



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Cox California Telcom, LLC (U-5684-C), Complainant

v.

Vaya Telecom, Inc. (U-7122-C), Defendant.

C. 11-09-007

(Filed September 9, 2011)

**MOTION OF COX CALIFORNIA TELCOM, LLC, DBA COX COMMUNICATIONS,
FOR AN ORDER DIRECTING VAYA TELECOM, INC. TO FILE UNDER SEAL
CONFIDENTIAL INFORMATION OF COX AND ITS CUSTOMERS**

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June 26, 2012

Pursuant to the California Public Utilities Commission Rules of Practice and Procedure (“Rules”) Rules 11.4 and the directive of ALJ Vieth given at the evidentiary hearing conducted on June 11, 2012,¹ Cox California Telcom, L.L.C., dba Cox Communications, (U 5684 C) (“Cox”) respectfully moves the Commission to issue an order directing Vaya to file under seal the confidential and proprietary information of Cox and Cox customers included in the confidential version of the Reply Testimony of James Mertz , submitted on behalf of Vaya Telecom, Inc. (“Vaya”) and identified as Vaya Exhibit 51-C (hereafter “Mertz Reply Testimony” or “Vaya Exhibit 51-C”).

This complaint concerns Cox invoicing Vaya for switched access charges pursuant to Cox’s switched access tariff on file with the Commission. In light of both certain defenses raised and testimony submitted by Vaya, Cox is submitting this Motion to ensure that Cox’s confidential data responses and customer proprietary network information (“CPNI”) concerning Cox’s customers included in the Mertz Reply Testimony are submitted under seal. Specifically, Cox requests that the Commission grant this Motion such that the following will be submitted under seal:

- Attachment 7 to Vaya Exhibit 51-C, which includes discs of what were described as Vaya call detail records (“CDRs”) (“Attachment 7”); and
- The portions of Attachment 15 to Exhibit 51-C that includes Cox’s confidential responses to Vaya Data Requests 3-4 and 3.7.

With respect to testimony that Cox submitted in this proceeding, Cox is not seeking to file under seal any portion of either the opening or rebuttal testimonies of Robert Allen, other than the portions that include Vaya’s confidential information.² However, with respect to the

¹ Hearing Transcript (Vieth), p. 267:24-268:7.

² For example, Mr. Mertz’s reply testimony refers to information in the invoices that Cox sent to Vaya, but

Opening Testimony of Joseph Gillan, which was identified at the hearing as Cox Exhibit 1 (“Gillan Opening Testimony” or “Cox Exhibit 1”), Cox wishes to submit only a public version and to do so requests permission to replace the names of certain equipment manufacturers with generic references to such equipment in that document. Upon the Commission approving this request, Cox would submit the revised version on Cox Exhibit 1 on July 16, 2012 pursuant to the joint schedule the parties submitted to ALJ Vieth on June 19, 2012 (and Cox would not submit a confidential version).

However, Mertz Reply Testimony, Attachment 15 also includes the same network diagrams that Cox seeks to replace in Cox Exhibit 1, and as such, Cox requests that the portion of Attachment 15 of Exhibit 51-C that includes the same network diagram either (a) not be entered into the record; or (b) be submitted under seal.

I. Section 583, General Order 66-C And Prior Commission Decisions Require the Commission to Grant This Motion.

General Order 66-C (“GO 66-C”) and California Public Utilities Code § 583³ provide for confidential treatment of proprietary and confidential information submitted to the Commission by public utilities. Pursuant to Section 583 and GO 66-C, Cox requests that the Commission issue an order requiring Vaya to submit under seal information that is confidential to Cox and/or its customers. Granting this Motion is consistent with the protections established by both statute and Commission order.

Specifically, Section 583 expressly states that information provided by a public utility to the Commission will not be available to the public, unless there is a specific statutory

as discussed herein, Cox is not designating its invoices as confidential; but is treating them as such upon Vaya’s request and will continue to do so upon the Commission granting Vaya’s request to file them under seal.

³ All sections referenced herein are to the California Public Utilities Codes, unless otherwise noted.

requirement indicating that they should be made public or there is an order by the Commission.⁴

“No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, *except those matters specifically required to be open to public inspection by this part*, shall be open to public inspection or made public *except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding*. Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor.⁵

The premise of Section 583 is that information designated by public utilities as confidential will not be disclosed, unless there is a rule within Part I of the California Public Utilities Code requiring disclosure or the Commission finds that disclosure is required. This statutory requirements is reflected, in part, in GO 66-C, Rules 2 and 2.2 which state as follows:

Public records not open to public inspection include:

...

