COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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

REPLY OF VERIZON MASSACHUSETTS TO AT&T MOTION FOR RECONSIDERATION AND CONDITIONAL MOTION TO STRIKE VERIZON'S RECURRING COST MODEL

Verizon Massachusetts ("Verizon MA") submits this Reply to AT&T's Motion for Reconsideration ("Motion for Reconsideration") and Conditional Motion of AT&T To Strike Verizon MA's Recurring Cost Model ("Conditional Motion to Strike"), both of which were filed with the Department on September 7, 2001. AT&T claims that the Department was mistaken in its Interlocutory Order of August 31, 2001 ("Order"), when it found that on-site or remote electronic access proposed by AT&T is insufficient to afford parties in this proceeding a meaningful opportunity to review and analyze the PNR Associates, Inc. (now TNS Telecoms) ("TNS" or "PNR") customer-location data. AT&T also requests that the time in which it has to produce the additional discovery required by the Order be extended by two weeks, to September 21, 2001.

AT&T's Motion for Reconsideration is without merit and should be rejected by the Department. The Department properly concluded that the customer-location data, software, and methodology used by AT&T's HAI 5.2a-MA Model is highly relevant in this proceeding. The Department ordered AT&T to produce the requested information in full, and if such information is proprietary or intellectual property, AT&T must make

arrangements with its vendors to provide the information under appropriate and workable non-disclosure arrangements. The Department's Order is not the result of mistake or inadvertence. Nor has AT&T brought to light any previously unknown or undisclosed facts that would have a significant impact on the Department's decision. To the contrary, AT&T merely seeks improperly to reargue its case.

I. BACKGROUND

The primary purpose of this proceeding is to identify the costs of providing UNEs and combinations of UNEs in Massachusetts. In support of its direct case, AT&T sponsored the HAI 5.2a-MA Model to estimate the cost of providing UNEs.[1] In propounding information requests on the HAI 5.2a-MA Model, Verizon MA sought to obtain information that would enable it to analyze the model and evaluate the propriety of AT&T's platform methodologies, input values, and the accuracy of the cost estimates it produces. In a number of responses, AT&T failed to provide requested material because, according to AT&T, it was procured from an outside vendor, is proprietary to that vendor and may be purchased from that vendor.

On July 5, 2001, Verizon MA filed a Motion to Compel Discovery with regard to AT&T's responses to 63 of Verizon MA's information requests. The Hearing Officer ruled on Verizon MA's motion on August 8, 2001, granting it in part and denying it in part ("August 8 Ruling"). On August 13, 2001, Verizon MA appealed the Hearing Officer's August 8 Ruling to the Commission ("Appeal") and filed a Motion to Extend

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[1] The HAI 5.2a-MA Model is a later version of the Hatfield model previously reviewed and rejected by the Department in the *Consolidated Arbitrations*. D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 - Phase 4 (1996), at 20-26.

Procedural Schedule. The Department issued its Order on the Appeal on August 31, 2001. Verizon MA replies to AT&T's Motion for Reconsideration of the Order.

II. STANDARD OF REVIEW

The Department's standard for reviewing a motion for reconsideration is well established. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that the Department take a fresh look at the record for the purpose of modifying a decision reached after review and deliberation. *Consolidated Arbitrations*, Phase 4-M, at 5 (1999), citing *North Attleboro Gas Company*, D.P.U. 94-130-B, at 2 (1995); *Boston Edison Company*, D.P.U. 90-270-A, at 2-3 (1991); *Western Massachusetts Electric Company*, D.P.U. 558-A, at 2 (1987). A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. *Consolidated Arbitrations*, Phase 4-M, at 5 (1999), citing *Commonwealth Electric Company*, D.P.U. 92-3C-1A, at 3-6 (1995); *Boston Edison Company*, D.P.U. 90-270-A, at 3 (1991); *Boston Edison Company*, D.P.U. 1350-A, at 4 (1983). In the alternative, a motion for reconsideration may be appropriate upon a showing that the Department's disposition of an issue was the product of mistake or inadvertence. *Consolidated Arbitrations*, Phase 4-M, at 5 (1999), citing *Massachusetts Electric Company*, D.P.U. 90-261-B at 7 (1991); *New England Telephone and Telegraph Company*, D.P.U. 86-33-J, at 2 (1989); *Boston Edison Company*, D.P.U. 1350-A, at 5 (1983).

