COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

A-R CABLE SERVICES, INC., ET ALS	)	
V.	)	D.T.E. 98-52
MASSACHUSETTS ELECTRIC COMPANY	)	

REPLY OF A-R CABLE SERVICES, INC., ET ALS TO ANSWER OF MASSACHUSETTS ELECTRIC COMPANY TO THEIR MOTION FOR A PROTECTIVE ORDER

I. INTRODUCTION

On August 14, 1998, Massachusetts Electric Company ("MECo") filed its Answer to Complainants' August 10, 1998 Motion for Protective Order pursuant to G.L.c. 25, §5D. In their Motion**,** Complainants established that the information for which they seek exemption from public disclosure is entitled to such protection, given the fact that this information is expressly kept confidential under G.L.c. 166a, §8. See, G.L.c.4, §7(26) (defining "public record" as excluding materials "(a) specifically or by necessary implication exempted from disclosure by statute..."). Complainants further demonstrated that the information to be protected is of a commercially sensitive nature and warrants protection from public disclosure on that separate ground as well. G.L.c. 25, §5D. MECo, however, argues that public disclosure of the requested information should be required and refuses to accept disclosure of the requested information to its

counsel under a non-disclosure agreement as an alternative to public disclosure. In this Reply, the Complainants respond to the arguments raised in MECo's Answer to their Motion.

II. The Department's Obligation to Consider the Interest of Cable Subscribers and Utility Customers Does Not Require it to Order Public Disclosure of the Information Requested in MECo-6 and DTE - CABLE-1-4

MECo has argued that the Department must require the public disclosure of the requested information in order to make findings in this case which consider the interest of cable subscribers and utility customers, even if the requested information is entitled to statutory exemption from public disclosure. (MECo Answer at 3-4). MECo's argument is without merit. The Department has the requested information and may make findings based upon that information if it deems such findings necessary to its consideration of the interest of cable subscribers and utility customers. Public disclosure of this information is not a necessary precondition for the findings to be made by the Department. Furthermore, MECo's rights to cross-examine the Complainants' witness and brief the subject matter of the requested information is fully protected-Complainants' Motion for a Protective Order expressly permits MECo counsel's access to the requested information. (Motion at 1). Contrary to MECo's claim (MECo Answer at 3), if Complainants' Motion is granted, MECo has the opportunity to examine the data requested and the opportunity to challenge any assertions made by the Complainants.

III. The Department has the Information Needed in Order to Support its Decision in this Proceeding and Need not Force the Public Disclosure of the Requested Information

As noted above, the Department already has the information which MECo argues must be made public in order for the Department to consider, in its determination of MECo's pole attachment rates, the interests of cable subscribers and utility customers. Thus, to the extent that

the Department deems such information relevant to its consideration of these interests, the Department is in a position to take that information into account without requiring public disclosure. Contrary to MECo's implication (MECo Answer at 4), a finding based upon a non-public, proprietary portion of the record is not vulnerable on appeal as unsupported by the record. The sealed portion of the hearing record is also part of the record and would be available to the Supreme Judicial Court in the event of any appeal from the final decision in this proceeding.

IV. MECo's Reliance Upon Discovery Rules is Misplaced and Ignores the Central Reason for According Protection from Public Disclosure

MECo next argues that Complainants have not met their burden of demonstrating that the requested information should be exempt from public disclosure. (MECo Answer at 5-7). Complainants do not dispute that they bear the burden of demonstrating that an exemption from public disclosure is warranted. (Complainants' Motion at 1,2). *Boston Edison Co.*, D.P.U. 97-95 at 13,14. (Interlocutory Order dated July 2, 1998).

Complainants have met their burden by demonstrating that the requested information is expressly exempted by statute from public disclosure. G.L.c.166A, §8. MECo, for its part, does not challenge this exemption on the merits. Rather, it argues that this statutory exemption, which remains in full force and effect, is only "past practice" that the Department should disregard. (MECo Answer at 6). However, the General Court has not authorized the Department to ignore this statutory exemption. Nor, as MECo implies, is their any conflict between the Department's obligations under G.L.c.166A, §8, G.L.c. 25, §5D and G.L.c.166, §25A. (MECo Answer at 6). Consistent with accepted canons of statutory construction, the Department should apply these statutes in a manner which harmonizes them in accordance with their purposes and avoids the

statutory conflict which MECo has manufactured. *Yeretsky v. City of Attleboro*, 424 Mass. 315 (1997) (two or more statutes that relate to same subject matter should be construed together so as to constitute a harmonious whole consistent with legislative purpose). It would be erroneous for the Department to construe and apply G.L.c.25, §5D in a manner which conflicts with G.L.c. 166A, §8. The purposes of the latter section would be fatally undermined if the Department were to require public disclosure of the same information pursuant to the former section.

