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September 8, 2006

VIA FEDERAL EXPRESS

Mary L. Cottrell, Secretary of the Department
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, Second Floor
Boston, MA 02110

Re: DTE 06-56; Petition for Arbitration of Charter Fiberlink MA-CCO, LLC Pursuant to 47 U.S.C. § 252(b)

Dear Secretary Cottrell:

Enclosed please find the Opposition of Charter Fiberlink MA-CCO, LLC to Verizon's Motion for a Protective Order filed September 6, 2006 in DTE Docket 06-56.

If you have any questions about this matter please contact me at the telephone number listed above. Thank you.

Sincerely,

K.C. Halm
Counsel for Charter Fiberlink MA-CCO, LLC

cc: Carol Pieper, Arbitrator
DTE 06-56 Service List

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BEFORE THE MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

In the Matter of Petition of Charter Fiberlink MA-CCO, LLC for Arbitration of an Amendment to the Interconnection Agreement Between Verizon-Massachusetts, Inc. and Charter Fiberlink MA-CCO, LLC Pursuant to Section 252 of the Communications Act of 1934, as Amended	D.T.E. No. 06-56

OPPOSITION OF CHARTER FIBERLINK MA-CCO, LLC TO VERIZON MOTION FOR PROTECTIVE ORDER

Charter Fiberlink MA-CCO, LLC ("Charter") hereby opposes Verizon New England, Inc. d/b/a Verizon Massachusetts' ("Verizon") September 6, 2006 Motion for Protective Order and request for relief from its duty to produce certain purportedly "highly sensitive" information called for by Charter's data requests.

By this filing Charter opposes only Verizon's request for relief from its duty to produce information responsive to Charter Data Request 1.1. Charter does not oppose Verizon's motion as it relates to Charter Data Request 1.17.[1] For the reasons set forth herein, Charter asks the Department to act in an expedited fashion to deny Verizon's motion and order Verizon to produce the information requested in Data Request 1.1 immediately.

I. INTRODUCTION

As the Arbitrator recently recognized in her ruling on Charter's Motion to Compel, the Department's discovery rules are designed to permit the parties and staff to gain access to

[1] Charter is not opposing Verizon's request to withhold data responsive to Charter Data Request 1.17 because Verizon has been ordered by the Arbitrator to produce information regarding its fiber network in LATAs 126 and 128 in response to Charter Data Request 1.24. The purpose of Data Request 1.17 was only to identify where Verizon was likely to install telecommunications-capable fiber in the near future, however, Verizon's response to 1.24 should provide the relevant information necessary for Charter to put on its affirmative case.

relevant information in an efficient and timely manner. 220 C.M.R. § 1.06(6)(c). The Department must afford all parties the opportunity for a full and fair hearing, which includes the parties' right to acquire information from each other in order to participate meaningfully in an adjudicatory proceeding. 2001 Mass. PUC LEXIS 91, * 53-55 (Mass. DTE 2001); G.L. c. 30A, § 10. Parties need access to relevant materials during discovery in order to assess the claims of other parties, to challenge the contentions of other parties' witnesses, and to make the most effective evidentiary record they can. *Id.* Only after such disclosure, is the Department in a position to make a well-reasoned decision on an ample evidentiary record. *Id.*; *see* D.P.U. 97-95, Interlocutory Order at 9-10.

Against this broad, well established, standard of disclosure Verizon now asks the Department to absolve Verizon of its obligation to produce relevant information in response to Charter's Data Request. The relief Verizon seeks is overreaching and unnecessary. It is unnecessary because the Parties have already executed a Protective Agreement ("Protective Agreement") which adequately protects from disclosure the information at issue here. Further, it overreaches because Verizon has failed to demonstrate any specific harm that would occur to Verizon or other CLECs by disclosing the information sought in Charter Data Request 1.1.

The purpose of the Data Request 1.1 is to obtain information about the rates, terms and conditions of Verizon's fiber meet point interconnection with other LECs in Massachusetts. This information, already deemed relevant by the Arbitrator,[2] will provide a basis for Charter to assess, and for the Department to determine, whether Verizon's proposed limitations and conditions upon the fiber meet point arrangement with Charter are just, reasonable and nondiscriminatory. Accordingly, the Arbitrator should deny Verizon's motion as it relates to

[2] Arbitrator Ruling on Motion to Compel Responses to Information Requests, D.T.E. No. 06-56, 5-6 (Mass. DTE 2006).

Charter Data Request 1.1 because it seeks information that will allow Charter to develop its affirmative legal and factual case and will allow the Department to make a reasoned decision based upon all relevant evidence.

