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

October 31, 2003

HEARING OFFICER RULING ON MOTION FOR PROTECTIVE TREATMENT OF HIGHLY SENSITIVE CONFIDENTIAL INFORMATION OF SBC TELECOM, INC.; MOTION OF WILTEL LOCAL NETWORK, LLC FOR PROTECTIVE TREATMENT OF HIGHLY SENSITIVE CONFIDENTIAL INFORMATION; AND MOTION OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC. FOR HEIGHTENED PROTECTION OF ITS RESPONSE TO DEPARTMENT'S REQUEST NUMBER 11

1. INTRODUCTION

On October 1, 2003, the Department of Telecommunications and Energy ("Department") adopted a Protective Order in this proceeding, stating:

> In recognition that documents, information, and other materials submitted to the Department . . . and provided to the participants in the course of this proceeding may represent or contain confidential or proprietary information, the Department hereby enters this Protective Order to ensure that such confidential or proprietary information is afforded protection from unwarranted disclosure, while permitting participants appropriate access to . . . such materials.

D.T.E. 03-60 Protective Order at 1. On October 9, 2003, the Department issued its First Set of Information Requests in this proceeding to all competitive local exchange carriers ("CLECs") registered in Massachusetts.[1] In recognition that the CLECs' responses to the

[1] In order to obtain information regarding the extent of competitive facilities in the Commonwealth, the Department sought responses from all Massachusetts CLECs, not just those CLECs participating as parties in this proceeding. The Department issued its information requests by subpoenas duces tecum, with responses due on October 23, 2003.

Department's information requests would likely contain confidential information, the Department informed CLECs that the information they provided in response to the Department's requests would be subject to the terms of the D.T.E. 03-60 Protective Order. See Department's First Set of Information Requests, D.T.E. 03-60 (issued October 9, 2003) (included as Attachment A to this ruling).

On October 23, 2003, along with partial responses to the Department's information requests, SBC Telecom, Inc. ("SBC") filed a Motion for Protective Treatment of Highly Sensitive Confidential Information contained in its responses to the following Department information requests: 2, 3, 6, 7, 15, 16, 17, and 18 ("SBC Motion"). Also on October 23, 2003, WilTel Local Network, LLC ("WilTel"), filed its responses with the Department, along with a Motion for Protective Treatment of Highly Sensitive Confidential Information contained in its responses to the Department's information requests numbered 1, 4, 6, 7, and 8 ("WilTel Motion"). On the same day, AT&T Communications of New England, Inc. ("AT&T") filed a Motion for Heightened Protection of its response to the Department's information request number 11 ("AT&T Motion").[2] All three carriers included affidavits with the motions.

On October, 30, 2003, Verizon Massachusetts ("Verizon" or "VZ") and AT&T responded to the motions. In addition, a joint response to the motions was filed by Broadview Networks, Inc., Bullseye Telecom, Inc., Choice One Communications of Massachusetts, Inc., Focal Communications of Massachusetts, Inc., InfoHighway Communications Corp., McGraw Communications, Inc., MetTel, Talk America, Inc., XO Communications of Massachusetts, Inc., and Z-Tel Communications, Inc. (jointly, "Broadview").

II. POSITIONS OF THE CARRIERS

A. SBC

In its Motion, SBC requests that the Department treat SBC's responses to information requests numbered 2, 3, 6, 7, 15, 16, 17, and 18, as highly sensitive and confidential pursuant to the D.T.E. 03-60 Protective Order (SBC Motion at 1). SBC states that it has no objection to providing its responses to the Department, but objects to disclosing its responses to any participant, or representative or employee of any participant, in this proceeding (id.). SBC argues that, if disclosed, the information contained in its responses would provide competitors with commercially valuable information on the type and locations of SBC's customers and the

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[2] Other than the Motion for Heightened Protection, AT&T did not respond to the Department's information requests on the due date, other than a notification to the Department that AT&T was unable to comply with the Department's deadline for responses. AT&T filed its responses on October 28, 2003. Of the three carriers that filed motions for heightened protection, only AT&T is a party to D.T.E. 03-60.

assets used to serve those customers (id. at 3). SBC further argues that, with the exception of Department employees, the list of persons to whom disclosure is permitted in the D.T.E. 03-60 Protective Order is far too broad to adequately protect SBC's competitive position (id.). Therefore, SBC argues that disclosure to participants and nonparticipants under the terms of the D.T.E. 03-60 Protective Order creates an unreasonable risk of harm for SBC (id.).

