

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Application of)	DOCKET NO. UT-050814
)	
VERIZON COMMUNICATIONS, INC.)	ORDER NO. 03
and MCI, INC.)	
)	ORDER DENYING REQUEST TO
For Approval of Agreement and Plan)	MODIFY PROTECTIVE ORDER;
of Merger)	AMENDING PROTECTIVE
)	ORDER ON THE COMMISSION'S
)	OWN MOTION
.....)	

- 1 **SYNOPSIS:** *The Commission denies Verizon's request to modify a protective order (Order No. 2) in this docket. On its own motion, the Commission modifies the protective order to require notice to the owner of information in certain documents of the intention to copy, to afford an opportunity for the parties and the Commission to consider whether further protections are necessary.*

- 2 This proceeding involves an application by Verizon Communications, Inc., and MCI, Inc., for approval of an Agreement and Plan of Merger between the two companies.

- 3 The matter immediately before us is Verizon's request to modify a Protective Order entered in this docket (i.e., Order No. 02) on June 28, 2005. As discussed below, we deny Verizon's request. However, with respect to the handling of documents designated "Copying Prohibited" under a protective order entered in FCC proceedings concerning the merger, we amend Order No. 02 on the Commission's own motion to provide for consistent treatment of such documents by all parties to this proceeding.

- 4 Order No. 02 entered in a form proposed by Verizon and MCI and agreed to by other parties, provides protection for confidential documents and provides added protections for information defined as "Highly Confidential." The added

protections for information designated as Highly Confidential include a use restriction. Any person seeking access to Highly Confidential information is required to sign an affidavit swearing that: "I will not use such Highly Confidential Information except in connection with this litigation."

5 On July 5, 2005, Verizon¹ moved to amend the Commission's protective order by adding provisions that are in a protective order entered by the Federal Communications Commission (FCC) on May 25, 2005, in its proceeding concerning the proposed merger. In brief, the proposed amendments provide that documents designated Highly Confidential in this proceeding would be barred from disclosure to in-house counsel of other parties,² and that documents designated as "Copying Prohibited" in filings to the FCC would be barred from copying in this proceeding, as well. Verizon provides a copy of the FCC order. Verizon argues that the state proceeding should be consistent with the federal docket to avoid nullification of the federal order and that the nature of this proceeding and the ultra-sensitive nature of certain competitive documents require the proposed treatment because of potential harm by release to competitors.

6 On July 7, 2005, the Commission authorized responses to Verizon's motion, if filed by the close of business on July 11, 2005. Covad, Integra, and Commission Staff all answered the motion, opposing it. Public Counsel expresses concerns about Verizon's motion, but said conditionally that it would not oppose the motion.³ Covad and Integra argue in the alternative that limitations other than those proposed by Verizon would protect Verizon without imposing undue

¹ Verizon filed the motion in its own name but stated that the motion was on behalf of both itself and MCI. We will cite to it as Verizon's motion, recognizing that if granted it would benefit both parties.

² The FCC order also appears to bar in-house experts from access to highly confidential documents. We will so understand Verizon's current motion.

³ Public Counsel stated non-opposition only upon imposition of specific restrictions against the application of certain provisions to Public Counsel.

hardships on the other parties in this proceeding. Covad and Integra, however, propose different limitations. Staff's response also discusses an accommodation it has reached with Verizon concerning the use of documents bearing the legend "Copying Prohibited."

- 7 The parties opposing the motion raise several issues. They point out that the provisions of the FCC protective order were in place well before Verizon and MCI proposed their preferred protective order in this proceeding. Parties in this proceeding had the opportunity to discuss and resolve concerns about the proposed protective order, and reached agreement on it. Verizon did state when the protective order was discussed that it might seek additional protections later in the proceeding. However, neither the Commission nor the parties, some of whom are parties to the FCC proceeding, had any reason to believe that this reservation was meant to include provisions already adopted by the FCC but not then sought by Verizon in this proceeding. Now, the parties argue, Verizon is backtracking from its own proposal in a way that would impose hardship on the other parties' ability to meet the expedited schedule in this docket—a schedule requested by the merging parties and consented to by the other parties in part because of the agreement reached on the form of the current protective order.
- 8 The opposing parties also make the following arguments: the proposal negates the provisions of this Commission's protective order and substitutes terms that are unduly burdensome on other parties; Verizon has failed to state reasons why a higher degree of protection than is already afforded under Order No. 02 is required in this proceeding; Verizon has not been specific about the kind of information or the criteria for determining what qualifies for the no-copy rule; and attorneys are subject to legal and ethical nondisclosure requirements whether they are in-house or retained.