Records or information of a confidential nature furnished to, or obtained by the Commission. (See P.U. Code §§ 583, 3709, 5228).⁶

GO 66-C, Rule 2.2 also includes a non-exhaustive list of examples of information that fall within the scope of the rule. One such example of information that the Commission will deem confidential is “information requested or required by the Commission which, if revealed, would place the regulated company at an unfair business disadvantage.”⁷ As discussed below, the Commission routinely allows carriers to submit sensitive network information and customer-related information, among other confidential information, under seal pursuant to GO 66-C.

Under Section 2891(a), carriers cannot disclose residential customers’ calling patterns, such as the listing of telephone numbers:

⁴ See, D.11-07-056, Attachment B (listing current statutes concerning customer privacy).

⁵ Section 583.

⁶ GO 66-C, Rules 2 and 2.1. (Footnotes omitted).

⁷ Id.

No telephone or telegraph corporation shall make available to any other person or corporation, without first obtaining the residential subscriber's consent, in writing, any of the following information:

(1) The subscriber's personal calling patterns, including any listing of the telephone or other access numbers called by the subscriber, but excluding the identification to the person called of the person calling and the telephone number from which the call was placed, subject to the restrictions in Section 2893, and also excluding billing information concerning the person calling which federal law or regulation requires a telephone corporation to provide to the person called.⁸

In D.95-07-054, Appendix B, Rule 14, the Commission expressly required competitive carriers to comply with this statute. While there are exceptions to this rule, none expressly apply to the information subject to this Motion.⁹

Additionally, Section 222 of the federal Communications Act of 1934 (“Federal Act”) requires telecommunications carriers like Cox and Vaya to protect other carriers’ confidential information:

SEC. 222. PRIVACY OF CUSTOMER INFORMATION.

(a) IN GENERAL- Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, *other telecommunication carriers*, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.

(b) CONFIDENTIALITY OF CARRIER INFORMATION- A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.¹⁰

Additionally, the Section 222(c) of the Federal Act requires telecommunications carriers to use the CPNI of their customers solely for purposes of providing telecommunications

⁸ Section 2891(a)(1).

⁹ See Section 2891(d).

¹⁰ 47 U.S.C. § 222. Emphasis added.

service.¹¹ CPNI is defined in 47 U.S.C. § 222(f) as follows:

(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information.

47 U.S.C. § 222(d) lists a few exceptions to the requirements above, but none of the exceptions apply to Cox, and therefore, it must not disclose any (a) information that Vaya deems confidential and proprietary; or (b) CPNI of its customers except to provide telecommunications service to them.

II. Information About Cox’s Network and Its Customers and Cox’s Form 477 Reports Are Confidential And Should Not Be Disclosed.

The Commission has a long history of designating as confidential the business plans, financial information, network information, confidential FCC reports and other internal documents of competitive carriers.¹² For example, when the Commission directed carriers to submit a report that they submit to the FCC on a confidential basis, the Commission provided the same confidential treatment as the FCC and directed carriers to file such reports subject to

¹¹ 47 U.S.C. § 222(c)(1) states as follows: “Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.”

¹² See e.g. *Application of BullsEye Telecom, Inc. (U6995C) for a Certificate of Public Convenience and Necessity for Additional Authority to Operate as a Provider of Resold Local Exchange and IntraLATA Service within the Service Areas of Citizens Telecommunications Company of California, Inc., d/b/a Frontier Communications of California*, Application 11-10-013, Decision 12-03-011; *Order Instituting Rulemaking to Address the Needs of Telecommunications Customers Who Have Limited English Proficiency*, Decision 08-10-016; *Rulemaking 07-01-021; Pacific Bell Telephone Company, dba AT&T California (U1001C), Complainant, vs. Cbeyond Communications, LLC (U6446C), Covad Communications Company (U5752C), and Arrival Communications, Inc. (U5248C), Defendants*, Case 06-03-023, Decision 08-04-055, O.P. 3, 2008 Cal. PUC LEXIS 146; *Order Instituting Rulemaking On The Commission's Own Motion Into Competition for Local Exchange Service; Order Instituting Investigation On The Commission's Own Motion Into Competition for Local Exchange Service*, R.95-04-043, I.95-04-044, Decision No. 99-07-048, 1999 Cal. PUC LEXIS 452.

