D.T.E. 01-20 October 18, 2001

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts.

INTERLOCUTORY ORDER ON AT&T'S MOTION FOR RELIEF, MOTIONS TO COMPEL VERIZON RESPONSES TO AT&T INFORMATION REQUESTS, AND CONDITIONAL MOTION TO STRIKE VERIZON'S RECURRING COST MODEL

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I. INTRODUCTION

On May 8, 2001, Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon") and AT&T Communications of New England, Inc. ("AT&T") submitted to the Department of Telecommunications and Energy ("Department") their direct cases in Part A of D.T.E. 01-20, addressing the appropriate pricing, based on Total Element Long-Run Incremental Costs ("TELRIC"), for unbundled network elements ("UNEs"). On August 31, 2001, the Department issued an Interlocutory Order ("August 31 Interlocutory Order") on an August 13, 2001 Appeal by Verizon of the Hearing Officer's August 8, 2001 Ruling ("August 8 Ruling") on motions to compel discovery responses. The August 8 Ruling, in part, had denied a Verizon motion to compel certain discovery responses by AT&T. The August 31 Interlocutory Order granted Verizon's Appeal and ordered AT&T to produce responsive answers to Verizon's discovery requests at issue by September 7, 2001.

On September 7, 2001, AT&T filed a Motion for Reconsideration of portions of the Department's August 31 Interlocutory Order with respect to: (1) one information request involving intellectual property of third parties, and (2) the time for producing further responses ("Motion for Relief").[1] AT&T requests it not be required to produce a response to

[1] For reasons discussed in Section II.A below, the Department will treat AT&T's Motion for Reconsideration as a Motion for Relief.

information request VZ-ATT 1-23[2] and that the Department grant an extension for AT&T to produce responsive answers to the other 39 information requests subject to the August 31 Interlocutory Order.

AT&T accompanied its motion with a Conditional Motion to Strike Verizon's recurring cost model ("Motion to Strike"), should the Department deny AT&T's Motion for Reconsideration. Verizon filed a single Reply to AT&T's Motion for Relief and Motion to Strike on September 20, 2001 ("VZ Reply to Motion for Relief"). AT&T filed a Surreply[3] on September 26, 2001 ("Motion for Relief Surreply").

AT&T also has filed two motions to compel Verizon to respond to certain AT&T information requests. On September 7, 2001, AT&T filed a motion to compel Verizon responses to 14 AT&T information requests ("Motion to Compel"). On September 20, 2001, Verizon filed a Reply to that motion ("VZ Reply to Motion to Compel"). Then, on September 26, 2001, AT&T filed a Surreply to its Motion to Compel ("Surreply to Motion to Compel"). On September 19, 2001, AT&T filed a second Motion to Compel Verizon responses to information requests ATT-VZ 2-41 and 27-2(g) regarding Verizon's guidelines for planning its interoffice facilities ("September 19 Motion to Compel"). In its Reply on

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[2] VZ-ATT 1-23 states: "Provide, in electronic format, the geocoded data set for the State of Massachusetts used to produce the clusters in HAI 5.2a." AT&T responded: "To the extent that the question is seeking any software or documentation that is the intellectual property of PNR, AT&T is not able to provide such information, but states that such material is commercially available from PNR [now TNS]."

[3] Although not customary, the Department permitted AT&T to file the surreply in the interest of completeness. We did so despite the chronically disputatious nature of telecommunications litigation. We note, however, and emphasize that this permission was highly exceptional and sets no pattern for future cases.

September 24, 2001, Verizon agreed to supplement its responses to ATT-VZ 2-41 and 27-2(g) ("VZ Reply to September 19 Motion to Compel"), and it did so on September 25, 2001.

II. MOTIONS REGARDING DISCOVERY DISPUTES

A. Introduction

AT&T has captioned its motion to be relieved of responding to information request VZ-ATT 1-23 and the time for producing discovery responses compelled by the August 31 Interlocutory Order as a Motion for Reconsideration. Pursuant to 220 C.M.R. § 1.11(10), a party may file a motion for reconsideration within 20 days of service of a final Department Order. The Department has repeatedly held that 220 C.M.R. § 1.11(10) limits reconsideration to final Department Orders, not interlocutory Orders. See Verizon Alternative Regulation, D.T.E. 01-31-Phase I, Hearing Officer Ruling on Motion of AT&T Communications of New England, Inc., for Leave to Seek Reconsideration or Clarification, at 3-4 (August 20, 2001) and cases cited; Price Cap Plan, D.T.E. 94-50, Interlocutory Order on Motions for Clarification of NYNEX, NECTA, Attorney General and AT&T, at 3 n.3 (July 14, 1994) (Department's procedural rules expressly limit reconsideration to Final Orders; as captioned, Motion for Reconsideration of interlocutory Order is deficient and beyond review). The August 31 Order in this proceeding is an interlocutory Order and not a final Order; therefore the Department could deny AT&T's motion for reconsideration on that ground alone without reaching the merits. Granting reconsideration of an interlocutory Order would be a considerable departure from both our procedural rules and past precedent, and would require,

at a minimum, a strong showing by the moving party that such a departure is not merely reasonable, but necessary for the orderly administration of this proceeding.[4]

We find that departure from long-standing precedent is inappropriate – in fact, to do so would violate the very principle of "reasoned consistency" that AT&T invokes in support of its arguments (Motion for Relief at 6; AT&T's Opposition to Verizon's Motion to Compel at 7-8 (July 12, 2001)) – and is, in this instance, unnecessary. AT&T's request is in the nature of a motion requesting relief from the Department's August 31 Interlocutory Order to produce a response to VZ-ATT 1-23, just one of the many responses that the order directed AT&T to produce. AT&T could have filed such a motion, and in substance has done so, despite the reference to reconsideration. In the interests of fairness and expedition, we will overlook the deficient captioning and treat AT&T's pleading as if it is such a motion and rule on it. See, e.g., D.T.E. 94-50, Interlocutory Order on Motions for Clarification of NYNEX, NECTA, Attorney General and AT&T, at 3 (motion for reconsideration of interlocutory Order and "responses" treated as motions for clarification). Accordingly, AT&T's request for relief, like its motions to compel Verizon responses to certain information requests, will be considered under the Department's usual standard of review governing discovery disputes.

AT&T also requested that the Department extend the deadline until September 21 for producing responsive answers to all of the Information Requests at issue, a request Verizon did not oppose (VZ Reply to Motion for Relief at 11). September 21 has already passed, so we

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[4] Under 220 C.M.R. § 1.01(4), "where good cause appears, not contrary to statute, the Commission and any presiding officer may permit deviation from 220 C.M.R. 1.00." Resort to § 1.01(4) is, of course, done sparingly.

find the extension requested is moot. We direct AT&T to produce any remaining responses within ten days of issuance of this Order.[5]

B. Standard of Review

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).

Under a G.L. c. 25, § 4, delegation, 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).

C. AT&T Motion for Relief

1. Positions of the Parties

a. AT&T

AT&T states that it intends to comply with the August 31 Interlocutory Order by producing the responses involving intellectual property of its vendor, TNS (Motion for Relief

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[5] AT&T supplemented VZ-ATT 1-38, 1-39, 1-70 through 1-75, 1-114 through 1-128, 1-131, 1-135, 2-15 and 2-91 on September 7, 2001; VZ-ATT 1-20, 1-21, 1-25, 1-26, 1-78, 1-79, 1-82 and 1-83 on September 21, 2001; VZ-ATT 1-76 and 1-77 on September 26, 2001; and VZ-ATT 2-1 on October 16, 2001.

at 10). However, AT&T requests relief from the Department's order to "physically produce, as distinguished from making completely available for review and analysis," a response to VZ-ATT 1-23, which requests "the geocoded data set for the State of Massachusetts used to produce the clusters" in AT&T's proffered cost model HAI 5.2a-MA (id. at 1, 10). According to AT&T, the geocoded data set is not owned by TNS, but consists of data third parties have licensed to TNS, subject to the condition that it not be released (id. at 10). AT&T states that the legal limitation cannot be altered, and therefore AT&T cannot produce the response (id.).

AT&T asserts that its motion meets the Department's standard of review for reconsideration.[6] First, AT&T states that the Department may have issued the August 31 Interlocutory Order without knowing that TNS does not own and is not permitted to release the data that is the subject of VZ-ATT 1-23 (id. at 3). AT&T further argues that the Department incorrectly assumed in the August 31 Interlocutory Order that the evidentiary standard it set forth was consistent with precedent, and that AT&T did not have notice that the issue of information it would be required to produce for the evidentiary record would be "decided" in an order resolving a discovery dispute (id. at 3).