III. DISCUSSION

A. AT&T Reargument of Previously Stated Positions Is Not a Proper Basis for Reconsideration

AT&T argues that the Department's Order is the result of mistake or inadvertence because the Department "incorrectly assumes" that the evidentiary standard it sets forth is consistent with past Department practice and with the presentation by Verizon MA of its alternative cost model in this proceeding (*Motion for Reconsideration*, at 3). According to AT&T, reconsideration of the Department's Order is also appropriate because AT&T did not have notice of the issues involved in the Appeal and because there was an "undisclosed fact" that was "not adequately presented to the Department before issuance of the [Order]" (*id.*). AT&T's contentions fail to identify any mistake or inadvertence by the Department in its Order and are wholly without merit.

AT&T's Motion for Reconsideration focuses on that portion of the Order that requires AT&T to produce, in electronic format, the geocoded data set for Massachusetts used to produce the clusters in the cost model sponsored by AT&T. *See* Information Request VZ-ATT 1-23. AT&T's response, which became the subject of Verizon MA's Motion to Compel, stated as follows:

> To the extent that the question is seeking any software or documentation that is the intellectual property of PNR, AT&T is not able to provide such information, but states that such material is commercially available from PNR.

It is undisputed by the parties, and acknowledged by the Hearing Officer, that the TNS customer-location data (*i.e.,* the geocoded data set for Massachusetts) is relevant to analysis of the HAI 5.2a-MA Model. Order, at 13, *citing* August 8 Ruling at 12. In

ruling that AT&T must provide the requested customer location data, the Department found that:

> AT&T has proposed the HAI 5.2a-MA Model for determining UNE rates in Massachusetts, and it is AT&T's responsibility to support its case and ensure that the underlying data and assumptions of the model are available for review.
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> * * *
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> If AT&T is to support its claims that the HAI 5.2a-MA Model accurately locates customers and produces a realistic estimate of actual costs of providing service to those customers, it must, as the FCC noted, make the model and its underlying data available to all interested parties for review and comment. AT&T therefore must provide parties with a meaningful opportunity to review and analyze the PNR customer location data and the method by which it is compiled and derived.
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> * * *
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> [W]e find that any method of on-site or remote electronic access proposed by AT&T in this proceeding is insufficient to afford parties in this proceeding a meaningful opportunity to review and analyze the PNR customer location data.

Order at 15-17.

Notwithstanding the Department's Order rejecting AT&T's proposed remote electronic access, AT&T argues that such remote access "is more than adequate" to fulfill AT&T's discovery obligation (*Motion for Reconsideration*, at 9-11). These arguments were all made and rejected by the Department in its Order. The Department properly concluded that *any method of remote electronic access* is insufficient to afford Verizon MA a meaningful opportunity to review and analyze the TNS customer location data. Order at 17. AT&T has failed to bring to light any previously unknown or undisclosed facts that would have a significant impact upon this Department decision. Accordingly, AT&T's improper reargument of its earlier proposal should be rejected. Longstanding

Department precedent does not recognize reargument as a proper basis for reconsideration of issues that have already been considered and decided in the main case. *The Berkshire Gas Company*, D.T.E. 98-129-A (1999), *citing Commonwealth Electric Company*, D.P.U. 92-3C-1A at 3-6 (1995); *Boston Edison Company*, D.P.U. 90-270-A at 3 (1991); *Boston Edison; Company*, D.P.U. 1350-A at 4 (1983).

In its Motion for Reconsideration, AT&T suggests that the geocoded data set at issue in Information Request VZ-ATT 1-23 belongs to third parties, not to TNS (formerly PNR) (Motion for Reconsideration, at 3-4). According to AT&T, these data belong to third parties, not to TNS, and was licensed to the predecessor-in-interest of TNS subject to the express condition that TNS may not release the data to others (*id.* at 4). AT&T states that it "does not expect that this legal limitation can be altered" (*id.*). AT&T's claim cannot defeat Verizon MA's legitimate interest in reviewing the customer-location data, software, and methodology. The direct testimony of Robert A. Mercer, sponsored by AT&T, asserts that the HAI 5.2a-MA Model specifically and accurately locates customers and that the clustering algorithm ensures that identified customer locations are served by an economically efficient quantity of outside plant (Direct Testimony of Robert A. Mercer at 38-39). AT&T cannot have it "both ways" by proffering a model to the Department while, at the same time, preventing parties from reviewing, analyzing and challenging the underlying inputs to the model. Moreover, AT&T's claim that it cannot produce the geocode source data and methodology is belied by its offer to make remote access available. AT&T is simply attempting to restrict the type of access in an effort to

limit a meaningful review of the data.[2] If AT&T cannot in fact make the customer-location data and methodology available as requested by Verizon MA and ordered by the Department, all portions of AT&T's cost presentation which rely on that data and methodology should be stricken because there is no means for Verizon MA or the Department to verify any of the data.

