TO: All Parties to Fiber Technologies Networks, L.L.C., D.T.E. 01-70
FROM: Robert J. Howley, Hearing Officer
DATE: February 14, 2002
RE: Ruling on Motions to Compel
CC: Mary Cottrell, Secretary
Commission

HEARING OFFICER'S RULING ON SHREWSBURY'S ELECTRIC LIGHT PLANT MOTIONS TO COMPEL DISCOVERY RESPONSES BY FIBER TECHNOLOGIES NETWORKS, L.L.C.

I. INTRODUCTION

On November 20, 2001, Shrewsbury's Electric Light Plant ("SELP") filed with the Department of Telecommunications and Energy ("Department") a Motion to Compel Discovery ("SELP Motion") regarding the responses of Fiber Technologies Networks, L.L.C. ("Fibertech") to SELP's Information Requests SELP 1-6, 1-7, 1-8, 1-12, 1-13. On November 28, 2001, Fibertech filed an opposition to the SELP Motion ("Opposition"). On November 28, 2001, SELP filed a second Motion to Compel Discovery regarding Fibertech's responses to SELP's Information Requests SELP 2-6 and 2-12 ("SELP Second Motion"). On November 29, 2001, Fibertech filed an opposition to the SELP Second Motion ("Second Opposition"). On January 24, 2002, SELP filed a third Motion to Compel Discovery regarding Fibertech's responses to SELP's Information Requests SELP 2-7, 2-8, 2-9, 2-10, 2-11, 3-11, 3-14 ("SELP Third Motion"). Fibertech filed an opposition to the SELP Third Motion on January 25, 2002 ("Third Opposition").

II. SELP'S MOTIONS TO COMPEL

SELP requests that the Department order Fibertech to provide complete responses to SELP 1-6, 1-7, 1-8, 1-12, 1-13. SELP seeks documents relating to Fibertech's leases, rates, nature of services, and business plan for providing local exchange voice, data and cable services (SELP 1-6, 1-7, 1-8, 1-12, 1-13). SELP argues that this information is integral to

SELP's preparation of its case (SELP Motion at 2). According to SELP, without this information neither SELP nor the Department can fully evaluate whether Fibertech is transmitting intelligence or meets the other criteria for protection under the pole attachment statute, G.L. c. 166, § 25A (id. at 3-4). SELP represents that if this information is proprietary, it is willing to execute a non-disclosure agreement with Fibertech (id. at 6).

With respect to SELP 2-6 and 2-12, SELP seeks documents relating to several customer agreements referenced in Fibertech's pre-filed testimony. SELP argues that without this information, neither SELP nor the Department can fully evaluate whether Fibertech is transmitting intelligence or meets the other criteria for protection under G.L. c. 166, § 25A (SELP Second Motion at 3-4). SELP again represents that if this information is proprietary, it is willing to execute a non-disclosure agreement with Fibertech (id. at 6).

With respect to SELP 2-7, 2-8, 2-9, 2-10, 2-11, 3-11, and 3-14, SELP seeks documents relating to specific customer agreements referenced in Fibertech's pre-filed testimony and information as to whether Fibertech's agreements with its customers are privately-negotiated. Fibertech also seeks an explanation as to how a Global NAPS matter referred to in Fibertech's pre-filed testimony is relevant (SELP 3-11). According to SELP, without this information neither SELP nor the Department can fully evaluate whether Fibertech is a common carrier or meets the other criteria for protection under G.L. c. 166, § 25A (SELP Third Motion at 7).

III. FIBERTECH'S OPPOSITION

Fibertech objects to producing its leases and customer agreements, maintaining that the material is competitively sensitive (Opposition at 5). With respect to providing its business plan and other related documents, Fibertech states that a certain number of these documents contain competitively sensitive, proprietary and confidential information (id. at 4-5). Fibertech also argues that the administrative burden of securing protective treatment for these documents outweighs any benefit to the Department or SELP from producing the materials (id. at 5).[1]

Fibertech objects to producing its customer agreements as referenced in SELP 2-6, 2-7, 2-8, 2-9, 2-10, 2-12, 3-14, maintaining that this information is the same type as at issue in the first SELP Motion. Fibertech argues that this information is competitively sensitive, that Fibertech's relationship with its customers is not at issue in this dispute, and that the terms under which Fibertech conducts business outside of Massachusetts do not establish whether it meets the requirements of G.L.c. 166, § 25A (Second Opposition at 1, Third Opposition at 1-2).

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[1] In the event Fibertech is compelled to respond to SELP's information requests, Fibertech seeks a non-disclosure agreement from SELP and protective treatment from the Department pursuant to G.L. c. 25, § 5D (Opposition at 5).

