

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Joint Application of	)	Docket No. UT-090842
)	
VERIZON COMMUNICATIONS INC. AND	)	REQUEST FOR ACCEPTANCE OF REVISED
FRONTIER COMMUNICATIONS	)	BROADBAND PLAN REPORT OF
CORPORATION	)	FRONTIER COMMUNICATIONS
	)	NORTHWEST INC., REQUEST
For an Order Declining to Assert	)	FOR CONFIRMATION OF TREATMENT
Jurisdiction Over, or, in the Alternative,	)	OF CONFIDENTIAL AND HIGHLY
Approving the Indirect Transfer of	)	CONFIDENTIAL DOCUMENTS FILED, AND
Control of Verizon Northwest Inc.	)	REQUEST FOR CLARIFICATION OF
	)	FUTURE DOCUMENT HANDLING

Frontier Communications Northwest Inc. (Frontier) files this pleading in response to the Utilities and Transportation Commission’s (Commission’s) Notice of *IN CAMERA* Hearing (Notice), issued March 28, 2012 in the above-captioned matter. The Commission gave notice of hearing or, in the alternative, directed Frontier to file a “revised pleading together with a draft order.”¹ This pleading constitutes Frontier’s election of the alternative of filing a revised pleading and draft order in this matter.

Introduction

The Commission’s Notice concerns Frontier’s Broadband Plan, which was required as a condition of the Commission’s approval of the Transfer of Verizon Northwest Inc. (now named Frontier Communications Northwest Inc.) to Frontier Communications Corporation.² As part of the transfer, Frontier committed to making broadband available to 89% of customers in its serving area by the end of 2014.³ Frontier agreed to additional specific targets for broadband availability in wire centers categorized as unserved, underserved, served and total, with particular benchmarks at year end through 2014. Frontier is proud to report that it has met or exceeded the benchmarks through year- end 2014 in three of the four categories, including total broadband availability. The expansion of Frontier’s broadband network brings benefits to

¹ Notice of *In Camera* Hearing, March 28, 2012 at 3.

² See Docket No. UT-090842, Order 06, April 15, 2010, Appendix A, Settlement Agreement (Staff Settlement).

³ *Id.* at ¶ 15.

Washington consumers. Other companies in Washington also provide or seek to provide broadband services in competition with Frontier, and therefore Frontier's Broadband Plan, supporting documents, and related filings made with the Commission and/or communicated to Staff contain highly sensitive proprietary information. Release of confidential and highly sensitive proprietary information is damaging to Frontier, and advantageous to Frontier's competitors, if disclosed. In recognition that such highly confidential information should be protected, the Commission provided for appropriate protection of such designated "Highly Confidential" documents in Order 01, the Protective Order.⁴

As more fully detailed below, Frontier consistently has provided Highly Confidential information in filings made in this docket, and the filings have been made in a manner consistent with the requirements of the Protective Order, without objection or challenge. Despite this continuing course of conduct, and Frontier's good faith reliance on the Protective Order and working relationship established with the Staff, recent issues have arisen. Frontier's first notice that Staff regarded some documents as being improperly marked was on March 5, 2012, after the release and withdrawal of Order 08, in which Highly Confidential information was unfortunately and publicly detailed.

By accompanying Draft Order, Frontier respectfully suggests the Commission direct, by Order released governing the continuing conduct of the parties in this proceeding, that all previously provided information will continue to be treated with the designation as submitted (Highly Confidential or Confidential). The Commission also should order continuing confidential treatment of Frontier's Revised Broadband Plan Report, attached as Highly Confidential Exhibit A, and confirm the Highly Confidential designation under the terms of the Protective Order. The Commission should accept the Revised Broadband Plan Report. Finally, the Commission, by accompanying Draft Order should designate a procedure whereby Staff and Frontier will jointly agree to procedures for handling Confidential and Highly Confidential documents on a going forward basis. In light of the facts presented here, the

⁴ Docket No. UT-090842, Order 01, July 23, 2009.

Commission should recognize that such procedural clarity is necessary for Frontier and other entities regulated by this Commission to take ordinary and prudent business steps, in reliance on established procedure, to protect confidential information. A draft Order is attached as Exhibit B, in compliance with the Commission's direction in the Notice.

I. The Commission Provided for Protection of Competitively Sensitive Information

Frontier has worked extensively with Staff to provide information on its broadband plan, supporting documents, escrow petitions, plan updates, and related filings in conformity with the Washington Administrative Code (WAC) and Order 01 (Protective Order) to ensure both appropriate handling of proprietary information, as well as meeting the conditions in the Staff Settlement.

