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**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Investigation into the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions raised in the Limited Rehearing of Decision 08-09-042.

Investigation 15-11-007  
(Filed November 5, 2015)

**ADMINISTRATIVE LAW JUDGE'S RULING ADOPTING PROTECTIVE ORDER**

The above-captioned Order Instituting Investigation (I.) 15-11-007 (OII) was released and served on Respondents on or around November 12, 2015, opening an investigation into competition among telecommunications providers in California. In Ordering Paragraph 4 of the OII, the Commission directed the parties "to enter into confidentiality agreements that facilitate the greatest possible sharing of information." At the January 20, 2016 Prehearing Conference, I reminded the parties of this direction, and urged them to enter into non-disclosure agreements (NDAs) as soon as possible. On February 8, I issued a ruling directing Respondents to advise me by February 12, 2016 of the status of negotiations with the other parties regarding the creation of required non-disclosure agreements. On February 12, via e-mails from Respondents and The Utility Reform Network (TURN), I was advised that the parties were engaged in crafting a form of NDA that would be acceptable to all concerned, and that Respondents "expect to be able to present a single Respondent proposal for an NDA to TURN and other consumer groups next week."

On February 18, 2016 I informed the parties by e-mail that I had prepared a draft of a Protective Order (which I attached to the e-mail), and that I intended to

enter that Protective order in lieu of a negotiated NDA if I had not been advised by the parties that they have reached agreement on an NDA (or multiple NDAs) by the close of business on February 25, 2016. Although I was willing to arbitrate (in a binding manner) any residue of disputes regarding an NDA, I reiterated that a Protective Order would issue if no agreement was reached on an NDA. I directed the parties to submit any changes to the proposed Protective Order they deem necessary by close of business on February 26, 2016. At the request of the parties, I then extended those two dates to February 26 and 29, respectively.

On February 24, 2016, the established carrier Respondents communicated that they believed "strongly ... that no sharing of confidential information should occur between them at this time." On February 25, 2016, I questioned (by e-mail) whether the competing carriers were of a similar mind. On February 26, 2016, counsel for the California Association of Competitive Telecommunications Companies (CalTel) responded as follows:

It is our understanding ... based on our conversations with representatives of the Joint Carriers over the past few days, that the Joint Carriers will not agree to an NDA with CALTEL giving CALTEL access to confidential materials made available to ORA, TURN and Greenlining or their own confidential material employed in this proceeding at this time.

By way of background, CALTEL does not pass confidential information it receives under NDAs or Protective Orders to its members (nor does CALTEL collect confidential information from its members). However, for CALTEL to participate fully and to adequately protect its members' common interests, given its limited resources, it must be able to have Ms. DeYoung, who is its principal expert witness, as well as its chief executive, given access to confidential

information disclosed to and by other parties in the proceeding.

CalTel proposed edits to the Protective Order. Respondent Sprint Telephony PCS, L.P. (U 3064 C) (Sprint) also proposed edits, which it stated were “not intended to be a substantive modification” of the Protective Order. In addition, Sprint noted:

Although Sprint had been part of a group of Respondents seeking to negotiate a Nondisclosure Agreement “(NDA)” with Intervenor (TURN et al.) (“Intervenor”), Sprint ultimately determined that it favored the approach reflected in Your Honor’s proposed Protective Order, so that, among other things, it would not need to negotiate an NDA with numerous other parties to this proceeding. Sprint today contacted Ms. Mailloux, counsel to TURN acting as a single point of contact for Intervenor, to indicate that, rather than seek to negotiate an NDA with Intervenor, Sprint would submit an email to Your Honor indicating that it favored adoption of a single Protective Order applicable to all parties in this proceeding, rather than multiple NDAs. Ms. Mailloux did not object to that approach.

... In addition to not wanting to negotiate multiple NDAs with multiple parties to I.15-11-007, Sprint concluded that it shares what it believes is a concern of CALTEL, that parties should have access, if they wish it, through an appropriate person not involved in Competitive Decision-Making, to other parties’ submissions to the Commission in I.15-11-007, including access to confidential and highly confidential information and documents, in order to participate effectively in this proceeding.

Counsel for the remaining Respondents countered, also on February 26, that the remaining “Respondents continue to feel strongly that, at this time, no

sharing of their confidential information should occur between them, or with commercial entities that obtain party status, and it's reasonable to reserve the right to revisit this issue at a later date as the proceeding unfolds."

On the morning of February 29, counsel for TURN, writing for TURN, the Greenlining Institute, and the Center for Accessible Technology (CforAT) (collectively the "Public Interest Intervenor"), provided edits to the Protective Order over those made previously by CalTel and Sprint, differing with CalTel on the definitions of "Respondent" and "Non-Carrier Party," but otherwise supporting the Protective Order and the edits made by CalTel and Sprint.

