

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Joint Application of)	DOCKET UT-082119
)	
EMBARQ CORPORATION AND)	
CENTURYTEL, INC.)	ORDER 02
)	
For Approval of Transfer of Control of)	
United Telephone Company of the)	PROTECTIVE ORDER WITH
Northwest d/b/a Embarq and Embarq)	"HIGHLY CONFIDENTIAL"
Communications, Inc.)	PROVISIONS
)	
.....)	

1 The Washington Utilities and Transportation Commission (Commission) finds that a protective order to govern disclosure of proprietary and confidential information is necessary in this proceeding. Following discussion among the parties at the January 5, 2009, prehearing conference, the Commission 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 or third parties could result.
- c. In accordance with WAC 480-07-420(2), the Commission finds that it is necessary to create a separate designation and a higher degree of protection for certain documents asserted by parties to be highly confidential. This is consistent with the Commission's practice in prior cases involving contentions that certain documents require heightened protection to facilitate discovery, and is consistent with the requirements of WAC 480-07-423.

2 Accordingly, the Commission enters this Protective Order to govern the discovery and use of proprietary and confidential documents in this proceeding:

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 redact such information from the pre-filed testimony, exhibits, briefs, and all other documents filed with the Commission, and provide complete versions of the documents that include the redacted material, 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 public information as confidential.
- 4 Parties must scrutinize potentially confidential material, and strictly limit what 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 UTC Docket UT-082119**". 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 of the redacted version of a document that contains Confidential Information must be marked separately to indicate where confidential information is redacted. The confidential (*i.e.*, unredacted) version must be provided on yellow or canary paper with references (*i.e.*, highlighting or other markings) to show where Confidential Information is redacted in the original document.
- 5 **Confidential and Redacted Versions.** Parties must file complete confidential (*i.e.*, unredacted) and redacted versions of testimony, exhibits, and briefs with the Commission. This includes electronic versions, and requires that all diskettes and all electronic mail specify whether the file is confidential, redacted, or public.
- a. 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 yellow or canary paper.

- b. Parties must submit (at least) two diskettes or e-mail attachments, one with the electronic version of the confidential text and one with the electronic version of the redacted text.
 - i. Parties **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".
 - ii. Parties **MUST** identify each confidential digital file with a C in the file name and **MUST** have the legend "**CONFIDENTIAL PER PROTECTIVE ORDER IN UTC DOCKET UT-082119**" prominently displayed on the first page (*i.e.*, the page that appears on the computer screen when the file is opened).
 - iii. Parties **MUST** identify each highly confidential digital file with an HC in the file name and **MUST** have the legend "**HIGHLY CONFIDENTIAL PER PROTECTIVE ORDER IN UTC DOCKET UT-082119**" prominently displayed on the first page (*i.e.*, the page that appears on the computer screen when the file is opened).
- 6 **Purpose of Access and Use; Confidentiality.** No Confidential Information distributed or obtained pursuant to this Protective Order may be requested, reviewed, used or disclosed, directly or indirectly, by any party, expert or counsel or any other person having access pursuant to this Order, except for purposes of this proceeding and Docket UT-082119. 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. Without limiting the foregoing, persons having access to Confidential Information shall not use any Confidential Information to design, develop, provide, or market any product, service, or business strategy that would compete with any product of the party asserting confidentiality.

B. Disclosure of Confidential Information

- 7 **Persons Permitted Access.** No Confidential Information will be made available to anyone other than Commissioners, the Washington Utilities and Transportation Commission Staff (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, counsel may authorize those persons designated as their party's experts in this matter to access any Confidential Information solely for the purposes of this proceeding. Except for the 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(s) for resolution.
- 8 Staff of designated outside counsel and staff of designated outside consultants who are authorized to review Confidential Information may have access to confidential documents or information for purposes of processing the case, including but not limited to, receiving and organizing discovery, and preparing prefiled testimony, hearing exhibits, and briefs. Outside counsel and consultants are responsible for appropriate supervision of their staff to ensure the protection of all confidential information consistent with the terms of this Order.
- 9 **Non-disclosure Agreement.** Before being allowed access to any Confidential Information designated for this docket, each counsel and 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 file 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 480-07-400 and WAC 480-07-405. 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 neither distribute copies of documents that include Confidential Information to, nor 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.

C. **Highly Confidential Information**

11 **Designation and Disclosure of Highly Confidential Information.** Intervenors in this proceeding may include competitors, or potential competitors. Moreover, information relevant to the resolution of this case is expected to include sensitive competitive information. Parties to this proceeding may receive discovery requests that call for the disclosure of highly confidential documents or information, the disclosure of which imposes a highly significant risk of competitive harm to the disclosing party or third parties. Parties may designate documents or information they consider to be Highly Confidential and such documents or information will be disclosed only in accordance with the provisions of this Section.

