

ORDER NO. 03-744

ENTERED DEC 17 2003

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1100

In the Matter of Of The Investigation To
Determine, Pursuant To Order Of The Federal
Communications Commission, Whether
Impairment Exists In Particular Markets If
Local Circuit Switching For Mass Market
Customers Is No Longer Available As An
Unbundled Network Element.

MODIFIED PROTECTIVE ORDER

MODIFIED PROTECTIVE ORDER

To facilitate the disclosure of documents and information during the course of this proceeding and to protect confidential information, the Administrative Law Judge now issues this Modified Protective Order (“Order”). This Order supercedes the Standard Protective Order No. 03-563, entered on September 18, 2003.

1. (a) Confidential Information. All documents, data, studies and other materials furnished pursuant to any requests for information, subpoenas or other modes of discovery (formal or informal), and including depositions, and other requests for information, that are claimed to be proprietary or confidential (herein referred to as “Confidential Information”), shall be printed on yellow paper, separately bound and placed in individually sealed envelopes or other appropriate containers. To the extent practicable, only the portions of a document that fall within ORCP 36(C)(7) shall be placed in the envelope container. The envelope/container shall be marked

“CONFIDENTIAL-SUBJECT TO MODIFIED PROTECTIVE ORDER, ORDER NO. 03-744, IN DOCKET UM 1100.” The Commission’s Administrative Hearings Division shall store the confidential information in a locked cabinet dedicated to the storage of confidential information. In addition, all notes or other materials that refer to, derive from, or otherwise contain parts of the Confidential Information will be marked by the receiving party as Confidential Information. Access to and review of Confidential Information shall be strictly controlled by the terms of this Order.

(b) Use of Confidential Information -- Proceedings. All persons who may be entitled to review, or who are afforded access to any Confidential Information by reason of this Order shall neither use nor disclose the Confidential Information for purposes of business or competition, or any purpose other than the purpose of preparation for and conduct of proceedings in the above-captioned docket or before the Federal Communications Commission ("FCC"), and all subsequent appeals ("TRO Proceedings"), and shall keep the Confidential Information secure as confidential or proprietary information and in accordance with the purposes, intent and requirements of this Order.

(c) Persons Entitled to Review.

(1) Confidential Information and Highly Confidential Information shall be provided to Commissioners, Administrative Law Judges, Commission staff counsel, Commission advisory staff members, and Commission employees when disclosure is necessary.

(2) Disclosure of both Confidential Information and Highly Confidential Information to consultants employed by Commission staff shall be under the terms and conditions described in paragraph 1(d) below. Court reporters who receive Confidential Information or Highly Confidential Information shall also be required to sign a nondisclosure agreement which shall be filed with the Commission.

(3) Each party that receives Confidential Information pursuant to this Order must limit access to such Confidential Information to (1) attorneys employed or retained by the party in TRO Proceedings and the attorneys' staff; (2) experts, consultants and advisors who need access to the material to assist the party in TRO Proceedings; (3) only those employees of the party who are directly involved in these TRO Proceedings, provided that counsel for the party represents that no such employee is engaged in the sale or marketing of that party's products or services.

(d) Nondisclosure Agreement. Any party, person, or entity that receives Confidential Information pursuant to this Order shall not disclose such Confidential Information to any person, except persons who are described in paragraphs 1(c)(2) and 1(c)(3) above and who have signed a nondisclosure agreement in the form which is attached hereto and incorporated herein as Appendix "A." Persons described in paragraph 1(c)(1) are bound by the confidentiality requirements of this order but are not required to sign a nondisclosure agreement.

The nondisclosure agreement (hereafter Appendix "A") shall require the person(s) to whom disclosure is to be made to read a copy of this Protective Order and to certify in writing that they have reviewed the same and have consented to be bound by its terms. The agreement shall contain the signatory's full name, employer, job title and job description, business address and the name of the party with whom the signatory is associated. An Appendix "A" shall be delivered to counsel for the providing party before disclosure is made, and if no objection thereto is registered to the Commission within three (3) business days, then disclosure shall follow. An attorney who makes Confidential Information available to any person listed in subsection (c) above shall be responsible for having each such person execute an original of Appendix "A" and a copy of all such signed Appendix "A"s shall be circulated to all other counsel of record promptly after execution.

