COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's *Triennial Review Order* Regarding Switching for Mass Market Customers	)	D.T.E. 03-60

COMMENTS OF VERIZON MASSACHUSETTS

Verizon Massachusetts ("Verizon MA") files these comments in response to the motions for heightened protective treatment filed by AT&T, SBC Telecom, and WilTel Local Network pursuant to paragraph 5 of the Protective Order issued by the Department in this proceeding. The special protections these parties seek are unnecessarily broad and deny Verizon MA the ability to review and use the highly relevant information contained in responses to Department Information Requests for the purpose of presenting its case. The Department should, accordingly, deny their motions.

DISCUSSION

A. AT&T's Motion For Heightened Protective Treatment

AT&T requests heightened protection for its response to Department Information Request DTE-ATT 1-11, which was asked of all carriers and seeks information regarding the customer locations where carriers have deployed or are in the process of deploying DS1 and DS3 loop facilities or dark fiber the carrier either owns or obtains through an IRU. AT&T asserts that it would be severely prejudiced if it were required to permit employees or agents of its competitors, other than attorneys involved in this proceeding, to have access to the information. Specifically, AT&T maintains that "if any individual with responsibility for, any involvement in,

or even the ability to influence a competing carrier's marketing or business planning efforts were to have access to this very specific customer location information, AT&T's competitors could hone their marketing efforts to AT&T's substantial disadvantage." Motion at 2.

AT&T's request that the data responsive to this request be made available solely to counsel for the parties would deny Verizon MA the ability to use the information for the purpose of preparing its case and should be rejected. The Department has addressed this issue in the past and concluded that limiting access to attorneys for a party is unreasonable and cannot be squared with the requirements for an adjudicatory proceeding – which is how the Department has decided to conduct this case. In *Eastern Edison Company*, D.P.U. 96-24, Interlocutory Order on Appeal (August 1, 1997), the Department overturned a Hearing Officer's ruling that would have limited access to certain confidential information to the attorney for a party. As here, there was no question that the information at issue was proprietary, competitively sensitive data that should be subject to protection. The only issue was whether the Hearing Officer's ruling limiting disclosure to a party's attorney was appropriate. The Department concluded that it was not.

> … [T]he Department must determine whether permitting disclosure of the protected information only to attorneys, and not to the client is reasonable. The Department must afford all parties an opportunity for full and fair hearing. G.L. c. 30A, s. 10. Every party has the right to call and examine witnesses, to introduce exhibits, and to cross-examine witnesses who testify. G.L. c. 30A, s. 11(3). In order to cross-examine witnesses effectively and prepare his argument, the Department acknowledges that an attorney should be able to consult with his client or independent consultant, who, in matters before the Department, possesses the technical expertise to assist the attorney. To deny an attorney the opportunity to consult with his client could constitute a denial of due process rights. It is the client, here Eastern, which is the party to a proceeding, not the attorney. Therefore, the Department determines that attorneys must be allowed to discuss the protected information with an agent or employee of the client who possesses the technical expertise necessary for the attorney to represent the client's interest adequately.

Eastern Edison Company, D.P.U. 96-24, Interlocutory Order on Appeal, at 7.

Although the Department's ruling in *Eastern Edison* dealt with the issue of attorney-only disclosure in the context of cross-examination, the Department's rationale for rejecting such extraordinary protection applies equally when a party requires information to prepare its case. The Department has chosen to conduct this case as an adjudicatory proceeding and asked carriers for information relevant to the issues it will address and on which Verizon MA will be presenting a direct case. Counsel for Verizon MA necessarily must rely on the Company's experts to review the relevant data so that its case can be prepared. If review of the data is limited to counsel, Verizon MA would effectively be denied an opportunity to present testimony using data that bears on the issues that the Department must determine. Such a result is clearly unfair and will not result in a complete record on which the Department can base its decision. Accordingly, AT&T's motion should be denied.[1]

B. SBC Telecom's and WilTel's Motions For Heightened Protective Treatment

SBC's and WilTel's motions are identical in all respects (indeed, they are verbatim copies) except for the specific Information Requests for which the carriers seek heightened protection. SBC requests added protection for its responses to Department Information Requests DTE-SBC 1-2, 1-3, 1-6, 1-7, 1-15, 1-16, 1-17, and 1-18.[2] WilTel's motion deals with its

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[1] As required by the Department's Protective Order, Verizon MA has filed certificates of compliance by Company personnel that will be assisting counsel in preparing the case. The individuals who have signed the certification are all managers with regulatory responsibility. If AT&T has concerns with any particular individual that has signed a certificate of compliance because of the scope of their job responsibilities, Verizon MA is willing to address those specific concerns with AT&T. However, although Verizon MA has not received copies of all carrier discovery responses, at least one carrier has provided the Company with data responsive to Information Request DTE 1-11, subject to the Protective Order, and not questioned the individuals whom Verizon MA has identified would review the data.

