

January 17, 2003

BY HAND AND U.S. MAIL

Jesse S. Reyes, Esq.
Hearing Officer
Department of Telecommunications and Energy
One South Station
Boston, MA 02110

Re: D.T.E. 02-76, Cambridge Electric Light Company, Sale of Blackstone Station

Dear Hearing Officer Reyes:

At the procedural conference in this matter held on January 7, 2003, we engaged in a colloquy regarding the documents that are the subject of Cambridge Electric Light Company's ("CELCo") Motion for a Protective Order, which was filed with the Department on January 6, 2003. Counsel for CELCo indicated to you the company's intent to seek confidential treatment of certain responses to Information Request DTE-1-1 (specifically, Attachments DTE-1-1 (a) through 1-1(d), which relate to valuations of Blackstone Station) only during the pendency of this proceeding.¹ I informed you that President and Fellows of Harvard College ("Harvard") would request that confidential treatment be extended to Attachments DTE-1-1(c) and (d) ("Spaulding & Slye Reports") for a longer period of time than that sought by CELCo. This letter memorializes that request and sets forth the reasons for it.

The Department applies a three-part test to requests for confidential treatment under G.L. c. 25, § 5D:

¹ CELCo's position in this regard was contingent, of course, upon the Department's approval of the Petition that is the subject of this proceeding. Should the Department take some other action with respect to the Petition, such that further efforts on CELCo's part will be required to sell Blackstone Station, CELCo would seek to extend confidential treatment of the valuations while such efforts are undertaken.

First, the information for which protection is sought must constitute "trade secrets, confidential, competitively sensitive or other proprietary information;" second, the party seeking protection must overcome the statutory presumption that all such information is public information by "proving" the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need.

Investigation by the Department of Telecommunications into Boston Edison Company's Compliance with the Department's Order in D.P.U. 93-37, D.T.E. 97-95, Interlocutory Order (July 2, 1998), at 13-14 (citation omitted).

As described in CELCo's Motion, the Spaulding & Slye Reports and other valuations of Blackstone Station meet this test and should be granted confidential treatment. Motion at 3-4. The valuations are based on market data, assumptions, and estimates made on behalf of CELCo and Harvard for purposes of the arms-length negotiations that have culminated in the proposed sale of Blackstone Station to Harvard. While G.L. c. 25, § 5D requires only that material for which protection is sought be "trade secrets, confidential, competitively sensitive or other proprietary information," the analyses, conclusions, and recommendations in these reports meet all four of these elements, describing, as they do, the various options that one could pursue in developing and using the land and appurtenances that compose Blackstone Station. Further, the valuations were prepared on a confidential basis, and the parties have taken steps to preserve that confidentiality, releasing them only to a limited number of persons who have executed non-disclosure agreements satisfactory to the releasing party, further indicating the proprietary, confidential, and competitively-sensitive nature of the material contained therein. Indeed, as stated in CELCo's response to Information Request DTE-1-1, Harvard only released the Spaulding & Slye Reports to CELCo "on the express condition of confidentiality."

Until the sale of the plant is consummated, the need to keep the valuations confidential far outweighs any legitimate interest the public may have in gaining access to these documents. Should the sale not be consummated for any reason, CELCo may be required to engage in further efforts to sell the plant at its maximum value. Such efforts would be frustrated if all potential buyers had access to confidential and proprietary valuations of the plant prepared for the seller.

In addition, the nature and content of the Spaulding & Slye Reports, and the circumstances of their production to the Department, justify a longer period of confidential treatment that extends beyond the end of this proceeding. As the seller, CELCo's interest in the confidential treatment of the valuations ends once the sale is approved and consummated. As the buyer, however, Harvard's interest in the confidential treatment of the Spaulding & Slye Reports, which were prepared on its behalf, continues until Harvard decides upon and makes public its planned use of the plant. Without revealing the contents of the Spaulding & Slye Reports, the Department may acknowledge that possible uses of the plant could include undertakings in highly competitive industries or business lines. The early disclosure of such potential plans could very well diminish the value of the plant for which Harvard is compensating CELCo. That

is the reason Harvard released the Spaulding & Slye Reports to CELCo on the express condition that they be kept confidential.

Moreover, while Harvard's interest in keeping the Spaulding & Slye Reports confidential continues beyond the consummation of the sale of the plant, the public's legitimate interest in viewing the contents of those reports actually decreases. During the pendency of this proceeding, members of the public who could show that they would be substantially and specifically affected by the sale of the plant could have intervened in the proceeding and, upon execution of an acceptable non-disclosure agreement, gained access to all material for which confidential treatment is being sought. After the proceeding is concluded, however, the relevance of the Spaulding & Slye Reports to the Department's consideration of the proposed sale concludes as well and the public no longer has an interest in gaining access to these documents to inform its participation in this proceeding.

Further, early release of the Spaulding & Slye Reports would not inform the public at large about the actual use that will be made of Blackstone Station. Harvard commissioned the study to be used only for valuation purposes – the study does not represent any specific development plan Harvard has for the property. In that respect, release of the study before Harvard's plans for the property are determined and made public will only cause confusion by leading some readers to the erroneous conclusion that the study depicts actual development plans for the site. The only interests that would be served by early release of the study would be the interests of potential competitors who could make use of the competitively sensitive market research and analysis contained in the study free of charge. The Department is under no obligation to serve such purely private interests where there is no corresponding public interest, and potentially great cost to Harvard. *Lowell Gas Light Company v. Department of Public Utilities*, 319 Mass. 46, 52 (1946) (the function of the Department is the protection of public interests and not the promotion of private interests).

As pointed out by CELCo in its Motion, the Department recognizes that competitively sensitive information should be protected and that such protection can be in the public interest. Motion at 3. Here, the public interest would be served by granting continuing confidential status to the Spaulding & Slye Reports because doing so would provide an incentive to potential purchasers of utility assets to ascertain the maximum value of those assets under a variety of use scenarios. Allowing the reports to become public too soon will cause potential purchasers to discount the value of utility assets to account for the possible early and unwanted disclosure of competitively sensitive uses of the assets. Such early disclosure will not benefit CELCo, its customers, or the public at large, but will only benefit potential competitors of Harvard, who remain free to conduct their own evaluations of market conditions related to various potential uses of the plant, at their own expense.

For these reasons, Harvard joins in CELCo's Motion, and requests further that confidential treatment be extended to the Spaulding & Slye Reports for at least two years following the approval of the proposed sale of the plant to Harvard, should such approval be forthcoming. Should continued confidential treatment be warranted after that time, which is unlikely, Harvard will move to extend the period as may be appropriate.

Jesse S. Reyes, Esq.

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Thank you for your consideration of this matter.

Sincerely,

Christopher H. Kallaher

cc: Ms. Mary L. Cottrell, Secretary
David S. Rosenzweig, Esq.
Alexander Cochis, Esq.
Robert McGaw, Esq.
Mr. Thomas E. Vautin