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November 10, 2011

Mr. David J. Collins
Executive Secretary
Public Service Commission of Maryland
6 St. Paul St., 16th Floor
Baltimore, Maryland 21202-6806

Re: Reply Brief - Case No. 9265

Dear Mr. Collins:

Enclosed please find the Reply Brief filed on behalf of the Staff of the Public Service Commission in Case No. 9265.

Sincerely,

Michael A. Dean
Assistant Staff Counsel

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IN THE MATTER OF THE
COMMISSION'S INVESTIGATION INTO
THE OUTAGES OF VERIZON MARYLAND
INC. 9-1-1 NETWORK IN MARYLAND

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BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

CASE NO. 9265

REPLY BRIEF

In accordance with Pub. Utils. § 3-104(e)(4) and COMAR 20.07.02.06, the Staff of the Public Service Commission files this Reply Brief in Case No. 9265 regarding the Commission's investigation into the 9-1-1 system operated by Verizon Maryland, Inc. ("Verizon"), and recommends that the Commission find that Verizon violated the requirement of Pub. Utils. § 5-303 by failing to maintain 9-1-1 equipment, services, and facilities that are safe, adequate, and efficient, and impose a civil penalty under §§ 13-202 and 13-201 for the series of 9-1-1 outages in 2010 and 2011.

1. Procedural History.

The prior procedural history of this proceeding is discussed in Staff's Brief of May 5, 2011.¹

On July 12, 2011, the Commission issued a Notice of Show Cause Hearing Continuation, noting that the Commission had been made aware that on May 30, 2011, certain 9-1-1 calls made by wireless telephones and by Voice Over Internet Protocol (VoIP)

¹ Staff filed a corrected version of its Brief on May 25, 2011, which added a missing word.

in the Washington, DC area and in Maryland were received by Maryland county Public Safety Answering Points (PSAPs) without the caller's associated 9-1-1 data. Specifically, the 9-1-1 calls lacked the associated Automatic Number Identification (ANI) and Automatic Location Identification (ALI) information. In addition, the Notice stated that some PSAPs had difficulty in reporting this failure to Verizon officials. The Notice directed Verizon to file documentation regarding the causes, nature, and extent of the E9-1-1 call problems, and scheduled a hearing.

In response, Verizon filed the direct testimony of Charles Forand, James McLaughlin, and Maureen Davies. An evidentiary hearing was held on September 27, 2011, for the cross-examination of these witnesses and to hear testimony from Gordon Deans, Executive Director of the Emergency Systems Number Systems Board,² and a briefing schedule established. Verizon filed its Opening Brief on October 21, 2011, which once again suggested that the 9-1-1 service outage was an "exceptional event." Vz. Br. p. 14.

² Verizon's Brief notes its objection to the testimony of Mr. Deans based upon hearsay and its not receiving a copy of the statement given by Mr. Deans. Vz. Br. p. 4. Staff notes that administrative agencies under Maryland law may receive hearsay evidence if it is reliable. *Travers v. Balt. Police Dept.*, 115 Md. App. 395, 413, 693 A.2d 378 (1997); Arnold Rochvarg, *Md. Admin. Law* 61-65 (MICPEL 2nd ed. 2007).

2. Argument.

- (a) Verizon wrongly asserts that the Commission lacks any authority to impose civil penalties for its provision of 9-1-1 service.

Verizon in its Opening Brief argues that the Commission lacks the legal authority to impose a civil penalty upon Verizon for its provision of 9-1-1 services, citing that Pub. Safety § 1-303(a)(2). As argued in its Brief, this statute provides that the "provision of services the rates, and the extent of liability of a public service company [is] governed by the tariffs approved by the Public Service Commission." Vz. Br. p. 27. Verizon then argues that, because its tariff does not provide that the Commission may impose any civil penalties for its provision of 9-1-1 services, the Commission lacks any legal authority to assess any penalties on Verizon. *Id.* Verizon then argues that because the "extent of liability" is not limited or qualified in Pub. Safety § 1-303(a)(2), it can only mean any liability, including the susceptibility to civil penalty. Vz. Br. p. 28.³

Verizon's argument makes little sense under Maryland administrative law. First of all, if the General Assembly

