

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON EXCHANGE)	DOCKET NO. UT-041244
CARRIER ASSOCIATION,)	
)	
Complainant,)	ORDER NO. 02
v.)	
)	
MARATHON COMMUNICATIONS,)	PROTECTIVE ORDER
INC.)	
)	
Respondent.)	

1 The Commission finds that a protective order to govern disclosure of proprietary and confidential information is necessary in this proceeding. The Commission provided the parties an opportunity to comment on the need for a protective order, considered their comments, and finds as follows:

- a. It is likely that proprietary and confidential information will be required to resolve the issues in this proceeding;
- b. Absent a protective order, a significant risk exists that confidential information might become available to persons who have no legitimate need for such information and that injury to the information provider could result.

2 Accordingly, the Commission enters the following protective order pursuant to RCW 34.05.446 to govern the discovery and use of proprietary and confidential documents in this proceeding:

ORDER

A. General Provisions

3 **Confidential Information.** All access, review, use, and disclosure of any material designated by a party to this proceeding as confidential (referred to in

this Order as "Confidential Information") is governed by this Order and by WAC 480-07-160. The Commission expects Confidential Information to include only numbers, customer names, and planning details. The Commission requires the parties to delete such information from the primary exhibits and provide these "confidential deletions" under separate cover in the manner described below. The Commission may reject a filing or any other submission that fails to segregate Confidential Information, or categorizes clearly public information as confidential.

- 4 Parties must scrutinize potentially confidential material, and limit the amount they designate "Confidential Information" to only information that truly might compromise their ability to compete fairly or that otherwise might impose a business risk if disseminated without the protections provided in this Order. The first page and individual pages of a document determined in good faith to include Confidential Information must be marked by a stamp that reads: "Confidential Per Protective Order in WUTC Docket No. UT-041244." Placing a Confidential Information stamp on the first page of an exhibit indicates only that one or more pages contains Confidential Information and will not serve to protect the entire contents of the multi-page document. Each page that contains Confidential Information must be marked separately to indicate where confidential information is redacted. Confidential Information shall be provided on colored paper with references to where each number, customer name, or planning detail is redacted in the original document.
- 5 **Confidential and Redacted Versions.** Because the parties and the Commission are manipulating data and handling a number of open cases, and because confidentiality is more significant than it has been in the past, we must require **complete confidential and redacted versions of testimony, exhibits, and briefs.**
- 6 This extends to electronic versions, as well, and requires that **all diskettes and all electronic mail** specify whether the file is confidential, redacted, or public.
 1. If a witness has a confidential portion of her testimony, the sponsoring party must provide a complete redacted version of the testimony and a complete confidential version, with confidential pages on color paper.

2. It also means that you must submit (at least) two diskettes and e-mails - one with the electronic version of the confidential text and one with the electronic version of the redacted text.
 - a. You MUST identify the confidential diskettes with prominent red markings and the word "confidential" in addition to the contents and the docket number. The others must be prominently labeled "redacted" or "public".
 - b. You MUST identify each confidential digital file with a C in the file name and MUST have the legend "CONFIDENTIAL PER PROTECTIVE ORDER IN WUTC DOCKET NO. UT-041244" prominently displayed on the first page (i.e., the page that appears on the computer screen when the file is opened).

7 **Purpose of Access and Use; Confidentiality.** No Confidential Information distributed or obtained pursuant to this protective order may be requested, reviewed, used or disclosed by any party or counsel having access pursuant to this order, except for purposes of this proceeding. Persons having access to the Confidential Information pursuant to this order must request, review, use, or disclose Confidential Information only by or to persons authorized under this Order, and only in accordance with the terms specified in this Order.

Disclosure of Confidential Information

8 **Persons Permitted Access.** No Confidential Information will be made available to anyone other than Commissioners, Commission Staff, the presiding officer(s), and counsel for the parties for this proceeding, including counsel for Commission Staff, and attorneys' administrative staff such as paralegals. However, access to any Confidential Information may be authorized by counsel, solely for the purposes of this proceeding, to those persons designated by the parties as their experts in this matter. Except for the Washington Utilities and Transportation Commission Staff, no such expert may be an officer, director, direct employee, major shareholder, or principal of any party or any competitor of any party (unless this restriction is waived by the party asserting

confidentiality). Any dispute concerning persons entitled to access Confidential Information must be brought before the presiding officer for resolution.

