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

SUPPLEMENTAL MOTION FOR CONFIDENTIAL TREATMENT

Verizon Massachusetts ("Verizon MA") files this Supplemental Motion as requested by the Hearing Officer's memorandum of January 16, 2002 on Verizon MA's Motions for Confidential Treatment, dated August 8 and 15, 2001. The Hearing Officer requests specifics to support Verizon MA's request for protective treatment of data that Verizon MA provided in response to Information Requests ATT-VZ 2-4; ATT-VZ 14-20; ATT-VZ 16-2; ATT-VZ 22-3; CC-VZ 1-16; CC-VZ 2-36; filed on August 8, 2001 and CC-VZ 1-16 (Supplemental), filed on August 15, 2001. In particular, Verizon MA is asked to provide (1) justifications for proprietary treatment; (2) whether the type of information contained in the response has always been treated as proprietary; and (3) whether Verizon MA can prepare redacted versions of the responses at issue.

As shown below, the data qualify as "trade secret" or "confidential, competitively sensitive, proprietary information" under Massachusetts law and are entitled to protection from public disclosure in this proceeding. Secondly, Verizon MA attempts to identify

proprietary materials on a consistent basis. In the event of inadvertent production or request for protection, Verizon MA will immediately respond and cure any document production error. Finally, redacted versions of the request would render the information useless to the reader; the data should be protected in its entirety.

DISCUSSION

In determining whether certain information qualifies as a "trade secret,"[1] Massachusetts courts have considered the following:

> (1) the extent to which the information is known outside of the business;
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> (2) the extent to which it is known by employees and others involved in the business;
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> (3) the extent of measures taken by the employer to guard the secrecy of the information;
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> (4) the value of the information to the employer and its competitors;
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> (5) the amount of effort or money expended by the employer in developing the information; and
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> (6) the ease of difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. Crampton, 282 N.E.2d 921, 925 (1972).

The protection afforded to trade secrets is widely recognized under both federal and state law. In *Board of Trade of Chicago v. Christie Grain & Stock Co.*, 198 U.S.

[1] Under Massachusetts law, a trade secret is "anything tangible or electronically kept or stored which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information design, process, procedure, formula, invention or improvement." G.L. c. 266, § 30(4); *see also* Mass. G.L. c. 4, § 7. The Supreme Judicial Court, quoting from the Restatement of Torts, § 757, has further stated that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors.... It may be a formula treating or preserving material, a pattern for a machine or other device, or a list of customers." *J.T. Healy and Son, Inc. v. James Murphy and Son, Inc*., 260 N.E.2d 723, 729 (1970).

236, 250 (1905), the U.S. Supreme Court stated that the board has "the right to keep the work which it had done, or paid for doing, to itself." Similarly, courts in other jurisdictions have found that "[a] trade secret which is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it, is private property which could be rendered valueless ... to its owner if disclosure of the information to the public and to one's competitors were compelled." *Mountain States Telephone and Telegraph Company v. Department of Public Service Regulation*, 634 P.2d 181, 184 (1981).

The attachment to the response to **Information Request ATT-VZ 2-4** identifies Verizon MA's wire centers and the number of lines by type and the different circuits served by the wire center. The total number of residential and business lines served by a wire center is reflected in the data. The requested data represents valuable commercial information that competitors could use to frustrate Verizon MA efforts in the competitive market. Disclosure of such information inappropriately tips the competitive balance by permitting competitors to target Verizon MA customers to gain a competitive advantage in the marketplace that they otherwise would not enjoy. In balancing the public's "right to know" against the public interest in an effectively functioning competitive marketplace, the Department should continue to protect information that, if made public, would likely create a competitive disadvantage for the party complying with legitimate discovery requests.

The attachment to the response to **Information Request ATT-VZ 14-20** details the number of residence secondary access lines and numbers for total access lines.

Massachusetts courts have frequently indicated that "a trade secret need not be a patentable invention." *Jet Spray Cooler, Inc. v. Crampton*, 385 N.E.2d 1349, 1355 (1979).

Verizon MA withdraws its request for confidential treatment of this data and will produce the information for the public record.

The attachment to the response to **Information Request ATT-VZ 16-2** identifies the Loop Cost Analysis Model and operational documents. The cost model was designed and developed at the direction of Verizon MA. The information is not published elsewhere or publicly available. Verizon MA regularly seeks to prevent dissemination of the information in the ordinary course of its business. Further, if made public, the requested information could create a competitive disadvantage for Verizon MA, and be of value to other providers in developing competing market strategies.

The attachment to the response to **Information Request ATT-VZ 22-3** identifies the penetration rates for selected vertical features as of December 2000. The vertical features presented include 3-way calling, call waiting, return call, repeat call, and Caller ID. The information is not readily available to competitors and would be of value to them in developing competitive marketing strategies. By releasing this information to the public, competitive companies will be able to determine characteristics of Verizon MA's market segments and will have the ability to utilize this information in developing offerings in particular exchanges in direct competition with Verizon MA. The benefits of nondisclosure, and associated evidence of harm to Verizon MA, outweigh the benefit of public disclosure in this instance.

The attachment to the response to **Information Request CC-VZ 1-16** and **Information Request CC-VZ 1-16 Supplemental** identifies the underlying productivity inputs used in the VCOST system. The information for which Verizon MA is requesting protective treatment is compiled from internal databases that are not publicly available, is

not shared with any non-Verizon employees for their personal use, and is not considered public information. Further, Verizon MA regularly seeks to prevent dissemination of the information in the ordinary course of its business. If made public, the requested information could create a competitive disadvantage for Verizon MA and the relevant resellers, and be of value to other providers in developing competing market strategies. Disclosure of the competitively sensitive material will undermine Verizon MA's ability to compete with other providers of like services.

The attachment to the response to **Information Request CC-VZ 2-36** identifies the percentage of Verizon MA's total number of lines that are served on fiber-based feeder facilities in Massachusetts for the years 1999 through to 2001. Verizon MA withdraws its request for confidential treatment of this data and will produce the information for the public record.

In summary, both the Department and the telecommunications industry have historically recognized the information above for which Verizon MA seeks proprietary treatment to be confidential and appropriately subject to protection by order and the execution of reasonable nondisclosure agreements. Nothing has changed in terms of law or circumstance that warrants an abandonment of that protection. Given the increasingly competitive telecommunications world, the Department should not now depart from its past practice and apply G.L. c.25, § 5D to permit competitors to gain access to what is private, commercial information. Disclosure of the competitively sensitive material will undermine Verizon MA's ability to compete with other providers of like services that are not subject to equal public scrutiny.

CONCLUSION

For the reasons stated above, Verizon MA respectfully requests that the Department grant its Supplemental Motion for Confidential Treatment of the proprietary portions of Verizon MA's responses to Information Requests ATT-VZ 2-4; ATT-VZ 16-2; ATT-VZ 22-3; CC-VZ 1-16; filed on August 8, 2001 and CC-VZ 1-16 Supplemental, filed on August 15, 2001. As demonstrated above, the information is entitled to such protection, and no compelling need exists for public disclosure in this proceeding.

Respectfully submitted,

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