AT&T avers that the August 31 Interlocutory Order introduced a "new evidentiary standard" in requiring all relevant information to be produced in a form that can be marked for identification and introduced into the record of the Department's evidentiary proceeding (id. at 4). This standard, AT&T argues, is inconsistent with Department practice, violating the

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[6] AT&T argues that it brings to light previously unknown or undisclosed facts; that the Department's treatment of the issue was the result of mistake or inadvertence; and that AT&T was not given adequate notice of the issues involved (Motion for Relief at 2-3). As noted above, the Department applies this standard for reconsideration to final Orders only, and for ruling on the Motion for Relief the Department will only apply traditional discovery standards of review, not standards governing reconsideration.

principle of "reasoned consistency"[7] and imposing significant burdens on the parties and the Department (id. at 4-6, 9; Motion for Relief Surreply at 2). AT&T maintains that the access to the geocode data it has offered in previous pleadings in this case will provide Verizon with the appropriate ability to review and analyze the data, and that such access is adequate to fulfill AT&T's discovery obligation.[8] However, AT&T maintains that Verizon has yet to contact AT&T to arrange access (Motion for Relief at 9-10; Motion for Relief Surreply at 4). Further, AT&T states that the geocode data are "tertiary data" that are not direct or fundamental inputs to the HAI Model, analogous to some of the data Verizon objects to producing (Motion for Relief Surreply at 4).[9]

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[7] AT&T argues that the August 31 Interlocutory Order violates the reasoned consistency requirement of Massachusetts law, articulated by the Supreme Judicial Court in Massachusetts Automobile Rating & Accident Prevention Bureau v. Commissioner of Insurance, 401 Mass. 282, 287 (1987) (party is entitled to reasoned consistency in agency decision making; state agency may not refuse to admit evidence of a kind permitted in previous proceedings without articulating an objective reason) (Motion for Relief at 6).

[8] AT&T states that Verizon can "subject the data set to computer analysis" using "whatever software it deems to be appropriate to analyze the geocoded data set in any way that it sees fit, and can do so by accessing that data set remotely through TNS's computer system" (Motion for Relief at 10). Further, AT&T states that the access offered is consistent with the procedure used by the FCC to allow evaluation of such data in its universal service cost model proceeding (id. at 11; see also August 31 Interlocutory Order at 14-17).

[9] According to AT&T, the geocode data consist of a listing of millions of customer location data points by longitude and latitude with no independent significance, development of which did not require exercise of judgment or professional analysis; and the data are meaningful only once summarized and run through the clustering process (Motion for Relief Surreply at 4-5). AT&T states that the clustering results have been filed in this proceeding (id.).

b. Verizon

Verizon states that AT&T's motion is without merit, seeking merely to reargue its case (VZ Reply to Motion for Relief at 1-2). According to Verizon, the Department properly concluded that because the customer location data, software and methodology used by AT&T's HAI 5.2a-MA Model are highly relevant in this proceeding, AT&T must produce the requested information in full, and if such information is proprietary or intellectual property, AT&T must make arrangements with its vendors to provide the information under appropriate and workable nondisclosure agreements (id.).

Verizon asserts that AT&T improperly reargues its earlier proposal to offer remote electronic access to the geocode data, and, further, that this argument was rejected by the Department in its August 31 Interlocutory Order, which stated that such access was insufficient to afford Verizon a meaningful opportunity to review and analyze the data (id. at 5, citing August 31 Interlocutory Order at 17). Verizon states that, pursuant to the normal rules of discovery, it seeks to review and analyze data recognized as relevant to this proceeding (id. at 10). The legal limitation of the third-party agreement AT&T asserts "cannot defeat Verizon's legitimate interest" in reviewing the data requested in VZ-ATT 1-23 (id. at 6).

Verizon states that the Department did not "effectively adopt" a new evidentiary standard in the August 31 Interlocutory Order; rather, the Order enforced the Department's existing rules of discovery and evidence (id. at 8-10). Verizon further argues that AT&T misses the mark with its contention that rules of evidence allow study results to be admitted even if underlying data are not made available for admission in evidence (id. at 10). Whether AT&T's study is admissible as evidence in this proceeding, absent a response to Verizon's

discovery request, is not yet at issue before the Department (id. at 6). Under the applicable discovery rules, Verizon asserts, the only issue is whether AT&T's inability to produce a response to VZ-ATT 1-23 will deprive Verizon, and the Department, of relevant information; if so the issue then becomes the appropriate sanction (id. at 10). According to Verizon, the proper sanction in this instance would be striking those portions of AT&T's testimony on the HAI 5.2a-MA Model, because there is no means for other parties to verify any of the customer location data (id. at 7, 10).

2. Analysis and Findings

Verizon is correct in noting that whether AT&T's study is admissible as evidence in this proceeding, absent a response to Information Request ATT-VZ 1-23, is not yet at issue before the Department. The issue is whether the Department's normal rules of discovery require AT&T to produce this response.

The Department's standard of review for discovery, referencing Massachusetts Rules of Civil Procedure, Rule 26 et seq., states that parties to a Department proceeding "may obtain discovery regarding any matter, not privileged,[10] relevant to the subject matter" of the proceeding. In this case, the relevance of the geocode data and customer location database information has not been disputed (see August 31 Interlocutory Order at 13). Thus, the

[10] Neither party argues that the information sought in this proceeding is privileged under Department regulations or precedent. G.L. c. 30A, § 11 makes evidentiary privilege the only statutorily mandated evidentiary rule of exclusion. See Western Massachusetts Electric Company, D.P.U. 92-8C-A, Order on Appeal by Western Massachusetts Electric Company of Hearing Officer Ruling Granting Attorney General's Motion to Compel Discovery, at 22-30 (June 25, 1993) and Boston Gas Company, D.P.U. 88-67 (Phase I), at 15-22 (September 30, 1988) for discussion of privilege against disclosure of information in discovery disputes before the Department.

Department ordered AT&T to make arrangements with its vendors to produce responses to VZ-ATT 1-20, 1-21, 1-23, 1-25, 1-26, 1-82, and 1-83 (id. at 19).

Not until its present motion requesting relief from producing a response to VZ-ATT 1-23 did AT&T distinguish between this particular request for information and the others it had previously claimed were intellectual property of outside vendors. AT&T stated in its Opposition to Verizon's July 5, 2001, Motion to Compel (Verizon's first attempt to obtain this information) that it could not produce responses to VZ-ATT 1-20, 1-21, 1-23, 1-25, 1-26, 1-82, and 1-83. AT&T claimed that the "highly proprietary" information was not in AT&T's possession, custody, or control, but was commercially available from TNS (AT&T's July 12, 2001, Opposition to Verizon's Motion to Compel at 12-14). In its August 17, 2001, Opposition to Verizon's August 13, 2001, Appeal, AT&T still did not reveal that it could arrange with TNS to provide most of the information Verizon requested, nor did it distinguish the information it could obtain from TNS from the geocode data that even TNS could not release (AT&T's August 17 Opposition to Verizon's Appeal from the Hearing Officer's Ruling on Verizon's Motion to Compel at 10). Now, in its September 7 Motion for Relief, AT&T states that it can produce responses to all of the requests except VZ-ATT 1-23, because it has obtained permission from its vendor TNS to do so (Motion for Relief at 10). AT&T further explains that the geocoded data set, subject of VZ-ATT 1-23, are the intellectual property of third parties, whose licensing agreements with TNS prohibit TNS from releasing the data (id.).

In the Hearing Officer's August 8 Ruling on Verizon's Motion to Compel, the Hearing Officer declined to compel responses that AT&T claimed involved intellectual property it was not authorized to provide, concluding that AT&T was legally barred from producing the data

(August 8 Ruling at 11). Upon Verizon's appeal, the Department ordered production of the data, determining, based on representations of AT&T regarding availability of the data, that AT&T should be able to arrange with its vendor to produce all of the information (August 31 Interlocutory Order at 19). However, in its September 7 motions, AT&T clarifies its position and unambiguously states that the geocode data sought by VZ-ATT 1-23 is protected from release by a legally-enforceable licensing agreement. Thus, it is now clear that AT&T is legally barred from releasing the geocode data. Verizon argues, nevertheless, that pursuant to normal discovery rules, the third-party licensing agreement "cannot defeat Verizon's legitimate interest" in reviewing the data (VZ Reply to Motion for Relief at 6, citing ISDN Basic Service, D.P.U. 91-63-A, Order on Motion to Compel (May 31, 1991)).[11] We agree. The Department customarily orders parties to produce, subject to a nondisclosure agreement, information claimed to be proprietary.[12] However, here the Department is faced with a situation in which a party is unable to produce an information response due to a licensing agreement between two non-parties (TNS and the suppliers of the underlying data) not subject to the Department's regulatory jurisdiction. This circumstance differs from the ISDN Basic Service case, in which New England Telephone was able to produce, under a nondisclosure agreement, information supplied by AT&T, which also intervened in the case. D.P.U. 91-63-A, Order on Motion to

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[11] In its ISDN Basic Service Order, the Department stated that it must guard against the operation of third-party agreements that would restrict the Department's regulatory process. D.P.U. 91-63-A at 12. In that case, the Department compelled production of the disputed information subject to a protective agreement. Id. at 13. However, the facts underlying that discovery dispute are easily distinguished from the facts in the present case.