Throughout the discovery phases, testimony, briefing, and subsequent procedures, Frontier has routinely provided information covered by the Protective Order. Frontier understands Confidential information is governed by the Protective Order and WAC 480-07-160.⁵ Frontier understands Highly Confidential information to be governed by the Protective Order.⁶ It is not stated in the Protective Order whether Highly Confidential information is also governed by WAC 480-07-160.⁷

The Protective Order notes that “[t]he Commission expects Confidential Information to include only numbers, customer names, and planning details.”⁸ There is no indication that the list is limited this type of information, nor do the paragraphs on Highly Confidential Information

⁵ *Id.* at ¶ 3 *et seq.*; Washington Administrative Code (WAC) §480-07-160.

⁶ *Id.* at ¶ 11 *et seq.*

⁷ *Id.* at ¶ 11.

⁸ *Id.* at ¶ 3.

indicate that the same list applies. In any event, Frontier’s information regarding the broadband plan, Petitions for reimbursement, and related documents provided in response to the Staff Settlement certainly fall within the description listed in paragraph 3 of the Protective Order, and certainly fall within the provisions of paragraph 1 of the Protective Order, and of WAC 480-07-160.

The Protective Order also gives instruction on marking documents, requiring the phrase either “Confidential per Protective Order in Docket UT-090842,” or “Highly Confidential per Protective Order in Docket UT-090842.” Frontier has consistently marked documents in this manner, and has provided hard copies on yellow or blue paper, as appropriate. Electronic copies have been submitted with appropriate markings as directed by the Protective Order, although Frontier cannot control how such copies may have been printed or reproduced by others.⁹

That Administrative Code section on confidential information provides examples for marking confidential documents.

Marking. Each page of the unredacted version that includes information claimed to be confidential must be printed on yellow or canary paper with the confidential information clearly designated (e.g., by highlighting text with no more than twenty percent grey shading, outlining the confidential information in a box or border, or setting the text off with asterisks). Similarly, each page of the unredacted version that contains information designated highly confidential under a protective order, must be printed on light blue paper with the highly confidential information clearly designated (e.g., by highlighting text with no more than twenty percent grey shading, outlining the highly confidential information in a box or border, or setting the text off with asterisks).¹⁰

⁹ Frontier has emphasized the sensitivity of the information and its concerns about disclosure to Staff on more than one occasion. For instance, in April, 2011 Frontier retrieved documents reviewed with Staff that it realized were not properly marked according to the Protective Order, and resubmitted the documents with proper marking.

¹⁰ WAC § 480-07-160(3)(c)(ii).

The examples in parentheses in the WAC section are denoted by “*e.g.*,” which Frontier understands to mean “for example,” or a suggestion, example, or model.¹¹ Based on conversations with Staff, and the Notice, Frontier understands that, going forward, shading and asterisk markings should be used on all documents containing Confidential or Highly Confidential information. All filings, submissions, reports and the like have been consistently marked and delivered to Staff and other parties.

There are also provisions made for challenging a designation of confidentiality. The Protective Order states that a party may challenge a claim of confidentiality, following which an *in camera* hearing is to be held.¹² If a claim of confidentiality is denied, the party providing the information is to be afforded sufficient time (10 days) to seek judicial review.¹³ Under WAC 480-07-160, the party claiming confidentiality is to be given opportunity to respond, prior to any ruling denying such claim.¹⁴

At no time did any party, including Staff, object to Frontier’s marking of documents. At no time did Staff invoke the Protective Order’s provisions for challenging confidentiality. Moreover, the Notice issued March 28, 2012 appears to conclude that Frontier’s Broadband Plan Update, described below, is not entitled to protection as Highly Confidential. The Notice was Frontier’s first notice of what is evidently a challenge to its designation of broadband plan details as Highly Confidential. Frontier respectfully suggests that the Commission’s Notice should not be considered a conclusion regarding Highly Confidential treatment since Frontier was not given notice and an opportunity to respond until this responsive pleading. The Commission’s rules,

¹¹ Throughout the proceeding, Frontier provided information in this manner, without additional shading, boxes or borders, or asterisks; this approach is particularly the one taken when an entire document was filed as Confidential or Highly Confidential.

¹² Order 01 at ¶ 28.

¹³ *Id.* at ¶ 30.

¹⁴ WAC § 480-07-160(4).

policies and fundamental notions of due process suggest that when issues arise about the confidential treatment of company-specific proprietary and sensitive information, that notice and an opportunity to be heard should be afforded prior to the release of the information.