Finally on February 29, 2016,<sup>1</sup> the remaining Respondents served 15 pages of formal Comments which they had filed (or intended to file) with the Commission, along with a redlined version of the Protective Order with extensive and substantive changes. The remaining Respondents make a number of points in their Comments, which I will consider *seriatim*: (a) the Commission does not need confidential data to analyze the state of California competition, and can proceed based solely on public data; (b) the Protective Order should restrict competitors' access to confidential documents and information "at this early stage of the docket"; (c) the Commission should adopt a "Commission Only" category for Highly Confidential<sup>2</sup> data, including the Form 477 data and

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<sup>1</sup> For reasons not entirely clear, counsel for the remaining Respondents served their Comments in multiple separate emails, so I am not able to ascertain exactly whether and when all those on the service list were served. All other service of email and documents in this proceeding to date has, as far as I am aware, been done by a single email, and I request that all future emails and email service be made on the entire service list, unless the serving party certifies that they have first attempted such unified service and failed in the attempt.

<sup>2</sup> Certain terms used in this Ruling, such as Highly Confidential, are capitalized because they are defined in the Protective Order.

“spectrum usage data”; (d) the Commission should revise the definition of “Confidential Information” and expand the categories of documents that are presumptively “Highly Confidential Information”; and (e) the Commission should adopt a handful of other modifications to the Protective Order.

**A. Confidential Data Generally**

The remaining Respondents repeat their assertions that there is sufficient data in the public record for this Commission to assess the state of telecommunications competition in California.<sup>3</sup> The remaining Respondents follow up this assertion, however, with a lengthy recitation of data they consider so sensitive that it should be treated as “Highly Confidential” under the Protective Order: customer numbers; customer breakdown between time division multiplex (TDM), Voice Over Internet Protocol (VoIP), and wireless; percentage of customers obtaining service in a bundle; the number of Competitive Local Exchange Carrier (CLEC) customers provisioned over Incumbent Local Exchange Carrier (ILEC) facilities, competing carrier facilities or the CLEC’s own facilities; total last-mile facilities provided by the ILECs to competing carriers; incumbent and other carrier provision of backhaul services from wireless antenna sites into the network, and the total number of a carrier’s antenna sites in California. In addition, the remaining Respondents believe that some information – the Form 477 data (broken down by census block and tract), and whether their published wireless spectrum holdings area actually being used – is so confidential that *only the Commission* should be able to review it.

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<sup>3</sup> Comments at 2, *passim*. In a February 9, 2016 letter responding to AT&T California President Kenneth McNeely’s letter of January 26, 2016, Assigned Commissioner Peterman agreed that “the Commission should make as much use as possible of public sources of data in this Investigation,” and invited AT&T and other carriers to identify and comment on such data.

In approving the OII, the Commission deemed these categories of information to be necessary to a full consideration of competition in California,<sup>4</sup> and the remaining Respondents now indicate that much of this information is not available publicly.

In the *URF* proceedings, the carriers argued that the Commission should forego other network reporting and rely solely on the Automated Reporting Management Information Systems (ARMIS) data of the Federal Communications Commission (FCC).<sup>5</sup> The ARMIS data is, however, public data, and includes customer numbers, the breakdown between circuit switched and packet switched lines, plant in service and plant held for future use, revenues, costs and expenses, aerial wire vs. underground wire, and certain pole attachment data.<sup>6</sup> After this Commission agreed with the carriers that it could “eliminate all NRF-specific monitoring reports and instead rely on the FCC ARMIS data” in continuing to monitor the telecommunications marketplace,<sup>7</sup> the large carriers

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<sup>4</sup> In its *URF* decisions, the Commission specifically relied on CLEC use of ILEC facilities, as well as on competition from VoIP and wireless carriers. *See, e.g.*, Decision (D.) 06-08-030 (*URF I*), Slip Op. at 133, where the Commission stated:

In summary, our analysis finds that the ubiquity of the FCC unbundling policies limits the market power of AT&T, Verizon, SureWest, and Frontier. Cross-platform competition, particularly that from wireless and VoIP technologies, provides an additional check that reduces market power of each carrier.

*See also, e.g., Id.*, at Findings of Fact 28-32, 44, 51, 61, 74, *passim*.

<sup>5</sup> D.06-08-030, at 213.

<sup>6</sup> *See, e.g.*, <https://www.fcc.gov/general/statistics-communications-common-carriers> (common carrier reporting based on ARMIS data).

