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December 18, 2009

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

Re: D.T.C. 09-1 — Regional Service-Quality Investigation

Dear Ms. Williams:

Enclosed for filing in the above-referenced matter is the Opposition of Verizon New England Inc. to Motion of Attorney General and IBEW to Strike Discovery relating to information requests issued to Western Massachusetts Connect, Inc (“WMA Connect”). Also attached is a certificate of service.

Please note that Verizon MA is presently attempting to resolve this matter with WMA Connect. If a resolution is achieved and approved by the Department of Telecommunications and Cable (the “Department”), it would render the Motion to Strike moot. Verizon MA will inform the Department and the parties if it has resolved the issue with WMA Connect.

Thank you for your attention to this matter.

Sincerely,



Robert N. Werlin

Enclosures

cc: Service List
Kalun Lee, Hearing Officer (3)
Jessica Atwood, Western Massachusetts Connect, Inc.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

Re: Verizon Service Quality in Western Massachusetts)
) D.T.C. 09-1
)

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing document upon the Department of Telecommunications and Cable and parties of record in accordance with the requirements of 220 C.M.R. 1.05 (Department's Rules of Practice and Procedures).



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Dated: December 18, 2009

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

Re: Verizon Service Quality in Western Massachusetts) D.T.C. 09-1
)

**OPPOSITION OF VERIZON NEW ENGLAND INC. TO MOTION OF
ATTORNEY GENERAL AND IBEW TO STRIKE DISCOVERY**

INTRODUCTION

On November 24, 2009, Verizon New England Inc. d/b/a Verizon Massachusetts (“Verizon MA” or the “Company”) issued four discovery questions to Western Massachusetts Connect, Inc. (“WMA Connect”) relating solely to the sworn testimony given by Jessica Atwood on behalf of WMA Connect on August 3, 2009.¹ On December 11, 2009, the Attorney General of the Commonwealth (the “Attorney General”) and the International Brotherhood of Electrical Workers Local 2324 (the “IBEW”) filed a joint motion to strike discovery issued to WMA Connect (the “Motion to Strike”).

The Motion to Strike must be denied. It misstates the nature of Ms. Atwood’s testimony and mischaracterizes the only cited precedent. Moreover, the Motion to Strike raises general policy concerns about discouraging participation at public hearings while totally ignoring Verizon MA’s specific due-process rights that are vested in statute and regulation. The Department of Telecommunications and Cable (the “Department”) cannot lawfully constrain Verizon MA’s rights to a fair adjudicatory proceeding in accordance with the Administrative Procedures Act (G.L. c. 30A), and therefore

¹ Attachment A, hereto, is a copy of Ms. Atwood’s testimony and Attachment B is a copy of the Company’s information requests.

Verizon MA must be permitted to complete the record initiated by WMA Connect's testimony through discovery and, if necessary, cross-examination.

FACTS

On August 3, 2009, the Department conducted a public hearing in this proceeding in Chester, Massachusetts. That hearing was "...intended to be an opportunity for the communities to share their experiences regarding the telephone service quality provided by Verizon" (Tr. at 4).² At the outset of the hearing, the Hearing Officer explained the difference between offering unsworn and sworn testimony:

There are two types of testimony that will be accepted at this hearing, sworn and unsworn testimony. By making your statement sworn, you are attesting to the truth of your statements. Pursuant to Department rules, only sworn testimony may be entered as part of the evidentiary record. That means that the Department may base its decision only on testimony that is sworn.

(Tr. at 5). In addition, Verizon MA made it clear at the public hearing that it was not waiving its rights to conduct cross-examination of any witness who gave sworn testimony at the hearing (Tr. at 7). *See also*, Letter on Hearing Procedures from Verizon MA to Secretary Williams, filed in this proceeding on June 9, 2009.

During the course of the hearing, Ms. Atwood gave the sworn testimony set forth in Attachment A, hereto. That testimony contained numerous factual assertions regarding Verizon MA's service in Western Massachusetts, including:

...the Connect has repeatedly heard about the experiences of individuals in regards to poor telephone service quality. The service complaints conveyed have included an insufficient number of quality phone lines available for existing and new residents, as well as static, clicking, humming and noise during periods of wet

² All transcript citations in this pleading reference the transcript of the public hearing held on August 3, 2009.

weather. The Connect believes that many of these complaints are indicative of the deteriorating copper cable plant in the region.