Section 583 and GO 66-C:

In requiring NORS information, we recognize that MSI data has critical utility infrastructure implications. Consistent with the FCC's treatment of NORS data, we will afford the information confidential treatment pursuant to the Commission's well-established protections under Pub. Util. Code § 583 and GO 66-C. *Carriers should designate "Section 583" on the reported data.*¹³

In another example, the Commission routinely grants requests to file under seal anticipated numbers of customers filed as part of CPCN applications.¹⁴ Similarly, the Commission has recognized that in a competitive environment, information about a public utility's customer base should remain confidential, since disclosure would reveal competitive information to its competitors:

Since competition for customers of electricity is now being permitted, the number of customers served by each registered ESP will become more important. *If this type of data is made known to other competitors, such information could place the company at an unfair business disadvantage.*¹⁵

Consistent with prior Commission decisions and FCC's practices, Cox requests permission to file under seal the following Cox confidential information.

Mertz Reply Testimony, Attachment 15. Included in Attachment 15 to the Mertz Reply Testimony are several Cox responses to Vaya data requests. Two of these responses – responses to Vaya's Data Request 3-4 and to Vaya Data Request 3-7 – include Cox's confidential information. Cox provided those responses pursuant to the non-disclosure

¹³ *Order Instituting Rulemaking on the Commission's Own Motion into the Service Quality Standards for All Telecommunications Carriers and Revisions to General Order 133-B*, R. 02-12-004, D.09-07-019, p. 65. Footnotes omitted. Emphasis added.

¹⁴ *Application of Ponderosa Cablevision for a Certificate of Public Convenience and Necessity in order to Provide Limited Facilities-Based and Resold Competitive Local Exchange Services (U6470C)*, A. 11-10-014, D. 12-05-009.

¹⁵ *Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation; Order Instituting Investigation on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation*, R. 94-04-031 (Filed April 20, 1994), I.94-04-032 (Filed April 20, 1994), D.98-03-072. Footnotes omitted. Emphasis added. See e.g. *In the Matter of the Joint Application of AT&T Corp., Meteor Acquisition Inc., and MediaOne Group, Inc. for Approval of the Change in Control of MediaOne Telecommunications of California, Inc., (U-5549-C) That Will Occur Indirectly as a Result of the Merger of AT&T Corp. and MediaOne Group, Inc.*, A. 99-08-013 (Filed August 9, 1999), D.00-05-023.

agreement that the parties executed (“NDA”). Cox would not have provided its confidential information to Vaya but for Vaya agreeing to treat the information as Cox’s confidential information under the NDA.¹⁶

In Vaya Data Request 3-4, Vaya requested the “percentage (on a monthly basis) of Cox end user customers to whom Cox terminated telecommunications traffic via a Multimedia Terminal Adaptor during the time period covered by the Complaint.” While Cox objected to the request on several grounds, it provided a response that it marked as confidential. The responsive information is confidential because it includes competitive and sensitive business information about Cox, Cox’s network, how it provides services and the nature of its customer base. Cox would be at an unfair business advantage if this information were disclosed to its competitors.

Also included in Attachment 15 is Cox’s response to Vaya Data Request 3-7. In this data request, Vaya requested copies of “all FCC Form 477 filings made by Cox.” In addition to objections, Cox responded by providing forms, marked as confidential, covering the relevant time period. Importantly, when Cox’s affiliate submits Form 477 to the FCC, it does so on a confidential basis. Since the FCC expressly permits Cox to file its Form 477s on a confidential basis, the Commission also must grant confidential treatment of such information in this proceeding to be consistent with the FCC’s treatment. Moreover, doing otherwise would lead to a perverse result in that it could motivate a party to use the Commission’s complaint process (among other processes) to obtain and disclose a carrier’s confidential information.