[12] See id. See also Boston Edison Company, D.T.E. 97-95, Interlocutory Order at 9 (July 2, 1998); D.P.U. 92-8C-A, Order on Appeal at 39, 43; Colonial Gas Company, D.P.U. 86-27-A at 8 (February 11, 1998).

Compel at 10-11, 13. Thus, while Verizon is correct that a third-party agreement may not defeat its legitimate interest in reviewing the data, the licensing arrangement does complicate, and apparently impair, AT&T's ability to produce it. The most important factor weighing in AT&T's favor is that AT&T has produced the clustering results based on that data and has offered the testimony of expert witnesses to support the reasonableness of those results. The Department will determine whether this evidence, minus the underlying data, is sufficient support for AT&T's proposed cost model. The Department therefore grants AT&T relief from our previous order to "produce, as distinguished from making completely available for review and analysis," a response to information request VZ-ATT 1-23. AT&T is directed to facilitate access to the geocode data by Verizon, the Department, and any other party wishing to view it, to the maximum extent the licensing agreement permits.

Verizon argues that if AT&T does not produce the geocode data sought by VZ-ATT 1-23, the proper sanction would be for the Department to strike the portions of AT&T's testimony that rely on that data. While AT&T's inability to produce this important supporting documentation for its cost model is less than satisfactory, as noted above, AT&T has produced clustering results based on this supporting documentation and has offered expert testimony in support of those results. Because AT&T has agreed to produce all other discovery Verizon has sought to compel, and for reasons discussed in Section II.B below, the Department does not strike AT&T's testimony on its cost model. We note, however, that AT&T's inability to produce supporting documentation for its cost model may be a significant factor in the Department's analysis of the accuracy and appropriateness of AT&T's cost model.

D. AT&T Motions to Compel

1. Information Requests Subject to Motions to Compel

The 16 information requests that are the subject of AT&T's Motions to Compel are attached in Appendix A to this Order. AT&T moves for an order compelling Verizon to provide complete responses to ATT-VZ 2-41, 4-1, 4-3, 4-16, 4-29, 4-48, 4-49, 5-6, 5-9, 12-2, 14-10, 14-11, 14-14, 14-15, 14-32, and 27-2(g). In its Reply to the Motion to Compel, Verizon agreed to supplement its responses to ATT-VZ 4-3, 4-16, 4-29, 4-49 and 12-2; to date, it has not done so. Verizon should get on with its supplementation. Verizon supplemented ATT-VZ 2-41 and 27-2(g) on September 25, 2001. The remaining information requests in dispute are ATT-VZ 4-1, 4-48, 5-6, 5-9, 14-10, 14-11, 14-14, 14-15, and 14-32.

2. Positions of the Parties

a. AT&T

AT&T states that it believes that the requested information will reveal errors in Verizon's cost studies that bias Verizon's cost estimates upward (Motion to Compel at 1). Hence, AT&T argues, the information is both relevant and likely to lead to discoverable evidence and is in accordance with the Department's relevance standard for consideration of motions to compel discovery responses, as articulated in the August 31 Interlocutory Order (id. at 1-2, citing Interlocutory Order at 12). Although Verizon responds that much of the information that AT&T seeks is of minimal probative value, AT&T argues that the information "far exceeds that minimal threshold" (Motion to Compel Surreply at 4). AT&T's arguments regarding the nine Information Requests still in dispute are as follows.

ATT-VZ 4-1. AT&T requested documentation and explanation for "all inputs used in Part C of Verizon's Cost Study that were sourced to Product Management." AT&T states that calculations in Workpaper Part C-1, Section 29 of Verizon's Cost Study, estimating monthly intercom costs per channel, "are predicated on an assumed number of 12.0" (Motion to Compel at 10). AT&T asserts that Verizon did not provide any explanation for the reasoning and judgment behind the 12.0 value, and that Verizon's claim that there is no documentation for the estimate is not credible (id., Motion to Compel Surreply at 8). AT&T argues that the method for deriving the number "is relevant to the reasonableness of the number for the purpose for which it is being used" (Motion to Compel at 10).

ATT-VZ 4-48. AT&T requested supporting documentation for the estimate of the Busy Hour to Annual Conversion Factor, predicated on an assumed ratio of .083 for "Busy Hour (BH) to All Hours of Day (AHD)" (Motion to Compel at 11). Documentation for the method for deriving a number is relevant to the reasonableness of the number, AT&T argues (id.).

ATT-VZ 5-6. AT&T requested supporting documentation for the "Digital Switch Power Installation Factor – 377C" of 2.7852, used to estimate installation costs for DC Power installation jobs (Motion to Compel at 13). Verizon did not provide invoices from vendors to substantiate labor costs, which AT&T asserts are needed to verify the accuracy of summary numbers and, therefore, relevant (id.).

ATT-VZ 5-9. AT&T sought engineering guidelines for Verizon's deployment of battery distribution fuse bays in its central offices (Motion to Compel at 14). AT&T asserts that the cable length assumptions Verizon uses in its cost study are significantly greater than the cable lengths it uses in practice (id.). Because the Department determined in the August 31

Interlocutory Order that a party's network and operational practices may be relevant to the reasonableness of the network and operational cost estimates in its cost study, AT&T argues that the Department should order Verizon to provide the information on its operational practices because they are relevant to the reasonableness of assumptions Verizon makes in its cost study (id.). AT&T states that Verizon does not provide a responsive answer in Attachment #2 to ATT-VZ 5-2(l), as Verizon claims in its Reply (Motion to Compel Surreply at 8). AT&T states that Verizon should be directed to provide a complete response, including actual distances used in placement of battery distribution fuse bays and engineering guidelines and factors involved in engineers' decisions for determining distances (id. at 9).

ATT-VZ 14-10, 14-11, 14-14, 14-15. AT&T requested details of the ten largest hardwired equipment installations and ten largest plug-in equipment installations for 1998 included in Verizon's Detailed Continuing Property Record ("DCPR") used to develop Verizon's Engineer, Furnish & Install ("EF&I") factor and its power factor, both used for estimating digital switching and digital circuit costs (Motion to Compel at 4, 6). The underlying information is needed to verify the suitability of the actual data used to create the EF&I and power factors and is, thus, relevant or potentially relevant, AT&T argues (id. at 5, 6). Furthermore, Verizon overestimates the burden of producing the information, AT&T asserts (Motion to Compel Surreply at 7). AT&T did not request "all" of the DCPR records, but documentation on the "ten largest" transactions in each category (id.).

ATT-VZ 14-32. AT&T states that Verizon's Loop Cost Analysis Model ("LCAM") is predicated upon average loop length estimates derived from surveys of selected feeder routes by Verizon engineers (Motion to Compel at 2). AT&T seeks information and documentation

relied on by the engineers, asserting that the information is relevant to the reasonableness of Verizon's loop length and cost estimates and the accuracy of the inputs on which those are based (id. at 3-4).

ATT-VZ 12-2, 4-3, 4-29, 4-49. AT&T further argues that, despite Verizon's agreement to supplement its responses to ATT-VZ 12-2, 4-3, 4-29 and 4-49[13] with additional information, the Department should order Verizon to provide complete responses to these requests to ensure that Verizon does what it has agreed to do (Motion to Compel Surreply at 8). Verizon's "offer to provide 'additional information'" does not moot the issue, AT&T asserts, because it is not certain that Verizon will provide all responsive information (id.).

Finally, in response to Verizon's assertion that AT&T unreasonably delayed filing its Motion to Compel, AT&T states that it had good cause for delay, because it did not know until after the August 31 Interlocutory Order that it should file a Motion to Compel (Motion to Compel Surreply at 2, 3). Throughout this proceeding, AT&T states, it has acted "under the reasonable assumption that parties would not be compelled to produce information if doing so would be burdensome," and thus AT&T believed that the Department would not require Verizon to produce the discovery in question (id. at 2, 3). However, in the August 31 Interlocutory Order, the Department implied that if AT&T wanted to address Verizon's objections to providing discovery, AT&T should file a motion to compel (id. at 3, citing August 31 Interlocutory Order at 12, 19-20). AT&T concluded from the Interlocutory Order that the Department's "new" discovery standard is relevance, and thus discovery must be provided if it is potentially relevant, even if complying would be burdensome (id. at 2).

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[13] Verizon also agreed to supplement ATT-VZ 4-16, 2-41 and 27-2(g) (VZ Reply to Motion to Compel at 7 and VZ Reply to September 19 Motion to Compel).

Evenhanded application of that standard requires that Verizon produce the information AT&T seeks in its Motion to Compel, AT&T states (id. at 3).

b. Verizon

Verizon argues that AT&T's Motion to Compel is up to three months late, and, although it agrees to provide responses to a number of the information requests, the Department should deny the Motion to Compel as to the remaining requests. Verizon's arguments for denial of the motion with respect to ATT-VZ 4-1, 4-48, 5-6, 5-9, 14-10, 14-11, 14-14, 14-15, and 14-32 are as follows.

ATT-VZ 4-1. Verizon states that it provided a full response to the request, indicating that the inputs, where the source is Product Management, are based on the opinion of the product manager, and no additional supporting documentation is available (VZ Reply to Motion to Compel at 6).

