**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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| Pricing for Unbundled Network Elements and for Verizon MA New England, Inc. d/b/a Verizon MA Massachusetts | ) | D.T.E. 01-20 (Part A) |

**APPEAL OF VERIZON MASSACHUSETTS FROM HEARING OFFICER'S RULING ON MOTION TO COMPEL DISCOVERY RESPONSES**

Pursuant to 220 C.M.R. 1.06(6)(d)(3), Verizon Massachusetts ("Verizon MA" or "Company") hereby appeals portions of the Hearing Officer's Ruling on Verizon Massachusetts' Motion to Compel Discovery Responses by AT&T Communications of New England, Inc. dated August 8, 2001 (the "Ruling").[1] Verizon MA requests that the Department of Telecommunications and Energy ("Department") reverse certain aspects of the Ruling (as described below) and order AT&T Communications of New England, Inc. ("AT&T") to respond fully to several of the discovery requests that the Hearing Officer did not compel AT&T to answer. Alternatively, Verizon MA requests that if AT&T does not provide adequate responses, the Department should strike certain portions of AT&T's prefiled testimony.

As described in the Company's Motion to Compel, the primary purpose of this proceeding is to identify the forward-looking costs of providing Unbundled Network Elements ("UNEs") and combinations of UNEs in Massachusetts. In support of its direct

[1] A copy of both the Ruling and Verizon MA's Motion to Compel are attached hereto.

case, AT&T sponsored the HAI Model, Release 5.2a-MA ("HAI 5.2a-MA") to estimate the forward-looking cost of providing UNEs. The information requests issued by Verizon MA attempted "to obtain information that will enable it to analyze the model and evaluate the propriety of its platform methodologies, input values, and the accuracy of the cost estimates it produces" (Verizon MA Motion to Compel at 2). At the time the discovery was requested, it was anticipated that the information contained in the responses would "form the basis of much of Verizon MA's rebuttal testimony and will provide the Department with a full and detailed record upon which the Department can determine the appropriateness of the HAI 5.2a-MA Model for computing the costs for UNEs" (*id.*).[2]

For the reasons described below, the information requested in this appeal is relevant to this proceeding (in fact, it is critical to the Company's ability to rebut the case presented by AT&T), meets the Department's discovery standards, and therefore, the Department should compel AT&T to provide full and complete responses.

## II. STANDARD OF REVIEW

It is well-settled that the Department will generally require discovery of relevant, non-privileged information:

> Parties may obtain discovery responses regarding any matter, not privileged, that is relevant to the subject matter in the proceeding. M.R.C.P. Rule 26(b) (1). Under this Rule, relevancy does not mean that the discovered material must be admissible in evidence. So long as the material to be discovered may lead to admissible evidence, the

[2] Verizon MA filed rebuttal testimony on July 18th without the benefit of the requested information. Surrebuttal testimony is presently scheduled to be filed on August 21, 2001. Verizon MA has now requested that the procedural schedule be extended to permit time to resolve discovery disputes and incorporate new information into the surrebuttal testimony.

> relevancy requirements of Rule 26(b) (1) are met. See, *e.g. Louis v. United Airlines Transport Corp.*, 27 F. Supp. 946, 947 (D. Conn. 1939). Although we consider discovery a useful tool for narrowing and defining issues for adjudication, we are careful to guard against the use of discovery as a fishing expedition for unnecessary information. We recognize that the establishment of limitations and restrictions may be necessary to protect parties from the abuses of unreasonable discovery.

*New England Telephone and Telegraph Company*, D.P.U. 91-63-A (1991), at 11.

The Department's procedural rule that governs discovery is 220 C.M.R. § 1.06(6)(c). This rule states in relevant part:

> 1. *Purpose* The purpose for discovery is to facilitate the hearing process by permitting the parties and the Department to gain access to all relevant information in an efficient and timely manner. Discovery is intended to reduce hearing time, narrow the scope of issues, protect the rights of parties, and ensure that a complete and accurate record is compiled.
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> 2. *Rules Governing Discovery*. Because the Department's investigations involve matters with a wide range of issues, levels of complexity and statutory deadlines, the presiding officer shall establish discovery procedures in each case which take into account the legitimate rights of the parties in the context of the case at issue. In establishing discovery procedures, the presiding officer must exercise his or her discretion to balance the interests of the parties and ensure that the information necessary to complete the record is produced without unproductive delays. In exercising this discretion, the presiding officer shall be guided by the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26 et seq. These rules, however, shall be instructive, rather than controlling.

Rule 26(b)(1) Massachusetts Rules of Civil Procedure, Rule 26(b)(1) states, in part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ... It is not ground for objection that the information sought will be inadmissible at the trial if

> the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

## III. ARGUMENT

The subject of this appeal is the Hearing Officer's denial of the Motion to Compel production of two categories of requested information: (1) information relating to costs and operational experience of AT&T's network;[3] and (2) information that AT&T claims is the "intellectual property of an outside vendor and that [AT&T] does not have and/or is not authorized to provide."[4] Hearing Officer's Ruling at 10-12.

For the reasons noted below, Verizon MA is entitled to discovery on these issues because the information sought is relevant to the case. Accordingly, those portions of the Ruling should be reversed by the Commission.

### A. The Hearing Officer Erred in Finding that Information Regarding AT&T's Network and Operational Experience Is Not "Crucial" to Verizon's Evaluation of AT&T's Cost Model.

