COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own motion pursuant to G.L. c. 159, §§ 12 and 16 into Verizon New England, Inc. d/b/a Verizon Massachusetts' provision of Special Access Services	DTE 01-34

MOTION OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC. FOR PROTECTIVE TREATMENT OF CONFIDENTIAL INFORMATION

AT&T Communications of New England, Inc., requests that the Department of Telecommunications and Energy grant protection from public disclosure of certain confidential, competitively sensitive and proprietary information submitted in this proceeding in accordance with G.L. c. 25, § 5D. Specifically, AT&T requests that DTE-ATT 1-1 and the attachments to DTE-ATT 1-4 and DTE-ATT 1-10 be granted the highest level of protective treatment because they contain competitively sensitive and highly proprietary information.

These materials have already been provided to the Department and to Verizon. If these materials are placed in the public record, however, AT&T's competitors would be able to use them to gain an unfair competitive advantage.

I. LEGAL STANDARD.

Confidential information may be protected from public disclosure in accordance with G.L. c. 25, § 5D, which states in part that:

> The [D]epartment may protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be on the

> proponent of such protection to prove the need for such protection. Where the need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

In determining whether certain information qualifies as a "trade secret," Massachusetts courts have considered the following:

> (1) the extent to which the information is known outside of the business;
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> (2) the extent to which it is known by employees and others involved in the business;
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> (3) the extent of measures taken by the employer to guard the secrecy of the information;
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> (4) the value of the information to the employer and its competitors;
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> (5) the amount of effort or money expended by the employer in developing the information; and
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> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. *Crampton*, 282 N.E.2d 921, 925 (1972).

The Department has recognized that competitively sensitive information is entitled to protective status. *See, e.g.*, Hearing Officer's Ruling On the Motion of CMRS Providers for Protective Treatment and Requests for Non-Disclosure Agreement, D.P.U. 95-59B, at 7-8 (1997) (the Department recognized that competitively sensitive and proprietary information should be protected and that such protection is desirable as a matter of public policy in a competitive market). As Bell Atlantic pointed out in a Motion for Confidential Treatment filed on October 26, 1999 in D.T.E. 99-271, "[information that provides] competitors of those carriers with valuable information regarding each individual carrier's marketing plans, entry strategy, and changes in market share… is precisely the type of data the G.L. c. 25, § 5D authorizes the

Department to protect from public disclosure." *See* Bell Atlantic's Motion for Confidential Treatment, D.T.E. 99-271, at 2 (October 26, 1999).

II. ARGUMENT.

A. ATTACHMENT A TO DTE-ATT 1-4.

Attachment A to DTE-ATT 1-4 provides internal AT&T data on Verizon's performance in provisioning special access circuits to AT&T. This information was developed by AT&T at AT&T's expense for its own internal purposes. AT&T's performance data is not publicly available, is not shared with non-AT&T employees for their personal use and is not considered public information. Any dissemination of this information to non-AT&T employees, such as contract consultants, is done so on a proprietary basis. Even AT&T employees who review these materials are subject to non-disclosure agreements and are allowed to use them for internal business reasons only.

Attachment A to DTE-ATT 1-4 contains Verizon performance data <u>specific to AT&T</u>. As such, it is distinguishable from the performance data submitted by Verizon in this proceeding in that Verizon has reported its performance for wholesale non-affiliated carriers in the aggregate and has not provided any carrier-specific data. AT&T-specific data is valuable commercial information that AT&T's competitors could unfairly use to their own advantage. For example, AT&T's competitors can advertise that they receive better provisioning and maintenance performance from Verizon than does AT&T. For this reason, AT&T requests that the data not be placed on the public record and not be provided to other CLECs in this proceeding.

This performance data resembles the carrier specific performance data which Verizon reports under the Carrier-to-Carrier ("C2C") metrics and the Performance Assurance Plan ("PAP"). The Department grants protective treatment to these carrier specific C2C and PAP reports, requiring Verizon to provide the confidential carrier specific information only to the

Department and to the specific carrier, but not to other parties. Just as the C2C and PAP reports are kept confidential, Attachment A to DTE-ATT 1-4 should be granted protective treatment.

B. ATTACHMENTS B-1 AND B-2 TO DTE-ATT 1-4.

Attachments B-1 and B-2 provide the prices that AT&T pays Verizon-North, Verizon-South and other ILECs for special access circuits. These prices reflect the discounts from tariffed rates that ILECs provide to AT&T, as opposed to other carriers. This is exactly the type of pricing information that the Department has previously recognized is proprietary and should not be made available on the public record. *See e.g.*, *Colonial Gas Company*, D.P.U. 96-18 at 4 (1996) (granting protective treatment to pricing terms contained in supply contracts); *Standard of Review for Electric Contracts*, D.P.U. 96-39 (August 30, 1996), at 2 (granting protective treatment to electricity contract prices).