ATT-VZ 4-48. Verizon states that it provided a complete response to the request, identifying the underlying basis for the BH to AHD conversion factor, and that AT&T's request goes beyond seeking model inputs or methodology used to develop the conversion factor and requests the "backup of the backup" (VZ Reply to Motion to Compel at 7-8). The request seeks a burdensome level of additional detailed documentation of minimal probative value, Verizon contends (id. at 8).

ATT-VZ 5-6. Verizon states that it supplemented the response on August 10, 2001, and provided all of the DCPR records that contain the inputs used in its study (VZ Reply to Motion to Compel at 8). An extensive manual effort would be required to identify the job-specific documentation reported to the DCPR system, Verizon asserts, and this burdensome level of additional detailed documentation would be of minimal probative value (id.).

ATT-VZ 5-9. Verizon states that it responded to the request for engineering guidelines for deployment of battery distribution fuse bays in central offices in Attachment #2 to ATT-VZ 5-2(l), which it misstated as ATT-VZ 5-21 in its original response (VZ Reply to Motion to Compel at 9).

ATT-VZ 14-10, 14-11, 14-14, 14-15. The DCPR system contains the official record of thousands of transactions that do not exist in a mechanized form, Verizon explains (VZ Reply to Motion to Compel at 5). Verizon states that, in response to ATT-VZ 4-16, it will provide the DCPR records, which are entered in the ordinary course of business, and which served as inputs to Verizon's study (VZ Reply to Motion to Compel at 5). However, Verizon asserts, ATT-VZ 14-10, 14-11, 14-14, and 14-15 seek data input into the DCPR – detailed information that is not readily available and is not itself used as inputs to Verizon's cost model (id.). Verizon estimates that providing the data would "require an extensive manual effort" by a group of four people, taking three to six months and costing over $200,000 (id.).

ATT-VZ 14-32. Verizon objected to providing copies of all materials used in conducting the survey of feeder route data on grounds that the request was overly broad and it would be unduly burdensome to produce the information because it resides at multiple outside plant engineering locations (VZ Reply to Motion to Compel at 3). Verizon claims that no written documentation was created contemporaneously by engineers that would identify each piece of information reviewed, and their review would be virtually impossible to reconstruct (id. at 3-4). Moreover, Verizon states, the request does not ask it to produce "fundamental inputs" used in its cost study, but rather "what may be tens of thousands of separate pieces of information in various forms that may have been reviewed by the engineers in numerous

locations" (id.). The probative value of information at this tertiary level of detail is slight in comparison to the undue burden it would require, Verizon argues (id.).

Verizon further argues that AT&T's Motion to Compel should be denied as an abuse of the administrative process, as it was not filed until nearly two months after Verizon's most recent letter to AT&T concerning the discovery dispute[14] and after the Department granted Verizon's Motion to Compel AT&T responses (VZ Reply to Motion to Compel at 2, citing D.P.U. 91-63-A, at 17-18 (unreasonable delay in filing a motion may amount to abuse of the administrative process)).

3. Analysis and Findings

220 C.M.R. § 1.06(6)(c)(4) provides:

> A party may move for an Order to compel compliance with its discovery request. Unless otherwise permitted by the presiding officer for good cause shown, such motion shall be made no longer than seven days after the passing of the deadline for responding to the request.

AT&T claims that it has good cause for delay in filing its Motion to Compel because it did not know until after the August 31 Interlocutory Order that it should file such a motion. (Motion to Compel Surreply at 2, 3). That assertion is untenable, given AT&T's repeated references to Verizon's failure to respond to AT&T information requests as a reason AT&T should not be compelled to produce discovery (see AT&T's July 12 Opposition to Verizon's Motion to Compel; August 17 Opposition to Verizon's Appeal). AT&T cites the language of 220 C.M.R. § 1.06(6)(c)(4) and is well aware that it is entitled to file its own motion to

[14] Letter from Bruce Beausejour, Verizon, to Kenneth Salinger, AT&T, July 10, 2001.

compel rather than make its arguments in response to Verizon motions (see Motion to Compel Surreply at 3 n.2).

AT&T states that, until the August 31 Interlocutory Order, it assumed that Verizon would not be compelled to produce discovery it claimed to be burdensome. AT&T disingenuously asserts that following that Order, the Department's "new discovery standard is relevance," and thus "discovery must be provided if it is potentially 'relevant,' despite the fact that its assembly and production may be burdensome" (Motion to Compel Surreply at 2).

The Department's standard for discovery rulings allows for denial of motions to compel if the objecting party makes sufficient showing that production would be unduly burdensome in relation to the probative value.[15] AT&T's statement in its Surreply that the Department "rejected AT&T's argument that burdensome discovery should not be compelled" attempts to recast its objections to Verizon's July 5 Motion to Compel and August 13 Appeal (Motion to Compel Surreply at 3, citing August 31 Interlocutory Order at 12, 19-20). AT&T objected to producing information on its own network as irrelevant,[16] and objected to producing the TNS geocode data on grounds they were proprietary (August 31 Interlocutory Order at 8-11; AT&T Opposition to Verizon's Appeal). The Department did not address the issue of undue burden

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[15] See, e.g., Fitchburg Gas and Electric Light Company, D.T.E. 99-118, Interlocutory Order (March 13, 2001); Boston Gas/Massachusetts LNG, D.P.U. 94-109 (Phase I) (January 13, 1995); Cambridge Electric Light Company, D.P.U. 92-250 (May 28, 1993); Fitchburg Gas and Electric Light Company, D.P.U. 84-145, Interlocutory Order (October 15, 1984).

[16] AT&T responded to information requests on its network with a catch-all objection that they were "overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence" (AT&T Opposition to Verizon's Appeal at 1-2). However, its argument was premised primarily on the alleged irrelevance of information on AT&T's own network to this proceeding (id. at 2-5).

in its August 31 Interlocutory Order, because AT&T did not advance undue burden as a basis for its objections. Contrary to AT&T's claim, the Department has not changed its standard to require any minimally relevant discovery to be produced, regardless of burden. Thus, AT&T has not shown "good cause" for the long delay in submitting its Motion to Compel. Nevertheless, we find, for the following reasons, that the Motion to Compel should be addressed on its merits.

The Department directed the parties in this case to attempt to resolve discovery disputes before bringing them to the Department (Hearing Officer Memorandum Re: Procedural Conference and Procedural Schedule; Service List; and Ground Rules at 3 (February 9, 2001); August 8 Ruling at 10). AT&T did so (see Letter to Bruce Beausejour, Verizon, from Kenneth Salinger, AT&T, June 1, 2001; Letter to Bruce Beausejour, Verizon, from Kenneth Salinger, AT&T, July 3, 2001). Furthermore, the discovery disputes in this proceeding have been complex and involved, and the subject matter in dispute is essential to the issues to be decided by the Department. The Department's interest in developing as complete an informational record as possible prior to hearings, under the specific facts of this case, outweighs a legitimate dismissal of the Motion to Compel on procedural grounds.[17] Accordingly, we address below the merits of AT&T's Motion to Compel.

In its initial responses to the majority of the nine information requests still in dispute, Verizon objects on grounds that the nine requests seek a "burdensome level of detailed documentation of minimal probative value" (ATT-VZ 4-48, 5-6, 14-10, 14-11, 14-14, 14-15

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[17] Pursuant to 220 C.M.R. §§ 1.01(4), 1.06(6)(c)(2) and 1.06(6)(c)(4), the Commission and presiding officer may, for good cause, permit deviation from the seven-day time frame for filing a motion to compel.

and 14-32). For example, the DCPR data inputs sought in response to ATT-VZ 14-10, 14-11, 14-14 and 14-15 consist of detailed information not used as cost model inputs and readily available, so "a burdensome special study would be required to develop this data," Verizon claims.

The Department evaluates a burdensomeness claim in the context of the case, including the procedural schedule and the importance of the information sought to the issues being litigated. D.T.E. 99-118, Interlocutory Order at 9-10; D.P.U. 92-250 at 5-6, 6 n.5; D.P.U. 84-145, Interlocutory Order at 4. Parties face a heavy burden to establish that relevant information should be blocked from discovery. D.P.U. 92-8C-A, at 35, citing 220 C.M.R. § 1.06(6)(c), Mass. R. Civ. P. 26(b)(1). The objecting party must make a sufficient showing of undue burden, providing details on such matters as the availability and location of materials and personnel needed to research and develop a response. D.P.U. 88-123, Hearing Officer's Ruling on Motion to Compel at 10. Merely because compliance would be costly or time consuming is not ordinarily a sufficient reason to avoid discovery where the requested information is relevant and necessary to discovery of evidence. Id., citing Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73, 76 (D. Mass. 1976). The Department may protect parties against the undue burden of responding to discovery requests that seek irrelevant or marginally relevant information. See D.P.U. 91-63-A at 11; Mass. R. Civ. P. 26(c); 220 C.M.R. § 1.06(6)(c)(2). Thus, the Department may determine that a request is burdensome if the level of detail sought would not further the analysis of the issues or if the impact of the response on the case is expected to be minimal. D.T.E. 99-118, Interlocutory Order at 10; D.P.U. 94-109 (Phase I) at 6-7.