II. ARGUMENT

A. Massachusetts Courts Rarely Excuse Parties from Their Duty to Produce Relevant Information

Verizon's request to be relieved of its duty to disclose relevant information is an extraordinary departure from the discovery standards used by the Department and the courts in Massachusetts.[3] Where a movant seeks such extraordinary relief (nondisclosure of relevant[4] information), it must satisfy a much higher standard than would apply if the only relief sought were to prevent unrestricted public disclosure of information. Specifically, the party seeking protection bears the burden of proving "good cause" by demonstrating a specific factual basis of potential harm. Fed. R. Civ. P. 27(c); *see Ares-Serono*, 1993 U.S. Dist. LEXIS at *12. "Good cause" is established when the movant demonstrates with specificity that disclosure will cause a clearly defined and serious injury. *See Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3rd Cir. 1995). Indeed, the *Glenmede* court explained that "[b]road allegations of harm, unsubstantiated by specific examples, . . . will not suffice." *Id.*

On several occasions the federal district courts in Massachusetts have rejected the same relief that Verizon seeks here: to be excused from producing relevant material to an adverse party during discovery. For example, in *Multi-Core, Inc. v. Southern Water Treatment Company,* 139 F.R.D. 262, 1991 U.S. Dist. LEXIS 19083 (D. Mass. 1991), the court denied one

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[3] The courts have noted that there is "no absolute privilege for trade secrets and similar confidential information." The court must generally weigh on the one hand the right of a plaintiff to examine relevant evidence against the right of a defendant to protect its confidential data. *See, e.g. GTE Products Corp. v. Gee*, 112 F.R.D. 169, 172 (D. Mass. 1986) (balancing risk of competitive injury against need for information).

[4] Arbitrator Ruling on Motion to Compel Responses to Information Requests, D.T.E. No. 06-56, 5-6 (Mass. DTE 2006).

party's request to be excused from producing information concerning its chemical formula. The court held that even though the chemical formula constituted a trade secret, which was valuable to the company and the disclosure of which would result in harm to the company, the formula would have to be disclosed because it was relevant to proving the plaintiff's cause of action. *Id.*

Also, in *Ares-Serono, Inc. et al., v. Organon International B.V.*, 1993 U.S. Dist. LEXIS 18912 (D. Mass 1993) the court rejected a request to relieve the party from the obligation to disclose certain confidential information. The court found that the terms of an existing protective agreement adequately protected defendants because disclosure was limited to outside litigation counsel, independent experts, paralegals and clerical employees. 1993 U.S. Dist. LEXIS at *11-15. The court explained that the defendants failed to demonstrate, by affidavit or other documentary evidence, that the harm resulting from disclosure under the restricted confidential category outweighs plaintiffs' need for the relevant information in responding to the defendant's partial summary judgment motion. 1993 U.S. Dist. LEXIS at *14.

These cases demonstrate that the courts are unwilling to relieve one party of the duty to produce relevant information if that party does not show with particularity and specificity a compelling need to withhold information from production. As explained below, Verizon has failed to meet its burden because it has not demonstrated that producing confidential information responsive to Data Request 1.1 would expose Verizon or other CLECs to any "clearly defined and serious injury."

B. Verizon Has Not Met Its Burden of Proving a "Clearly Defined and Serious" Injury

Verizon makes three basic arguments in support of its request. First, it asserts that information concerning Verizon's interconnection arrangements with other CLECs is "carrier proprietary information." (Verizon Motion at 6-7) Verizon contends that the requested data is

proprietary information that is not publicly disclosed by either Verizon or the respective carrier, and that the Department should therefore excuse Verizon from production. This reasoning is flawed because it ignores the fact that the terms and conditions of Verizon's interconnection with CLECs (after all, a fiber meet point is simply one method of interconnection) are already memorialized in interconnection agreements that are on file with the Department. Those agreements are, of course, matters of public record and are available for public inspection and review. Indeed, the purpose of Charter's Data Request 1.1 is to obtain the identity of those other entities so that Charter may then review the terms of Verizon's publicly-filed interconnection agreement with such entities. Thus, simply disclosing the identity of the entity with whom Verizon interconnects will not lead to any "serious injury" to either Verizon or the CLEC. The terms of those parties' interconnection arrangements should already be public information, on file with the Department.

Verizon's second argument is that Charter would find it valuable to know the locations and names of companies with fiber meet arrangements with Verizon because it would "hand Charter a valuable competitive advantage in designing and implementing its own marketing efforts." (Verizon Motion at 7). This assertion lacks merit because it incorrectly assumes that Charter competes with other CLECs in Massachusetts.