The Connect experienced similar conditions while implementing the Connect beta test program from 2007 through 2009.

...on the occasion that outages did occur, they were primarily due to problems with the T1 circuit at the vendor level.... It was believed this outage was related to heavy rains experienced in the area and how these weather conditions impacted the incumbent infrastructure. In some cases of these outages, tickets reporting the outage were not opened because the service was anticipated to be returned once the inclement weather stopped and the infrastructure dried out.

(Tr. at 14-16).

On November 24, 2009, Verizon MA sent four questions to WMA Connect, which were narrowly framed to gather information regarding the specific factual allegations contained in Ms. Atwood's sworn testimony, and thereby prepare for cross-examination of the witness, if necessary. A copy of the information requests issued by Verizon MA is appended hereto, as Attachment B.

ARGUMENT

The procedural due-process rights of parties to adjudicatory proceedings before the Department are amply addressed in governing statute and regulation. Taken together, G.L. c. 30A, § 11 and 220 C.M.R. 1.00 provide for, *inter alia*, "...notice of the issues involved to afford [parties] reasonable opportunity to prepare and present evidence and argument..." (G.L. 30A, § 11(1)); the right for every party "...to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence" (G.L. 30A, § 11(3); 220 C.M.R. 1.06(6)(f)); the right to discovery (220 C.M.R. 1.06(6)(c)) and the opportunity to file briefs (220 C.M.R. 1.11(3)-(6)). There is

no dispute that this investigation is an adjudicatory proceeding, and therefore, Verizon MA is entitled to the full panoply of rights afforded by statute and regulation.

The use of discovery is available to Verizon MA (and all parties to an adjudicatory proceeding) in order “...to facilitate the hearing process by permitting the parties and the Department to gain access to all relevant information in an efficient and timely manner. Discovery is intended to reduce hearing time, narrow the scope of issues, protect the rights of parties and ensure that a complete and accurate record is compiled.”

220 CMR 1.06(6)((c)(1)). In this case, Verizon MA limited its discovery directed to WMA Connect to four questions directly relating to factual allegations made in its sworn testimony. Not only are responses to those questions relevant to the evidence already on the record, but complete responses could reduce or eliminate the need for cross examination of the witness.³ However, even if cross examination is not eliminated, Verizon MA is entitled to this limited discovery to enable it to conduct meaningful cross examination and/or prepare rebuttal testimony.

The Motion to Strike fatally ignores the difference between sworn testimony and unsworn statements (*see e.g.*, Motion to Strike at 2-3). Because unsworn statements do not become part of the evidentiary record upon which the Department may base its decision, the Company would not normally need to pursue the factual basis of such statements. However, in this case, Ms. Atwood gave sworn testimony, and as the Hearing Officer accurately noted, such testimony is part of the evidentiary record upon which the Department may base its decision (Tr. at 5). Verizon MA is therefore entitled

³ Because responses to information requests are usually placed on the evidentiary record, they often substitute for the need to cross examine the witness at the evidentiary hearing.

to meaningful cross examination and rebuttal, and thus discovery in some form, concerning that testimony.

The Motion to Strike not only tries to deny the nature of Ms. Atwood's testimony, but then argues that the procedural rights enunciated in G.L. c. 30A don't apply to certain witnesses who give sworn testimony at a public hearing (Motion to Strike at 5). The Motion to Strike offers no citation to statute, precedent or any applicable law in support of the proposition that some witnesses giving sworn testimony are not subject to the Administrative Procedures Act. Nor could it, because G.L. c. 30A, § 11(3), is unambiguous about the rights of parties:

(3) Every party shall have the right to call and examine witnesses, to introduce exhibits, *to cross examine witnesses who testify*, and to submit rebuttal testimony.