AT&T contends that the responses it seeks to the nine information requests are relevant to the reasonableness and the accuracy of assumptions and inputs Verizon uses in its cost study (Motion to Compel at 4-14). In the August 31 Interlocutory Order, the Department granted Verizon's motion to compel AT&T responses where the data sought were relevant to verifying the accuracy of AT&T's HAI 5.2a-MA Model inputs (August 31 Interlocutory Order at 12). The Department stated that, without addressing the merits of the position Verizon intended to take, Verizon should have the opportunity to develop that position (id.). The Department ordered AT&T to produce extensive information on its own network and operational practices and to arrange with its vendor to produce proprietary materials (id. at 12-13, 19; but see Section II.C.2, above, for our findings on AT&T's obligation to produce third-party proprietary data). AT&T is entitled to the same considerations in obtaining data relevant to developing its arguments regarding Verizon's cost model and inputs, and, consistent with these general observations, we rule on the nine information requests as follows.

ATT-VZ 14-32, 4-48. Verizon argues that AT&T's requests for supporting documentation for the BH to AHD conversion factor and all materials used by Verizon engineers in conducting the survey of feeder route data involve detailed information of minimal probative value because it goes beyond actual "fundamental" inputs used in Verizon's cost study. Nevertheless, as AT&T points out, Verizon's LCAM is based on the engineer survey, and development of those data required exercise of judgment and professional analysis (Motion to Compel Surreply at 5). AT&T cannot fully evaluate the conclusions made without being able to review and analyze the underlying materials; thus we find the request is relevant to assessment of Verizon's LCAM (id.).

Verizon also objects that the request is overly broad and unduly burdensome, involving gathering the information from outside plant engineering locations and requiring engineers to reconstruct "their review and knowledge of the network and identify scores of documents that may have been considered by them in responding to the survey" (VZ Reply to Motion to Compel at 3). We find Verizon's burdensomeness objection to be persuasive, but in balancing the burden with the probative value of the data being sought, we conclude that reducing the burden, rather than eliminating it entirely, is the more appropriate action.[18] Therefore, we grant the motion to compel as follows. Rather than provide copies of "tens of thousands of separate pieces of information in various forms," the Department directs Verizon to provide the following information: To the extent not already provided in responses to ATT 14-31 and ATT 14-33, identify any and all outside plant engineering locations (a) which participated in the survey and (b) at which the requested information resides. Provide (a) the number of engineers who participated in the survey and (b) copies of the most significant materials used by the engineers in conducting the feeder route data surveys, and, for each such material, explain how the engineers relied upon the materials.

Regarding 4-48, AT&T argues that the method for deriving the BH to AHD factor is relevant to the number's reasonableness. Though Verizon asserts that it has provided a complete response, we grant AT&T's motion to compel all supporting information for this factor.

ATT-VZ 14-10, 14-11, 14-14, 14-15. Verizon responded to these information requests that: "The requested data is not readily available. A burdensome special study would be

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[18] See D.T.E. 99-118, Interlocutory Order at 10 (reducing retroactive time period for which company had to produce records from three years to two).

required to develop this data." In its Motion to Compel Reply, Verizon estimates that it would take three to six months to perform the studies at a cost of $200,000. Verizon states that it will provide sufficient information on DCPR records used as inputs in its cost study in response to ATT-VZ 4-16. AT&T argues that Verizon's objection that the information sought in the four requests functions as inputs to the DCPR, not inputs to its model, is a "distinction without a difference" (Motion to Compel Surreply at 7). AT&T contends that it is entitled to review the data to determine if the summary data Verizon derived from the DCPR is appropriate for use in a TELRIC proceeding. AT&T further argues that the undue burden claim is unfounded, because AT&T does not seek all DCPR records, but documentation on the ten largest transactions described in each information request.

It is unclear from Verizon's response whether its estimate of the time and cost of producing this information is actually based on the subset of data AT&T requests. As with ATT-VZ 14-32, we modify the response required to reduce the burdensomeness of producing the response. Accordingly, Verizon is directed to respond to these four requests by providing details of the five largest transactions included in the DCPR in each category. Information on the five transactions should give AT&T a large enough sample for its purposes while limiting the time and cost Verizon must bear to produce the response.

In sum, we find Verizon's claims that AT&T's information requests pose an undue burden because they seek information of minimal probative value to be unfounded. The supporting documentation AT&T seeks is of similar magnitude to the information Verizon successfully moved to compel from AT&T (see August 8 Hearing Officer Ruling at 10-15; August 31 Interlocutory Order at 11-19). Verizon has provided details in support of some of

its undue burden objections, indicating what responding would entail in terms of time, cost, personnel, and assembly of the data. As noted above, merely because compliance would be costly or time consuming is not automatically grounds to avoid producing discovery. Therefore, we have modified the compelled responses to reduce the burden to appropriate level in relation to probative value of this data. AT&T's motion to compel responses to ATT-VZ 14-10, 14-11, 14-14, 14-15, 14-32 and 4-48 is granted, with the modifications described.

ATT-VZ 4-1. Verizon claims to have no additional supporting documentation for its 12.0 value for estimating monthly intercom costs per channel, which it states is based on product managers' judgment. We agree with AT&T that the method of deriving this number is relevant to its reasonableness, and any existing documentation used or produced by the person(s) making the determination is discoverable. In the absence of any documentation, Verizon is directed to provide a step by step delineation of the process product managers used to derive the estimate.

ATT-VZ 5-6. Verizon supplemented its response to this request, attaching "13 files that provide DCPR data used in the development of the 377C Power Installation Factor" (Supplemental Response to ATT-VZ 5-6, August 10, 2001). AT&T did not contest the supplemental response in its Motion to Compel Surreply. Based on the adequacy of Verizon's supplemental reply, we find that Verizon has provided a responsive answer.

ATT-VZ 5-9. Verizon claims that its response was misconstrued and that it responded in Attachment #2 to ATT-VZ 5-2(L). AT&T counters that that attachment is not a responsive answer because it does not provide actual engineering guidelines giving actual distances used in placement of battery distribution fuse bays and the means by which those distances were

determined. Verizon asserts no objection regarding this request and is directed to revise its answer to make it more responsive.

Finally, we grant AT&T's motions to compel responses to ATT-VZ 2-41, 12-2, 4-3, 4-16, 4-29, 4-49, and 27-2(g). Although Verizon has agreed to supplement these responses, we grant the motions to ensure Verizon's supplemental answers are fully responsive and avoid any further motions to compel.

III. CONDITIONAL MOTION TO STRIKE

A. Positions of the Parties

1. AT&T

AT&T moves that, in the event that its Motion for Relief is denied and the evidentiary standard in the August 31 Interlocutory Order is upheld, the Department should strike Verizon's recurring cost model on grounds that Verizon has not met, and cannot meet, the evidentiary burden described in that Order (Motion to Strike at 1). AT&T restates its assertion that the Interlocutory Order imposes a new burden on parties to introduce into evidence all underlying data supporting their cost models, and that even-handed application of that standard would require rejection of Verizon's cost study (id. at 1, 2; Motion for Relief Surreply at 3).[19]

According to AT&T, the August 31 Interlocutory Order holds that making relevant data available for viewing and analysis by other parties is not sufficient, and that all data underlying any cost model must be physically produced and introduced into the evidentiary record (Motion to Strike at 2). AT&T asserts that "no comprehensive, TELRIC-compliant cost study could reasonably meet" that evidentiary standard (Motion for Relief at 5, 8).

Specifically, AT&T contends that the evidentiary burden outlined in the August 31 Interlocutory Order is inconsistent with that used in the Consolidated Arbitrations[20] docket setting initial UNE rates, in which the Department adopted a NYNEX cost study despite the fact that it was "replete with data inputs" that were never made part of the evidentiary record

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[19] See Section II.B.1, above. Because AT&T develops its argument on the evidentiary standard in the Motion for Relief, Motion for Relief Surreply, and Motion to Strike, we draw from all of these in summarizing AT&T's position.

[20] D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 4) (1996).

(Motion for Relief at 5-6; Motion to Strike at 2). AT&T further asserts that the Federal Rules of Evidence recognize that expert testimony reporting study results is admissible even if some underlying data are not in evidence (Motion for Relief at 7). Witnesses sponsoring AT&T's cost studies in this proceeding will be available for cross-examination; hence, AT&T argues, the reliability of the supporting data can be fully explored even if all of the data is not already entered in the evidentiary record (id.).

A requirement that all supporting data for a cost model be produced in hard copy so it may be entered into evidence is burdensome and does not benefit the decision making process, AT&T asserts (Motion for Relief Surreply at 3). An appropriate evidentiary standard would focus not on supporting documentation that is not being produced but rather on "determining the weight to be given the evidence that is in fact produced" (Motion for Relief at 9). Failure to produce all relevant supporting data should be a factor to be considered in evaluating the models, AT&T states, not an evidentiary prerequisite to consideration of a model (id.)