9 **Nondisclosure Agreement.** Before being allowed access to any Confidential Information designated for this docket, each counsel or expert must agree to comply with and be bound by this Order on the form of Exhibit A (counsel and administrative staff) or B (expert) attached to this Order. Counsel for the party seeking access to the Confidential Information must deliver to counsel for the party producing Confidential Information a copy of each signed agreement, which must show each signatory's full name, permanent address, the party with whom the signatory is associated and, in the case of experts, the employer (including the expert's position and responsibilities). The party seeking access must also send a copy of the agreement to the Commission and, in the case of experts, the party providing Confidential Information shall complete its portion and file it with the Commission or waive objection as described in Exhibit B.

10 **Access to Confidential Information.** Copies of documents designated confidential under this Order will be provided in the same manner as copies of documents not designated confidential, pursuant to WAC 480-07-423. Requests for special provisions for inspection, dissemination or use of confidential documents must be submitted to the presiding officer if not agreed by the parties. The parties must not distribute copies of Confidential Information to, and they must not discuss the contents of confidential documents with, any person not bound by this Order. Persons to whom copies of documents are provided pursuant to this Order warrant by signing the confidentiality agreement that they will exercise all reasonable diligence to maintain the documents consistent with the claim of confidentiality.

Use of Confidential Information in This Proceeding

11 **Reference to Confidential Information.** If reference is to be made to any Confidential Information by counsel or persons afforded access to this information during any part of this proceeding including, but not limited to, motions, briefs, arguments, direct testimony, cross-examination, rebuttal and proposed offers of proof, any public reference (*i.e.*, any reference that will not be placed in a sealed portion of the record) shall be either solely by title or by

exhibit reference. Any other written reference shall be segregated and marked "Confidential Information," and access to it shall be given solely to persons who are authorized access to the information under this Order. References to the Confidential Information must be withheld from inspection by any person not bound by the terms of this Order.

- 12 In oral testimony, cross-examination or argument, public references to Confidential Information must be on such prior notice as is feasible to the affected party and the presiding officer. Unless alternative arrangements exist to protect the Confidential Information as provided below, there must be minimum sufficient notice to permit the presiding officer an opportunity to clear the hearing room of persons not bound by this Order or take such other action as is appropriate in the circumstances.
- 13 **Protected Use by Agreement.** Any party who intends to use any Confidential Information in the course of this proceeding, including but not limited to testimony to be filed by the party, exhibits, direct and cross-examination of witnesses, rebuttal testimony, or a proffer of evidence, shall give reasonable notice of such intent to all parties and to the presiding officer, and attempt in good faith to reach an agreement to use the Confidential Information in a manner which will protect its trade secret, proprietary, or other confidential nature. The parties shall consider such methods as use of clearly edited versions of confidential documents, characterizations of data rather than disclosure of substantive data, and aggregations of data. The goal is to protect each party's rights with respect to Confidential Information while allowing all parties the latitude to present the evidence necessary to their respective cases.
- 14 If the parties cannot reach agreement about the use of Confidential Information, they must notify the presiding officer, who will determine the arrangements to protect the Confidential Information to ensure that all parties are afforded their full due process rights, including the right to cross-examine witnesses.
- 15 **Right to Challenge Admissibility.** Nothing in this Order may be construed to restrict any party's right to challenge the admissibility or use of any Confidential Information on any ground other than confidentiality, including but not limited to competence, relevance, or privilege.