II. Frontier Was Diligent to Protect Highly Confidential Information

A. Broadband Plan

In Order 06, the Commission adopted conditions included in a number of other settlements, including a settlement with Staff (Staff Settlement).¹⁵ The Staff Settlement included, among other things, the following reports, submissions, filings, or petitions (emphasis added).

Frontier NW must *submit an initial plan* for broadband deployment within 90 days of the transaction closing date. Frontier NW will *consult* with Commission Staff regarding the geographic scope of the broadband deployment...¹⁶

Frontier NW may *petition* the Commission quarterly for reimbursement of expenditures [from the \$40 million deposited in an escrow account] for costs incurred for broadband projects that have been completed and placed into service...the Commission will use its best efforts to approve the release of funds from the Account to Frontier NW within thirty (30) days from the date of the filing seeking reimbursement.¹⁷

If Frontier NW determines that it is technically infeasible to fulfill one or more of the broadband deployment objectives identified in paragraphs 15 through 18, Frontier NW must immediately (within 30 days of determining the technical infeasibility) *submit* to the Commission a detailed report identifying the technical or operation impediments and limitations that prevent fulfillment of the condition and propose an alternative broadband deployment plan that provides at least a similar level of public benefit.¹⁸

The broadband plan, escrow reimbursement, and status submissions have been the subject of extensive conversations and multiple meetings with Staff. Given the competitively sensitive data involved, including the network, financial, and operational detail provided, most of the information provided to the Staff is Highly Confidential. Frontier expressed strong reservations

¹⁵ See Order 06, April 15, 2010, Appendix A, Staff Settlement.

¹⁶ Staff Settlement, ¶ 17.

¹⁷ Staff Settlement, ¶ 13.

¹⁸ Staff Settlement, ¶ 14.

about distribution of the information in its first meeting with Staff on September 23, 2010, and on multiple subsequent occasions. Frontier has taken great care, as detailed herein, to ensure appropriate marking and handling of this highly sensitive information. At no time prior to March, 2012 has any party given any indication of challenging Frontier's designation of documents as Highly Confidential.

Frontier first submitted its broadband plan, as required, on September 23, 2010, providing an overview and wire center-specific detail. The documents were reviewed in detail in a face-to-face meeting. On September 28, 2010, Frontier filed the documents in this docket, at Staff's direction.¹⁹ Frontier continued to work extensively with Staff over the next seven months to provide additional information and submit further detail as Staff has made further requests.²⁰

Although Frontier and Staff certainly have disagreed at times on the interpretation of the broadband requirements of Order 06 and the Washington Administrative Code, at no time until March 2012 has Staff indicated any disagreement whatsoever with Frontier's designation of information as Highly Confidential.

Frontier has consistently pursued ongoing dialogue with Staff, has accommodated Staff requests for additional information, and has refiled the broadband plan a number of times in response to Staff's requests. The repeated filings and conversations about the confidential and proprietary nature of the material being filed should have emphasized the Highly Confidential nature of the broadband information therein. The parties had an established pattern of conduct, and through repetition this pattern of conduct should have heightened sensitivity of all parties concerned to the sensitive nature of the documents being reviewed. In addition, through this required course of

¹⁹ On October 11, 2010, Frontier refiled the same documents, and served all parties. (All parties were served a redacted, public version, and those who had signed the Highly Confidential Non-Disclosure Agreement required by the Protective Order received unredacted versions.)

²⁰ Frontier refiled the broadband plan, with additional information and revisions, several more times between October, 2010 and March, 2011.

repetitive filing Frontier's concern about risk of disclosure and the resulting competitive harm also increased.

The Commission accepted Frontier's broadband plan on April 26, 2011.²¹ During the period from September, 2010 to April, 2011, Frontier proceeded with its planned broadband deployment, surpassing these goals:

- total broadband availability for year end 2011;
- two of the four year end 2013 goals;
- three of the four year end 2014 goals, including that for total broadband availability.

B. Escrow reimbursement

During the first several months of 2011, Frontier discussed with Staff the format Staff wanted to see in conjunction with its Petition. Frontier filed its first request for reimbursement from the escrow account²² on May 2, 2011, requesting expedited review consistent with Staff's commitment to use "best efforts" to process requests within 30 days.²³ All supporting documentation, consisting of a project list with substantial financial and wire center detail, as well as work orders, is highly sensitive competitively, and was submitted as Highly Confidential. The Commission authorized release of funds on August 31, 2011.²⁴

²¹ Letter Order in Docket UT-090842, April 26, 2011.

²² See Staff Settlement at ¶ 13.

²³ *Id.*

²⁴ Letter Order in Docket UT-090842, August 31, 2011.