G.L. c. 30A, § 11(3) (emphasis added)

The Motion to Strike's lone case citation, to the Department's Order in *Nextel et al.*, D.P.U. 95-59-B/95-80/95-112/96-13 (1997) ("Nextel"), is unavailing. Not only does *Nextel* not limit discovery as suggested in the Motion to Strike, but it clearly supports the Company's rights in this case. The Motion to Strike cites *Nextel* for the proposition that "...discovery has traditionally been limited by the Department to parties that have submitted pre-filed testimony" (Motion to Strike at 4). Although the Company agrees that discovery is usually issued to parties, that is because parties are generally the only entities that offer relevant testimony in a case.⁴ The discovery dispute in the *Nextel* case

⁴ For example, in a public hearing for a rate case, members of the public often offer sworn testimony, but rarely is the testimony linked directly to a company's filing or calculation of its rates. In the case at bar, the subject matter of the proceeding is Verizon MA's service quality in Western Massachusetts, so sworn allegations about that service quality (even if anecdotal) have more relevance to the case, and the Company has more of a need to challenge such assertions.

involved whether parties *who had not submitted testimony* could be issued discovery.

Nextel at 12. The Department made it clear that parties in a case were entitled to all relevant discovery:

Our regulations expressly provide for motions to compel and do not distinguish between parties who have filed testimony and those who have not. See 220 C.M.R. s. 1.06(6)(c)(4). *In fact, our rules expressly authorize, by subpoena, the compelled appearance of witnesses who are not even parties, and the production of documents by them.* 220 C.M.R. s. 1.10(9). Moreover, G.L. c. 30A, s. 12(3), which states that any party to an adjudicatory proceeding shall be entitled as of right to the issue of subpoenas in the name of the agency conducting the proceeding, does not limit this right to parties who have filed testimony. Thus, the Department has the authority to compel responses to discovery from parties who have not filed testimony.

Nextel at 11-12 (emphasis added).

Perhaps recognizing the unfairness and lack of legal support for the notion that a party has no right to cross examine all witnesses, the Motion to Strike suggests that sworn testimony offered at a public hearing is routinely given little weight by the Department (Motion to Strike at 5-6) (“statements given through public hearings that are not subject to cross examination may have different evidentiary value to the Department”). That argument is simply disingenuous, given that the IBEW’s prefiled testimony expressly relies on the factual assertions made by Ms. Atwood. *See* Pre-filed Direct Testimony of John D. Rowley, Sr. at 12-13.

The Motion to Strike also argues that “[a]llowing discovery or other process to be issued to participants at a public hearing will discourage participation in the public comment process” (Motion to Strike at 4). This statement again ignores the distinction between unsworn comments and sworn testimony and the basic precepts of due process to parties in a case. Certainly, unsworn written or oral comments submitted by a member

of the public are not part of the evidentiary record and cannot form the factual basis for a Department decision, and therefore there is generally no reason for a party to seek discovery on them.⁵ In this case, however, the sworn, factual allegations made on behalf of WMA Connect require Verizon MA to gain access to the information upon which the witness based her testimony in order to be able to complete the record and, if necessary, cross examine the witness or prepare rebuttal testimony. Since Verizon MA has no way of knowing the basis of Ms. Atwood's testimony, the information sought in the information requests issued by the Company is "...necessary to the establishment of a complete and accurate record, and not otherwise readily obtainable." *Nextel* at 13.

Verizon MA is mindful that the Department conducted the public hearings to provide "...an opportunity for the communities to share their experiences regarding the telephone service quality provided by Verizon" (Tr. at 4). As noted above, if commenters share their experiences through unsworn statements, there is virtually no risk that follow-up discovery or sworn testimony would be compelled. It is only because the "sharing" was provided under oath that creates an evidentiary record that the Company must address. In this case, Verizon MA has not abused its right to conduct discovery and compel production of documents. The four limited questions to a corporate entity that chose to make sworn, factual allegations in an evidentiary proceeding cannot be construed as a serious impediment to public participation at Department hearings, and certainly no impediment to the giving of unsworn comments.

⁵ Although, as noted by the Department in *Nextel*, parties are entitled, as a matter of law, to compel anyone with relevant information to testify and produce documents.