³ During the September 27, 2011, hearing, Chairman Nazarian questioned why Verizon recently had repeatedly experienced a series of problems in providing 9-1-1 service in Maryland despite having to come before the Commission and provide explanations for them. Tr. 125-6. Verizon's belief that the Commission lacks any enforcement authority over it for its provision of 9-1-1 services in Maryland may partially explain this.

wished to limit the ability of the Commission to impose civil penalties in regards to 9-1-1 services, it clearly knows how to state this in statutory language, and would never delegate this to the tariff-drafting abilities of a regulated public service company. Secondly, it is clear that even Verizon understood the language of Pub. Safety § 1-303(a)(2) to refer to the tort or contractual liability it might have to its customers that might use its 9-1-1 services, as that is what Verizon discusses in its tariff:

5. Liability of the Telephone Company

a. This service is offered solely as an aid in handling assistance calls in connection with fire, police and other emergencies. The Telephone Company is not responsible for any losses, claims, demands, suits or any liability whatsoever, whether suffered, made, instituted or asserted by the customer or by any other party or person, for any personal injury to or death of any person or persons, and for any loss, damage or destruction of any property, whether owned by the customer or others, caused or claimed to have been caused by installation, operation, failure to operate, maintenance, removal, presence, condition, location or use of such equipment and facilities.

b. Neither is the Telephone Company responsible for any infringement or invasion of the right of privacy of any person or persons, caused or claimed to have been caused, directly or indirectly, by the installation, operation, failure to operate, maintenance, removal, presence, condition, occasion or use of Enhanced 911 Service features and the equipment associated therewith, or by any services furnished by the Telephone Company in connection therewith, including, but not limited to, the identification

of the telephone number, address or name associated with the telephone used by the party or parties accessing Enhanced 911 Service, and which arise out of the negligence or other wrongful act of the Telephone Company, the customer, its user, agencies or municipalities, or the employees or agents of any one of them.

Verizon Tariff Sect. 14, Universal Emergency Number 911 Services, Part B.5 (Staff Ex. 3, pp. 7-8).

Lastly, even if Verizon is correct in arguing that the extent of its liability per § 1-303(a)(2) is specified in its tariff, its argument that this precludes the imposition of civil penalties would still fail. Under Maryland law, any ambiguity in a tariff is construed against the drafting party, which is the public service company. *Marriott Corp. v. Chesapeake & Potomac Tel. Co. of Md.*, 124 Md. App. 463, 475, 723 A.2d 454 (1998). Additionally, limitations of liability or exculpatory clauses are generally construed narrowly against the drafting party. *Adloo v. H.T. Brown Real Estate*, 344 Md. 254, 267-68, 686 A.2d 298 (1996). If the Verizon 9-1-1 tariff was intended to limit the ability of the Commission to impose civil penalties, it does not expressly state such a limitation upon the Commission, nor does it even imply it. As such, the Verizon tariff fails to restrict the ability of the Commission to impose a civil penalty that any tariff could do this, for the provision of 9-1-1 services.

- (b) Staff's previous Brief details the basis for assessing civil penalties for the failure to provide 9-1-1 services.

Staff in its Brief of May 5, 2011, detailed how Commission regulations at COMAR 20.45.05.09A & B require Verizon to "take appropriate measures to assure that service interruptions" are kept to a minimum, and to make provisions to meet emergencies, and to "inform its employees as to procedures to be followed in the event of these contingencies in order to prevent or mitigate interruption or impairment of services." Staff's Brief also discussed how the failure to meet this regulation would be a violation of the requirement of Pub. Utils. § 5-303 that Verizon furnish "equipment, services, and facilities that are safe, adequate, . . . and efficient," and then described the legal basis for the Commission to issue a civil penalty under Pub. Utils. §§ 13-201 or 13-202. Staff incorporates these arguments from its Brief of May 5, 2011, into this Reply Brief.

- (c) Verizon admits that its 9-1-1 service outage on May 30, 2011, in which wireless and Voice Over Internet Protocol 9-1-1 service calls to several Maryland PSAPs lacked the necessary Automatic Location Information and Automatic Number Information was caused by two separate technicians who failed to follow procedures.