- 9 Finally, Commission Staff points out that no similar provision was required to protect companies in recent merger proceedings before the Commission and that the merging parties fail to identify reasons why the provision is necessary here.
- 10 Verizon does not explain why it did not previously ask in this proceeding for the provisions in the already-approved FCC protective order if those protections are necessary here or consistency between the two protective orders is important. Verizon and the other parties in this proceeding, with full knowledge of the terms of the federal order, agreed to a different form of protective order here. The parties based other procedural decisions, at least in part, on that agreement. Amending Order No. 02 as Verizon requests now would impose an undue burden on other parties and place them at a disadvantage as they prepare their cases and plan their advocacy. Granting Verizon's motion could impede the parties' ability to maintain the schedule in this docket.
- 11 Verizon replied to Covad's answer, pursuant to leave of the Commission. It contests Covad's assertions that the prohibition against access by competitors' inside counsel would impose additional expense, arguing that Covad already retained outside counsel to review the documents for the FCC proceeding and thus would incur no additional expense. Verizon also argues that the FCC has determined that it is inappropriate to house certain sensitive documents at competitors' sites, and the FCC determination demonstrates the need for the limitation.
- 12 We conclude that Verizon is too late to shift its course at this juncture. It negotiated a protective order and represented its sufficiency to other parties well after entry of the FCC order. In addition, beyond conclusory language, it does not identify the exact nature of the protected documents nor explain why the additional provisions are needed.

- 13 Verizon argues that any variance between the state and federal orders would vitiate the effect of the more restrictive federal order. We disagree. Parties to this proceeding who are also party to the federal proceeding appear to remain bound by the FCC protective order as to documents provided under that order.⁴ Parties to this proceeding who are not party to the federal proceeding have no obligation to comply with the FCC order.
- 14 The absence of similar provisions in prior merger proceedings and the lack of consequent concerns in those proceedings provide some assurance that the no-copy and restricted access provisions Verizon seeks here are not necessary. Each restriction imposes some burden on parties to conduct discovery and prepare their own presentations in a timely manner. On balance, we do not believe Verizon's motion is sufficiently supported.
- 15 We see no distinction between in-house and retained attorneys in terms of their legal and ethical obligations to abide by the terms of our protective order. Nor is it clear that outside counsel, many of whom have long standing ties to and relationships with their client companies, can be meaningfully distinguished from in-house counsel for any relevant practical purpose. Order No. 02—Protective Order, paragraphs 36 and 37, require that any person granted access to documents will take fully sufficient protections as necessary to preserve the integrity of the terms of the Commission's protective order.
- 16 The prohibition on copying presents a different issue, however. As Commission Staff points out in its answer to the motion, documents are only barred from

⁴ Verizon represents that XO and Covad are parties in the federal proceeding. Without an exemption from the FCC for purposes of this proceeding, they would appear to be bound by the terms of the FCC protective order. Even if Verizon and MCI's prior consent to the protective order in this proceeding is construed as a waiver of the protections of the FCC order for purposes of this docket, anyone who gains access to the Highly Confidential documents in this proceeding is barred from sharing the information with others or using the information in any way other than for purposes of advocacy in this proceeding.

copying under terms of the FCC order after the agency approves the restriction as to the specific documents. It is not within the power of the owner of the information to impose a unilateral restriction.

- 17 Verizon and Commission Staff reached an accommodation by which documents designated copy-prohibited would be supplied to Staff in digital format and, if Staff desired to make a copy, it would notify Verizon and the parties would have the opportunity to consider need and potential limitations on use.
- 18 We recognize the significance of the FCC proceeding and understand that the FCC would not exercise its discretion to designate specific documents as copy-restricted without determining a need for the protection. At the same time, we also believe that the flexibility to work with copies could be critical to the parties' ability to pursue discovery and prepare their presentations. Receiving copies of certain documents in this proceeding could be essential to reaching an informed result. The agreement reached between Verizon and Commission Staff recognizes the significance of the determination and respects the integrity of the federal proceeding, yet affords the flexibility to accommodate the legitimate needs of the parties and the Commission in this proceeding.
- 19 Consequently, we determine that the arrangement between Verizon and Staff regarding documents that the FCC has designated "Copy Prohibited" in accordance with the FCC protective order, should be consistently applied to all parties in this proceeding. We conclude that Order No. 02 should be amended by adding at the end of section "C " the following paragraph:

Certain documents under Verizon's control that may be requested by parties in this proceeding may bear the designation "Copying Prohibited" under the terms of an FCC protective order entered in that agency's proceedings on the subject merger. Subject to the other terms of this Protective Order, Verizon must provide those

documents in electronic format on a compact disc for inspection. Any party that intends to copy or make an exhibit of any document bearing the "Copying Prohibited" designation must notify Verizon at least two business days prior to making any such copy, identifying the document and the quantity and purpose of the copying, so Verizon will have an opportunity to approve, negotiate conditions on the copying, or seek from this Commission whatever particular protection it believes might be required for the use of that document.

20 The Commission also understands that if discovery issues interfere with the timely preparation of a party's presentation, that party may seek alteration in the schedule.

21 For the reasons specified above, the Commission denies Verizon's motion to amend Order No. 2: Protective Order, entered in this docket on June 28, 2005. The Commission amends Order No. 02 on its own motion as discussed in the preceding paragraphs of this Order.

DATED at Olympia, Washington, and effective this 15th day of July, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner