

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of The Commission, ) Application No. C-3026  
on its own motion, seeking to )  
conduct a 9-month proceeding as )  
contemplated by the Federal Com- ) PROTECTIVE ORDER  
munications Commission in its )  
Triennial Review Order adopting )  
new rules for network unbundling )  
obligations. ) Entered: November 25, 2003

BY THE COMMISSION:

On October 28, 2003, the Commission entered Procedural Order No. 1 and Request for Comments in the above-captioned proceeding. In that Order, the Commission requested comments on the proposed protective order, which was posted on the Commission's website. On November 17, 2003, comments on the Commission's proposed protective order were filed by MCImetro Access Transmission Services, LLC, and MCI WorldCom Communications, Inc. (collectively, MCI) and Cox Nebraska Telcom, LLC (Cox.) Reply comments were filed by AT&T Communications of the Midwest, Inc., and TCG Omaha, Inc. (AT&T), on November 24, 2003.

O P I N I O N      A N D      F I N D I N G S

Upon consideration of the comments filed by MCI, Cox, and AT&T, the Commission finds that the following protective order should be adopted:

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 proprietary or confidential (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 entitled to review, or who are afforded access to any Confidential Information by reason of this order shall neither use nor disclose the Confidential Information for purposes of business or competition, or any purpose other than

the purpose of preparation for and conduct of proceedings in the above-captioned docket or, in accordance with section 7(e) herein, before the Federal Communications Commission (FCC), but only in connection with this docket, and all subsequent appeals (TRO Proceedings), and shall keep the Confidential Information secure as confidential or proprietary information and in accordance with the purposes, intent and requirements of this order.

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

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

The nondisclosure agreement (Exhibit "A") shall require the person(s) to whom disclosure is to be made to read a copy of this Protective Order and to certify in writing that they have reviewed the same and have consented to be bound by its terms. The agreement shall contain the signatory's full name, employer, job title and job description, business address and the name of the party with whom the signatory is associated. Such agreement shall be delivered to counsel for the providing party before disclosure is made, and if no objection thereto is registered to the Commission within three (3) business days, then disclosure shall follow. An attorney who makes Confidential Information available to any person listed in subsection (c) above shall be responsible for having each such person execute an original of Exhibit "A" and a copy of all such signed Exhibit "A"s shall be circulated to all other counsel of record promptly after execution and filed with the Commission.

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

(b) Return. All notes, to the extent they contain Confidential Information and are protected by the attorney client privilege or the work product doctrine, shall be destroyed within thirty (30) days after the final settlement or conclusion of the TRO Proceedings if requested by the providing party. The party destroying such Confidential Information shall advise the providing party of that fact within a reasonable time from the date of destruction.

(c) Copies. The receiving party shall not make copies of any documents containing Confidential Information except in accordance with this provision or Section 7. Each copy shall be numbered and the receiving party shall maintain a list of the individuals receiving such copies and the copies they received, which shall be provided to the providing party upon request. All copies shall be subject to the provisions of this agreement as if they were originals. This section shall be equally applicable to copies made of Highly Confidential Information.

3. Highly Confidential Information. Any person, whether a party or non-party, may designate certain competitively sensitive Confidential Information as "Highly Confidential Information" if it determines in good faith that it would be competitively disadvantaged by the disclosure of such information to its competitors. Highly Confidential Information includes, but is not limited to, documents, pleadings, briefs and appropriate portions of deposition transcripts, which contain information regarding the market share of, number of access lines served by, or number of customers receiving a specified type of service from a particular provider or other information that relates to a particular provider's network facility location detail, revenues, costs, and marketing, business planning or business strategies.

Parties must scrutinize carefully responsive documents and information and limit their designations as Highly Confidential Information to 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—USE RESTRICTED PER PROTECTIVE ORDER IN DOCKET NO. C-3026."

Placing a "Highly Confidential" stamp on the first page of a document indicates only that one or more pages contain 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 Highly Confidential Information, even where that information has been redacted. The unredacted versions of each page containing Highly Confidential Information, and provided under seal, should be submitted on paper distinct in color from non-confidential information and "Confidential Information" described in section 1 of this Protective Order.