2. (a) Notes. Limited notes regarding Confidential Information may be taken by counsel and experts for the express purpose of preparing pleadings, cross-examinations, briefs, motions and argument in connection with this proceeding, or in the case of persons designated in paragraph 1(c) of this Protective Order, to prepare for participation in this proceeding. Such notes shall then be treated as Confidential Information for purposes of this Order, shall be submitted as designated as in paragraph 1(a) of this Protective Order, and shall be destroyed after the final settlement or conclusion of the TRO Proceedings in accordance with paragraph 2(b) below.

(b) Return. All notes, to the extent they contain Confidential Information and are protected by the attorney-client privilege or the work product doctrine, shall be destroyed after the final settlement or conclusion of the TRO Proceedings. The party destroying such Confidential Information shall advise the providing party of that fact within a reasonable time from the date of destruction.

3. Highly Confidential Information. Any person, whether a party or non-party, may designate certain competitively sensitive Confidential Information as “Highly Confidential Information” if it determines in good faith that it would be competitively disadvantaged by the disclosure of such information to its competitors. Highly Confidential Information includes, but is not limited to, documents, pleadings, briefs and appropriate portions of deposition transcripts, which contain information regarding the market share of, number of access lines served by, or number of customers receiving a specified type of service from a particular provider or other information that relates to a particular provider’s network facility location detail, revenues, costs, and marketing, business planning or business strategies.

Parties must scrutinize carefully responsive documents and information and limit

their designations as Highly Confidential Information to information that truly might impose a serious business risk if disseminated without the heightened protections provided in this section. The first page and individual pages of a document determined in good faith to include Highly Confidential Information must be marked by a stamp that reads:

“HIGHLY CONFIDENTIAL—USE RESTRICTED PER
MODIFIED PROTECTIVE ORDER, ORDER NO. 03-744,
IN DOCKET UM 1100.”

Placing a “Highly Confidential” stamp on the first page of a document indicates only that one or more pages contain Highly Confidential Information and will not serve to protect the entire contents of a multi-page document. Each page that contains Highly Confidential Information must be marked separately to indicate Highly Confidential Information, even where that information has been redacted. The unredacted versions of each page containing Highly Confidential Information, and provided under seal, should be submitted on paper distinct in color from non-confidential information and “Confidential Information” described in paragraph 1(a) of this Protective Order.

Parties seeking disclosure of Highly Confidential Information must designate the person(s) to whom they would like the Highly Confidential Information disclosed in advance of disclosure by the providing party. Such designation may occur through the submission of Appendix “B” of the non-disclosure agreement identified in paragraph 1(d). Parties seeking disclosure of Highly Confidential Information shall not designate more than (1) a reasonable number of in-house attorneys who have direct responsibility for matters relating to Highly Confidential Information; (2) five in-house experts; and (3) a reasonable number of outside counsel and outside experts to review materials marked as “Highly Confidential.” Disclosure of Highly Confidential Information shall be limited to Commissioners, Administrative Law Judges, Commission staff counsel, Commission advisory staff members, and Commission employees when disclosure is necessary.

Disclosure of Highly Confidential Information to consultants employed by Commission staff shall be under the terms and conditions as described in paragraph 1(d). Court reporters who receive Highly Confidential Information shall also be required to sign a nondisclosure agreement, which shall be filed with the Commission. Appendix "B" also shall describe in detail the job duties or responsibilities of the person being designated to see Highly Confidential Information and the person's role in the proceeding. Highly Confidential Information may not be disclosed to persons engaged in the development, planning, marketing or selling of retail or wholesale services for the purposes of any party competing with or against any other party, strategic or business decision making non-regulatory strategic or business planning or procurement on behalf of the receiving party.

Any party providing either Confidential Information or Highly Confidential Information may object to the designation of any individual as a person who may review Confidential Information and/or Highly Confidential Information. Such objection shall be made in writing to counsel submitting the challenged individual's Appendix "A" or "B" within three (3) business days after receiving the challenged individual's signed Appendix "A" or "B." Any such objection must demonstrate good cause to exclude the challenged individual from the review of the Confidential Information or Highly Confidential Information. Written response to any objection shall be made within three (3) business days after receipt of an objection. If, after receiving a written response to a party's objection, the objecting party still objects to disclosure of either Confidential Information or Highly Confidential Information to the challenged individual, the Commission shall determine whether Confidential Information or Highly Confidential Information must be disclosed to the challenged individual.

Copies of Highly Confidential Information may be provided to the in-house attorneys, outside counsel and outside experts who have signed Appendix "B." The in-

house experts who have signed Appendix “B” may inspect, review and make notes from the in-house attorney’s copies of Highly Confidential Information.