12 Parties must carefully scrutinize responsive documents and information and strictly limit the amount of information they designate as Highly Confidential Information to only 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 Per Protective Order' in UTC Docket UT-082119**".

13 Placing a "Highly Confidential" stamp on the first page of a document indicates only that one or more pages contains 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 where Highly Confidential Information is redacted. The unredacted versions of each page containing Highly Confidential Information and provided under seal also must be

stamped "Highly Confidential" and submitted on light blue paper with references (*i.e.*, highlighting or other markings) to show where Highly Confidential Information is redacted in the original document.

- 14 Parties who seek access to or disclosure of Highly Confidential documents or information must designate one or more outside counsel and one or more outside consultant, legal or otherwise, to receive and review materials marked "Highly Confidential . . ." For each person for whom access to Highly Confidential Information is sought, parties must submit to the party that designated the material as Highly Confidential and file with the Commission a Highly Confidential Information Agreement, in the form prescribed by Exhibit C of this Order, certifying that the person requesting access to Highly Confidential Information:
- a. Is not now involved, and will not for a period of two years involve themselves in, competitive decision making with respect to which the documents or information may be relevant, by or on behalf of any company or business organization that competes, or potentially competes, with the company or business organization from whom they seek disclosure of highly confidential information with respect to the pricing, marketing, and sales of retail telecommunications services in the state of Washington; and
 - b. Has read and understands, and agrees to be bound by, the terms of the Protective Order in this proceeding, including this Section of the Protective Order.
- 15 The restrictions in paragraph 14 do not apply to persons employed with the Attorney General's office for Public Counsel and Commission Staff. However, Public Counsel and Commission Staff shall submit the Highly Confidential Information Agreement, in the form prescribed by Exhibit C of this Order, for any external experts or consultants they wish to have review the Highly Confidential Information.
- 16 Any party may object in writing to the designation of any individual counsel or consultant as a person who may review Highly Confidential documents or information. Any such objection must demonstrate good cause, supported by affidavit, to exclude the challenged counsel or consultant from the review of Highly Confidential documents or information. Written response to any objection must be filed within five days after receipt of the objection. If, after receiving a written

response to a party's objection, the objecting party still objects to disclosure of the Highly Confidential Information to the challenged individual, the Commission shall determine whether the Highly Confidential Information must be disclosed to the challenged individual.

- 17 Outside counsel designated in the manner described in Section 14, above, may provide one copy of Highly Confidential documents or information to their outside consultants or experts who have been designated to receive Highly Confidential Information in the manner described in paragraph 14, above. Designated outside counsel and consultants will each maintain the Highly Confidential documents and information and any notes reflecting their contents in a secure location to which only designated counsel and consultants have access. No additional copies will be made, except for use as part of prefiled testimonies or exhibits or during the hearing, and then such copies shall also be subject to the provisions of this Order.
- 18 Staff of designated outside counsel and staff of designated outside consultants who are authorized to review Highly Confidential Information may have access to Highly Confidential documents or information for purposes of processing the case, including but not limited to receiving and organizing discovery, and preparing prefiled testimony, hearing exhibits, and briefs. Outside counsel and consultants are responsible for appropriate supervision of their staff to ensure the protection of all confidential information consistent with the terms of this Order.
- 19 Any testimony or exhibits prepared that include or reflect Highly Confidential Information must be maintained in the secure location until filed with the Commission or removed to the hearing room for production under seal and under circumstances that will ensure continued protection from disclosure to persons not entitled to review Highly Confidential documents or information. Counsel will provide prior notice (at least one business day) of any intention to introduce such material at hearing, or refer to such materials in cross-examination of a witness. The presiding officer will determine the process for including such documents or information following consultation with the parties.
- 20 The designation of any document or information as Highly Confidential may be challenged by motion and the classification of the document or information as Highly Confidential will be considered in chambers by the presiding officer(s). The party contending that a document or information is Highly Confidential bears the burden of proving that such designation is necessary.

21 Highly Confidential documents and information will be provided to Commission Staff and Public Counsel under the same terms and conditions of this Protective Order as govern the treatment of Confidential Information provided to Commission Staff and Public Counsel and as otherwise provided by the terms of this Protective Order other than this Section.

D. Use of Confidential Information in This Proceeding

22 Unless specifically stated otherwise, references to "Confidential Information" in Part D of this Order apply to Confidential Information and to Highly Confidential Information.