Granting this Motion will not impair the rights of Vaya or the public, as the information pertains solely to Cox’s internal network, practices and customer base. This proceeding concerns a dispute between two carriers, and they are the only two parties participating. As

¹⁶ For clarity, Cox’s response to Vaya Data Request 1-4 includes information designated as confidential. Other than the network diagrams that Cox provided in response to Vaya Data Request 1-4 and which are discussed below, Cox does not seek confidential treatment of the other materials in response to Vaya Data Request 1-4.

such, there is no risk that granting this Motion would preclude meaningful participation by the public. Nor will granting the Motion limit the Commission from engaging in open decision-making, as Cox anticipates the final decision adopted by the Commission will not need to include the confidential information included in Cox's data responses. However, disclosure could place Cox at an unfair business disadvantage.

III. Vaya CDRs Contain Vaya Confidential Information and Customer Proprietary Network Information And Must Be Filed Under Seal.

A. Mertz Reply Testimony, Attachment 7 – Vaya CDRs.

Attachment 7 to the Reply Testimony of James Mertz is marked as confidential and includes "Vaya CDRs" for the Vaya traffic at issue in this complaint.¹⁷ The Vaya CDRs are on approximately 14 discs. While the parties disagree as to the whether the records included in Attachment 7 are "call detail records,"¹⁸ Cox submits that the information provided on the discs includes, at a minimum, information related to the quantity, destination and amount of use of a telecommunications service. Accordingly, this information should not be made public for two reasons.

First, Cox anticipates that Vaya designated this information as confidential, at least in part, because it includes either or both Vaya confidential information, the CPNI of Vaya's affiliate/customer O1 or the CPNI of O1's customers. Under 47 U.S.C. Section 222, Cox has a duty to protect the confidential information of and relating to Vaya and its customer. Second, the Vaya CDRs include information about Cox's customers. While Vaya may consent to the disclosure of its confidential information and CPNI included in these records in Attachment 7, Cox cannot obtain the consent of its customers for purposes of disclosure of their respective CPNI. Accordingly, under both 47 U.S.C. Section 222(c) and Section 2891(a)(1), Cox may not

¹⁷ Mertz Reply Testimony, p. 21:13-15.

¹⁸ See, Hearing Transcript, Robert Allen (Cox), p. 111:3-15.

disclose any information in Attachment 7 that includes the CPNI or similar information of customers (other than Vaya, as described herein).

B. Mertz Reply Testimony, Attachment 3 - Cox's Invoices.

Mertz Reply Testimony, Attachment 3 was submitted on a confidential basis and includes invoices that Cox sent to Vaya. To the extent the information in these invoices is CPNI, Cox must keep such information confidential. However, Cox does not deem these invoices to include confidential information of Cox or Cox customers other than Vaya. Accordingly, if Vaya consents to the invoices being made public, then they may be made public. If Vaya does not consent to the invoices being disclosed publicly, then Cox requests that they be filed under seal on the ground that they may include the CPNI and/or other confidential information of Vaya.

IV. Non-Confidential Version of the Opening Testimony of Joseph Gillan, Including Cox Network Diagrams Which Are Also Included in Mertz Reply Testimony, Attachment 15.

On March 9, 2012, Cox submitted public and confidential versions of the Gillan Opening Testimony. The public version of his opening testimony has been identified as Cox Exhibit 1 and was moved into the record.¹⁹ The confidential version was identified as Cox Exhibit 1-C, but was not entered into the record yet.

In response to the ALJ's directive to minimize the submission of confidential information in to the record in this proceeding, Cox proposes making minor revisions to the Gillan Opening Testimony which would eliminate the need for a confidential version. Specifically, Cox requests permission to remove the names of the equipment manufacturers and the types of equipment included in Attachments JPG-2 and JPG-3 (i.e. network diagrams) and on pages 7-10 of the Gillan Opening Testimony. Cox will replace the specific references with a generic term

¹⁹ Hearing Transcript, p. 118:6-13.

like “Cox Switch.” Upon the Commission approving this change, none of the text included in this testimony, including the attachments, will be designated as confidential to Cox.

Accordingly, there will be only one version (i.e. a public version) of the Opening Testimony of Joseph Gillan.

