COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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	D.T.E. 01-20

AT&T'S OPPOSITION TO VERIZON'S MOTION FOR PROTECTIVE TREATMENT THAT WOULD BAR WITNESSES AND SUBJECT MATTER EXPERTS FROM VIEWING VERIZON'S RESPONSE TO ATT-VZ 4-29

By departmental order, Verizon Massachusetts ("Verizon") was required to file fully responsive answers to a variety of AT&T discovery requests, and November 26, 2001, was established as the absolutely final date for Verizon to do so. On November 26, Verizon filed answers to some of those discovery requests, but still did not provide a complete response to ATT-VZ 4-29, which seeks information regarding Verizon's access line forecasts. Verizon refused to provide AT&T with the attachment to its supplemental response to ATT-VZ 4-29 and instead filed a Motion for Confidential Treatment seeking to prevent the CLECs' witnesses and subject matter experts from having access to the information (the "Motion"). Verizon wants to let only CLEC attorneys see the substantive response. This attempt to deny CLEC witness and subject matter experts with access to information that the Department has already found to be relevant and already ordered Verizon to produce is not only unprecedented in this docket, but is also wholly unnecessary in light of the fact that the subject matter experts and witnesses have

signed protective agreements that prevent them from using confidential information provided in this docket for any purposes other than participation in this case. Verizon's motion with respect to ATT-VZ 4-29 is a transparent attempt by Verizon to cripple the ability of AT&T and other CLECs to fully evaluate Verizon's cost studies and to provide the Department with useful surrebuttal and oral testimony. Because the requested level of treatment is both inappropriate and unnecessary, AT&T asks the Department to reject Verizon's motion and order Verizon to immediately produce the attachment to its supplemental response to VZ-ATT 4-29 without any restriction beyond those agreed to in the protective agreement signed by the parties. If Verizon continues to refuse to provide a fully responsive answer, the Department should strike all portions of Verizon's cost studies which purport to rely on access line forecasts.

Factual Background.

On May 11, 2001, AT&T propounded ATT-VZ 4-29, an information request which sought access line forecasts and CCS growth trends used by the marketing, engineering, or strategic planning organizations of Verizon. This information is essential to an evaluation of whether the cost studies submitted by Verizon in this docket made reasonable growth assumptions.

Under the ground rules of this docket, Verizon was obligated to provide a fully responsive answer by May 21. On June 6, seventeen days late, Verizon finally did provide an answer to ATT-VZ 4-29. Unfortunately, this answer was wholly non-responsive. As a result, AT&T sent a letter to Verizon on July 3 seeking a more responsive answer. Verizon refused to do so and AT&T was forced to file a motion to compel (seeking a fully responsive answer to ATT-VZ 4-29 and other requests) on September 7, 2001.

On October 18, 2001, the Department ordered Verizon to provide a supplemental response to ATT-VZ 4-29 and other requests by October 29. The Department stated that it

granted AT&T's motion to compel a response to ATT-VZ 4-29 and other questions "to ensure [that] Verizon's supplemental answers are fully responsive and avoid any further motions to compel."

Verizon then sought, and was granted, an extension of time for filing these responses until November 26 and the Department set a new procedural schedule based on the assumption that Verizon would follow its order and in fact produce all responses by November 26.

On November 26, however, instead of filing a complete response to ATT-VZ 4-29, Verizon failed to provide the CLECs with the attachment and filed its motion in an effort to prevent the CLECs from actually analyzing and using the attachment. Thus, 192 days after it was required by the ground rules of this docket to provide a fully responsive answer to ATT-VZ 4-29, Verizon has still failed to do so and is now attempting to blindfold the CLECs by requesting that the Department prevent CLEC subject matter experts and witnesses from having access to this crucial information.