<sup>7</sup> D.06-08-030, Conclusion of Law 57. “NRF” stands for “New Regulatory Framework,” the regulatory model that preceded “URF,” or the “Uniform Regulatory Framework.”

obtained forbearance orders from the FCC absolving them of the duty to continue filing such ARMIS data.<sup>8</sup>

I am thus somewhat skeptical of the remaining Respondents' broad-brush claims of confidentiality, and it is for that reason that the proposed Protective Order required Submitting Carriers essentially to certify that to the best of their knowledge that information they are claiming to be confidential is not found in the public record. I agree with Respondents that it is important that this proceeding be based as much as possible on the public record, and that in any event the data underlying the parties' analysis be as robust as possible.

#### **B. Competitors' Access to Information**

The remaining Responding carriers argue that no competitive parties should see *any* information labelled as Confidential or Highly Confidential.<sup>9</sup> I disagree. It is my intent to follow best practices as developed in the AT&T-TMobile merger Investigation (I.11-06-009) and in the FCC's Special Access proceeding, to the extent they are appropriate here. Both of these proceedings afforded competitive carriers access to commercially sensitive data under properly structured protective orders.

Based on the assertions of CalTel that CalTel representatives do not share data with their individual carrier members, I tentatively conclude that CalTel's representatives are not engaged in Competitive Decision-Making, and they therefore should have access to both Confidential and Highly Confidential

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<sup>8</sup> See, e.g., *In re Petition of Qwest et al for Forbearance from ARMIS Reporting Requirements*, 23 FCC Rcd 184838, ¶ 1 (2008) ("we grant conditional forbearance from the obligation of Qwest ..., AT&T... and Verizon to file ... ARMIS Reports 43-01, 43-02, and 43-03"); see generally FCC website at <https://www.fcc.gov/general/significant-changes-armis-reporting-requirements>.

<sup>9</sup> Comments at 4-6.

information. If CalTel's representatives seek access to Confidential or Highly Confidential Information, they will have to execute the attached Acknowledgment certifying that they are not engaged in "Competitive Decision-Making" with or on behalf of any of their clients or members. Such certification, along with the protections of the Protective Order, ensures that protected information obtained by CalTel in this proceeding will not flow to the entities which are members of CalTel and which are also market participants. If the Carrier Parties or other Submitting Party has good reason to challenge CalTel's certification, they may do so under paragraphs 5-6 of the Protective Order.

**C. The Creation of a "Commission Only" Category of Information and Documents**

Following the remaining Respondents suggestion, the attached Protective Order creates a category of "Commission Only" Confidential Information (Appendix A.1), and tentatively populates it with the Form 477 data and its extensions, as requested in OII Information Requests 5-7 (except to the extent they include broadband deployment data the FCC has made public – see following footnote). The Commission's concern here is to maintain procedures that are consistent with the FCC's procedures. This Ruling puts the burden on the Public Interest Intervenors, other Non-Carrier Parties, and/or competing carriers to show that this data is disseminated outside the FCC and state agencies, or that it should be disseminated outside the FCC and state agencies.<sup>10</sup>

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<sup>10</sup> The February 4, 2016 Ruling on Pending Motions found that Respondents were required to produce this information to the Commission, and was silent as to whether competing carriers or Non-Carrier Parties would have access to same. The data is given to the FCC by carriers under a basic premise of confidentiality. *In re Local Competition and Broadband Reporting*, FCC 00-114, 15 FCC Rcd 7717, at ¶¶ 86- 95 ("Reporting Order") At the same time, however, the FCC noted it had originally "proposed to make available for public release all information collected pursuant

*Footnote continued on next page*



I realize that this creates an information asymmetry for both the Non-Carrier Parties and any competing carrier that becomes a party, and even among the Respondents. It also renders the Office of Ratepayer Advocates – to the extent the Form 477 data remains in the Commission Only category – unable to cite that data in its disaggregated form in any public or Confidential/Highly Confidential filing. The FCC has suggested certain work-arounds:

Consistent with this provision [for non-disclosure of Confidential and Highly Confidential Information], the Commission has never interpreted its protective orders to prevent the public version of filings made at the Commission from containing general, qualitative descriptions or characterizations of Confidential or Highly Confidential Information. Thus, there is no Commission precedent viewing descriptions or characterizations such as “the majority,” “almost all,” “virtually none,” or “only a small number of,” or statements such as “This view is confirmed by the party’s own documents,” as violating a protective