In addition, Verizon MA attempted to use the least formal and onerous means of obtaining the information. Instead of issuing a subpoena for a deposition and production of documents (which was and continues to be its right under the Administrative Procedures Act and Department regulations), Verizon MA issued four straightforward questions, directly related to the WMA Connect's testimony. The hope was (and is) that if WMA Connect simply provides written responses, those could be placed on the record and there will be no need to compel the witness to appear for cross examination. Nonetheless, Verizon MA has a right to the information and to cross examine all witnesses, and cannot leave the record on this matter incomplete and unchallenged.

CONCLUSION

For all of the above reasons, the Department should deny the Motion to Strike and should order WMA Connect to answer the four discovery questions issued to it.

Respectfully submitted,

VERIZON MASSACHUSETTS

By Its Attorneys,



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Dated: December 18, 2009

ATTACHMENT A (Tr. 13-16)

MR. LEE: Thank you, Ms. Perkins. The next person on the list is Jessica Atwood. Would you like your testimony sworn?

MS. ATWOOD: Yes.

Jessica Atwood, Sworn

MS. ATWOOD: My name is Jessica Atwood, J e s s i c a, A t w o o d. I'm with WesternMA Connect, Inc. My address is 425 Main Street, Greenfield. And my phone number is 413-774-1194. If it is all right, I am going to read a letter that we prepared.

Western Mass. Connect, Inc, formerly Berkshire Connect, Inc., and Pioneer Valley Connect is a regional organization whose mission is to support the creation of an advanced telecommunications landscape that will provide affordable, reliable and redundant high-capacity broadband services throughout Berkshire, Franklin, Hampden and Hampshire Counties. The Connect understands that this investigation is focused on basic telephone service quality and does not address broadband.

While Western Mass. Connect, Inc. was formally created in April of 2009, members of this entity have been working on broadband access issues for over ten years and have been a champion for broadband access equity in the region. This work has brought us in contact with many residents, businesses and local officials throughout western Massachusetts. Through these conversations, the Connect has repeatedly heard about the experiences of individuals in regards to poor telephone service quality. The service complaints conveyed have included an insufficient number of quality phone lines available for existing and new residents, as well as static, clicking, humming and noise during periods of wet weather. The Connect believes that many of these complaints are indicative of the deteriorating copper cable plant in the region.

The Connect experienced similar conditions while implementing the Connect beta test program from 2007 through 2009. The beta test program was an effort to test wireless broadband technologies and models in three unserved rural areas of western Massachusetts. The basic structure of these networks was to utilize an internet T1 circuit for backhaul, which provided bandwidth to at least two wireless access nodes. Public grant funds from the John Adams Innovation Institute were used to implement this effort, along with financial resources from Berkshire Connect, Inc., and staff time from the Franklin Regional Council of Governments.

During the nearly 18-month beta test program period, there were relatively few outages that disrupted the wireless networks' operations. However, on the occasion that outages did occur, they were primarily due to problems with the T1 circuit at the vendor level, or in one instance due to an extreme weather incident that impacted the radio access nodes. The T1 outages that occurred due to the incumbent infrastructure were experienced⁶ at two of the three beta test program sites. It is estimated that there were five such T1 outages experienced by the Florida network and four to five outages experienced by the New Salem network. As an example, in July 2008 there was an outage of the T1 circuit connecting the beta test program site in Florida. It was believed this outage was related to heavy rains experienced in the area and how these weather conditions impacted the incumbent infrastructure. In some cases of these outages, tickets reporting the outage were not opened because the service was anticipated to be returned once the inclement weather stopped and the infrastructure dried out.

The Connect appreciates this opportunity to submit comments regarding the Verizon telephone service quality in western Mass.

MR. LEE: Thank you.

ATTACHMENT B

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

In re Verizon Service Quality in Western Massachusetts) D.T.C. 09-1
)

**VERIZON'S FIRST SET OF INFORMATION REQUESTS
TO WESTERN MA CONNECT, INC.**

Verizon New England, Inc. d/b/a Verizon Rhode Island ("Verizon MA") requests that Western MA Connect, Inc. ("WMA Connect") respond to the following information requests.