B. WilTel

WilTel argues that the Department should grant protection from disclosure in this proceeding to WilTel's responses to Department information requests numbered 1, 4, 6,7, and 8 (WilTel Motion at 1). Similar to SBC, WilTel states that it has no objection to providing its responses to the Department, but objects to any further disclosure (id.). WilTel argues that, if disclosed, the information sought by the Department in these requests could be used by competitors and potential competitors to develop market strategies that would harm WilTel's competitive position (id. at 2). WilTel argues that the list of individuals permitted access to confidential information under the D.T.E. 03-60 Protective Order is overly broad and creates an unreasonable risk of competitive commercial harm to WilTel (id. at 3).

C. AT&T

AT&T requests that the Department grant heightened protection from disclosure to AT&T's response to the Department's information request number 11 (AT&T Motion at 1). AT&T does not object to disclosing its response to the Department and to the attorneys participating in this proceeding who have signed the D.T.E. 03-60 Protective Order, but requests that the Department order the parties to not share the information with anyone else, including any other employee or agent of any party (id.). AT&T argues that its response to Department information request number 11 reveals the specific locations of AT&T's largest customers in Massachusetts, and if any individual with responsibility for, or involvement in, a competitor's marketing or business planning efforts were to gain access to this information, AT&T's competitors could hone their marketing efforts to AT&T's substantial disadvantage (id. at 2). Therefore, AT&T requests that the Department restrict access to its response to Department information request number 11 to only counsel of record for all parties in this proceeding (id. at 3).

In addition, AT&T objects to SBC's motion for heightened protective treatment (AT&T Response at 1). AT&T argues that SBC has failed to offer any reason why the D.T.E. 03-60 Protective Order does not adequately protect it from the harm SBC seeks to prevent (id. at 2-3).

D. Broadview

Broadview also objects to SBC's motion for heightened protective treatment (Broadview Response at 1).[3] Broadview argues that its counsel requires access to SBC's responses to the Department's information requests in order to provide full legal representation to the identified parties and to fully litigate the issues in this proceeding (id. at 2). Broadview further argues that the information SBC seeks to protect is not available through any other means than production by SBC (id.). Broadview argues that there are sufficient protections in place to avoid any disclosure of the information to the public or direct competitors of SBC (id. at 2-3). Therefore, Broadview urges the Department to require SBC to permit counsel of record in this proceeding to have access to SBC's responses to the Department's information requests (id. at 3).

E. Verizon

Verizon argues that the Department should deny the motions for heightened protective treatment of SBC, WilTel, and AT&T (VZ Response at 1). Verizon argues that AT&T's request that only counsel of record have access to AT&T's response to the Department information request number 11 would deny Verizon the ability to use the information for the purpose of preparing its case (id. at 2). Verizon argues that the Department has previously held that limiting access to information to attorneys only is unreasonable and contrary to the requirements of an adjudicatory proceeding (id.). Verizon argues that it must rely on its experts to review the relevant data, and, therefore, its experts, in addition to its counsel of record, must have access to AT&T's response (id. at 3). Likewise, Verizon argues that the Department should deny the motions of SBC and WilTel (id.). These motions, argues Verizon, misstate the applicable Department precedent regarding the production of confidential information (id. at 5). Moreover, Verizon argues that limiting access to WilTel's and SBC's responses to the Department only would deprive Verizon from obtaining relevant information necessary to case preparation and would deny Verizon its due process rights (id. at 6).

III. STANDARD OF REVIEW

Paragraph 5 of the D.T.E. 03-60 Protective Order states:

> Highly Sensitive Confidential Information. Nothing contained herein shall be construed as requiring a participant to produce all documents which it designates as Confidential Information, should

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[3] Broadview states that it did not receive WilTel's motion, and, therefore, Broadview reserves its right to object to WilTel's motion after receipt, if necessary (Broadview Response at 3).

> the providing participant allege that any Confidential Information to be provided pursuant to this Order is of such a highly sensitive nature that access to and copying of such Confidential Information as herein set forth would expose the providing participant or any of its affiliates to an unreasonable risk of harm. Where the providing participant so contends, on or before the date such highly sensitive information would otherwise be produced, the providing participant shall object to the production of such information and shall file with the Department and serve on all participants a motion requesting that the items of Confidential Information in question be declared to be highly sensitive Confidential Information. The motion must conform to the requirements set forth in G.L. c. 25, § 5D and shall include the special protection and treatment desired, the grounds why the Confidential Information in question needs special protection and a detailed list of the items of Confidential Information alleged to be too highly sensitive to be accessed or copied under the provisions of this Order. The motion must also include an affidavit from an officer affirming that access to the Confidential Information under the terms of this Protective Order would be likely to harm the providing participant and specifying the type of harm that would be suffered. All other participants will have five (5) business days to respond in writing to the motion, which response must include a description of the need for access to such Confidential Information and why such a need cannot be satisfied with other information, whether Confidential Information or otherwise. The Department shall determine the status of the Confidential Information in question and the treatment that should be afforded to it as expeditiously as possible.