AT&T also asserts that Verizon has not complied with the "new" evidentiary standard of the August 31 Interlocutory Order, "and its discovery responses make clear that it is unable to do so" for certain aspects of its recurring cost model[21] (Motion to Strike at 3). Should the evidentiary standard of the August 31 Interlocutory Order be upheld, AT&T states, the Department should strike Verizon's recurring cost model on the ground that Verizon's failure to supply all relevant input data means that it cannot present an adequate prima facie case in support of that model (id. at 8; Motion for Relief Surreply at 5).

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[21] See section II.D above, discussing AT&T's motion to compel Verizon responses.

2. Verizon

Verizon states that AT&T's Motion to Strike is premised on a misreading of the Department's August 31 Interlocutory Order (VZ Reply to Motion for Relief at 11). Verizon asserts that the Department has not "effectively adopted" a new evidentiary standard in the Interlocutory Order; rather, the Order enforced the Department's existing rules of discovery and evidence (id. at 8-10). Because the Department has not imposed a new evidentiary burden on parties, AT&T's Motion to Strike Verizon's cost model based on the alleged new evidentiary standard is without merit (id.).

Verizon notes that, in conducting an adjudicatory proceeding, the Department must ensure that a complete and accurate record is developed and that all parties are accorded due process (id. at 7). The Department properly recognized in the August 31 Order that, in this and any other evidentiary proceeding, it is required to render its decision exclusively on the evidentiary record before it, Verizon states (id. at 8). Accordingly, Verizon continues, each party has the responsibility to seek inclusion in the record of whatever evidence that party contends, and the Department finds, is properly admissible pursuant to G.L. c. 30A, § 1 et seq. (id.). Parties may ask information requests to develop facts, and proponents of affirmative cases bear the burden of providing responses that support their cases, Verizon adds (id. at 9). These requirements were no different in the Consolidated Arbitrations than in any other proceeding, and, as a party in that past proceeding, AT&T cannot now suggest that the record in that case was incomplete (id. at 9-10).

With regard to AT&T's assertions that Verizon is unable to provide certain key information, Verizon states that it has provided the underlying assumptions and data used in its

study, and that the data sought by AT&T involve "tertiary levels of back-up support for the assumptions and data or tangential information not used" in Verizon's study (VZ Reply to Motion for Relief at 12). Verizon states that it objects to the excessive burdens that it would incur in providing information that has "remote" relevance to its study and this case (id.).

B. Analysis and Findings

AT&T's Motion to Strike is conditioned upon the Department denying AT&T relief from of the portions of the August 31 Interlocutory Order pertaining to VZ-ATT 1-23 and the time for producing responses (Motion for Relief at 1). The Department has granted AT&T that requested relief. However, AT&T also moves to strike Verizon's cost model if the Department will not "reconsider its new evidentiary requirement" that parties "spread upon the record" all data supporting their proposed cost models, because Verizon has not met, and is unable to meet, that new evidentiary burden (Motion to Strike at 1).

First, as noted above, whether either party's cost model is admissible as evidence in this proceeding is not yet at issue before the Department. This Order, as was the August 31 Interlocutory Order, is necessitated by the ongoing discovery disputes between AT&T and Verizon. The Department's standard for determining whether information is discoverable is much broader than the standard for admission into evidence; therefore, determination of admissibility is not essential to a discovery ruling and would be premature. D.P.U. 92-8C-A, at 31.

In referencing its evidentiary standard in the August 31 Interlocutory Order at 15-19, the Department was reminding the parties that each party proposing a cost model has the burden of proof in supporting the validity of its proposed model for producing forward-

looking, TELRIC-compliant rates for UNEs. In its previous UNE pricing proceeding, the Consolidated Arbitrations, the Department stated that its standard of review was derived from the Federal Communications Commission's ("FCC") Local Competition Order.[22] In accordance with that standard, the Department stated:

> To determine whether NYNEX's proposed TELRIC study meets the standards set forth by the FCC, we must examine both the structure of the model and the inputs used in the model. With regard to the structure of the model, we must determine whether it is reviewable, i.e., whether it is possible to find and understand the financial and numerical relationships inherent in the model. We must also determine whether the structure itself provides a good representation of a reconstructed local network that will employ the most efficient technology for reasonably foreseeable capacity requirements. If the model is reviewable and accurately portrays the network we desire, we must determine whether the various financial inputs to the model are appropriate.

Consolidated Arbitrations at 8-9. The Department explained that the FCC placed the burden of proof on the incumbent local exchange carrier ("ILEC") "with regard to calculation of incremental costs of unbundled network elements," because "the ILECs have greater access to the cost information needed for such a study." Id. at 8. In that proceeding, the Department also evaluated an earlier version of the Hatfield Model (sponsored then by AT&T and MCI; later version proposed by AT&T in this case) and stated that if NYNEX failed to meet "its burden of proof with regard to the efficacy of its TELRIC model, we could employ the Hatfield model as a replacement, if we determine that it meets the FCC's requirements." Id. at 9 (emphasis added). In other words, proponents of an alternative cost model have the burden of proving that model's reviewability; the efficacy of that model in representing a

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[22] First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 (released August 8, 1996).

reconstructed local network that employs the most efficient technology for reasonably foreseeable capacity requirements; and the appropriateness of the model inputs, just as the ILEC must demonstrate with regard to its own cost model. We noted in the August 31 Interlocutory Order that the FCC, in adopting a forward-looking cost model to be used in determining federal universal service high-cost support for non-rural carriers, stated that the "model and all underlying data, formulae, computations, and software associated with the model must be available to all interested parties for review and comment."[23] Hence, we affirmed the Hearing Officer's finding that it is each party's responsibility, in support of its case, to ensure that its model's underlying assumptions and data are made available to the Department and all parties in the proceeding (August 31 Interlocutory Order at 13; August 8 Ruling at 12).

The discovery and evidentiary standards articulated by the Department in this proceeding are neither "new" nor unique to a UNE rate proceeding; nor can they be equated.[24] Under G.L. c. 30A, § 10, which sets forth the procedural rights of parties in Massachusetts administrative proceedings, the Department must afford all parties the opportunity for a full and fair hearing. This includes the parties' right to acquire information

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[23] Federal-State Joint Board on Universal Service Forward-Looking Mechanism for High Cost Support for Non-Rural LECs, CC Docket Nos. 96-45 and 97-160, Tenth Report, FCC 99-304, at **&** 38 (released November 2, 1999).

[24] The purpose for discovery is to enable parties and the Department to gain access to all relevant information and ensure that a complete and accurate record is compiled. 220 C.M.R. § 1.06(6)(c)(1). The standard for determining whether a document is discoverable is much broader than the standard for admission into evidence. Information is discoverable if it is reasonably calculated to lead to the discovery of admissible evidence. Mass. R. Civ. P. 26(b); D.P.U. 92-8C-A, Order on Appeal at 31. Moreover, only a fraction of written or documentary material made available in responses to discovery requests ever finds its way into the evidentiary record in a typical Department proceeding.

from each other in order to participate meaningfully in an adjudicatory proceeding. Parties need access to relevant materials during discovery in order to assess the claims of other parties, to challenge the contentions of other parties' witnesses, and to make the most effective evidentiary record they can. In this way, the Department is able to come to a well-reasoned decision on an ample evidentiary record. See D.P.U. 97-95, Interlocutory Order at 9-10. Discovered materials are not themselves evidence of record until they are presented to the trier of fact and properly admitted. The distinction between discovery and admission into the evidentiary record should not be blurred.

The Department's primary objectives in the conduct of an adjudicatory proceeding are that a complete and accurate record be developed and that all parties are accorded due process. D.P.U. 91-63-A, Order on Motion to Compel at 12. As both AT&T and Verizon have acknowledged, in any evidentiary proceeding, the Department must base its decision solely on the evidentiary record before it (AT&T Opposition to Verizon Motion to Compel at 8; VZ Reply to Motion for Relief at 8). The Department "shall follow the rules of evidence where practicable . . . There shall be excluded such evidence . . . as is not the kind on which reasonable persons are accustomed to rely in the conduct of serious affairs." G.L. c. 30A, § 11; 220 C.M.R. § 1.10(1). In ordering AT&T to produce discovery requested by Verizon so that such information could be "spread upon the record," the Department was not altering its evidentiary standard, but recognizing the connection between the production of relevant documentation during discovery and a party's ability to support its case. The Department merely illustrated in the August 31 Interlocutory Order that production of all relevant materials

is instrumental to laying the foundation for a complete and accurate evidentiary record as the proceeding continues.

As AT&T suggests, we confirm that the adequacy of production of all relevant supporting data will be considered in evaluating the parties' cost models, and will affect the weight to be given to a cost model. If a party intends to use certain data as evidence to satisfy its burden of proof, it must provide evidentiary support for the development and accuracy of those data, or it risks having those data assigned little probative weight. To characterize this as a "new" evidentiary standard, and assert that the Department's "new discovery standard is relevance" (Motion for Relief at 4; Motion to Strike at 2; Motion to Compel Surreply at 2) is inaccurate.