INSTRUCTIONS

1. With respect to each information request, please state the name(s) and title(s) of the person or persons responsible for preparing the response.
2. If WMA Connect cannot answer a request in full, answer to the extent possible and state why it cannot answer the request in full.
3. If WMA Connect refuses to respond to any request by reason of a claim of privilege, state the privilege claimed and the facts relied upon to support the claim of privilege.
4. If WMA Connect believes that any request is ambiguous, please notify Verizon MA so that the request may be clarified prior to the preparation of a written response.
5. These requests shall be deemed continuing so as to require further and supplemental responses if WMA Connect receives or generates additional information within the scope of these requests between the time of the original responses and the end of any hearings in this proceeding.

DEFINITIONS

In these Information Requests, the following terms have the following meanings.

"Concerning" means referring to, describing, evidencing or constituting.

"Document" is used in its broadest sense and includes, without limitation, writings, drawings, graphs, charts, photographs, audio or video recordings, emails and

other data compilations from which information can be obtained. A draft or non-identical copy of a document is a separate document.

“Identify,” with respect to a person means to provide the person’s full name, present or last known address, and, when referring to a natural person, the present or last known place of employment and employment title.

“Verizon MA” means Verizon New England Inc. d/b/a Verizon Massachusetts.

INFORMATION REQUESTS

VZ-WMC 1-1 Ms. Atwood testified on behalf of WMA Connect at the public hearing in this matter on August 3, 2009, that, “. . . the Connect has repeatedly heard about the experiences of individuals in regards to poor telephone service quality.” See Transcript of August 3, 2009, hearing, at 14. Please provide all documents concerning any of the “experiences of individuals” referenced by Ms. Atwood, including all documents concerning any communication between WMA Connect and any such individuals. In addition, please provide the name, telephone number and street address of each such individual, the approximate date(s) on which the individual experienced poor telephone service quality, the name of the individual’s telephone service provider, the date on which WMA Connect “heard about” such experiences and the method by which it so heard.

VZ-WMC 1-2 Please provide all documents and state all facts which support the belief of WMA Connect that, as stated by Ms. Atwood (August 3, 2009, hearing transcript at 15), “many of these complaints are indicative of the deteriorating copper cable plant in the region.” Include in your answer all facts and information supporting the claim by WMA Connect that the copper cable plant in Western Massachusetts is “deteriorating.”

VZ-WMC 1-3 At pages 15 and 16 of the transcript of the August 3, 2009, hearing, Ms. Atwood stated that WMA Connect experienced outages with a T1 circuit or circuits, some of which were “due to problems with the T1 circuit at the vendor level . . .”

- a. Please describe each T1 circuit used by WMA Connect and provide its location.
- b. Was WMA Connect’s vendor for these T1 circuits Verizon MA? If not, please identify each such vendor.
- c. Please provide the date(s) of each outage of any T1 circuit used by WMA Connect during the 18-month period referred to by Ms. Atwood in her testimony, and for each outage identify the T1 circuit affected and whether WMA Connect reported the outage to Verizon MA.

VZ-WMC 1-4 At page 16 of the transcript of the August 3, 2009, hearing, Ms. Atwood stated that, "In some cases of these [T1] outages, tickets reporting the outage were not opened because the service was anticipated to be returned once the inclement weather stopped and the infrastructure dried out." With respect to each T1 circuit outage for which a trouble ticket was not opened:

- a. Identify the outage by date and, if necessary, location of the T1 circuit;
- b. State whether WMA Connect reported the outage to Verizon MA
- c. Did Verizon MA fail to open a trouble ticket in its V-repair system for the outage? Please explain how WMA Connect knows whether Verizon MA opened a trouble ticket for the outage.
- d. Who was it who anticipated that service would be returned once the infrastructure dried out? Please explain how WMA Connect knows that this was the reason for failing to open a trouble ticket for the outage, and identify each person, if any, who provided any information to WMA Connect concerning the reason for failing to open a trouble ticket.

Respectfully submitted,

VERIZON NEW ENGLAND INC.

By its attorney,



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Dated: November 24, 2009