

DRAFT

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department of Telecommunications)
and Energy on it own Motion to Implement the)
Requirements of the Federal Communications) D.T.E. 03-60
Commission's Triennial Review Order Regarding)
Switching for Mass Market Customers)

PROTECTIVE ORDER

Adopted by the Department of Telecommunications and Energy on September , 2003

In recognition that documents, information, and other materials submitted to the Department of Telecommunications and Energy (“Department”) and provided to the participants in the course of this proceeding may represent or contain confidential or proprietary information, the Department hereby enters this Protective Order to ensure that such confidential or proprietary information is afforded protection from unwarranted disclosure, while permitting participants appropriate access to such confidential or proprietary materials:

1. Non-Disclosure. Documents, data, information, studies and other materials submitted to the Department and furnished to the participants either on a producing participant's own initiative or pursuant to interrogatories, information requests, record requests, subpoenas, depositions or other modes of discovery, that are claimed by the producing participant to be a trade secret, privileged, proprietary, sensitive, or confidential (hereinafter referred to as "Confidential Information") shall be provided pursuant to the terms of this Order, and shall be treated as confidential by all persons accorded access thereto. Except with the prior written consent of the participant originally designating the information as confidential, or as hereinafter provided under this Order, no Confidential Information may be disclosed to any person. No person accorded access to any Confidential Information shall use such information for any purpose other than the purpose of preparation for and conduct of this proceeding and related proceedings, as contemplated herein. Every person accorded access to Confidential Information shall use his or her best efforts to keep the Confidential Information secure and shall not disclose it or accord access to it to any person not authorized in accordance with this Order.

2. Stamped Confidential Documents. Documents and other materials containing or reflecting Confidential Information should be stamped “CONFIDENTIAL–SUBJECT TO PROTECTIVE ORDER” to signify that they contain information believed to be subject to protection under the Department’s rules of this Order. For purposes of this Order, the term

“document” means all written, recorded, or graphic material, whether produced or created by a participant or another person (including persons not a party to this case), whether produced pursuant to the Department’s rules, information request, record request, subpoena, agreement, or otherwise. Documents that quote, summarize, or contain materials entitled to protection may be accorded status as a stamped confidential document, but, to the extent feasible, shall be prepared in such a manner that the confidential information is bound separately from that not entitled to protection.

3. Permissible Disclosure. Notwithstanding paragraph 1, Confidential Information may be disclosed subject to the provisions of subparagraphs (a) and (b), to the following persons if disclosure is reasonably necessary for such persons to render professional services in this proceeding: counsel of record for participants that may file in this proceeding, including in-house counsel who are actively involved in the conduct of this proceeding; partners, associates, secretaries, paralegal assistants, and employees of such counsel; outside consultants or experts retained to render professional services in this proceeding, provided that they are under the supervision of the counsel of record; and in-house economists and regulatory analysts, provided that they are under the supervision of the counsel of record. Such documents may also be disclosed to relevant employees of regulatory agencies, Department employees involved in this proceeding, and to any person designated by the Department in the interest of justice, upon such terms as the Department may deem proper.

(a) Notwithstanding any other provision of this Order, before any disclosure shall occur, any individual (other than a Department employee) to whom confidential information is disclosed must certify in writing that he/she has read and understands this Protective Order, agrees to abide by its terms, and understands that unauthorized disclosure of the Confidential Information is prohibited. A copy of each such certification shall be provided to the Department and the participant that designated the information confidential. (See Attachment A for a model certification).

(b) Before disclosing Confidential Information to any person who is listed in paragraph 3 (other than an attorney, secretary, paralegal assistant or other employee of such attorney) and who is employed by a competitor or potential competitor of the participant that so designated the information, counsel for the participant seeking such disclosure shall give at least five (5) business days’ advance notice in writing to the counsel who designated such information as confidential, stating the names and addresses of the person(s) to whom the disclosure will be made, identifying with particularity the documents to be disclosed, and stating the purpose of such disclosure. If, within the five-day period, a motion is filed objecting to the proposed disclosure, disclosure is not permissible until the Department has denied such motion and disclosure is permitted. Any such motion shall be served by hand on the participant seeking such disclosure.

