rate regulation, to make such rates, and to make rules "to facilitate the operation of this section and enforce the application of the rates fixed and established by them." This is a far cry from the separate authority in § 16 of chapter 166A to make regulations only as appropriate to carry out the purposes of the statute. *Grocery Manufacturers* is even less compelling precedent, since it merely cites to *Warner* and does not

itself address the scope of rulemaking authority under Chapter 166A. *See Grocery Manufacturers*, 379 Mass. at 75.[3]

Boston and Andover are on more firm ground in asserting that a regulation that is consistent with the "scheme" or "design" of a statute need not be traced to a specific section of the statute. *See* Boston Comments at 4; Andover Comments at 5. Nevertheless, no commenter identifies any statutory "scheme" or "design" that would justify a requirement that carriers report their municipal subscribership data to the Department, as opposed to the LFAs. Andover posits that this information is necessary "to allow Issuing Authority evaluation of complaints as a percentage of total subscribers." Andover Comments at 5. *See also* Boston Comments at 5; SELCO Comments at 2 ("Plainly, issuing authorities have a legitimate interest in knowing whether cable operators are adequately responding to the needs of their subscribers in the licensed area.") Those assertions may explain why this information is useful to LFAs, which issue, renew and are parties to license agreements, but they do not explain how any statutory purpose is served by reporting this data *to the Department.* Moreover, while the number of subscribers might be useful to LFAs and the Department to evaluate how a carrier is addressing the needs of its customers, the legislature took a different approach to this issue in G.L. c. 166A, § 10, by requiring carriers to report only complaints and "the manner in which [the complaints] have been met, including the time required to make any necessary repairs or adjustments." The statute evidences no scheme or design by which the Department may require operators to report municipal subscribership data to it.

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[3] The only other authority Andover and Boston cite in support of their conception of the scope of the Department's rulemaking authority is a 25-year old Superior Court decision, *NECTA v. Community Antenna Television Commission*, Civil Action No. 70134 (1984). Boston Comments at 4-5; Andover Comments at 5. This is weak precedent. Superior Court decisions are not binding even on other sessions of that court.

SELCO and Boston also argue that the Department and LFAs have an interest in collecting municipal subscribership data because the annual license fee provided for in G.L. c. 166A, § 9, is based on the number of subscribers of the carrier in the licensed area. *See* SELCO Comments at 2; Boston Comments at 6 (subscriber count is necessary to assure municipality of full payment). Again, this theory fails to distinguish between the interests and roles of the LFAs and the Department. An LFA may need a count of subscribers in its community to verify the amount of the carrier's payment, but the Department's sole interest in this regard is in assuring that it has received payment in full of the $0.80 license fee due to the Commonwealth. This payment is based on a carrier's total subscribership in the state, however, so the Department needs only that total, not a breakdown of subscribers by municipality.

III. The Department Should Refrain From Collecting Municipal-Level Subscribership Data, Because Disclosure Of The Statewide Compilation Of That Data Harms Competition and Verizon MA And Is Of Little Policy Value.

Even if the Department has authority to collect municipal subscribership data, Verizon MA explained that the Department should refrain from doing so because the data has little policy value on a statewide basis, yet its disclosure harms Verizon MA and impedes competition. *See* Petition at 13-16. This data is extremely valuable to incumbent cable monopolies, enabling them to use this data to target their own marketing responses to competition in an effort to thwart competitive entry in their service areas. *See id.* at 13-14. In addition, because Massachusetts is the only state where municipal-level subscribership data is publicly available, competitors and public stock analysts misuse the data Verizon MA provides on the Form 500 as an indicator of Verizon's cable penetration nationwide, distorting public perception of Verizon's performance in the video market. *Id.* at 15-16.

None of the comments filed with the Department changes this cost/benefit analysis. Boston, Andover and SELCO identify some policies that are allegedly furthered by reporting municipal level subscribership data to LFAs,[4] but as noted above, they do not explain how this data is necessary or even relevant to *the Department's* duties under the statute. Andover also argues that, "[o]ne of the overriding goals of regulatory policy is to encourage competition...," but it then quixotically concludes that, "[c]ontinuing access to this data is essential for Department regulators to do their jobs -- evaluate the existence, growth or lack of competition." Andover Comments at 6. Nothing in Chapter 166A, however, assigns the Department the task of evaluating the existence and growth of competition in the CATV market generally, apart from addressing the matter should it arise in a proceeding before it. Moreover, Verizon MA has demonstrated that the collection and public disclosure of municipal subscribership data by the Department *harms* competition, by arming monopolist incumbents with valuable commercial information to better target their marketing activities and impede competition by newcomers such as Verizon MA. The Department can best encourage competition by protecting this valuable information from disclosure.