IV. ANALYSIS AND FINDINGS

The need for a Protective Order in this case was first suggested by AT&T at the September 25, 2003 procedural conference.[4] In response, the Department issued a draft

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[4] AT&T stated, "We believe that, given the time constraints under which we are operating in this case, given the enormous amount of data that's likely to be asked for and produced, given the enormous numbers of parties that are involved, multiple sets of bilateral agreements with respect to confidential documents and then ad seriatim filings with respect to each confidential material that's filed would be burdensome and would tie up resources that will desperately needed to conduct the proceeding" (Tr.

Protective Order and requested comments on the draft order from interested parties. On September 30, 2003, Verizon, AT&T, and Z-Tel Communications, Inc. suggested various changes to the draft order. The Department adopted some of the parties' proposed changes and issued the final D.T.E. 03-60 Protective Order on October 1, 2003. Although the order grants protection from public disclosure to confidential materials submitted in this proceeding, the order also anticipates that certain, extraordinarily confidential information may require additional protection. As AT&T correctly noted at the procedural conference, however, addressing a myriad of confidentiality issues on a continuing and piecemeal basis would be burdensome for both the parties and the Department, given the other responsibilities we are required to address in this proceeding. This is what the D.T.E. 03-60 Protective Order seeks to prevent.

With regard to SBC's and WilTel's motions for heightened protective treatment, I determine that SBC's and WilTel's requests that only the Department have access to its responses to the Department's first set of information requests must be denied. I agree that, pursuant to the D.T.E. 03-60 Protective Order, SBC's and WilTel's responses will not be placed on the public record in this proceeding, and also agree that the responses will not be made available to non-parties (or to any party or limited participant in this proceeding that has not certified compliance with the D.T.E. 03-60 Protective Order); however, it would be impossible for Verizon and the other parties to present their cases without having access to information regarding the existence of CLEC facilities in Massachusetts. Moreover, I agree with Broadview that Verizon's and the other parties' need for this information cannot be adequately addressed by sources of information other than that provided by the CLECs in response to the Department's information requests. Particularly in this instance, where Verizon has the burden to prove a "triggers case," it would be inappropriate for the Department to allow CLECs to eliminate all possibility of Verizon's sustaining that burden by denying Verizon access to the information required to present its case.[5] The nature of the investigation that the FCC has mandated we conduct requires this result.

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[4](…continued)
at 15).

[5] On October 3, 2003, Verizon filed with the Department a letter indicating that Verizon would not be contesting the Federal Communications Commission's ("FCC") national determination of impairment with regard to loops, transport, or switching in this proceeding on the basis of operational or economic impairment factors (October 3, 2003 Letter from Bruce Beausejour to Secretary Cottrell at 1). Rather, Verizon indicated that it would confine its case in Massachusetts to whether or not the FCC's "triggers" have been met for these elements (id. at 1-2).

Turning to AT&T's request that only counsel of record in this proceeding have access to AT&T's response to Department request number 11, I determine that this request must also be denied. I agree with AT&T that disclosure of AT&T's response to competitors' marketing or business planning personnel for use in customer acquisition efforts would create an unfair advantage for AT&T's competitors. However, the D.T.E. 03-60 Protective Order prohibits this possibility. The D.T.E. 03-60 Protective Order restricts disclosure of confidential materials to:

> counsel of record for participants . . . including in-house counsel who are actively involved in the conduct of this proceeding; partners, associates, secretaries, paralegal assistants, and employees of such counsel; outside consultants or experts retained to render professional services in this proceeding, *provided that they are under supervision of the counsel of record*; and in-house employees (such as economists, operational, technical, and regulatory personnel) who are actively engaged in the conduct of this proceeding, *provided they are under the supervision of the counsel of record.*

D.T.E. 03-60 Protective Order at 2 (emphasis added). The order also prohibits use of confidential information "for any purpose other than the purpose of preparation for and conduct of this proceeding and related proceedings" (id. at 1), and specifically prohibits the use of confidential information "for any other purpose, including business, governmental, commercial, or other [unrelated] administrative or judicial proceedings." Id. at 5. The use of any confidential materials produced in this proceeding for marketing or business planning efforts is strictly prohibited and would be a clear violation of the D.T.E. 03-60 Protective Order. Counsel of record in this proceeding have the responsibility to confirm that such use is not occurring, and to ensure that such use will not occur by the parties they represent.[6]

