

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Implementation of the  
Federal Communications Commission's  
Triennial Review Order

Docket No. UT-033025

PROTECTIVE ORDER

To facilitate the disclosure of documents and information during the course of this proceeding and to protect trade secret and other confidential information not in the public domain, the Commission now issues this Protective Order ("Order") to govern these proceedings.

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 of a trade secret, proprietary or confidential nature (herein referred to as "Confidential Information"), shall be so marked by the providing party by stamping the same with a "Confidential" designation. 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

PROTECTIVE ORDER

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

8 (c) Persons Entitled to Review. Each party that receives Confidential  
9 Information pursuant to this Order must limit access to such Confidential Information to (1)  
10 attorneys employed or retained by the party in TRO Proceedings and the attorneys' staff; (2)  
11 experts, consultants and advisors who need access to the material to assist the party in TRO  
12 Proceedings; (3) only those employees of the party who are directly involved in these TRO  
13 Proceedings, provided that counsel for the party represents that no such employee is engaged in the  
14 sale or marketing of that party's products or services. In addition, access to Confidential  
15 Information may be provided to Commissioners and all Commission Hearing Officers, and staff  
16 members and employees of the Commission to whom disclosure is necessary.

17 (d) Nondisclosure Agreement. Any party, person, or entity that receives  
18 Confidential Information pursuant to this Order shall not disclose such Confidential Information to  
19 any person, except persons who are described in section 1(c) above and who have signed a  
20 nondisclosure agreement in the form which is attached hereto and incorporated herein as Exhibit  
21 "A." Court reporters shall also be required to sign an Exhibit "A" and comply with the terms of  
22 this Order.

23 The nondisclosure agreement (Exhibit "A") shall require the person(s) to whom disclosure  
24 is to be made to read a copy of this Protective Order and to certify in writing that they have  
25 reviewed the same and have consented to be bound by its terms. The agreement shall contain the  
26 signatory's full name, employer, business address and the name of the party with whom the

1 signatory is associated. Such agreement shall be delivered to counsel for the providing party  
2 before disclosure is made, and if no objection thereto is registered to the Commission within five  
3 (5) days, then disclosure shall follow. An attorney who makes Confidential Information available  
4 to any person listed in subsection (c) above shall be responsible for having each such person  
5 execute an original of Exhibit A and a copy of all such signed Exhibit "A"s shall be circulated to  
6 all other counsel of record promptly after execution.

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

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

19 3. Highly Confidential Trade Secret Information: Any person, whether a party or non-  
20 party, may designate certain competitively sensitive Confidential Information as "Highly  
21 Confidential Information" if it determines in good faith that it would be competitively  
22 disadvantaged by the disclosure of such information to its competitors. Highly Confidential  
23 Information includes, but is not limited to, documents, pleadings, briefs and appropriate portions  
24 of deposition transcripts, which contain information regarding the market share of, number of  
25 access lines served by, or number of customers receiving a specified type of service from a  
26 particular provider or other information that relates to marketing, business planning or business

1 strategies.

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

7 "HIGHLY CONFIDENTIAL—USE RESTRICTED PER  
8 PROTECTIVE ORDER IN DOCKET NO. \_\_\_\_\_."

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

16 Parties seeking disclosure of Highly Confidential Information must designate the person(s)  
17 to whom they would like the Highly Confidential Information disclosed in advance of disclosure  
18 by the providing party. Such designation may occur through the submission of Exhibit A of the  
19 non-disclosure agreement identified in section 1(d). Parties seeking disclosure of Highly  
20 Confidential Information shall not designate more than (1) a reasonable number of in-house  
21 attorneys who have direct responsibility for matters relating to Highly Confidential Information;  
22 (2) two in-house experts; and (3) a reasonable number of outside counsel and outside experts to  
23 review materials marked as "Highly Confidential." Disclosure of Highly Confidential Information  
24 to Commissioners, Hearing Officers and Staff members shall be limited to persons to whom  
25 disclosure is necessary. The Exhibit "A" also shall describe in detail the duties or responsibilities  
26 of the person being designated to see Highly Confidential Information and the person's role in the

1 proceeding. Highly Confidential Information may not be disclosed to persons engaged in strategic  
2 or competitive decision making for any party, including the sale or marketing of products or  
3 services on behalf of any party.

4 Any person, whether a party or non-party, may object in writing to the designation of any  
5 individual as a person who may review Highly Confidential Information within three (3) business  
6 days after receiving a signed Exhibit "A". Any such objection must demonstrate good cause to  
7 exclude the challenged individual from the review of the Highly Confidential Information.

8 Written response to any objection shall be made within three (3) business days after receipt of an  
9 objection. If after receiving a written response to the providing party's objection, the providing  
10 party still declines to produce the requested information, the Commission shall determine whether  
11 the Highly Confidential Information must be disclosed to the challenged individual.