With respect to the cost side of the cost/benefit analysis, Boston asserts that Verizon MA has overstated the competitive harm arising from disclosure of its detailed subscribership data, on the ground that incumbents already know when Verizon MA has obtained a franchise. *See* Boston Comments at 6. Boston misses the point. Incumbents may know when Verizon MA is authorized to compete in a particular community, but they cannot know how successful Verizon MA has been in that competition without expending significant time and money to gather and

[4] For example, Boston asserts that LFAs need this data not only to verify proper payment of § 9 fees, but also to verify whether a carrier has paid proper franchise fees and PEG support and has complied with line extension and build-out obligations. *See,* Boston Comments at 6.

assess various data points from the field. The current Form 500 allows incumbents to avoid these costs by compiling this information for them, allowing them to pinpoint their own marketing efforts in response. That is the competitive advantage that the current disclosure policy bestows on incumbent operators, and that is how it impedes the growth of competition in Massachusetts.

Boston again misses the point in asserting that, "the cable market is anything but competitive," apparently on the sole ground that Verizon MA has not yet obtained a franchise for Boston. *See* Boston Comments at 7. The lack of a Verizon MA franchise in Boston says nothing about the state of competition in the rest of the state, where Verizon MA is competing against established incumbents to win CATV customers in over 90 communities. Nor does the lack of a Verizon MA franchise in Boston imply in any way that Verizon MA is not harmed by disclosure of its subscribership data to its competitors in those communities.

For its part, SELCO asserts that Verizon MA has failed to show that the information at issue here is a trade secret or is commercially valuable because its argument of competitive harm "is entirely speculative." SELCO Comments at 3. SELCO points to no authority, however, for the proposition that the Department can act to prevent competitive harm only on a showing of actual harm, and there is no such authority. To the contrary, the Department is allowed to, and regularly does, draw reasonable inferences of potential harm in determining motions for confidential treatment, upon consideration of the factors outlined in law. *See e.g., Jet Spray Cooler, Inc. v. Crampton*, 282 N.E.2d 921, 925 (1972) (setting forth factors for determining whether information constitutes a trade secret).

SELCO also argues that the Legislature did not intend to protect cable operators from disclosing competitively sensitive information, as evidenced by the statutory requirement on

cable operators to file financial balance sheets with the Department and the LFAs for public inspection. SELCO Comments at 3. SELCO's conclusion, however, does not follow from its premise. That the Legislature saw fit to require cable operators to disclose certain information simply does not imply that the Legislature also expected operators to disclose other information that is not covered by the statute, nor does it allow an inference that the Legislature intended to strip cable operators of the right to protect trade secrets or other commercially valuable information, such as subscribership data, from disclosure.[5]

Because the harm to competition in general and Verizon MA in particular resulting from continued collection and disclosure of municipal subscribership information by the Department easily outweighs any benefits this data provides at a state level, the Department should eliminate this reporting requirement from Form 500.[6]

IV. Whether This Matter proceeds As An Adjudication Or As A Rulemaking, Verizon MA Is Entitled To Procedural Rights To Present Its Case And To Respond To Opposition To Its Petition.

Andover, joined by Boston, argues that under the Administrative Procedures Act, G.L. c. 30A, this case should proceed as a rulemaking pursuant to § 4, not as an adjudicatory proceeding under § 10. It claims a right to comment on the Petition without moving to intervene and asserts that a rulemaking requires notice to "interested persons." It asserts that managing this case as an adjudicatory proceeding is legal error and that to cure this error, the Department should start this

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[5] SELCO also fails to point out that the Department has determined that certain financial information is confidential and, although cable operators are required to report the information, the Department maintains its confidentiality.

[6] SELCO opposes this request on the additional ground that eliminating the reporting requirement "would not place all cable operators on a level playing field" because as a municipal light plant, SELCO is subject to the public disclosure requirements of G.L. c. 66. *See* SELCO Comments at 4. This argument is entirely without merit. No "level playing field" theory could justify extending to all private sector cable operators the statutory requirements that apply by their terms only to public entities, merely because such an entity has elected to provide cable service.

case over again as a rulemaking and issue a new notice. *See* Andover Comments at 3-4, 7; Boston Comments at 2-3.

Whether the Department chooses to proceed with this case as an adjudicatory proceeding or as a rulemaking, Verizon MA is entitled to certain procedural rights. If the case moves forward as an adjudicatory proceeding, Verizon MA reserves its right to an evidentiary hearing and all other rights afforded it under G.L. c. 30A, including under §§ 10 and 11. If the case proceeds as a rulemaking, Verizon MA demands the opportunity to respond in writing to any and all comments submitted to the Department, including any oral comments that might be offered at a public hearing. *See e.g. Petition of Verizon New England Inc. For Adoption Of Competitive License Regulation*, D.T.E. No. 06-1, Order of August 23, 2006, affording Verizon MA the opportunity to respond in writing to oral comments offered at public hearing.

V. Conclusion

For the above reasons, the Department should amend its Form 500 to eliminate the requirement for annual reporting to the Department of subscribership numbers at the municipal level.

Respectfully submitted,

VERIZON NEW ENGLAND INC.

By its attorney,

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Dated: May 12, 2009