Finally, with respect to SELP 3-11, Fibertech explains that it first cited the Global NAPS case, Petition of Global Naps, Inc. against New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts regarding dark fiber, D.T.E. 98-116 (April 2000), Civil Action 00-10938-RWZ (D. Mass., July 11, 2001) ("Global NAPS") in its initial Complaint. In its Answer, SELP responded that Global NAPS was not relevant (Third Opposition at 2). In an information request propounded by Fibertech to SELP on October 29, 2001 (FIBERTECH 1-20), Fibertech asked SELP to explain why the Global NAPS case is *not* relevant. SELP objected to FIBERTECH 1-20 on the grounds that it called for a legal conclusion. In the information request at issue in this motion (SELP 3-11), SELP then asked Fibertech to explain why Global NAPS *is* relevant. In response, Fibertech referred to SELP's earlier objection to FIBERTECH 1-20 (id.).[2] Fibertech argues that SELP cannot obtain discovery it is not wiling to provide itself.[3]

IV. ANALYSIS AND FINDINGS

With respect to discovery (i.e., information requests), the Department's regulations provide:

> The purpose for discovery is 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 the issues, protect the rights of the parties, and ensure that a complete and accurate record is compiled. 220 C.M.R. § 1.06(6)(c)1.

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[2] FIBERTECH 1-20: Please refer to Paragraph 28 of the Response of Shrewsbury Electric Light Plant in this matter. Explain why the Global NAPS cases are irrelevant to the instant matter.

RESPONSE: SELP objects to this request on the grounds that it calls for a legal conclusion.

SELP 3-11: Please refer to page 10 of Mr. Lundquist's testimony. How is the Global NAPS case referred to relevant to a pole attachment dispute under G.L. c. 166, § 25A?

RESPONSE: Please refer to SELP's response to Fibertech 1-20.

[3] Fibertech did not file a Motion to Compel a further response regarding FIBERTECH 1-20.

Hearing officers have discretion in establishing discovery procedures and are guided, but not bound, in this regard by the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26 et seq. 220 C.M.R. § 1.06(6)(c)2. Rule 26 provides that:

> Parties may obtain discovery regarding any matter, not privileged, relevant to the subject matter involved in the pending action.... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Mass. R. Civ. P. 26(b).

SELP seeks information from Fibertech involving the nature and scope of Fibertech's services, business plan and arrangements with customers. Fibertech contends that the requested material is not relevant to this proceeding. Fibertech also argues that the material is competitively sensitive and that securing protective treatment is an unnecessary administrative burden. I find, however, that the documents SELP requests are discoverable because information contained in the documents may be relevant to this proceeding. Specifically, the nature of services Fibertech provides to its customers over dark fiber may be relevant to whether Fibertech's attachments are afforded protection under G.L. c. 166, § 25A and 220 C.M.R. §§ 45.00, et. seq. SELP's requests may lead to the discovery of admissible evidence. See 220 C.M.R. § 1.06(6)(c). While Fibertech argues that its leases, business plan and related documents are confidential, SELP represents that it is willing to enter into a non-disclosure agreement to view this protected material.[4] Therefore, after due consideration, I grant SELP's Motion to Compel Discovery responses with respect to information requests SELP 1-6, 1-7, 1-8, 1-12, and 1-13 and SELP 2-6, 2-7, 2-8, 2-9, 2-10, 2-11, 2-12, 3-14.

In SELP 3-11, SELP questions the relevancy of Global NAPS, as referenced in Fibertech's pre-filed testimony. In responding to SELP 3-11, Fibertech did not articulate any direct objection. Rather, Fibertech referred to SELP's earlier objection to Fibertech's similar information request. Global NAPS was cited in Fibertech's pre-filed testimony about the nature of dark fiber and the role of dark fiber in the development of facilities-based competition. This testimony includes a number of references to Federal Communication Commission orders, case law and precedent discussing dark fiber and its relation to telecommunications services. See e.g., Lundquist at 6, 9-11, 13-15, 21-22. Fibertech's pre-filed testimony addresses in some detail legal precedent to support its complaint. Therefore, I find that SELP 3-11 is an appropriate information request. Because Fibertech's answer to SELP 3-11 is unresponsive, Fibertech is directed to supplement its response to SELP 3-11, providing the basis for its argument that Global NAPS is relevant.

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[4] Once the parties enter into a non-disclosure agreement, Fibertech must file a properly supported motion for confidential treatment pursuant to G.L. c 25, § 5D.

In addition, both parties will have a further opportunity to fully address the relevancy of Global NAPS to this proceeding either on brief or in appropriate legal pleadings.

Under the provision of 220 C.M.R. § 1.06(6)(d)(3), any aggrieved party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation by Tuesday, February 19, 2002, at 5:00 p.m. A copy of this Ruling must accompany any appeal. Any response to any appeal must be filed by 5:00 p.m. Thursday, February 21, 2002.