Therefore, the motions for heightened protective treatment of SBC, WilTel, and AT&T are denied. AT&T is directed to forward its response to Department information request number 11 to the parties on the service list that have certified compliance with the D.T.E. 03-60 Protective Order. Given that SBC and WilTel are not parties to this proceeding, the Department will distribute one set of their responses to the Department's first set of information requests to the counsel of record for each party that has certified compliance with

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[6] Moreover, under the D.T.E. 03-60 Protective Order at 2, parties have the opportunity to object to any specific individual designated as a person to whom disclosure of confidential materials will be made.

the D.T.E. 03-60 Protective Order, as the Department has done with the responses of other non-party CLECs.

V. RULING

The Motion for Protective Treatment of Highly Sensitive Confidential Information of SBC Telecom, Inc., Motion of Wiltel Local Network, LLC for Protective Treatment of Highly Sensitive Confidential Information, and Motion of AT&T Communications of New England, Inc. for Heightened Protection of its Response to Department's Request Number 11, are denied.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within three (3) days of this Ruling. Any appeal must include a copy of this Ruling.

Date: October 31, 2003 _____/s/_____
Paula Foley, Hearing Officer

ATTACHMENT A

INSTRUCTIONS FOR RESPONSES TO INFORMATION REQUESTS OF THE DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Pursuant to 220 C.M.R. § 1.06(6)(c), the Department of Telecommunications and Energy ("Department") submits the following Information Requests to Massachusetts Competitive Local Exchange Carriers ("CLECs") in D.T.E. 03-60.

Instructions

The following instructions apply to these Information Requests issued to all Massachusetts CLECs as part of this proceeding.

1. To the extent that any of the attached information requests are not applicable to the telecommunications service provided by you in Massachusetts, please so indicate in your response.

2. Each request should be answered in writing on a separate, three-hole punch page with a recitation of the request, a reference to the request number, the docket number and the name of the person responsible for the answer.

3. Do not wait for all answers to be completed before supplying answers. Provide the answers as they are completed.

4. These requests shall be deemed continuing so as to require further supplemental responses if the petitioner or its witness receives or generates additional information within the scope of these requests between the time of the original response and the close of the record in this proceeding.

5. The term "provide complete and detailed documentation" means:

   Provide all data, assumptions, and calculations relied upon. Provide the source of and basis for all data and assumptions employed. Include all studies, reports and planning documents from which data, estimates or assumptions were drawn and support for how the data or assumptions were used in developing the projections or estimates. Provide and explain all supporting workpapers.

6. The term "document" is used in the broadest sense and includes, without limitation, writings, drawings, graphs, charts, photographs, phono-records, microfilm, microfiche, computer printouts, correspondence, handwritten notes, records or reports, bills, checks, articles from journals or other sources and other data compilations from which information can be obtained and all copies of such documents that bear notations or other markings that differentiate such copies from the original.

7. If any one of these requests is ambiguous, notify the Hearing Officer so that the request may be clarified prior to the preparation of a written response.

8. Please serve one (1) copy of the responses to Mary Cottrell, Secretary of the Department, and one (1) copy to Paula Foley, Hearing Officer. Parties to D.T.E. 03-60 seeking access to this information must certify compliance with the Protective Order adopted in this proceeding. Unauthorized disclosure, or the use of this information for competitive commercial or business purposes by any party to D.T.E. 03-60, will constitute a violation of the Protective Order.

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY
D.T.E. 03-60
QUESTIONS TO MASSACHUSETTS CLECS
October 9, 2003

TRANSPORT

1. Provide a list of all the incumbent local exchange carrier ("ILEC") wire centers in Massachusetts to which you have deployed your own transport facilities (i.e., any facilities that, directly or indirectly, provide connections to wire centers) or are currently in the process of deploying such facilities.

2. Provide a list of all the ILEC wire centers in Massachusetts to which you have obtained transport facilities (i.e., any facilities that, directly or indirectly, provide connections to wire centers) from a supplier other than the incumbent LEC (including wholesale providers and non-certificated providers, and the names of such providers).

3. For each ILEC wire center or pair of ILEC wire centers identified in your previous responses (questions 1 and 2) state the amount of capacity (e.g., DS-1, DS-3) obtained on each route and the level of capacity the facility is capable of supporting.