Parties seeking disclosure of Highly Confidential Information must designate the person(s) to whom they would like the Highly Confidential Information disclosed in advance of disclosure by the providing party. Such designation may occur through the submission of "B" of the non-disclosure agreement identified in section 1(d). Parties seeking disclosure of Highly Confidential Information shall not designate more than (1) a reasonable number of in-house attorneys who have direct responsibility for matters relating to Highly Confidential Information; (2) two in-house experts; and (3) a reasonable number of outside counsel and outside experts to review materials marked as "Highly Confidential." Disclosure of Highly Confidential Information to Commissioners, Hearing Officers and Commission Advisory Staff members shall be limited to persons to whom disclosure is necessary. The Exhibit "B" also shall describe in detail the job duties or responsibilities of the person being designated to see Highly Confidential Information and the person's role in the proceeding. Highly Confidential Information may not be disclosed to persons engaged in strategic or competitive decision making for any party including but not limited to, the sale or marketing or pricing of products or services on behalf of any party.

Any party providing either Confidential Information or Highly Confidential Information may object to the designation of any individual as a person who may review Confidential Information and/or Highly Confidential Information. Such objection shall be made in writing to counsel submitting the

challenged individual's Exhibit "A" or "B" within three (3) business days after receiving the challenged individual's signed Exhibit "A" or "B." Any such objection must demonstrate good cause to exclude the challenged individual from the review of the Confidential Information or Highly Confidential Information.

Written response to any objection shall be made within three (3) business days after receipt of an objection. If, after receiving a written response to a party's objection, the objecting party still objects to disclosure of either Confidential Information or Highly Confidential Information to the challenged individual, the Commission shall determine whether Confidential Information or Highly Confidential Information must be disclosed to the challenged individual.

Copies of Highly Confidential Information may be provided to the in-house attorneys, outside counsel and outside experts who have signed Exhibit "B." The in-house experts who have signed Exhibit "B" may inspect, review and make notes from the in-house attorney's copies of Highly Confidential Information.

Persons authorized to review the Highly Confidential Information will maintain the documents and any notes reflecting their contents in a secure location to which only designated counsel and experts have access. No additional copies will be made, except for use during hearings and then such disclosure and copies shall be subject to the provisions of Section 6. Any testimony or exhibits prepared that reflect Highly Confidential Information must be maintained in the secure location until removed to the hearing room for production under seal. Unless specifically addressed in this section, all other sections of this Protective Order applicable to Confidential Information also apply to Highly Confidential Information.

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

5. Small Company Exemption. Notwithstanding the restrictions in sections 1 and 3 applicable to persons who may access Confidential Information, a Small Company, may designate any employee or in house expert to review Confidential Information and/or Highly Confidential Information, 1) if the producing party, upon request, gives prior written authorization for that person, or, 2) if the Commission, on a case-by-case basis, determines such person should receive access to the Confidential Information and/or Highly Confidential Information.

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

(a) A party seeking to challenge the confidentiality of any materials pursuant to this order shall first contact counsel for the providing party and attempt to resolve any differences by stipulation;

(b) In the event that the parties cannot agree as to the character of the information challenged, any party challenging the confidentiality shall do so by appropriate pleading. This pleading shall:

- (1) Designate the document, transcript or other material challenged in a manner that will specifically isolate the challenged material from other material claimed as confidential; and
- (2) State with specificity the grounds upon which the documents, transcript or other material are deemed to be non-confidential by the challenging party.

(c) A ruling on the confidentiality of the challenged information, document, data or study shall be made by a Hearing Officer after proceedings in camera, which shall be conducted under circumstances such that only those persons duly authorized hereunder to have access to such confidential materials shall be present. This hearing shall commence no earlier than five (5) business days after service on the providing party of the pleading required by subsection 5(b) above.

(d) The record of said in camera hearing shall be marked "CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. C-3026." 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.