The Hearing Officer's denial of Verizon MA's discovery of information relating to AT&T's network and operational experience is based on an erroneous finding and an erroneous standard of review. The erroneous finding is that if "…the HAI 5.2a-MA Model is not based on AT&T's historical costs … the information Verizon [MA] seeks would not serve as any useful benchmark." Ruling at 10-11. The Hearing Officer misses the point of Verizon MA's argument and the relevance of the information. It is Verizon MA's position that the costs computed by the HAI 5.2a-MA Model do not represent a

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[3] The following discovery requests fall into the category of information relating to AT&T's network: Information Requests VZ-ATT 1-38, 1-39, 1-70 through 1-79, 1-114 through 1-128, 1-131, 1-135, 2-1, 2-15 and 2-91.

[4] The following discovery requests fall into the category of information that AT&T claims it is not authorized to provide: Information Requests VZ-ATT 1-20, 1-21, 1-23, 1-25, 1-26, 1-82, 1-83 and 2-62.

realistic depiction of the costs that would be incurred by a forward-looking network. Verizon MA believes that its cost model properly reflects a reasonable level of forward-looking costs for a network that could actually be built and operated by an efficient service provider. Relevant to that inquiry is a review of the operations, practices and costs incurred by AT&T. Information that the operations, practices and costs of AT&T are inconsistent with the inputs, assumptions and cost outputs of the HAI 5.2a-MA, would undermine the credibility of that model and support Verizon MA's position that the costs generated by the HAI 5.2a-MA grossly understate costs that would actually be incurred by a service provider. For this reason, the information about AT&T's network and operational experiences is relevant, and AT&T should be compelled to provide the requested data.

The Hearing Officer compounds the error by applying an inappropriate standard. The Ruling determined "that the information on AT&T's network is therefore not crucial to evaluation of the model it is sponsoring…". *Id.*, at 11. The standard for discovery is not whether the requested information is "crucial," but whether it is *relevant*. *See* D.P.U. 91-63-A (1991), at 11, *supra*; 220 C.M.R. § 1.06(6)(c); Rule 26(b)(1) Massachusetts Rules of Civil Procedure. Although Verizon MA would argue that the information *is* crucial for its case, there is no legal support for applying any standard of review other than relevance.

The application of the appropriate relevance standard to the information sought by Verizon MA leads to the inescapable conclusion that information about the costs and operational experiences relating to AT&T's network will tend to support or undermine the credibility and reasonableness of the inputs, assumptions and cost outputs of AT&T's

proffered HAI 5.2a-MA. Since the information will "tend[] to prove or disprove an alleged fact" (*Black's Law Dictionary*, Abridged Sixth Edition, at 894), it meets the definition of relevance and is therefore discoverable.

Accordingly, the Hearing Officer's Ruling with respect to the information requests concerning AT&T's operational experience and network should be overturned and AT&T should be ordered to respond to the requests.

**B. The Hearing Officer Erred in Refusing to Order AT&T To Produce Information That Is Allegedly the Intellectual Property of Outside Vendors or, Alternatively, To Strike AT&T's Testimony Relating to the HAI 5.2a-MA.**

The Hearing Officer's Rulings with respect to information that AT&T claims is the "intellectual property of an outside vendor and that [AT&T] does not have and/or is not authorized to provide" should be overturned, or the Department should strike testimony relating to the HAI 5.2a-MA. Citing AT&T's burden to "ensure that its HAI 5.2a-MA Model and its inputs are sufficiently available for public review" (Ruling at 12), the Hearing Officer does not in any way dispute the relevance of the information requested by Verizon MA or the importance to Verizon MA of being able to review and comment on the underlying data for the HAI 5.2a-MA. *Id*. Although warning AT&T about its burden, the Ruling neither orders AT&T to produce the information nor strikes the prefiled testimony relating to the HAI 5.2a-MA for failure to produce the material.[5]

This portion of the Ruling is erroneous in that the Hearing Officer refuses both to require AT&T to produce relevant information, while indicating that the failure to make

[5] In fact, the Ruling explicitly refuses to strike AT&T's testimony ("[b]ased on our ruling below, we do not find it appropriate to strike any of AT&T's testimony"). Ruling, at 3, n.2.

such information available would cause AT&T to fail to meet its evidentiary burden to support the HAI 5.2a-MA. Verizon MA has demonstrated (and the Hearing Officer has determined) that the information sought in this regard is relevant and necessary if AT&T is to go forward with the HAI 5.2a-MA. The Department must either order production of the information or strike the prefiled testimony relating to the HAI 5.2a-MA.[6]

## IV. CONCLUSION

For the forgoing reasons, Verizon MA respectfully requests that the Department grant this Appeal and order AT&T to supplement its answers to the subject information requests, or, alternatively to strike testimony relating to the HAI 5.2a-MA.

Respectfully submitted,

Verizon Massachusetts


Bruce P. Beausejour
185 Franklin Street, Room 1403
Boston, Massachusetts 02110-1585
(617) 743-2445

Robert N. Werlin
Keegan, Werlin & Pabian, LLP
21 Custom House Street
Boston, Massachusetts 02110
(617) 951-1400


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[6] Since the failure of AT&T to produce the information would require a finding that it had not met its burden concerning the HAI 5.2a-MA, the Department should strike the material now to save all parties and the Department the expenditure of resources needed to address a model that cannot be supported on this record.