4. Provide a list of all ILEC wire centers in Massachusetts in which you offer transport facilities to other carriers, and for each identify the capacity or type of transport you offer (e.g., DS1, DS3, or dark fiber).

5. State whether you are affiliated with the ILEC in any way or with any other carrier (including intermodal providers) that serves the same transport route. If so, please describe the affiliation.

6. Identify the points within Massachusetts at which you connect your local network facilities to the networks of carriers other than the incumbent LEC, including interconnection with other CLECs, interexchange carriers, or internet service providers at any point of presence ("POP"), network access point ("NAP"), collocation hotel, data center, or similar facility.

7. Provide a list of all fiber rings in Massachusetts you own or control and identify the location (by street address and/or V&H coordinates) of each add-drop multiplexer or comparable facility for connecting other transport facilities (e.g., wire centers, loops, other fiber rings) to the fiber ring.

8. Provide a list of all ILEC wire centers in Massachusetts at which you connect a collocation arrangement to a facility or collocation arrangement belonging to another carrier, and for each, identify the carrier and the capacity or type of connection.

9. State whether you have any long-term (10 or more years) dark fiber IRUs (i.e., indefeasible right of use) between any two central offices in the same LATA, in which you maintain an active physical collocation arrangement.

10. If the above question is answered in the affirmative, please answer the following. As to each pair of central offices, identify:

    a. The common name, address and CLLI code for each pair of central offices,
    b. The number of dark fiber pairs terminating at each of the physical collocation facilities,
    c. Whether the facilities have been lit by the carrier attaching its own optronics, and if so, the transmission level of each such lit circuit, and
    d. The term of the IRU.

LOOPS

11. Please provide a list of customer locations where you deploy your own, or are in the process of deploying, DS1 and DS3 loop facilities, and where you provide dark fiber that you either own or obtain through an IRU. For each location, identify the address, the number of facilities and corresponding capacity, and nature of the loop.

12. For each facility identified in the previous response, indicate whether you are providing the facility to yourself, or on a wholesale basis to another unaffiliated service provider. If providing facilities on a wholesale basis, indicate the names of such unaffiliated service providers.

13. Please identify whether you are affiliated in any way with Verizon or any other carrier (including intermodal providers) that provides loop facilities to any of the locations

identified in the above response, and describe any such affiliation.

SWITCHING

14. Provide a list of all switches that you currently use to provide a qualifying service (as defined in 47 C.F.R. § 51.5, as that section will be amended by the Final Rules issued by the FCC pursuant to the Triennial Review Order) anywhere in Massachusetts, regardless of whether the switch itself is located in Massachusetts. Do not include Verizon switches utilized by you on an unbundled basis or through the resale of Verizon services at wholesale rates.

15. Identify each Verizon wire center district (i.e., the territory served by a Verizon Massachusetts wire center) in which you provide qualifying service to any end user customers utilizing any of the switches identified in your response to the above question. Wire centers should be identified by providing their name, address, and CLLI code.

16. For each ILEC wire center identified in response to question 15, identify the total number of voice-grade equivalent lines you are providing to customers in that wire center from your switch(es) identified in response to question 14. For purposes of this question, "voice-grade equivalent lines" should be defined consistent with the FCC's use of the term. See, e.g. FCC Form 477, Instructions for the Local Competition and Broadband Reporting Form.

17. With respect to the voice-grade equivalent lines identified in response to the above question, separately indicate the number being provided to: (a) residential customers; (b) business customers to whom you provide only voice-grade or DS0 lines; and (c) business customers to whom you provide DS1, ISDN-PRI, or other high capacity lines. For purposes of this question, "high capacity" means DS1 or equivalent, or higher capacity lines, including, but not limited to DS1, ISDN-PRI, DS3, OCn.

18. With respect to the voice-grade equivalent lines identified in response to the above question, indicate the types of loops over which they are being provided (e.g., an unbundled loop leased from the incumbent LEC, a copper or fiber loop leased from a third party, a self-supplied copper or fiber loop, or a coaxial cable loop).

19. For each of the switches identified in your response to question 14, state whether the switch is owned by you, or whether you have leased the switching capacity or otherwise obtained the right to use the switch on some non-ownership basis. If the facility is not owned by you, identify the entity owning the switch and (if different) the entity with which you entered into the lease or other arrangement, identify the nature of the arrangement, and state whether such entity or entities are affiliates of yours, in the sense defined in ¶ 408 n.1263 of the Triennial Review Order.

20. Provide a list of all switches from which you offer or provide switching capacity to another local service provider for use in providing qualifying service anywhere in Massachusetts.