If Cox’s request to remove equipment manufacturers’ names and the references to a specific type of equipment from the Gillan Opening Testimony is not granted, then Cox requests permission to file under seal Cox Exhibit 1-C, as it includes sensitive business information of Cox, its vendors and the particular pieces of equipment Cox has deployed. Again, this dispute concerns Cox and Vaya and Vaya’s refusal to pay Cox’s invoices for switched access charges. There is no public interest in disclosure of this information, yet, the disclosure of the specific type of equipment utilized by Cox could create a security risk to Cox’s network. Namely, detailed equipment information could assist someone attempting to obtain unauthorized access to Cox’s network.

Finally, but importantly, the Mertz Reply Testimony, Attachment 15 includes Cox’s response to Vaya Data Request 1-4 and this response includes the same network diagrams that are attached to the Cox Exhibit 1-C – the confidential version of the Gillan Opening Testimony. If the Commission grants Cox’s request to make the minor revisions to Cox Exhibit 1 described above, then the network diagrams Cox provided in response to Vaya Data Request 1-4, should (a) either not be entered into the record;²⁰ or (b) be submitted under seal as they still include Cox’s confidential information.

V. Conclusion.

Cox submits that sufficient good cause exists for the Commission to apply the protective

²⁰ For example, it appears duplicative and unnecessary to have Cox’s network diagrams included in the testimony of Cox’s witness, as well as Vaya’s witness.

mechanisms set forth in Section 583 and GO 66-C to the confidential documents and information of Cox and its customers included in the Mertz Reply Testimony. Therefore, Cox requests that the Commission enter an order protecting this confidential/proprietary information from public disclosure.

Date: June 26, 2012

Respectfully submitted,
/s

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(Proposed Ruling)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Cox California Telcom, LLC (U-5684-C), Complainant

v.

Vaya Telecom, Inc. (U-7122-C), Defendant.

C. 11-09-007
(Filed September 9, 2011)

ADMINISTRATIVE LAW JUDGE’S RULING GRANTING MOTION OF COX CALIFORNIA TELCOM, LLC, DBA COX COMMUNICATIONS, FOR AN ORDER DIRECTING VAYA TELECOM, INC. TO FILE UNDER SEAL CONFIDENTIAL INFORMATION OF COX AND ITS CUSTOMERS

On June 26, 2012, Cox California Telecom, LLC, dba Cox Communications, (U 5684 C) filed a motion to file under seal and for a protective order maintaining the confidentiality of certain information contained in the following:

- Attachment 7 to the Mertz Reply Testimony which includes discs of Vaya CDRs (“Attachment 7”); and
- The portions of Attachment 15 to the Mertz Reply Testimony that includes Cox’s confidential response to Vaya data requests 3-4 and 3.7.

One category of information that Cox seeks to file or have filed under seal by Vaya includes confidential information of Cox that if it were disclosed publicly would place Cox at an unfair business advantage. Cox also seeks an order requiring Vaya to file under seal, Cox discovery response that includes a report Cox submits to the FCC on a confidential basis. Finally, Cox also seeks to protect from disclosure customer proprietary network information and confidential information it obtained from Vaya in providing service to Vaya. Cox’s requests are reasonable and should be granted. Disclosing the information subject to the Motion would provide little to no benefit to the public as this is complaint case involving only Cox and Vaya.

As such, the filing of information under seal will not preclude or limit public participation. Moreover, granting the Motion will not preclude the Commission from engaging in an open decision-making process as it does not appear necessary to include any confidential information in any decision adopted by the Commission, even though that information will be included in the formal record.

Cox also states it will not seek to file under seal a confidential version of the Opening Testimony of Joseph Gillan, provided that the Commission allows Cox to remove the manufacturers' names and the type of equipment included in such testimony, including the attachments. To minimize the submission of confidential information in this proceeding, Cox's request is granted and Vaya is ordered to either (a) not include in the confidential version of the Mertz Reply Testimony, the portion of Attachment 15 that includes a network diagram that Cox provided in response to Vaya Data Request 1-4; or (b) file under seal the portion of Mertz Reply Testimony, Attachment 15 that includes a network diagram that Cox provided in response to Vaya Data Request 1-4.

IT IS HEREBY RULED that the written materials submitted herein on June 26, 2012, in connection with the Motion will remain under seal and not be accessible or disclosed to persons other than Commission staff except on further order or ruling of the Commission, the administrative law judge to whom the application is assigned, or the administrative law judge then designated as the law and motion judge. Accordingly, it is ORDERED that:

Dated: _____, 2012, at San Francisco, California.

Administrative Law Judge