4. Access to Confidential Information. Any participant (or in the case of non-

participants producing Confidential Information pursuant to Department request or subpoena) producing Confidential Information pursuant to this Order shall provide a copy to counsel for all participants who have executed the certification described in paragraph 3(a), except where such confidential materials are so voluminous that providing copies would impose an undue burden. In such cases, the participant producing the confidential material shall designate a Boston location and such other locations as may be convenient at which all certified participants shall be permitted access to and review of requested confidential information pursuant to the other terms of this Order, or pursuant to alternative arrangements agreed upon by the participants. Any such access or review may be limited to regular business hours after reasonable notice by the requesting participant. Participants may obtain copies of any such voluminous confidential material at their expense upon request after inspection.

5. Highly Sensitive Confidential Information. Nothing contained herein shall be construed as requiring a participant to produce all documents which it designates as Confidential Information, should the providing participant allege that any Confidential Information to be provided pursuant to this Order is of such a highly sensitive nature that access to and copying of such Confidential Information as herein set forth would expose the providing participant or any of its affiliates to an unreasonable risk of harm. Where the providing participant so contends, on or before the date such highly sensitive information would otherwise be produced, the providing participant shall object to the production of such information and shall file with the Department and serve on all participants a motion requesting that the items of Confidential Information in question be declared to be highly sensitive Confidential Information. The motion must conform to the requirements set forth in G.L. c. 25, § 5D and shall include the special protection and treatment desired, the grounds why the Confidential Information in question needs special protection and a detailed list of the items of Confidential Information alleged to be too highly sensitive to be accessed or copied under the provisions of this Order. All other participants will have five (5) business days to respond in writing to the motion, which response must include a description of the need for access to such Confidential Information and why such a need cannot be satisfied with other information, whether Confidential Information or otherwise. The Department shall determine the status of the Confidential Information in question and the treatment that should be afforded to it as expeditiously as possible.

6. Prohibited Copying. If a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited." Application for relief from this restriction against copying may be made to the Department, with notice to counsel so designating the document.

7. Confidential Information Filed in the Record

(a) Confidential Information may be offered in the record of this proceeding, provided that such Confidential Information is furnished under seal. The participant submitting

Confidential Information shall ensure that each page bears the legend "CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER."

(b) If counsel for a participant desires to use or place any Confidential Information provided by another participant (or non-participant) on the record in this proceeding, then counsel shall notify the providing participant at least four (4) business days prior to introduction of the documents to be used, or, in the case of cross-examination, at least twenty-four (24) hours in advance, or as soon as otherwise practicable. The providing participant will notify counsel for the participant intending to introduce such confidential material at least two (2) business days prior to the proposed introduction of the documents, or, in the case of cross-examination, as soon as practicable, which portion, if any, of the documents so identified shall be placed in a sealed record. Documents, or any portion thereof, not designated to be placed in a sealed record shall be available for use in the public record.

(c) The court reporter(s) shall be instructed as to the nature of certain testimony with respect to Confidential Information and shall be further instructed to and shall start a separate transcription for testimony or discussion on the record of Confidential Information. Such transcriptions shall be marked "Confidential Subject to Protective Order," sealed and filed with the Department and copies made available only in a manner consistent with this Order. Such transcriptions shall in all respects be treated as Confidential Information under this Order.

(d) No person other than those who have signed a certification agreeing to be bound by this Order shall be permitted to hear or review testimony given or discussion held with respect to Confidential Information.

8. Department Treatment of Confidential Information.

(a) If confidential documents are submitted to the Department in accordance with paragraph 7, the materials shall remain sealed while in the Department's office or such other place as the Department may designate so long as they retain their status as Confidential Information. The Department may, *sua sponte* or by petition, determine that all or part of the information claimed by the producing participant (or non-participant) to be confidential is not entitled to such treatment. In the event the Department, a participant, or any other person challenges such confidential treatment and restriction from disclosure, the Department will provide notice of such challenge to the participant (or non-participant) that submitted the Confidential Information at issue. The participant (or non-participant) desiring confidential treatment thereafter bears the burden of establishing within five (5) business days of such notice that the material is entitled to protection from disclosure consistent with G.L. c. 25, § 5D.