23 **Reference to Confidential Information.** If counsel or persons afforded access to confidential information refer to such information orally or in writing during any part of this proceeding, any public reference (*i.e.*, any reference that will not be placed in a sealed portion of the record) shall be solely by title, exhibit reference, or some other description that will not disclose the substantive confidential information contained in the document. Any other written reference shall be segregated and marked "Confidential Information," or "Highly Confidential Information," as appropriate, and access to it shall be given solely to persons who are authorized access to the information under this Order. The parties must not disclose to any person not bound by the terms of this Order any confidential information that has been referenced in this proceeding.

24 Parties intending to refer publicly to confidential information in oral testimony, cross-examination, or argument must provide as much prior notice as is feasible to the affected party and the presiding officer. Unless alternative arrangements are in place to protect the confidential information, as provided below, there must be 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. Use of protected information must be made only after finding alternative means of presentation to be inadequate.

25 **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: (1) use of clearly edited versions of confidential documents, (2) characterizations of data rather than disclosure of substantive data, and (3) 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.

- 26 If the parties cannot reach agreement about the use of confidential information, they must notify the presiding officer. The presiding officer will determine the manner of best protecting the confidential information while ensuring that all parties are afforded their rights to due process, including the right to cross-examine witnesses.
- 27 **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.
- 28 **Right to Challenge Confidentiality.** Any party may challenge another party's contention that information should be entitled to protection under this Order. The presiding officer will conduct an *in camera* hearing to determine whether the information shall be accorded protection under the terms of this Order. The party asserting confidentiality bears the burden of proving that confidential designation is proper. Pending determination, the challenged information shall be treated in all respects as protected under the terms of this Order.
- 29 The presiding officer may challenge a party's assertion of confidentiality by notice to all parties.
- 30 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.

- 31 **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, and must not be examined by any person except under conditions of this Order, 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.
- 32 **Return of Confidential Information.** Within thirty (30) days after the conclusion of this proceeding, including any administrative or judicial review, every person who possesses any confidential information (including personal notes that make substantive reference to confidential information and transcripts of any depositions to which a claim of confidentiality is made), must return all confidential information to the party that produced it, or at the producing party's election, must certify in writing that all copies and substantive references to confidential information in notes have been destroyed. These provisions apply to all copies of exhibits which contain confidential information and for that reason were admitted under seal. The only exceptions are: (1) that counsel may retain exhibits as counsel records, for only so long as they represent the participant in this proceeding; and (2) that the Commission will retain a complete record of the testimony and documentary evidence admitted to the record or refused admission, including confidential information, as part of the Agency's official records.
- 33 **Freedom of Information Laws.** Any federal agency that has access to and/or receives copies of the confidential information that becomes the subject of a request under the Freedom of Information Act (5 U.S.C. § 552 as amended) shall observe the safeguards established for submitters of confidential commercial information set forth in Executive Order 12600 (52 FR 23781) and the corresponding provisions contained in the agency's procedures for processing FOIA requests for records potentially subject to exemption under 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 42.56.330(1).
- 34 **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 ten days following notice, to permit the party that provided the 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.

35 **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.

36 **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 or Highly Confidential Information may subject such party or person to liability for damages and shall subject such party to penalties as generally provided by law, including, but not limited to, the provisions of RCW 80.04.380-.405.

DATED at Olympia, Washington, and effective January 9, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS
Administrative Law Judge

EXHIBIT A (ATTORNEY AGREEMENT)

AGREEMENT CONCERNING CONFIDENTIAL INFORMATION
IN DOCKET UT-082119
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 UT-082119, 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 UT-082119
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 UT-082119, 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

EXHIBIT C (HIGHLY CONFIDENTIAL INFORMATION AGREEMENT)

AGREEMENT CONCERNING HIGHLY CONFIDENTIAL INFORMATION
IN DOCKET UT-082119
BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

I, _____, as

- In-house attorney
- In-house expert
- Outside counsel
- Outside expert

in this proceeding for _____ (a party to this proceeding) hereby declare under penalty of perjury under the laws of the State of Washington that the following are true and correct:

- a. I am not now involved, and will not for a period of two years involve myself in, competitive decision making with respect to which the documents or information may be relevant, by or on behalf of any company or business organization that competes, or potentially competes, with the company or business organization from whom they seek disclosure of highly confidential information with respect to the pricing, marketing, and sales of retail telecommunications services in the state of Washington; and
- b. I have read and understand, and agree to be bound by, the terms of the Protective Order in this proceeding, including this Section C of the Protective Order.

Signature

Date

City/State where this Agreement was signed

Employer

Position and Responsibilities

Permanent Address

* * *

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 a person having access to Highly Confidential Information under the terms and conditions of the protective order.

_____ No objection.

_____ Objection. The responding party objects to the above-named person having access to Highly Confidential Information. The objecting party shall file a motion with the Commission, supported by affidavit, setting forth the basis for objection and asking exclusion of the person from access to Highly Confidential Information.

Signature

Date