As the Department stated in its Order, "[i]f AT&T is to support its claims that the HAI 5.2a-MA Model accurately locates customers and produces a realistic estimate of actual costs of providing service to those customers, it must, as the FCC noted, make the model and its underlying data available to all interested parties for review and comment." Order, at 16. The Department's primary objectives in the conduct of an adjudicatory proceeding are that a complete and accurate record be developed and that all parties be accorded due process. *New England Telephone*, D.P.U. 91-63-A, at 12 (1991) (The Department must guard against the operation of third-party agreements that would restrict the Department's regulatory process.)

Were AT&T to hide behind third-party agreements in violation of Verizon MA's due process rights in this proceeding, the Department should strike from the record AT&T's HAI 5.2a-MA Model, together with all associated pre-filed testimony. A similar result was required by the Department in *New England Telephone*, D.P.U. 91-63-A, at 15 (1991) (The Department held that the failure to comply with a motion to compel the underlying material and workpapers supporting a prefiled cost study by a stated date

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[2] It is particularly critical that Verizon MA be given the ability to conduct a meaningful review since AT&T admits that it has not even validated the customer location data. *See* VZ-ATT 1-1, 1-20, 1-23, 1-26, 1-28, 1-31, and 1-32.

would result in the Department's striking of all relevant prefiled testimony).

B. AT&T's Subsidiary Arguments for Reconsideration Are Without Merit

AT&T makes a series of subsidiary arguments in support of its Motion for Reconsideration, which when considered either alone, or in their entirety, are without merit and fail to raise legitimate issues on reconsideration. AT&T argues that: (1) the Department effectively adopts an evidentiary standard that requires all potentially relevant information be included as record evidence in the case; (2) the Department did not require that all data supporting the original NYNEX cost study be entered into the record in 1996; (3) the rules of evidence allow study results to be admitted even if all underlying data are not in evidence; (4) Verizon MA has not complied with the evidentiary standards of the Department; and (5) the standards imposed by the Department will hinder a reasoned decision making process (Motion for Reconsideration, at 1-9). Each of these arguments are without merit.

The Department's Order does not "effectively adopt" an evidentiary standard that requires all information potentially relevant to evaluating the cost models be marked at the hearing and spread upon the record of the proceeding. *See* Motion for Reconsideration, at 4. Rather, the Department properly recognizes that, because this is an evidentiary proceeding, it is required to render its decision exclusively based on the evidentiary record before it in this case. The Order does not alter or effectively adopt any new evidentiary standard applicable to this or any other proceeding. Accordingly, all parties, including AT&T, are charged with the responsibility to seek inclusion in the record of whatever evidence such parties contend, and the Department finds, is properly admissible pursuant to the Administrative Procedures Act, G.L. c. 30A, § 1 *et seq.* *See*

Western Mass. Bus Lines v. Department of Public Utilities, 363 Mass. 61, 63 (1973) (The DPU has wide latitude in the admission of evidence. . . [under] G.L. c. 30A, s. 11(2)).[3] No more is required of a party by the Department. Accordingly, AT&T's suggestion that the Department has effectively adopted a new evidentiary standard is without merit.