Persons authorized to review the Highly Confidential Information will maintain the documents and any notes reflecting their contents in a secure location to which only designated counsel and experts have access. No additional copies will be made, except for use during hearings and then such disclosure and copies shall be subject to the provisions of Section 7. Any testimony or exhibits prepared that reflect Highly Confidential Information must be maintained in the secure location until removed to the hearing room for production under seal. Unless specifically addressed in this section, all other sections of this Protective Order applicable to Confidential Information also apply to Highly Confidential Information.

4. Small Company. Notwithstanding anything to the contrary in this Order, persons authorized to review Confidential Information and Highly Confidential Information on behalf of a company with less than 5,000 employees shall be limited to the following: (1) the company’s counsel or, if not represented by counsel, a member of the company’s senior management; (2) a company’s witnesses and no more than five (5) employees engaged in the review of and preparation of testimony; and (3) independent consultants acting under the direction of the company’s counsel or senior management and directly engaged in this proceeding. Such persons **do not** include individuals primarily involved in marketing activities for the company, unless the party producing the information, upon request, gives prior written authorization for that person to review the Confidential Information or Highly Confidential Information. If the producing party refuses to give such written authorization, the company may, for good cause shown, request an order from the Administrative Law Judge allowing that person to review the

Confidential Information or Highly Confidential Information. The producing party shall be given the opportunity to respond to the company's request before an order is issued.

5. Objections to Admissibility. The furnishing of any document, data, study or other materials pursuant to this Protective Order shall in no way limit the right of the providing party to object to its relevance or admissibility in proceedings before this Commission.

6. Challenge to Confidentiality. This Order establishes a procedure for the expeditious handling of information that a party claims is Confidential or Highly Confidential. It shall not be construed as an agreement or ruling on the confidentiality of any document. Any party may challenge the characterization of any information, document, data or study claimed by the providing party to be confidential in the following manner:

- (a) A party seeking to challenge the confidentiality of any materials pursuant to this Order shall first contact counsel for the providing party and attempt to resolve any differences by stipulation;
- (b) In the event that the parties cannot agree as to the character of the information challenged, any party challenging the confidentiality shall do so by appropriate pleading. This pleading shall:
 - (1) Designate the document, transcript or other material challenged in a manner that will specifically isolate the challenged material from other material claimed as confidential; and
 - (2) State with specificity the grounds upon which the documents, transcript or other material are deemed to be non-confidential by the challenging party.
- (c) A ruling on the confidentiality of the challenged information, document, data or study shall be made by an Administrative Law Judge after proceedings in camera, which shall be conducted under circumstances such that only those persons duly authorized hereunder to have access to such confidential materials shall be present. This hearing shall commence

no earlier than five (5) business days after service on the providing party of the pleading required by paragraph 6(b) above.

- (d) The record of said in camera hearing shall be marked “CONFIDENTIAL-SUBJECT TO MODIFIED PROTECTIVE ORDER, ORDER NO. 03-744, IN DOCKET UM 1100.” Court reporter notes of such hearing shall be transcribed only upon agreement by the parties or instruction from the Administrative Law Judges and in that event shall be separately bound, segregated, sealed, and withheld from inspection by any person not bound by the terms of this Order.
- (e) In the event that the Administrative Law Judge(s) should rule that any information, document, data or study should be removed from the restrictions imposed by this Order, no party shall disclose such information, document, data or study or use it in the public record for five (5) business days unless authorized by the providing party to do so. The provisions of this subsection are intended to enable the providing party to seek a stay or other relief from an order removing the restriction of this Order from materials claimed by the providing party to be confidential.

7. (a) Receipt into Evidence. Provision is hereby made for receipt into evidence in this proceeding materials claimed to be confidential in the following manner:

- (1) Prior to the use of or substantive reference to any Confidential Information, the parties intending to use such Information shall make that intention known to the providing party.
- (2) The requesting party and the providing party shall make a good-faith effort to reach an agreement so the Information can be used in a manner which will not reveal its confidential or proprietary nature.
- (3) If such efforts fail, the providing party shall separately identify which portions, if any, of the documents to be offered or referenced shall be placed in a sealed record.
- (4) Only one (1) copy of the documents designated by the providing party to be placed in a sealed record shall be made.
- (5) The copy of the documents to be placed in the sealed record shall be tendered by counsel for the providing party to the Commission, and maintained in accordance with the terms of this Order.