Moreover, the pricing information contained in the attachments to AT&T's response to DTE-ATT 1-4 is not publicly available, is not shared with non-AT&T employees for their personal use and is not considered public information. Any dissemination of this information to non-AT&T employees, such as contract consultants, is done so on a proprietary basis. Even AT&T employees who review these materials are subject to non-disclosure agreements and are allowed to use them for internal business reasons only.

Furthermore, this pricing information is valuable commercial information that competitors could unfairly use to their own advantage. Disclosure of such information could be harmful both to AT&T and Verizon. To the extent that competing carriers have greater discounts from Verizon's tariffed rates than AT&T, those carriers could use that information to a competitive advantage. Also, disclosure of this information could place Verizon at a disadvantage in the competitive marketplace in which it seeks to negotiate tariff discounts with

CLECs on an ongoing basis. Thus, these materials should be granted proprietary treatment and should not be placed on the public record.

C. DTE-ATT 1-1.

In response to DTE-ATT 1-1, AT&T provides the standard intervals which CLECs have agreed to provide AT&T for the provisioning of special access circuits. These intervals are terms of negotiated agreements with third-party vendors to AT&T. These intervals are competitively sensitive information. Verizon can use its knowledge of the intervals offered by CLECs to develop sales strategies for offering services that compete with AT&T services. For example, Verizon could advertise that Verizon provides DS1 service to its retail customers in a shorter interval than CLECs agree to provision DS1 circuits to AT&T which in turn provides service to its customers. Just as pricing terms in contracts are regularly kept confidential, the intervals negotiated and agreed upon by AT&T and other CLECs should be granted protective treatment.

The CLEC-ATT intervals are not publicly available, are not shared with non-AT&T employees for their personal use and are not considered public information. Any dissemination of this information to non-AT&T employees, such as contract consultants, is done so on a proprietary basis. Even AT&T employees who review these materials are subject to non-disclosure agreements and are allowed to use them for internal business reasons only.

D. ATTACHMENT TO DTE-ATT 1-10.

The attachment to DTE-ATT 1-10 provides the number of Verizon DS1 and DS3 circuits AT&T commits to use each month over a period of years. The possession of this information would provide AT&T's competitors with a significant competitive advantage. These "forecasts" inform competitors about AT&T's projected use of leased facilities from Verizon to serve AT&T customers. The information in the attachment to DTE-ATT 1-10, therefore, provides insight into

AT&T's internal decision-making processes and sheds light on AT&T's marketing plans and entry strategy. As Verizon asserted in its request for protective treatment of access line forecasts, competitors could find such service-specific information useful in establishing sales strategies that target particular market segments. For that reason, the Department granted Verizon protective treatment of access line forecasts, stating that "Verizon's internal growth forecasts are confidential, proprietary material which warrant protective treatment. The response…contains Verizon's forecasted growth for access lines…, and, if made public, would assist competitors in developing competing marketing strategies." *Hearing Officer Ruling on Motions for Confidential Treatment by Verizon*, D.T.E. 01-20 (December 21, 2001), at 5, 11.

In addition, to the extent that customers perceive that AT&T's level of customer service depends on whether AT&T leases circuits from Verizon, disclosure of this information gives competing carriers knowledge which they can use to influence customer perceptions about the level of service AT&T provides. A carrier that knows the exact number of circuits that AT&T will utilize over the next several years by leasing facilities from Verizon can capitalize on that information for marketing purposes. The carrier can refer to the extent to which AT&T relies on Verizon facilities in order to gain an unfair competitive advantage. Customers differentiate carriers on the basis of the extent to which carriers use their own network facilities as opposed to leased facilities. The attached Affidavit of Joseph Stack, previously submitted in the D.T.E. 01-31 proceeding, supports this fact.

As demonstrated above, the commitment numbers in the attachment to DTE-ATT 1-10 provide the same type of information as the percentages of "Type II" or "off-net" provisioning provided in the testimony of Anthony Fea in D.T.E. 01-31 and submitted in this docket. The Department granted protective treatment to the percentages in Fea's testimony, recognizing that

"a carrier competing with AT&T in Massachusetts could use the information in the Fea testimony as a marketing tool to gain unfair advantage, and, therefore, that information should be protected." Order, D.T.E. 01-31 – Phase I (May 8, 2002), at 15. Likewise, AT&T's commitment to use a specific number of DS1 and DS3 circuits provisioned by Verizon should be granted protective treatment for at least as long as the length of the commitment.

Conclusion.

For these reasons, AT&T requests in accordance with G.L. c. 25, § 5D, that the Department grant its Motion for Protective Treatment of the response to DTE-ATT 1-1, the attachments to DTE-ATT 1-4, and the attachment to DTE-ATT 1-10. This information is entitled to protective treatment for at least five years, except for the circuit commitments provided in the attachment to DTE-ATT 1-10 which deserve protective treatment for at least the length of the commitments. After five years, there will be sufficient change in the market so that the proprietary information contained in these responses will no longer be relevant.

Respectfully submitted,

AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

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