Frontier's second Petition for reimbursement was filed on August 18, 2011. Following formal and informal exchanges of information with Staff, the Commission authorized release of funds on October 18, 2011.²⁵

For Frontier's third Petition for reimbursement, Frontier worked with Staff prior to filing so that Staff could preview the projects for which it would like to review the work orders. The third Petition, with selected work orders and project list detail, was filed November 18, 2011. The Commission authorized release of funds on January 13, 2012.²⁶

The Highly Confidential supporting documents filed with the three escrow Petitions discussed above all have been marked as Highly Confidential, all filed consistently in the same manner as prior documents in the docket, all redacted as required, and all provided on blue paper hard copies as required. No party, including Staff, has challenged Frontier's designation of the documents.

Frontier has prepared, but not yet filed, its fourth Petition. The uncertainty generated by the course of events discussed herein, the handling of Highly Confidential information in the Broadband Report, and the actual and potential competitive harm to Frontier, are all concerns, as detailed below.

C. Broadband Plan Report

In early November, 2011 Frontier discussed with Staff the progress on the broadband deployment, and the broadband availability targets in the Staff Settlement.²⁷ Frontier filed a written update on November 29, 2011.²⁸ Staff reviewed Frontier's update, and suggested

²⁵ Letter Order in Docket UT-090842, October 18, 2011.

²⁶ Letter Order in Docket UT-090842, January 13, 2012.

²⁷ See Staff Settlement at ¶14.

²⁸ The Update provided detailed information on specific wire centers and network planning.

revisions in late December. Frontier resubmitted its update on December 23, 2011, detailing broadband availability and network plans for 12 wire centers. The updates were consistently submitted in the same manner as prior documents containing Highly Confidential information, including document marking and blue paper hard copies.

The issue of greatest concern occurred on March 1, 2012. On that date, Order 08 in this docket was issued to all parties and posted to the public on the Commission's website. The Order was withdrawn after approximately 2 hours when it was discovered that the Order was issued in error, but the Highly Confidential information already had been made available to a wide variety of competitors and potential competitors for a substantial period of time. It was not until several days later, on March 5, 2012, that Frontier received its first indication that Staff viewed its Broadband Update as not meeting the requirements of WAC 480-07-160. Frontier responded that it disagreed with Staff's interpretation.

Staff's statements that questioned Frontier's compliance with WAC 480-07-160 are concerning because that stance does not meet the requirements of either WAC 480-07-160(4) or the requirements of the Protective Order, paragraphs 28-30. Frontier also is concerned that while the Notice could be viewed as the notice required in paragraph 28 of the Protective Order, it appears to have already drawn an erroneous conclusion about not protecting Frontier's Highly Confidential information. If such a conclusion has been drawn, Frontier is concerned that it did not receive notice of that conclusion in sufficient time to respond or seek judicial review.

III. The Commission Should Confirm Highly Confidential Treatment of All Previously Provided Documents, of Frontier’s Broadband Plan Report, and Accept the Report

In light of the above, Frontier requests that the Commission confirm and conclude that all previously designated and provided Highly Confidential and Confidential documents be afforded continuing treatment as originally designated, including Frontier’s previously submitted Broadband Updates. Frontier also requests that Exhibit A, revised to follow the Staff’s current interpretation of WAC 480-07-160(3)(c)(ii) as requiring shading, boxes, or asterisks, be afforded Highly Confidential treatment and be accepted. Finally, Frontier suggests that the Commission direct Staff and Frontier to meet and jointly agree to procedures for handling Confidential and Highly Confidential documents on a going forward basis.

Frontier has committed, as noted in Exhibit A, to report to the Staff quarterly on its progress toward the broadband availability targets. Frontier suggests that these reports start in August, 2012, and continue until the targets are met and/or the broadband plan is further modified. The next broadband report (an annual requirement in the Staff Settlement²⁹) is due May 1, and the next milestone date is July 1. Thus, August 1 would be a logical date for the next report.

Frontier, as directed in the Notice, provides the attached Exhibit B as a draft Order accomplishing the above requests.

²⁹ Staff Settlement, ¶ 17.

Conclusion

For the above noted reasons, Frontier requests that:

1. the Commission confirm and conclude that all previously designated and provided Highly Confidential and Confidential documents be afforded continuing treatment as originally designated, including Frontier's previously submitted Broadband Updates;
2. the Commission confirm and conclude that Exhibit A, Frontier's Broadband Report, be afforded Highly Confidential treatment;
3. the Commission accept Frontier's revised Broadband Report;
4. the Commission direct Staff and Frontier to jointly agree to procedures for handling Confidential and Highly Confidential documents on a going forward basis.

Respectfully submitted,

DATED this 10th day of April, 2012.

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