Furthermore, contrary to MECo's assertions, the data provided by the Complainants is commercially sensitive and its disclosure beyond MECo counsel and outside consultants would be harmful to both cable operators and their customers. The information requested contains internal financial data which is not available to the public today. The fact that some cable operators are public companies does not change the fact that their Massachusetts-specific revenue data- either in the aggregate or by breakdown- is not publicly disclosed. Only multi-state aggregated data is disclosed to the public and that information has been provided to MECo without objection. Disclosure of the specific information requested would impair the commercial interests of cable operators with parties with whom they have business dealings, given the type of information which has been provide to the Department, as well as result in competitive harm.The increasingly competitive nature of the video services market has been recognized by the Department, as its ongoing investigation in D.P.U. 97-95 and its rulemaking in D.P.U. 97-96 readily attest. MECo itself is assisting the entry of its affiliate NEESCom into the telecommunications market. A MECo in house witness in this proceeding, Mr. Anundson, has testified that he worked on the development of a NEES companies policy that permits NEESCom fiber to be placed in power supply space, but does not permit the placement of coaxial cable of hybrid fiber coaxial cable used

by cable operators in that power supply space. The fact is that the information requested is competitively sensitive and the NEES companies stand in the shoes of a competitor of cable operators.

MECo's next claim, that the execution of a nondisclosure agreement would "overtake the briefing schedule" (briefs due in mid-September), is unfounded. MECo is no stranger to non-disclosure agreements. Complainants are prepared to adopt the same non-disclosure agreement being used by Boston Edison Company in D.P.U. 97-95 in order to avoid such delay. A copy of that nondisclosure agreement is attached.

. VI. MECo's Speculation About Prior Public Disclosure of the Requested Information is Without any Merit and Does not Demonstrate that such Prior Public Disclosure has Occurred

MECo finally alleges that "it is likely that Complainants have disclosed the requested data in other fora." (MECo Answer at 7). There is absolutely no support for this blanket assertion. Indeed, if the information requested by MECo were as public as MECo claims, it would have been as readily available to MECo as the MECo FERC Form 1. SEC filings made by some of the Complainants contain national, aggregated data, not data specific to Massachusetts cable operations. Complainants have previously explained that in the absence of a system-wide cost of service rate filing that they would not file with the Cable Television Division of the Department even the cable revenue data which is being sought. The prevalent FCC Form 1240, does not provide for disclosure of all Massachusetts cable revenues or revenues from other sources.

MECo mixes together with its final argument a claim that since balance sheet information may have been publicly disclosed, income statement data should be disclosed publicly, despite the express statutory exemption from public disclosure of income statement data (e.g., revenues)

under G.L.c. 166A, §8. (MECo Answer at 8). MECo's argument is devoid of any logic and would place the Department in violation of G.L.c. 166, §8.

Finally, Complainants must underscore that their Motion does *not* deprive MECo of access to the protected information. MECo counsel and outside consultants would be afforded access. The Department has recognized the need to limit the disclosure of information to counsel and outside consultants, as Complainants' Motion requested. *Boston Edison Company*, D.P.U. 97-95 at 11 (Interlocutory Order dated July 2, 1998). Given the converging character of the businesses of the Complainants and NEES, Complainants are warranted in seeking to limit the disclosure of the requested information.

VII. CONCLUSION

For the reasons stated above, Complainants submit that their Motion for a Protective Order should be granted. If deemed necessary by the Department, the Complainants are prepared to execute a nondisclosure agreement in the form of the attached Boston Edison nondisclosure agreement. In the event that the Department rules that the information at issue must be disclosed publicly, Complainants request that they be permitted to aggregate their information so that the information specific to each Complainant cannot be discerned. Such aggregate disclosure would enable MECo's in house personnel to review the information with MECo counsel without compromising the legitimate commercial interests of the individual Complainants in non-public disclosure. Such aggregated data would also not run afoul of the statutory exemption under G.L.c. 166, §8. It would also be consistent with the manner in which the Department has

evaluated the relationship between utility pole attachment revenues and electric service revenues in making its findings and ruling under G.l.c. 166, §25A. *Greater Media,* D.P.U. 91-218 at (1992).

Respectfully submitted,

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By their attorneys,

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