I. PRECLUDING CLEC SUBJECT MATTER EXPERTS AND WITNESSES FROM VIEWING THE REQUESTED INFORMATION WOULD PREVENT THE CLECS FROM FULLY EVALUATING VERIZON'S COST STUDIES AND PROVIDING RESPONSIVE TESTIMONY.

The Department has already recognized, by compelling Verizon to provide a fully responsive answer to ATT-VZ 4-29, that the requested information regarding access line forecasts is relevant to the review of Verizon's cost studies. In ATT-VZ 4-29, AT&T sought access line forecasts and CCS growth trends used by the marketing, engineering, or strategic planning organizations of Verizon, if different from such forecasts and trends used in Verizon's cost model. The Department has already ordered Verizon to provide a "fully responsive" answer to this request.

Verizon's attempt to prevent CLEC subject matter experts and witnesses from viewing the information that Verizon has already been ordered to produce in response to ATT-VZ 4-29 is

improper. Indeed, if the subject matter experts and witnesses are not allowed access to this information, the CLECs will be not only blindfolded, but also unable to provide any testimonial response to the information. If the CLEC subject matter experts are not allowed access to this information, Verizon's cost studies will not be subject to a robust review and Verizon will be unable to even claim to have met its burden of proving the reasonableness of such cost studies.

In its Motion, Verizon cites to *Boston Gas Company*, D.T.E. 88-67, at 7 (Phase II) (1988), as support for its position that Verizon cannot risk that employees of Verizon's competitors may have access to the information. *See* Motion at 4. The cited holding in *Boston Gas Company* is irrelevant. It dealt with a wholly unrelated issue: whether a party may add information to the record of a case after the record has closed. In that case, the Department refused to allow Boston Gas to introduce such additional information because "[a] party's presentation of extra-record evidence to the fact-finder long after the record has closed and after all briefs have been filed is an unacceptable tactic, potentially prejudicial to the rights of other parties even when the evidence is ultimately excluded." *Boston Gas Company*, t 7. *Boston Gas* had nothing to do with an attempt by one party to withhold confidential information from the witnesses and subject matter experts of other parties, and does not support Verizon's efforts to do so here.

II. IF VERIZON'S DEMAND FORECASTS WERE CONFIDENTIAL INFORMATION, THE EXISTING PROTECTIVE AGREEMENT WOULD PROVIDE ADEQUATE PROTECTION AGAINST MISUSE.

Verizon has not even attempted a serious explanation as to why it cannot provide the requested information to subject matter experts and witnesses pursuant to the terms of the confidentiality agreements that those experts have signed in this case. The confidentiality agreements bar use of confidential information for any purposes other than in connection with participation in this docket. AT&T has provided highly confidential information to Verizon

under this arrangement in this proceeding, without attempting to prevent Verizon witnesses or subject matter experts from reviewing the information in connection with their analysis of the issues raised in this docket.

Verizon wrongly asserts that "[b]y releasing this information to individuals beyond the Department, the Attorney General, and the attorneys of Verizon MA's competitors in this proceeding, competitive companies will be able to determine characteristics of Verizon MA's marketing segments, network plans, and vendor relationships and will have the ability to utilize this information in developing business strategies in direct competition with Verizon MA." Verizon's Motion at 4. In fact, the existing protective agreement prevents use of confidential information to develop business strategies, and is entirely adequate to address Verizon's purported concerns. Notably, Verizon does not explain how information it has been ordered to produce in response to ATT-VZ 4-29 is any different from the highly confidential information routinely provided by CLECs to Verizon and vice versa under protective agreements in this and other dockets.