The fact is, Charter focuses primarily on serving residential areas while most other CLECs serve urban or metropolitan areas. As a facilities-based CLEC, Charter's telephony service offerings are provided by means of the local distribution network of Charter's affiliated-cable company. That network is almost entirely based in residential and suburban areas, rather than urban or metropolitan areas. For that reason Charter primarily provides telephone service in suburban and residential areas. This is in contrast to the majority of existing CLECs who focus

their service offerings on the enterprise market located in urban and metro areas. It is well established that the vast majority of existing CLECs[5] have built their networks in urban or metro areas to serve the enterprise (i.e. business) customers located in those areas. Therefore, Charter generally does not directly compete with other CLECs to provide telephony services in Massachusetts. That, in turn, means that any information obtained regarding the location of other CLECs' facilities will not provide any competitive value to Charter. For that reason Verizon is wrong that disclosure of the identity (or location) of other CLECs with fiber meet point arrangements will result in any specific or serious injury to Verizon, or other CLECs.

Verizon's third argument also fails to demonstrate that any specific or serious injury will result if Verizon discloses the requested information. Verizon argues that the parties' Protective Agreement does not offer any real protection from improper use of information disclosed by Verizon. (Verizon Motion at 7). On this point Verizon asserts that it is "unrealistic" to believe that "mere contract provisions requiring the recipients of the data to use it only for limited purposes and not to use it in any competitive fashion . . ." *id.* would adequately protect the information from disclosure. In other words, Verizon argues that Charter would effectively be free to use the information that it obtains in discovery in "any competitive fashion" to its advantage.

This contention, however, completely ignores the fact that the parties recently entered into a contractually binding Protective Agreement, which requires that all confidential data produced in this proceeding remain confidential. (Section 1, Protective Agreement). Specifically, the agreement provides that "[n]o person with access to any Confidential Information shall use such information for any purpose other than the purpose of preparation for

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[5] Except, of course, for other facilities-based "cable CLECs."

and conduct of this proceeding and related proceedings."[6] *Id.* So Charter is by no means free to disclose confidential data and any effort to do so would constitute a breach of the agreement. Such a breach would subject Charter to penalties and allow Verizon to pursue additional remedies from the Department. (Sections 15 & 19, Protective Agreement). As such, Charter is subject to a legally enforceable contract; a contract that Charter takes seriously and expects the parties to be bound by. Verizon's claims notwithstanding, there is no reason to believe that the Protective Agreement does not adequately protect the parties from unauthorized disclosure given that the Arbitrator assured the parties that this was the Department's preferred way of dealing with confidential information in Massachusetts.

Moreover, Verizon's allegations focus entirely on Charter's purported ability to gain advantage over other CLECs with this "secret, commercially valuable, confidential information." However Verizon fails to describe with any level of specificity the potential harm that it would suffer from disclosure.[7] Although Verizon's rather tenuous contentions appear to suggest that disclosure would injure Verizon's relationships with its clients (i.e. other CLECs), the courts have made it unmistakably clear that "broad allegations of harm, unsubstantiated by specific examples or articulated reasoning" do not support a good cause showing. *See Pansey v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3rd Cir. 1994). Accordingly, Verizon has not demonstrated, with necessary specificity, that disclosure would be harmful.

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[6] Specifically, persons obtaining access to confidential data under the Agreement shall use the information only in the conduct of this proceeding, other Department proceedings arising or resulting from this proceeding, and any Federal Communications Commission or judicial proceeding arising from this or such other Department proceedings, and shall not use such confidential data for any other purpose, including, but not limited to, business, governmental, commercial, or other administrative or judicial proceedings. (Section 8, Protective Agreement).

[7] The only evidence that Verizon offers are two paragraphs in an affidavit by John Conroy which simply restates (almost literally) assertions made in Verizon's motion. *See* Affidavit of John Conroy, DTE Docket 06-56 at ¶¶ 8-9.

C. Charter's Need for Relevant Information Outweighs Any Alleged Harms

Further, even if the Department were to find merit in Verizon's unsubstantiated allegations of harm, Charter's need for the relevant information in Data Request 1.1 outweighs any harm that would result from disclosure. Charter seeks the information in Data Request 1.1 to gather the facts necessary to develop its affirmative case. Under Section 251(c)(2)(D) of the Telecommunications Act of 1996, Verizon must provide interconnection on rates, terms and conditions that are just, reasonable and nondiscriminatory. With that in mind, identifying the names and locations of CLECs with fiber meet point arrangements with Verizon is necessary for Charter to prove, and for the Department to determine, whether Verizon's proposed fiber meet point arrangement is in fact just, reasonable and nondiscriminatory. In other words, in order for the Department to properly determine if the requirements of Section 251(c)(2)(D) are met, it must know whether, and to what extent, Verizon imposes such conditions on other competitive LECs in Massachusetts.