(b) Seal. While in the custody of the Commission, materials containing Confidential Information shall be marked “CONFIDENTIAL – SUBJECT TO MODIFIED PROTECTIVE ORDER, ORDER NO. 03-744, IN DOCKET UM 1100” and Highly Confidential Information shall be marked “HIGHLY CONFIDENTIAL—USE RESTRICTED PER MODIFIED PROTECTIVE ORDER, ORDER NO. 03-744, IN DOCKET UM 1100” and shall not be examined by any person except under the conditions set forth in this Order.

(c) In Camera Hearing. Any Confidential Information or Highly Confidential Information that must be orally disclosed to be placed in the sealed record in this proceeding shall be offered in an in camera hearing, attended only by persons authorized to have access to the information under this Order. Similarly, any cross-examination on or substantive reference to Confidential Information or Highly Confidential Information (or that portion of the record containing Confidential Information or Highly Confidential Information or references thereto) shall be received in an in camera hearing, and shall be marked and treated as provided herein.

(d) Access to Record. Access to sealed testimony, records and information shall be limited to the Administrative Law Judges and persons who are entitled to review Confidential Information or Highly Confidential Information pursuant to paragraph 1(c) above and have signed an Appendix “A” or “B,” unless such information is released from the restrictions of this Order either through agreement of the parties or after notice to the parties and hearing, pursuant to the ruling of a Administrative Law Judge, the order of the Commission and/or final order of a court having final jurisdiction.

(e) Appeal/Subsequent Proceedings. Sealed portions of the record in this proceeding may be forwarded to any court of competent jurisdiction for purposes of an appeal or to the FCC, but under seal as designated herein for the information and use of the court or the FCC. If a portion of the record is forwarded to a court or the FCC, the providing party shall be notified which portion of the sealed record has been designated by the appealing party as necessary to the record on appeal or for use at the FCC.

(f) Return. Unless otherwise ordered, Confidential Information and Highly Confidential Information, including transcripts of any depositions to which a claim of confidentiality is made, shall remain under seal, shall continue to be subject to the protective requirements of this Order, and shall, at the providing party's discretion, be returned to counsel for the providing party, or destroyed by the receiving party, within thirty (30) days after final settlement or conclusion of the TRO Proceedings. If the providing party elects to have Confidential Information or Highly Confidential Information destroyed rather than returned, counsel for the receiving party shall verify in writing that the material has in fact been destroyed.

8. Use in Pleadings. Where references to Confidential Information or Highly Confidential Information in the sealed record or with the providing party is required in pleadings, briefs, arguments or motions (except as provided in section 5), it shall be by citation of title or exhibit number or some other description that will not disclose the substantive Confidential Information or Highly Confidential Information contained therein. Any use of or substantive references to Confidential Information or Highly Confidential Information shall be placed in a separate section of the pleading or brief and

submitted to the Administrative Law Judge(s) or the Commission under seal. This sealed section shall be served only on counsel of record and parties of record who have signed the nondisclosure agreement set forth in Appendix "A" or "B." All of the restrictions afforded by this Order apply to materials prepared and distributed under this section.

9. Summary of Record. If deemed necessary by the Commission, the providing party shall prepare a written summary of the Confidential Information referred to in the Order to be placed on the public record.

10. The provisions of this Order are specifically intended to apply to all data, documents, studies, and other material designated as confidential or highly confidential by any party to Docket UM 1100 or by any Competitive Local Exchange Carrier from whom the Commission is seeking information in Docket UM 1100.

11. This Protective Order shall continue in force and effect after Docket UM 1100 is closed.

Made, entered, and effective December 17, 2003, pursuant to OAR 860-012-0035(1)(k).

Samuel J. Petrillo
Administrative Law Judge

This order may be appealed to the Commission pursuant to OAR 860-014-0091. The appeal should be in the form of a motion. *See* OAR 860-013-0031.

APPENDIX "A"
CONFIDENTIAL INFORMATION

DOCKET UM 1100

I have read the foregoing Modified Protective Order, Order No. 03-744, entered December 17, 2003, in Docket UM 1100, and agree to be bound by the terms and conditions of this Order.

Full Name (Printed)

Employer

Job Title and Job Description

Business Address

Party

Signature

Date

APPENDIX "B"
HIGHLY CONFIDENTIAL INFORMATION

DOCKET UM 1100

I have read the foregoing Modified Protective Order, Order No. 03-744, entered December 17, 2003, in Docket UM 1100, and agree to be bound by the terms and conditions of this Order.

Full Name (Printed)

Employer

Job Title and Job Description

Business Address

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Signature

Date