It is entirely improper for Verizon to try to change the rules of discovery in this docket at this late date. Throughout the proceeding, confidential information has been shared with witnesses and subject matter experts under the existing protective agreements. When AT&T moved to compel a response to ATT-VZ 4-29, Verizon raised no objection to providing the requested information, and made no attempt to limit its production in such a manner that CLECs could make no practical use of it. At the recent scheduling conference with the Department, Verizon agreed that it would provide its response to ATT-VZ 4-29 "no later than the 26th [of November], which is the final date for supplemental information responses." Atty Werlin for Verizon, Tr. 11/15/2001 at 323-324. Verizon assured that Department that "[t]o the extent

information exists, we will make it available." *Id.* at 324-325. Verizon has not lived up to its promise or abided by the Department's order to provide and make available the information sought in ATT-VZ 4-29. At no earlier time did Verizon attempt to bar CLEC witnesses and subject matter experts from viewing the response, and its effort to do so at this late date appears to be nothing more than yet another attempt by Verizon to disrupt the schedule in this proceeding and delay and impede the resolution of this proceeding.

III. INDEED, VERIZON HAS FAILED TO SHOW THAT THE REQUESTED INFORMATION IS ENTITLED TO *ANY* LEVEL OF PROTECTIVE TREATMENT, LET ALONE THE UNPRECEDENTED LEVEL OF PROTECTIVE TREATMENT THAT VERIZON IS SEEKING.

In its Motion, Verizon has failed to meet its burden of proving that the attachment to its supplemental response to ATT-VZ 2-49 is entitled to any protective treatment, let alone the extraordinary protection that Verizon is seeking.

> G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, confidential, competitively sensitive or other proprietary information"; second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by "proving" the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect.

Hearing Officer Ruling on Motion of AT&T Communications of New England, Inc. for Protective Treatment of Confidential Information, D.T.E. 01-31 Phase I, September 7, 2001, at 2 *citing* G.L. c. 25, § 5D.

The Department has emphasized that "[c]laims of competitive harm resulting from public disclosure, without further explanation, have never satisfied the Department's statutory requirement of proof of harm." *See Interlocutory Order on Verizon Massachusetts' Appeal of*

Hearing Officer Ruling Denying Motion for Protective Treatment, D.T.E. 01-31 Phase I, August 29, 2001, at 7.

Verizon's Motion does not satisfy the burden set forth in these Departmental orders or the burden for demonstrating that a piece of information is a trade secret that Verizon cited in its own brief. Under the standard for "trade secret" cited by Verizon, the Department must consider "(1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of the measures taken by the employer to guard the secrecy of the information… and (5) the amount of effort or money expended by the employer in developing the information…" *See* Verizon Motion at 2 *citing Jet Spray Cooler, Inc.* v. *Crampton*, 282 N.E.2d 921, 925 (1972).

Verizon's Motion does not contain a single allegation that it limits the dissemination of the requested information either within or outside of Verizon,[1] nor does it mention any measures taken by Verizon to guard the secrecy of the information. *See generally* Verizon Motion. If Verizon has discussed demand forecasts with financial analysts or others outside the company, then this information would not be entitled to any level of confidential treatment at all.

Conclusion.

For the reasons stated above, AT&T respectfully requests that the Department deny Verizon's Motion for Protective Treatment of its response to ATT-VZ 4-29. In the alternative, if Verizon refuses to provide the CLECs with the forecasts responsive to ATT-VZ 4-29 which the

[1] It is likely that Verizon cannot claim that it does not disseminate its line forecasts and growth trends for Massachusetts with anyone outside of Verizon because this is exactly the type of information that Verizon likely would share with its financial analysts and investors.

Department has already ordered Verizon to produce, the Department should strike all portions of Verizon's cost studies which purport to rely on any forecasts of access line numbers or demand.

AT&T COMMUNICATIONS OF NEW ENGLAND INC.

Respectfully submitted,

_____

Jeffrey F. Jones
Kenneth W. Salinger
Jay E. Gruber
Emily R. Donovan
Kevin R. Prendergast
PALMER & DODGE LLP
111 Huntington Avenue
Boston, MA 02199-7613
(617) 239-0100

Robert Aurigema
AT&T Communications, Inc.
32 Avenue of the Americas, Room 2700
New York, NY 10013
(212) 387-5627

November 30, 2001