Given our discussion on the weight to be assigned to a party's cost model evidence, we deny the motions to strike of AT&T and Verizon in which each of the parties asserts that the other has failed to produce supporting data.[25] The Department has already declined in the course of this proceeding to strike either party's cost model in response to Verizon's July 5 Motion to Compel, Verizon's August 13 Appeal, AT&T's August 17 Cross-Motion to Strike Verizon's Recurring Cost Model, and Verizon's August 24 Response to AT&T's Opposition to Verizon's Appeal. Each of the previous motions to strike was predicated on the opposing party's failure to produce discovery responses that were concurrently the subjects of motions to

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[25] AT&T contends that Verizon's failure to respond to the information requests that are the subject of AT&T's Motion to Compel is cause for striking Verizon's recurring cost model on grounds that it has not, and cannot, meet the evidentiary burden to support its model (Motion to Strike at 1). Likewise, Verizon maintains that, if AT&T cannot make available the geocode data as Verizon requested, all portions of AT&T's cost presentation that rely on those data and methodology should be stricken, because there is no means for other parties to verify those data (VZ Reply to Motion for Relief at 7).

compel, as is AT&T's September 7 Motion to Strike. The Department faced a similar situation in its ISDN Basic Service Order on a motion to compel (VZ Reply to Motion for Relief at 7-8, citing D.P.U. 91-63-A at 15 (failure to comply with order to produce proprietary information under nondisclosure agreement would result in Department striking portions of prefiled testimony relying on that information). The Department noted in that case that the result of striking testimony "could be severe":

> The Department must evaluate the record to determine whether NET's proposed rates are just and reasonable. NET has the burden of showing that its rates are proper. NET's inability to present substantial evidence on the issue of contribution, as a result of [ ] testimony being stricken, could amount to a failure to sustain its burden of proof.

Id. at 15-16 (citations omitted). Although stating that it would strike testimony where relevant supporting information was not produced, the Department declined to rule on the motion to strike at the time it granted the motion to compel. As noted above, determination of admissibility of evidence supported by underlying data that are the subject of a motion to compel would be premature at the time of the discovery ruling. D.P.U. 92-8C-A, at 31. In addition, although the Department has already ordered AT&T to produce a response to VZ-ATT 1-23, its inability to comply with that order is not analogous to the circumstances in the ISDN Basic Service Order, because circumstances do not allow AT&T to produce the information under a standard nondisclosure agreement. While this is not a completely novel question, the Department has never been confronted so directly with the issue. In order to proceed along with this investigation, we cannot strike the cost models of the participants. But, going forward, if a party chooses to enter into agreements with third parties that will preclude the discovery or cross-examination about that party's own evidence, then the party

resisting discovery or cross-examination about its own evidence presented in the case is on notice that such evidence (or potential evidence, where it has not yet been presented on the record, but merely filed) (a) may be subject to limitations by the Department on the weight to be given to that evidence or (b) may be excluded altogether.[26] When AT&T entered into its licensing agreement with PNR (predecessor to TNS), AT&T knew or should have known that the agreement would make it very difficult for regulatory commissions reviewing the AT&T Hatfield model to fully evaluate the reasonableness of its model unless the agency had full access to all the data underlying the model. The point is important because the fact-finder/agency's access to background support or assumptions behind a model can come through its own interrogatories and questions or through vetting of the assumptions behind the model by opposing parties.

Though AT&T's assertion that third-party rights prevent it from producing the data requested in VZ-ATT 1-23 is alone an inadequate justification for non-production, AT&T has provided testimony in support of results that are based on the underlying data and has produced the bulk of discovery responses that Verizon sought to compel in its July 5 Motion to Compel and August 17 Appeal, including information AT&T initially objected to as irrelevant or proprietary. Under the circumstances, for purposes of discovery this will be considered sufficient; however, the non-production of discovery that other parties have a legitimate interest in reviewing is not without consequences. The evidentiary value of the results

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[26] Denying access to relevant data that supports a party's case because of binding third-party agreements, a practice that we want to make clear will not be tolerated in the future by participants in our adjudicatory proceedings, is distinguished from withholding access on the grounds that the data would be unduly burdensome to produce in relation to its probative value. Questions of burden vs. probative value are best left to the hearing officer to address on a case-by-case basis.

obtained from underlying data not produced in discovery is yet to be determined. The Department can and may accord such evidence less probative weight than it might otherwise be accorded, rather than strike the evidence altogether. This also applies to either party's testimony and cost model. Striking testimony or cost models is therefore not appropriate at this point in the proceeding.

Therefore, in future Chapter 30A adjudications involving Chapter 159 or Chapter 164 or 165, potential parties must be prepared for discovery of background information regarding the evidence they intend to present and should provide in their arrangements with their own contractors for discovery and cross-examination access, through nondisclosure agreements, to information that lies behind their evidentiary submissions. Where a party fails to do so and then pleads the rights of a third party as reason for not producing answers responsive to discovery or cross-examination, that party must understand that he risks impairing the quality and reliability of the evidence he seeks to put on the record.

IV. ORDER

Accordingly, after review and consideration, it is

ORDERED: That AT&T's September 7, 2001 Motion for Relief from the Department's August 31, 2001 Order to produce a response to Information Request VZ-ATT 1-23 and request to provide a response by electronic access is hereby GRANTED; and it is

FURTHER ORDERED: That AT&T's September 7, 2001 Motion to Compel Verizon Responses to AT&T Information Requests is GRANTED with respect to Information Requests ATT-VZ 4-1, 4-3, 4-16, 4-29 and 4-49, 4-48, 5-9, 12-2, 14-10, 14-11, 14-14, 14-15, and

14-32; and that Verizon produce responsive answers to these requests within 10 days of issuance of this order; and it is

FURTHER ORDERED: That AT&T's September 7, 2001 Motion to Compel Verizon Responses to AT&T Information Requests is DENIED with respect to Information Request ATT-VZ 5-6; and it is

FURTHER ORDERED: That AT&T's Conditional Motion to Strike Verizon's recurring cost model is DENIED; and it is

FURTHER ORDERED: That all parties comply with all other directives contained herein.

By Order of the Department,

_____
James Connelly, Chairman

_____
W. Robert Keating, Commissioner

_____
Paul B. Vasington, Commissioner

_____
Eugene J. Sullivan, Jr., Commissioner

_____
Deirdre K. Manning, Commissioner

Appendix A

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY
D.T.E. 01-20

Information Requests Subject of AT&T's Motions to Compel, September 7 and 19, 2001

Respondent: Nancy Matt
Title: Manager – Service Costs

REQUEST: AT&T Communications of New England, Inc., Set #4

DATED: May 11, 2001

ITEM: ATT 4-1 Please provide supporting documents and explanations for all inputs used in Part C of the Cost Study that were sourced to Product Management (*e.g.*, Workpaper Part C-1, Section 29, Page 1 of 1, Line 1, regarding "BH Intragroup CCs per Channel").

REPLY: The inputs for studies in C-1, where the source has been identified as Product Management, are based upon the opinion of the respective product manager. There is no additional supporting documentation available.

Respondent: Nancy Matt
Title: Manager – Service Costs

REQUEST: AT&T Communications of New England, Inc., Set #4

DATED: May 11, 2001

ITEM: ATT 4-3 Please provide supporting documents for all investments or inputs in Part C of the cost study that were sourced to Vendor (*e.g.*, Workpaper Part C-1, Section 37, Page 1 of 2, Line 1 regarding "modem" and Line 2 regarding "application processor").

REPLY: Please see the attachment (file "ATT 4-3 Attachment.xls") for the development of the investments.

Respondent: Michael J. Anglin
Title: Director – Service Costs

REQUEST: AT&T Communications of New England, Inc., Set #4

DATED: May 11, 2001

ITEM: ATT 4-16 Please provide all data from the Detailed Continuing Property Record ("DCPR") that was relied upon to develop the Engineer, Furnish & Install ("EF&I") factor for digital switches, and either describe or explain such DCPR data in sufficient detail that it can be understood. *See* Verizon's direct panel testimony at pages 28-29.

REPLY: Attachment 1 is the workpaper displaying the development of the Engineer, Furnish & Install ("EF&I") factor for Digital Switch account 2212. Attachment 2 displays the supporting DCPR data.

Respondent: Nancy Matt
Title: Manager – Service Costs

REQUEST: AT&T Communications of New England, Inc., Set #4

DATED: May 11, 2001

ITEM: ATT 4-29 Verizon's direct panel testimony states at pages 132-133 that, in developing inputs for SCIS, "the current number of lines and trunks per switch were adjusted based on the Verizon MA's access line growth forecast, and the averages CCS per line and trunk were adjusted based on current CCS growth trends."

Please provide the access line forecasts and CCS growth trends used by Verizon to adjust the line inputs to SCIS. Provide all supporting documentation and calculations. Please identify the Verizon organization that developed the forecasts and trends. If Verizon has other line forecasts or trends used by the marketing, engineering, or strategic planning organizations, please provide them.