Verizon's Brief notes that the facts associated with the May 30, 2011, 9-1-1 outage are not in dispute. After the failure of a circuit breaker, two different technicians failed

to follow procedures at two different times, although Verizon adds that there is no evidence that the procedures were deficient or that the technicians' training was deficient. Vz. Br. p. 14. Verizon also admits that the evidence is undisputed that the impact of the power outage in the Newark central office resulted in the loss of ALI and ANI data for some wireless and VoIP 9-1-1 calls, although it calls this result unforeseeable and claims that it did not impact public safety. Vz. Br. p. 15. Verizon then discusses the difficulty that some PSAPs had in contacting their 9-1-1 service customer care center, which during the outage was experiencing four times the anticipated call volume. Vz. Br. p. 16. Verizon's Brief concludes that it responded appropriately to the outage, and that there was no harm to public safety.

As Staff views the undisputed facts, the loss of 9-1-1 service on May 30, 2011, is very similar to the other recent 9-1-1 outages. Here, the failure of two different technicians at different times to follow procedures led to the loss of ANI and ALI data for 9-1-1 service calls made using wireless telephones and over VoIP. Such a loss clearly violates Commission regulations:

- A. Each utility shall take appropriate measures to assure that service interruptions shall be kept to a minimum.

B. Each utility shall make provisions to meet emergencies resulting from failure of power, sudden and prolonged increases in traffic, absences of employees, or from fire, storm, or similar contingencies. The utility shall inform its employees as to procedures to be followed in the event of these contingencies in order to prevent or mitigate interruption or impairment of service.

COMAR 20.45.05.09A & B. Clearly the separate failures of two Verizon employees to follow procedures, which led to the interruption or significant impairment of 9-1-1 service on May 30, 2011, violated the regulation. Such a violation would also be a violation of the requirement of Pub. Utils. § 5-303 to furnish equipment, services, and facilities that are safe, adequate, and efficient.

(d) The Commission should assess a civil penalty against Verizon for the series of 9-1-1 service outages that have occurred in 2010 and 2011.

Staff in its Brief of May 5, 2011, recommended that the Commission impose a civil penalty under Pub. Utils. §§ 13-201 and 13-202 for the 9-1-1 outages to the Prince George's and Montgomery County PSAPs on July 25, 2010, December 17, 2010, January 26, 2011, and January 31, 2011 as suggested by the Commission's Order to Show Cause. Staff now recommends that the Commission consider imposing a civil penalty for the outages in 2010 and 2011 for which notice of potential penalties was given

in the Commission's Order to Show Cause of March 25, 2011, and the Notice of Show Cause Continuation of July 12, 2011.⁴

- (e) The Commission should issue an order with appropriate findings of fact regarding the recent failures involving Verizon's 9-1-1 service in Maryland.

Since the Commission issued a Letter Order on September 16, 2010, regarding outages in July, August, and September 2010 to the Verizon 9-1-1 system in St. Mary's and Calvert Counties,⁵ the Commission has held hearings on October 13, 2010, and on March 2, April 5 and 12, and September 27, 2011, regarding various 9-1-1 outages. Verizon has also made several filings discussing proposed commitments in response to the outages and concerns of the Commission and PSAPs. However, following these hearings the Commission did not issue any orders regarding the outages or the Verizon filings, nor has it accepted any of the Verizon commitments. Staff encourages the Commission to issue an order regarding the Verizon 9-1-1 system outages to provide guidance to the Staff as well as to Verizon, the Emergency Number Systems Board, and the PSAPs regarding Verizon's responsibilities in providing 9-1-1 services that are "safe, efficient, and adequate."

⁴ Staff previously reviewed the factors to consider in determining a civil penalty under Pub. Utils. §§ 13-201 and 13-202 in its May 5, 2011, Brief.

⁵ The Commission was later notified that the Charles County PSAP was also affected by 9-1-1 outages. See Mail Log No. 125619.

3. Conclusion.

As discussed above and in its Brief of May 5, 2011, Staff recommends that the Commission find that Verizon violated the requirement of Pub. Utils. § 5-303 by failing to maintain 9-1-1 equipment, services, and facilities that are safe, adequate, and efficient, and impose a civil penalty under §§ 13-202 and 13-201 for the series of 9-1-1 outages in 2010 and 2011.

Michael A. Dean
Assistant Staff Counsel

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the above document was mailed by first-class, U.S. Mail, postage prepaid this 10th day of November, 2011, to the Service List of Case No. 9265.

Michael A. Dean