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

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

(b) Seal. While in the custody of the Commission, materials containing Confidential Information shall be marked "CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. C-3026" and Highly Confidential Information shall be marked "HIGHLY CONFIDENTIAL-USE RESTRICTED PER PROTECTIVE ORDER IN

DOCKET NO. C-3026" and shall not be examined by any person except under the conditions set forth in this order.

(c) In-Camera Hearing. Any Confidential Information or Highly Confidential Information that must be orally disclosed to be placed in the sealed record in this proceeding shall be offered in an in camera 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 Highly Confidential Information (or that portion of the record containing Confidential Information or Highly 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 Information or Highly Confidential Information pursuant to subsection 1(c) above and have signed an Exhibit "A" or "B," unless such information is released from the restrictions of this order either through agreement of the parties or after notice to the parties and hearing, pursuant to the ruling of a Hearing Officer, the order of the Commission and/or final order of a court having final jurisdiction.

(e) Appeal/Subsequent Proceedings. Sealed portions of the record in this proceeding may be forwarded to any court of competent jurisdiction or to the FCC for purposes of an appeal of any decision in this proceeding, but under seal as designated herein for the information and use of the court or the FCC. If a portion of the record is forwarded to a court or the FCC, the providing party shall be notified which portion of the sealed record has been designated by the appealing party as necessary to the record on appeal or for use at the FCC. Nothing in this section authorizes the use of any Confidential Information or any Highly Confidential Information in any proceeding other than Docket No. C-3026 and any related appeals to a court of competent jurisdiction or the FCC.

(f) Return. Unless otherwise ordered, Confidential Information and Highly Confidential Information, including transcripts of any depositions to which a claim of confidentiality is made, shall remain under seal, shall continue to be subject to the protective requirements of this order, and shall, upon written request by the providing party, be returned to counsel for the providing party, or destroyed by the receiving party, within thirty (30) days after final settlement or conclusion of the TRO Proceedings. If the providing party



elects to have Confidential Information or Highly Confidential Information destroyed rather than returned, counsel for the receiving party shall verify in writing that the material has in fact been destroyed.

8. Use in Pleadings. Where references to Confidential Information or Highly Confidential Information in the sealed record or with the providing party is required in pleadings, briefs, arguments or motions (except as provided in section 6) it shall be by citation of title or exhibit number or some other description that will not disclose the substantive Confidential Information or Highly Confidential Information contained therein. Any use of or substantive references to Confidential Information or Highly Confidential Information shall be placed in a separate section of the pleading or brief and submitted to the Hearing Officer or the Commission under seal. This sealed section shall be served only on counsel of record and parties of record who have signed the nondisclosure agreement set forth in Exhibit "A" or "B." All of the restrictions afforded by this order apply to materials prepared and distributed under this section.

9. Summary of Record. If deemed necessary by the Commission, the providing party shall prepare a written summary of the Confidential Information referred to in the order to be placed on the public record.

10. Applicability. 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 entity to Docket No. C-3026.

11. This Protective Order shall continue in force and effect after this docket is closed.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Protective Agreement set forth herein is hereby adopted.

MADE AND ENTERED at Lincoln, Nebraska, this 25th day of  
November 2003.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Executive Director

EXHIBIT "A"

CONFIDENTIAL INFORMATION

I have read the foregoing Protective Order dated \_\_\_\_\_, 2003, in Docket No. C-3026 and agree to be bound by the terms and conditions of this order.

\_\_\_\_\_  
Name

\_\_\_\_\_  
Employer

\_\_\_\_\_  
Job Title and Job Description

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

\_\_\_\_\_  
Party

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

EXHIBIT "B"

HIGHLY CONFIDENTIAL INFORMATION

I have read the foregoing Protective Order dated \_\_\_\_\_, 2003, in Docket No. C-3026 and agree to be bound by the terms and conditions of this order.

\_\_\_\_\_  
Name

\_\_\_\_\_  
Employer

\_\_\_\_\_  
Job Title and Job Description

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

\_\_\_\_\_  
Party

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date