REPLY: The access lines used for the study was provided in Verizon MA's response to Information Request ATT 4-6. The forecast used to trend the CCS per line was developed based upon historical data from 1997 to 2000. The data used to develop the forecast is included in the attachment. (ATT 4-29 CCS).

Respondent: Nancy Matt
Title: Manager – Service Costs

REQUEST: AT&T Communications of New England, Inc., Set #4

DATED: May 11, 2001

ITEM: ATT 4-48 Please provide supporting documentation for the busy hour to any hour of the day conversion factor. *See* Verizon's direct panel testimony at 159.

REPLY: The development of the busy hour to any hour of the day conversion factor can be found in Part C-3, Workpaper Section 7, Page 1.

Respondent: Nancy Matt
Title: Manager – Service Costs

REQUEST: AT&T Communications of New England, Inc., Set #4

DATED: May 11, 2001

ITEM: ATT 4-49 Please provide supporting documentation for the non conversation time factor. See Verizon's direct panel testimony at 159-160.

REPLY: The development of the non conversation time factor can be found in Part C-3, Workpaper Section 6, Page 1.

Respondent: Dinell Clark
Title: Staff Director

REQUEST: AT&T Communications of New England, Set #5

DATED: May 17, 2001

ITEM: ATT 5-6 Referring to Part CA Exhibit Page 1 of 2 and Part CA Workpaper 5.0, please provide supporting documentation to substantiate the power installation factor used in the DC Power Consumption cost study. Include actual invoices from vendors to substantiate the labor costs necessary to install each of the DC Power Plant components included in the Verizon cost study.

ITEM: ATT 5-6
REPLY: For supporting documentation associated with the development of the power installation factor used in the collocation cost study, please see the response to WCom 2-8. Verizon MA did not use vendor labor costs in its cost study, instead it applied the 377C power installation factor to all the power plant components.

SUPPLEMENTAL REPLY: Please see the attached 13 files that provide DCPR data used in the development of the 377C Power Installation Factor. Verizon MA considers this information to be proprietary, confidential, and voluminous. Verizon is providing a copy of this information to the Department and to AT&T subject to the terms of a mutually agreeable Protective Agreement. Verizon MA will make this information available to other parties for review at its offices at 125 High St. in Boston MA, and subject to the same terms.

Respondent: Dinell Clark
Title: Staff Director

REQUEST: AT&T Communications of New England, Set #5

DATED: May 17, 2001

ITEM: ATT 5-9 Please provide the engineering guideline (Bell System Practice or similar document) that outlines how Verizon is to engineer the deployment of Battery Distribution Fuse Bays in its central offices. This should include, but not be limited to specifically noting the distance between the Battery Distribution Fuse Bays and the telecommunications equipment they serve.

REPLY: Please see Verizon MA's response to Information Request ATT 5-2l Attachment #2.

Respondent: Michael Anglin
Title: Director – Service Costs

REQUEST: AT&T Communications of New England, Inc., Set #12

DATED: May 25, 2001

ITEM: ATT 12-2 Please provide an explanation of the process of how the forecasted RTU fees for digital switching were developed, including the Verizon organizations responsible for developing the forecast and the organizations which provided input to the forecast. Please provide the details of the quantification of the forecast, including all documentation and calculations used by the organizations providing input and the organization responsible for developing the forecast. See Workpaper Page 1 of 3 in Part G-9.

REPLY: RTU fees (software) requirements are based upon site-level deployment plans as developed by Network Engineering and Network Planning. The deployment plans ensure software releases for the switches within all states are kept current in accordance with switch vendor support guidelines, and in support of new hardware and feature activation. These deployment plans are primarily based upon Business Plans for the Enterprise, Retail, & Wholesale organizations, Regulatory orders, Equipment Capacity Exhaust forecasts, and Vendor Generic Support Guidelines. Multiple organizations beyond Network Engineering and Network Planning have input to this process. Verizon MA objects to producing "all documentation and calculations used by these organizations" because it would be overly burdensome to try to compile such data.

Respondent: Michael J. Anglin
Title: Director – Service Costs

REQUEST: AT&T Communications of New England, Inc., Set #14

DATED: May 31, 2001

ITEM: ATT 14-10 Referring to page 29 of the Verizon-MA Panel testimony, provide details of the ten largest hardwired equipment installations for 1998 included in the Verizon-MA Detailed Continuing Property Records ("DCPR") database upon which forward-looking EF&I were developed.

REPLY: The requested data is not readily available. A burdensome special study would be required to develop this data.

Respondent: Michael J. Anglin
Title: Director – Service Costs

REQUEST: AT&T Communications of New England, Inc., Set #14

DATED: May 31, 2001

ITEM: ATT 14-11 Referring to page 29 of the Verizon-MA Panel testimony, provide details of the ten largest plug-in equipment installations for 1998 included in the Verizon-MA Detailed Continuing Property Records ("DCPR") database upon which forward-looking EF&I were developed.

REPLY: The requested data is not readily available. A burdensome special study would be required to develop this data.

Respondent: Michael J. Anglin
Title: Director – Service Costs

REQUEST: AT&T Communications of New England, Inc., Set #14

DATED: May 31, 2001

ITEM: ATT 14-14 Referring to page 33 of the Verizon-MA Panel testimony, provide details of the ten largest hardwired equipment installations for 1998 included in the Verizon-MA Detailed Continuing Property Records ("DCPR") database upon which forward-looking power factors were developed.

REPLY: The requested data is not readily available. A burdensome special study would be required to develop this data.

Respondent: Michael J. Anglin
Title: Director – Service Costs

REQUEST: AT&T Communications of New England, Inc., Set #14

DATED: May 31, 2001

ITEM: ATT 14-15 Referring to page 33 of the Verizon-MA Panel testimony, provide details of the ten largest plug-in equipment installations for 1998 included in the Verizon-MA Detailed Continuing Property Records ("DCPR") database upon which forward-looking power factors were developed.

REPLY: The requested data is not readily available. A burdensome special study would be required to develop this data.

Respondent: Michael J. Anglin
Title: Director – Service Costs

REQUEST: AT&T Communications of New England, Inc., Set #14

DATED: May 31, 2001

ITEM: ATT 14-32 Provide copies of all materials (plats, network diagrams, demand forecasts, engineering guidelines, maps, etc.)(in both electronic and hard copy format) reviewed or otherwise used by the Verizon-MA engineers in conducting the survey of feeder route data.

REPLY: Verizon MA objects to this request on the grounds that the request is overly broad and would be unduly burdensome to respond. The information requested resides at multiple Outside Plant Engineering locations and would be extremely burdensome to respond to.

Respondent: Donald Albert
Title: Director

REQUEST: AT&T Communications of New England, Inc., Set #2

DATED: May 8, 2001

ITEM: ATT 2-41 Please provide a copy of all planning documents, engineering guidelines, manufacturers' specifications and the like that Verizon uses in planning and engineering its interoffice fiber ring network.

REPLY: Verizon MA does not use engineering guidelines for planning and engineering its interoffice fiber ring network. Manufacturers specifications can be obtained from the manufacturers themselves.

Respondent: Joseph Gansert
Title: Director

REQUEST: AT&T Communications of New England, Set #27

DATED: July 31, 2001

ITEM: ATT-VZ 27-29 (g) On page 29, lines 13-15, of his Rebuttal Testimony, Joseph Gansert states: "There is nothing in an actual telephone network that is equivalent to the 'logical rings' assumed by the Model – all SONET rings are quite physical." Referring to this testimony, please answer the following . . .

(g) In Information Request ATT-VZ 2-41, AT&T requested the following information:

Please provide a copy of all planning documents, engineering guidelines, manufacturers' specifications and the like that Verizon uses in planning and engineering its interoffice fiber ring network.

Verizon responded:
Verizon MA does not use engineering guidelines for planning and engineering its interoffice fiber ring network. Manufacturers specifications can be obtained from the manufacturers themselves.

Because there are no engineering guidelines for the interoffice network, please provide the source of any information relied upon to answer ATT-VZ 27-2 (a)-(e) inasmuch as those answers pertain to the Verizon network. Provide each and every source of such information.

ITEM: ATT-VZ 27-29
(g)

REPLY:

(g) The answers to (a-e) are based on Mr. Gansert's knowledge and experience. He did not need to refer to any documentation to provide the answers.

In 1992-1994, Mr. Gansert was the Managing Director of Network Transition Planning for NYNEX. His organization provided recommendations for deploying new technologies such as SONET in all NYNEX states including Massachusetts. In 1994-1996, he was Managing Director Network and OSS Architecture Planning for NYNEX. One of this organizations responsibilities was to provide all Engineering Applications Guidelines for the use of SONET technology throughout NYNEX telcos.

Mr. Gansert's organization did not conduct detailed engineering on specific network projects but rather supplied guidelines and direction for such projects. The organization produced a large volume of such documents relative to SONET deployment. Most of these will be difficult or impossible to locate at this time. A search is being conducted of old document libraries. Any documents discovered that are responsive to this request will be provided in a supplemental response.