Specifically, the information requested in Data Request 1.1, could assist the Department in determining whether Verizon has imposed on other CLECs in Massachusetts the same limitations and conditions on a fiber meet point arrangement that Verizon has proposed to impose on Charter.[8] Thus, the terms, conditions and limitations imposed by Verizon on fiber meet point arrangements with other CLECs is also necessary for Charter to determine and for the Department to assess whether Verizon's proposed conditions in this case meet Verizon's nondiscrimination obligation. Accordingly, the Department should recognize that Charter's need

[8] It is also important to note that Verizon presumes that these other fiber meet point arrangements that Verizon has entered into with other competitive LECs were built only after there was so-called "sufficient" traffic to warrant construction. That fact has yet to be proven and shows why Charter asked this question in the first place.

for the relevant information in developing its affirmative case outweighs any potential harm resulting from disclosure.

For these reasons, the Department should deny Verizon's request to be relieved of the duty to produce relevant information. Instead, the Department should order Verizon to respond to Charter Data Request 1.1 and identify the name of the other entities in Massachusetts with whom Verizon has fiber meet point arrangements, and the location of such arrangements.

D. Any Relief Granted to Verizon Should be Extremely Limited and Consistent with Massachusetts Law

In the alternative, and at a minimum, if the Department believes that further protection is warranted, it should order Verizon to produce such information, but limit disclosure to certain designated representatives of Charter, e.g., Charter's counsel of record.

In striking a balance, courts have routinely required disclosure of confidential information, but limited that disclosure to safeguard a party's concerns about harmful dissemination of confidential information. *See e.g. Multi-Core v. Southern Water Treatment Company*, 1991 U.S. Dist. LEXIS 19083, *7 (D. Mass. 1991) (allowing disclosure of confidential documents and answers are limited to plaintiff's counsel of record and two experts and/or independent consultants of counsel's choosing); *GTE Products*, 112 F.R.D. at 169 (limiting disclosure to counsel); *Alloy Cast Steel Co. v. United Steel Workers of America*, 70 F.R.D. 687 (D.C. Ohio 1976), opinion incorporated, 429 F. Supp. 445 (N.D. Ohio 1977) (answers to interrogatories limited to defendant and counsel; answers were sealed and used only for litigation); *Triangle Ink and Color Co. v. Sherwin-Williams Co*, 61 F.R.D. 634, 636-637 (N.D. Ill. 1974) (limiting access to confidential information to trial counsel and independent experts); *Spartanics, Ltd. v. Dynetics Engineering Corp.*, 54 F.R.D. 524 (D.C. Ill. 1972) (disclosure of confidential research limited to trial counsel and two independent consultants).

If the Department determines that additional protection is warranted, the Department should issue an order requiring Verizon to disclose the information sought in Charter Data Request 1.1 to Charter's counsel of record. Contrary to Verizon's assertions, Charter's counsel of record has no intentions whatsoever of using the requested information to obtain a competitive advantage over other competitive LECs in Massachusetts. Rather, Charter's counsel of record would limit its use of the information supplied for matters in this proceeding only. Thus, issuing such an order would be consistent with the vast weight of legal authority on this matter and would permit Charter to inspect the relevant documents to fully develop the factual record in this proceeding.

III. RELIEF REQUESTED

For the aforementioned reasons Charter respectfully requests that the Department expeditiously rule on this matter, and order Verizon to produce the relevant information sought in Charter Data Request 1.1. Or, in the alternative, to produce such information with the additional limitation that disclosure only be made to Charter's counsel of record in this proceeding.

Charter Fiberlink MA-CCO, LLC

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Dated: September 8, 2006

CERTIFICATE OF SERVICE

I, Gina Lee, hereby certify that on September 8, 2006, I served a true and correct copy of the foregoing Opposition of Charter Fiberlink MA-CCO, LLC's to Verizon's Motion for a Protective Order via Federal Express and electronic copy upon the following:

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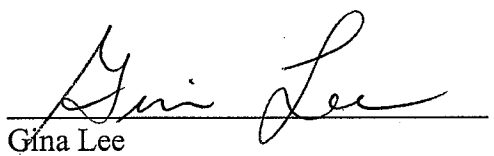

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