[2] The Information Requests that are the subject of SBC's motion seek the following information: the ILEC wire centers where the CLEC has obtained transport facilities from a supplier other than the ILEC (Information Request DTE-SBC 1-2); for the ILEC wire centers identified in the prior questions, the amount of capacity obtained on each route (Information Request DTE-SBC 1-3); the points in Massachusetts at which the CLEC connects its local network facilities to the networks of other carriers

responses to Department Information Requests DTE-WilTel 1-1, 1-4, 1-6, 1-7, and 1-8.[3] Unlike all other carriers that are producing information responsive to the specific requests included in SBC's and WilTel's motions, these carriers propose that *only* the Department would receive the information. SBC and WilTel assert that because the information is competitively sensitive, no party should have access even under the terms of the Protective Order. SBC Motion at 3, WilTel Motion at 3. Their argument is without merit and should be rejected by the Department.

First, the basis of their claim is the assertion that "the Department has recognized that competitively sensitive information of telecommunications providers should be protected from disclosure." SBC Motion at 3, WilTel Motion at 3. SBC and WilTel then cite to two rulings in which the Department has granted confidential treatment for certain competitively sensitive information requested by parties in the discovery phase of cases. However, while the cases they cite unquestionably stand for the proposition that the Department protects confidential information from public disclosure, the Department did not rule in either case that such information did not have to be produced to parties because it was confidential, competitively sensitive information. To the contrary, in both cases, the confidential information was provided to parties (counsel as well as in-house and outside consultants), subject to protective

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(Information Request DTE-SBC 1-6); the location of fiber rings in Massachusetts (Information Request DTE-SBC 1-7); each Verizon MA wire center in which the CLEC provides switching services (Information Request DTE-SBC 1-15); the number of voice-grade equivalent lines provided in each wire center identified in question No. 15; (Information Request DTE-SBC 1-16); the number of voice-grade equivalent lines provided in each wire center identified in the response to Information Request DTE-SBC 1-15 separated by business, residence, and high capacity (Information Request DTE-SBC 1-17); and the types of loops over which the CLEC is providing the voice-grade equivalent lines (Information Request DTE-SBC 1-18).

[3] The Information Requests that are the subject of WilTel's motion seek the following information: the ILEC wire centers where the CLEC has deployed or is in the process of deploying transport facilities (Information Request DTE-WilTel 1-1); the wire centers where the CLEC offers transport facilities to other carriers, and the capacity or type of the transport (Information Request DTE-WilTel 1-4); the points in Massachusetts at which the CLEC connects its local network facilities to the networks of other carriers (Information Request DTE-WilTel 1-6); the location of fiber rings in Massachusetts (Information Request DTE-WilTel 1-7); and a list of ILEC wire centers at which the CLEC connects a collocation arrangement to a facility or collocation arrangement of another carrier (Information Request DTE-WilTel 1-8).

arrangements similar in all material respects to the terms of the Protective Order issued in this case. In short, SBC and WilTel misstate applicable Department precedent and practice regarding the production of confidential information. The Department's recognition that certain data produced in discovery are confidential and thus should not be publicly disclosed has not led it to shield relevant data from production to parties. Rather, the Department has provided for production of confidential information to parties by issuing a Protective Order, as it has done here, or through Protective Agreements among parties. These protective arrangements ensure that the data are not publicly disclosed while enabling parties to review and use information relevant in a case.

Second, the Department has rejected efforts such as SBC's and WilTel's to restrict access to information to the Department or other government agencies. In *Boston Edison Company*, D.T.E. 97-95, Interlocutory Order (July 2, 1998), the utility proposed a Nondisclosure Agreement that would have restricted access to commercially sensitive materials to the Department and governmental agencies in the case, but not to other parties, which included competitors. Several parties objected to this restriction, and the Department rejected Boston Edison's proposal. The Department stated:

> Access to relevant material is needed by all parties in order to develop a complete record in a proceeding. To the extent that BECo's Proposal prohibits all access to certain documents for certain parties, that Proposal is inconsistent with G.L. c. 30A. Denial of material to parties or their consultants contravenes both G.L. c. 30A and general due process considerations. We find that BECo's proposed non-disclosure agreement is inconsistent with G.L. c. 30A and is therefore not approved.

Boston Edison Company, D.T.E. 97-95, Interlocutory Order, at 11.

SBC's and WilTel's request would preclude Verizon MA from obtaining relevant information necessary for the preparation of its case and deny the Company's due process rights.

Indeed, if their request were granted and other parties were likewise able to limit access to their data to the Department, essentially all of the relevant data that the Department must consider in this case would not be available for review by any other party (except perhaps for the Attorney General). In such circumstances, it is difficult to imagine how this proceeding could be conducted at all.[4]

CONCLUSION

For the reasons set forth above, the Department should deny the motions of AT&T, SBC, and WilTel.

Respectfully submitted,

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[4] SBC's and WilTel's concern about providing their information to any party, even under the Protective Order, is clearly extreme as it is not shared by other carriers. Verizon MA has received data from several carriers to a number of the Information Requests addressed in the SBC and WilTel motions.