- 16 **Right to Challenge Confidentiality.** Any party may challenge another party's assertion of confidentiality with respect to any information asserted to be entitled to protection under this Order. The Presiding officer will conduct an *in camera* hearing to determine the confidentiality of information. The burden of proof to show that such information is properly classified as confidential is on the party asserting confidentiality. Pending determination, the assertedly Confidential Information shall be treated in all respects as protected under the terms of this Order. If the presiding officer determines the challenged information is not entitled to protection under this Order, the information continues to be protected under this Order for ten days thereafter to enable the producing party to seek Commission or judicial review of the determination, including a stay of the decision's effect pending further review.
- 17 **Admission Of Confidential Information Under Seal.** The portions of the record of this proceeding containing Confidential Information will be sealed for all purposes, including administrative and judicial review, unless such Confidential Information is released from the restrictions of this Order, either through the agreement of the parties or pursuant to a lawful order of the Commission or of a court having jurisdiction to do so.
- 18 **Return of Confidential Information.** At the conclusion of this proceeding every person who possesses any Confidential Information (including personal notes that make substantive reference to Confidential Information), must return all Confidential Information to the party that produced it, or must certify in writing that all copies and substantive references to Confidential Information in notes have been destroyed, within thirty days following the conclusion of this proceeding, including any administrative or judicial review. These provisions apply to all copies of exhibits which contain Confidential Information and for that reason were admitted under seal. The only exceptions are that exhibits may be preserved by counsel as counsel records, and a complete record, including Confidential Information, will be preserved by the Secretary of the Commission as part of the Agency's official records.
- 19 **Freedom of Information Laws.** Until the Commission or any court having jurisdiction finds that any particular Confidential Information is not of a trade secret, proprietary, or confidential nature, any federal agency that has access to

and/or receives copies of the Confidential Information must treat the Confidential Information as within the exemption from disclosure provided in the Freedom of Information Act at 5 U.S.C. § 552 (b)(4); and any Washington state agency that has access to and/or receives copies of the Confidential Information must treat the Confidential Information as being within the exemption from disclosure provided in RCW 42.17.310(1)(h) and (q).

- 20 **Notice of Compelled Production In Other Jurisdictions.** If a signatory to this protective order is compelled to produce confidential documents in any regulatory or judicial proceeding by the body conducting the proceeding, the signatory must provide notice to the party that provided the confidential information. Such confidential information must not be produced for at least five days following notice, to permit the party that provided such information an opportunity to defend the confidential nature of the material before the regulatory or judicial body that would compel production. Disclosure after that date, in compliance with an order compelling production, is not a violation of this Order.
- 21 **Modification.** The Commission may modify this Order on motion of a party or on its own motion upon reasonable prior notice to the parties and an opportunity for hearing.
- 22 **Violation of this Order.** Violation of this Order by any party to this proceeding or by any other person bound by this Order by unauthorized use or unauthorized divulgence of Confidential Information may subject such party or person to liability for damages and shall subject such party to penalties as generally provided by law.

DATED at Olympia, Washington, and effective this 19th day of August, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS
Administrative Law Judge

EXHIBIT A (ATTORNEY AGREEMENT)

AGREEMENT CONCERNING CONFIDENTIAL INFORMATION
IN DOCKET NO. UT-041244
BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

I, _____, as attorney in
this proceeding for _____ (party
to this proceeding) agree to comply with and be bound by the Protective Order
entered by the Washington Utilities and Transportation Commission in Docket
No. UT-041244, and acknowledge that I have reviewed the Protective Order and
fully understand its terms and conditions.

Signature

Date

Address

EXHIBIT B (EXPERT AGREEMENT)

AGREEMENT CONCERNING CONFIDENTIAL INFORMATION
IN DOCKET NO. UT-041244
BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

I, _____, as expert witness in this proceeding for _____ (a party to this proceeding) hereby agree to comply with and be bound by the Protective Order entered by the Washington Utilities and Transportation Commission in Docket No. UT-041244 and acknowledge that I have reviewed the Protective Order and fully understand its terms and conditions.

Signature

Date

Employer

Address

Position and Responsibilities

* * *

The following portion is to be completed by the responding party and filed with the Commission within 10 days of receipt; failure to do so will constitute a waiver and the above-named person will be deemed an expert having access to Confidential Information under the terms and conditions of the protective order.

_____ No objection.

_____ Objection. The responding party objects to the above-named expert having access to Confidential Information. The objecting party shall file a motion setting forth the basis for objection and asking exclusion of the expert from access to Confidential Information.

Signature

Date