AT&T's assertion that the Department approved UNE rates for Verizon MA in 1996 based on an evidentiary record that did not include all underlying data inputs to the cost model proves nothing (Motion for Reconsideration, at 5-7). The record in that case was comprehensive and thorough, consisting of numerous, detailed, individually submitted prefiled testimonies, together with the responses to hundreds of information requests, all of which were introduced into evidence. This evidence was supplemented by the extensive oral testimony and responses to record requests from a dozen witnesses at hearings on November 4 through November 8, and November 11, 1996. *Consolidated Arbitrations*, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 – Phase 4, at 3-4 ("*Consolidated Arbitrations*"). The procedure for developing the record in the *Consolidated Arbitrations* was no different from any other Department proceeding. Parties who desire to make arguments based on the record evidence bear the responsibility to submit such evidence. Parties may ask information requests to develop facts, and proponents of affirmative cases bear the burden of providing reasonable

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[3] The standard for admissibility of evidence in adjudicatory hearings is stated in G.L. c. 30A, sec. 11(2):

> Unless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

responses to support their cases. AT&T, a full and active party in the *Consolidated Arbitrations*, cannot now be heard to suggest, nearly five years later, that the record of the case was incomplete.

AT&T's contention that the rules of evidence allow study results to be admitted even if underlying data are not in evidence misses the mark (Motion for Reconsideration, at 7). Pursuant to the normal rules of discovery, Verizon MA has properly sought to review and analyze what has already been recognized as highly relevant information in this case. The issue is whether Verizon MA (and the Department) will be deprived of relevant information. If AT&T is unable to provide such information because of alleged proprietary agreements, the issue becomes what the appropriate sanction should be. The only meaningful sanction here is striking those portions of AT&T's testimony that rely on the HAI 5.2a-MA Model. Accordingly, the issue of whether AT&T's study could be admitted into evidence absent Verizon MA's discovery request for this information is not at issue before the Department.

AT&T's suggestion that Verizon MA has not complied with the "new" evidentiary standards of the Department is nonsensical (Motion for Reconsideration, at 8-9). The Department's Order did not alter in any way the Department's rules of evidence. To the contrary, the Order enforced the Department's existing rules of discovery and evidence. Similarly, AT&T contends that the "new evidentiary standards" imposed by the Department will hinder a reasoned decision making process (*id.*, at 9). As explained above, the Department has not established any "new evidentiary standard". Accordingly, AT&T's underlying premise is without merit.

C. Verizon MA Does Not Object to AT&T's Request for Additional Time to Produce Discovery Responses

AT&T requests that it be allowed until September 21, 2001, to complete the production of documents in response to the Department's Order, which required AT&T to produce all additional material by September 7, 2001 (Motion for Reconsideration, at 11-13). According to AT&T, the additional time requested is necessary to allow AT&T a meaningful opportunity to comply with the Department's Order (*id.*, at 12). Recognizing the importance of a meaningful response, Verizon MA does not object to AT&T's request for an extension until September 21, 2001.

IV. CONDITIONAL MOTION TO STRIKE

AT&T's Conditional Motion to Strike requests the Department to strike Verizon MA's recurring cost model should the evidentiary standard set forth in the Order be upheld (Conditional Motion to Strike, at 1). According to AT&T, Verizon MA's cost model should be stricken on the ground that Verizon MA has not met the "new evidentiary burden imposed by the [Order]". AT&T's Conditional Motion to Strike is without merit because it relies on a fundamental misreading of the Department's Order.

The foundational argument underlying AT&T's Conditional Motion to Strike is that the Department's Order imposes a new burden on parties to introduce evidence of all underlying data supporting their cost models (*Conditional Motion to Strike*, at 2). However, as explained by Verizon MA in section III.B, *supra*, the Department has *not* established any new evidentiary standard.

AT&T contends that Verizon MA is unable to satisfy the Department's "new evidentiary burden" with respect to Verizon MA's cost model (*Conditional Motion to Strike*, at 3-7). According to AT&T, Verizon MA is unable to provide key information

upon which its loop cost model, switching and digital circuit model and proposed RTU fees for digital switching are based (*id.*). Each of these assertions is without merit because they rely on the erroneous premise that the Department has established a "new evidentiary burden" in this case. Moreover, as noted in Verizon MA's Reply to AT&T Motion to Compel, Verizon MA has provided the underlying assumptions and data used in its study. The additional data that AT&T originally sought in its Information Requests largely seeks tertiary levels of back-up support for the assumptions and data or tangential information that was not used in Verizon MA's study. The objections of Verizon MA go to excessive and unnecessary burdens that would be imposed to provide information that has remote, if any, relevance to the case or its study.

Accordingly, AT&T's Conditional Motion to Strike should be rejected.

V. CONCLUSION

For the forgoing reasons, Verizon MA respectfully requests the Department to deny AT&T's Motion for Reconsideration and the Conditional Motion to Strike.

Respectfully submitted,

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