12 Copies of Highly Confidential Information shall be provided to the in-house attorneys,  
13 outside counsel and outside experts. The in-house experts may inspect and review the in-house  
14 attorney's copies of Highly Confidential Information.

15 Persons authorized to review the Highly Confidential Information will maintain the  
16 documents and any notes reflecting their contents in a secure location to which only designated  
17 counsel and experts have access. No additional copies will be made. Any testimony or exhibits  
18 prepared that reflect Highly Confidential Information must be maintained in the secure location  
19 until removed to the hearing room for production under seal and under circumstances that will  
20 ensure continued protection from disclosure to persons not entitled to review Highly Confidential  
21 Information.

22 Unless specifically addressed in this section, all other sections of this Protective Order  
23 applicable to Confidential Information also apply to Highly Confidential Information.

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

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

- 6           (a)     A party seeking to challenge the confidentiality of any materials pursuant to  
7 this Order shall first contact counsel for the providing party and attempt to  
8 resolve any differences by stipulation;
- 9           (b)     In the event that the parties cannot agree as to the character of the  
10 information challenged, any party challenging the confidentiality shall do so  
11 by appropriate pleading. This pleading shall:
- 12                 (1)     Designate the document, transcript or other material challenged in a  
13 manner that will specifically isolate the challenged material from  
14 other material claimed as confidential; and
- 15                 (2)     State with specificity the grounds upon which the documents,  
16 transcript or other material are deemed to be non-confidential by the  
17 challenging party.
- 18           (c)     A ruling on the confidentiality of the challenged information, document,  
19 data or study shall be made by a Hearing Officer after proceedings in  
20 camera, which shall be conducted under circumstances such that only those  
21 persons duly authorized hereunder to have access to such confidential  
22 materials shall be present. This hearing shall commence no earlier than five  
23 (5) business days after service on the providing party of the pleading  
24 required by subsection 5(b) above.
- 25           (d)     The record of said in camera hearing shall be marked "CONFIDENTIAL-  
26 SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. \_\_\_\_\_"  
Court reporter notes of such hearing shall be transcribed only upon  
agreement by the parties or Order of the Hearing Officer 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 Hearing Officer 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.

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

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

18               (b)     Seal. While in the custody of the Commission, materials containing  
19 Confidential Information shall be marked "CONFIDENTIAL – SUBJECT TO PROTECTIVE  
20 ORDER IN DOCKET NO. \_\_\_\_\_" and Highly Confidential Information shall be marked  
21 "HIGHLY CONFIDENTIAL—USE RESTRICTED PER PROTECTIVE ORDER IN DOCKET  
22 NO. \_\_\_\_\_" and shall not be examined by any person except under the conditions set  
23 forth in this Order.

24               (c)     In Camera Hearing. Any Confidential Information that must be orally  
25 disclosed to be placed in the sealed record in this proceeding shall be offered in an in camera  
26 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 that  
portion of the record containing 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 Hearing Officer and persons who are entitled to review Confidential

1 Information pursuant to subsection 1(c) above and have signed an Exhibit "A," unless such  
2 information is released from the restrictions of this Order either through agreement of the parties  
3 or after notice to the parties and hearing, pursuant to the ruling of a Hearing Officer, the order of  
4 the Commission and/or final order of a court having final jurisdiction.

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

11 (f) Return. Unless otherwise ordered, Confidential Information and Highly  
12 Confidential Information, including transcripts of any depositions to which a claim of  
13 confidentiality is made, shall remain under seal, shall continue to be subject to the protective  
14 requirements of this Order, and shall be returned to counsel for the providing party within thirty  
15 (30) days after final settlement or conclusion of the TRO Proceedings.

16 7. Use in Pleadings. Where references to Confidential Information in the sealed  
17 record or with the providing party is required in pleadings, briefs, arguments or motions (except as  
18 provided in section 5), it shall be by citation of title or exhibit number or some other description  
19 that will not disclose the substantive Confidential Information contained therein. Any use of or  
20 substantive references to Confidential Information shall be placed in a separate section of the  
21 pleading or brief and submitted to the Hearing Officer or the Commission under seal. This sealed  
22 section shall be served only on counsel of record and parties of record who have signed the  
23 nondisclosure agreement set forth in Exhibit "A." All of the restrictions afforded by this Order  
24 apply to materials prepared and distributed under this section.

25 8. Summary of Record. If deemed necessary by the Commission, the providing party  
26 shall prepare a written summary of the Confidential Information referred to in the Order to be

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placed on the public record.

9. 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 No. \_\_\_\_\_.

10. This Protective Order shall continue in force and effect after this Docket is closed.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2003.

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EXHIBIT "A"

I have read the foregoing Protective Order dated August \_\_\_\_, 2001, in Docket  
No. \_\_\_\_\_ and agree to be bound by the terms and conditions of this Order.

\_\_\_\_\_  
Name

\_\_\_\_\_  
Employer

\_\_\_\_\_  
Business Address

\_\_\_\_\_  
Party

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date