(b) All transcripts, exhibits, responses to discovery requests, prefiled testimony and other information which have been determined by the Department to be or contain Confidential

Information shall be segregated from the balance of the record in this proceeding and placed in a sealed file or otherwise given appropriate protection against disclosure consistent with this Order.

9. Use. Persons obtaining access to stamped confidential documents under this Order shall use the information only in the conduct of this proceeding, other Department proceedings arising or resulting from this proceeding, and any Federal Communications Commission or judicial proceeding arising from this or such other Department proceedings, and shall not use such information for any other purpose, including business, governmental, commercial, or other administrative or judicial proceedings. Persons obtaining access to confidential information under the terms of this Order may disclose, describe, or discuss confidential information made part of the record in any pleading filed in this proceeding, provided that such pleading is stamped confidential and filed under seal, and provided that a separate public version is filed in which all confidential information is redacted. Persons filing pleadings under seal based on confidential information provided by others shall serve such pleadings by hand or over-night delivery on the participant originally requesting confidential treatment of the underlying information.

10. Right To Contest Confidential Treatment and Admissibility. Neither this Order, nor the execution of any certification pursuant to this Order, shall in any way prejudice or otherwise constitute any waiver of the rights of any participant (or non-participant) at any time to contest any assertion or to appeal any finding that specific information is or is not Confidential Information or that it should or should not be subject to the protective requirements of this Order. The participants (or non-participants) hereto retain the right to question, challenge, and object to the admissibility of any and all Confidential Information provided under this Order on any available grounds, including but not limited to competency, relevancy, and materiality. Any participant at any time may seek by appropriate pleading to have documents submitted under this Protective Order removed from coverage of such Order. Notice of such challenge shall be provided as described in paragraph 8(a). In the event the Hearing Officer or the Department should rule that any information is not appropriate for inclusion in a sealed record, no participant shall use such information in the public record for two (2) business days, in order to permit the providing participant (or non-participant) an opportunity to seek a stay or other relief.

11. Subpoena by Courts or Other Agencies. If a court or another administrative agency subpoenas or orders production of stamped confidential documents which a participant has obtained under terms of this Order, such participant shall promptly notify the participant (or non-participant) and any other person who designated the document as confidential of the pendency of such subpoena or order.

12. Client Consultation. Nothing in this Order shall prevent or otherwise restrict counsel from rendering advice to their clients regarding the D.T.E. 03-60 proceeding in which

a confidential document is submitted and, in the course thereof, relying generally on examination of stamped confidential documents submitted in that proceeding; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure of any item so designated except pursuant to the procedures of paragraph 3 above.

13. Non-Termination. The provisions of this Order shall not terminate at the conclusion of this proceeding.

14. Modification Permitted. Nothing in this Order shall prevent any participant or other person from seeking modification of this Order.

15. Responsibility of Attorneys. The attorneys of record are responsible for employing reasonable measures to control, consistent with this Order, duplication of, access to, and distribution of copies of stamped confidential documents. Participants shall not duplicate any stamped confidential document except working copies and for filing at the Department under seal.

16. Return of Confidential Documents. Within two weeks after final resolution of this proceeding (which includes administrative or judicial review), participants that have received Confidential Information shall either return all copies of such information in their possession to the participant that submitted the documents, or destroy all such Confidential Information and advise the participant that submitted the documents of said destruction.

17. Penalties. In addition to any other penalties or remedies authorized under the federal Communication Act of 1934, the Department's regulations, Massachusetts statutory and common law or other source of law, any failure to abide by the terms of this Order may result in such additional measures as may be imposed by the Department.

18. Effective Date. This Protective Order is effective upon its adoption.

ATTACHMENT A

CERTIFICATION OF COMPLIANCE WITH PROTECTIVE ORDER

I have received a copy of the Protective Order in D.T.E. 03-60. I hereby certify that I have read the Order and agree to comply with and be bound by the terms and conditions of this Protective Order. The signatory understands, in particular, that unauthorized disclosure, or the use of the information for competitive commercial or business purposes, will constitute a violation of this Protective Order.

SIGNATURE: _____

NAME PRINTED: _____

TITLE: _____

ADDRESS: _____

REPRESENTING: _____

EMPLOYER: _____

DATE: _____