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to this information collection program,” as “wide dissemination of the information promotes a more informed, more efficient market,” and that it was adopting a confidentiality regime out of expediency, and “[w]ithout making a prospective decision about what these data elements would satisfy the Commission’s standard for non-disclosure.” *Id.* at ¶¶86, 91-92. Four years later, the FCC asked whether the confidentiality procedures should be modified “so that the maximum amount of non-competitively sensitive Form 477 information is made publicly available...” *In re Local Competition and Broadband Reporting*, Notice of Proposed Rulemaking, 19 FCCR 7364 (2004). We are not aware that the FCC ever finally resolved this question, so the confidentiality regime of the 2000 *Reporting Order* appears intact. *Cf. Modernizing the FCC Form 477 Data Program*,) FCC 13-87, Report and Order, at ¶¶ 78-84 (June 27, 2013) (allowing public dissemination of broadband deployment, but not subscription, data). At the same time, TURN’s counsel, in her Protective Order edits, voiced the belief that “much of the Form 477 data is publically available. Therefore, TURN would object to putting all of the Form 477 data into the “highly confidential” classification.” TURN or other Parties may make this or other showing that some or all of the Form 477 data is publicly available.

order's prohibitions against the release of confidential information.<sup>11</sup>

Nevertheless, to the extent that Form 477 data remains in the "Commission Only" category and ORA chooses to use that disaggregated data in its filings, ORA will have to prepare and file a "Commission Only" filing, in addition to its "Confidential/Highly Confidential" and public redacted filings, and provide the pages of that Commission Only filing with disaggregated data to the Submitting Party, with the disaggregated data of *other* Submitting Parties redacted.<sup>12</sup> Because of the substantial burden this imposes, I am loathe to extend this category any more than is necessary.

The remaining Respondents also request that "spectrum usage" data (understood to refer particularly to OII Request 19's requirement that carriers disclose whether their spectrum is currently in use) be placed in the Commission Only category. Spectrum usage data, however, seems categorically different. It relates to a resource that has been traditionally viewed as public,<sup>13</sup> so it seems to follow that the use of this public resource should be public information, as manifest by the FCC's website detailed disclosure of spectrum ownership in each

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<sup>11</sup> FCC Public Notice DA 16-81, in *Special Access* proceeding, WC Docket 05-25 (January 21, 2016).

<sup>12</sup> In endnote 2 to the remaining Respondents' Protective Order edits, and in a slightly different context, Respondents suggest that "Respondents (excluding Sprint) are willing to retain a neutral, third party representative who will create "Submitting Party specific" versions of pleadings, testimony, etc. to alleviate the burden of creating multiple versions of filings/submissions." If all parties can agree on such a solution, it might attenuate this burden.

<sup>13</sup> See, e.g., *In re Broadcast Incentive Auction*, 30 FCCR 8975, ¶217, fn 646 (2015) (measures to ensure an "adequate public return on public airwaves" licensed for mobile telephone use).

State and Metropolitan Statistical Area.<sup>14</sup> In this instance, therefore, it seems appropriate to put the burden on Respondents to show that their *use* of that spectrum is indeed confidential, i.e., is not information commonly available in the industry or found in the public record, and that the disclosure would put Respondents at a business disadvantage; alternatively other parties may show the contrary.

**D. The Definition of “Confidential” Information and Documents**

The remaining Respondents propose a definition of “confidential” that replaces the objective “demonstrably confidential” test for confidentiality with one of a Submitting Party’s “good faith.” I decline to do so. The definition of “confidential” in the earlier-distributed Protective Order read:

"Confidential Information" means information that is “demonstrably confidential,” that the Submitting Party believes to be unavailable to the public (whether on the Internet, in published reports, or elsewhere), not widely available in the telecommunications industry, and, if revealed, would place the Submitting Party at an unfair business disadvantage.

The attached Protective Order makes clear that a Submitting Party has a duty of inquiry as to whether information is available publicly, and that the Submitting Party’s designation of a document as “Confidential” or Highly Confidential” means that Party is prepared to certify: (1) that the public release of these materials would place the responding carrier at an unfair business disadvantage; and (2) that, after reasonable inquiry, the Submitting Party has no knowledge of the public availability of such information or documents, and

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<sup>14</sup> See <http://reboot.fcc.gov/spectrumdashboard/searchMap.seam>.

believes that the information or documents are not found in the public record, i.e., are not known to be accessible to the public, whether on a government website, on responding party's website, in documents publicly available from the websites of the Securities & Exchange Commission or other government agencies, in the publicly available reports of those government agencies, in the online or published versions of industry reports, or in other publications available to the public or any substantial part of the public.

