

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own
Motion as to the propriety of the rates and
charges set forth in M.D.T.E No. 17, filed with
the Department on April 6, 2001, for effect on
May 6, 2001, by Verizon New England, Inc.
d/b/a Verizon Massachusetts

D.T.E. 98-57, Phase IV

MOTION OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC.
FOR PROTECTIVE TREATMENT OF CONFIDENTIAL INFORMATION

AT&T Communications of New England, Inc. (“AT&T”) hereby requests that the Department of Telecommunications and Energy (the “Department”) grant protection from public disclosure of certain confidential, competitively sensitive and proprietary information submitted in this proceeding in accordance with G.L. c. 25, § 5D. Specifically, AT&T requests that the attachment to AT&T’s response to VZ-ATT 1-4 be granted protective treatment because it contains competitively sensitive and highly proprietary information and trade secrets.

These materials have already been provided to the Department, Verizon and those parties which have signed a protective agreement with AT&T in this docket. If these materials are placed in the public record, however, AT&T’s competitors would be able to use them to gain an unfair competitive advantage.

I. LEGAL STANDARD.

Confidential information may be protected from public disclosure in accordance with G.L. c. 25, § 5D, which states in part that:

The [D]epartment may protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be on the proponent of such protection to prove the need for such protection. Where the need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

The Department has recognized that competitively sensitive information is entitled to protective status. *See, e.g., Hearing Officer's Ruling On the Motion of CMRS Providers for Protective Treatment and Requests for Non-Disclosure Agreement*, D.P.U. 95-59B, at 7-8 (1997) (the Department recognized that competitively sensitive and proprietary information should be protected and that such protection is desirable as a matter of public policy in a competitive market). 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;
- (2) the extent to which it is known by employees and others involved in the business;
- (3) the extent of measures taken by the employer to guard the secrecy of the information;
- (4) the value of the information to the employer and its competitors;
- (5) the amount of effort or money expended by the employer in developing the information; and
- (6) the ease or 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. 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

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." Mass. General Laws c. 266, § 30(4); *see also* Mass. General Laws c. 4, § 7. The Massachusetts 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). 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).

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).

II. ARGUMENT.

The attachment to AT&T's response to VZ-ATT 1-4 contains competitively sensitive and proprietary information and trade secrets. The information contained in this responses was developed by AT&T at AT&T's expense for its own internal purposes. This information is not publicly available, is not shared with non-AT&T employees for their personal use and is not considered public information. Any dissemination of this information to non-AT&T employees, such as contract consultants, is done so on a proprietary basis. Even AT&T employees who review these materials are subject to non-disclosure agreements and are allowed to use them for internal business reasons only. Furthermore, as discussed in more detail below, these materials contain valuable commercial information that competitors could unfairly use to their own advantage. Thus, these materials should be granted proprietary treatment and should not be placed on the public record.

In response to VZ-ATT 1-4, AT&T provided detailed information about power readings performed by AT&T engineers at Verizon-NY's central offices for the months of April, May and June of 2001. This information is highly proprietary because it identifies the locations and sizes of AT&T's New York power installations. This in turn allows AT&T's competitors to identify the sizes and locations of AT&T's collocation arrangements in New York. This information provides AT&T's competitors with a window into AT&T's strategic planning and marketing strategy. This information would allow AT&T's competitors to target specific geographic areas for competition. The Department has recognized that proprietary treatment is necessary to avoid such targeting and prevent competitors from gaining an unfair competitive advantage. *See* Interlocutory Order On Verizon Massachusetts' Appeal Of Hearing Officer Ruling Denying Motion For Protective Treatment, D.T.E 01-31 (August 29, 2001) ("Interlocutory Order") at 9.

Thus, the attachment to AT&T's response to VZ-ATT 1-4 is entitled to protective treatment. AT&T requests that this information be protected for a period of five (5) years. It costs AT&T a substantial amount of money to invest in collocation facilities and a substantial amount of time to plan for, order and occupy those facilities once they are completed. Because of this, AT&T's collocation presence does not change substantially from year to year. Therefore, in order to avoid giving AT&T's competitors an unfair competitive advantage, the information provided in response to VZ-ATT 1-4 must be protected for an extended period. AT&T reasonably believes that five years should be sufficient for this purpose.

Conclusion.

For these reasons, AT&T requests in accordance with G.L. c. 25, § 5D that the Department grant protective treatment to the attachments to AT&T's response to VZ-ATT 1-4 and that such protective treatment be granted for a period of five years.

Respectfully submitted,

AT&T COMMUNICATIONS OF NEW
ENGLAND, INC.

Its Attorney,

Jeffrey F. Jones
Kenneth W. Salinger
Jay E. Gruber
Kevin R. Prendergast
Palmer & Dodge LLP
One Beacon Street
Boston, MA 02108
(617) 573-0100

February 12, 2002