Indeed, this standard is consistent with the Commission authority cited by the remaining Respondents, which excludes from General Order 66C protection "any information or document contained in the public files of the CPUC *or any other state or federal agency, or in any state or federal court,*" or "is public knowledge or which becomes public knowledge, other than through disclosure in violation of this Protective Order."<sup>15</sup>

#### **E. The Definition of Highly Confidential Information and Documents**

This Ruling clarifies the obvious: information or documents cannot be Highly Confidential unless they meet the "Confidential" standards set out above. In addition to those requirements, "Highly Confidential" information is data which the "Submitting Party has kept strictly confidential," and which contains "highly detailed or granular customer or geographic information."<sup>16</sup>

The remaining Respondents seek to categorically move substantial information into the "Highly Confidential" category, with no factual showing

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<sup>15</sup> Comments, at 9, and fn. 14, citing Commission Resolution E-4468 (emphasis added), approving the model protective order in a PG&E and SCE advice letter filings.

<sup>16</sup> Second Protective Order, *In re Special Access for Price Cap Local Exchange Carriers*, 25 FCCR 17725, at ¶¶ 5-6 (2010).

that it is indeed information that meets the confidentiality test above (much less has some extra level of sensitivity attached to it), including:

- The number of a carrier's TDM wireline, VoIP and wireless customers;
- The percentage of those customers obtaining service in a bundle;
- the number of CLEC customers provisioned over ILEC facilities, competing carrier facilities or the CLEC's own facilities;
- total last-mile facilities provided by the ILECs to competing carriers;
- incumbent and other carrier provision of backhaul services from wireless antenna sites into the network;
- and the total number of a carrier's antenna sites in California.

The data sought in the OII's Information Requests, apart from the Form 477 Requests discussed above, is generally not "highly detailed or granular customer or geographic information," but rather data aggregated on a statewide basis.

One could question whether some of this data even meets the confidentiality thresholds. CLECs' use of ILEC facilities, for instance, is known to the CLECs, and ILEC-CLEC interconnection agreements are required by law to be publicly filed.<sup>17</sup> Indeed, one purpose of the 1996 Telecommunications Act's interconnection and unbundling regime was to make these matters as transparent as possible.

I will give the parties five days from the date of this ruling to make the showing that these categories of documents and information are confidential,

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<sup>17</sup> 47 U.S.C. § 252(h).

and are so commercially sensitive and “highly detailed or granular customer or geographic information” as to warrant Highly Confidential designation, as well as to make a showing regarding the claimed “Commission Only” documents described above. Declarations attesting to the specific elements discussed above will be more persuasive than general assertions of competitive disadvantage by counsel. It is not sufficient to assert that such information has been filed under seal in other proceedings.<sup>18</sup>

**F. Other Suggested Modifications.**

For the reasons stated above, I decline to amend the definition of “confidential” so that a carrier representative need do no more than assert that she or he had a “good faith” belief that information or a document was confidential. Remaining Respondents also request (in edits to the Protective Order) that they be given five, rather than three, business days to object to a Reviewing Party’s Acknowledgment. I recognize that the FCC’s protective order scheme allows for five business days for such objections, but that is in nationwide proceedings with counsel all across the United States. Here, counsel is primarily in this region, and time is of the essence.

The Protective Order will also not adopt at this time the remaining Respondents’ suggestion of an express requirement that parties meet and confer before making use of Confidential or Highly Confidential Information in an oral submission. The standard ground rules at the Commission for treatment of

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<sup>18</sup> The remaining Respondents cite the final decision in the Verizon/Frontier merger, where the Commission stated all pending “requests for confidential treatment of information produced in response to data requests, or contained in briefs or in expert testimony including the exhibits thereto, are granted for a period of three years.” D.15-12-005, O.P. 15. The issue at that point of the proceeding was not which parties would get access to the information and documents, but the future treatment of such information.

confidential information in an evidentiary hearing or *en banc* argument is that parties do not orally convey information identified as confidential without either contesting its confidentiality off the record and/or in a filed motion, or securing some kind of agreement from the Submitting Party as to whether and how such information may be used. The Submitting Party may object if this protocol is not followed, and the record will be corrected accordingly.

As to the requirement that parties designate as confidential only those portions of a document that are demonstrably confidential, that language will stand. I do, however, expect the parties to work out some sort of arrangement that reasonably apportions the burden involved, erring on the side of providing as much information to the public record as possible. Where, however, a document is permeated with confidential information, or is by its nature completely confidential, there may be no alternative but to mark the entire document as such. In short, a rule of reason obtains.

Finally, the remaining Respondents request an across-the-board declaration that any violations of the Protective Order constitute irreparable injury. Whether or not a given breach is an “irreparable injury” is an individuated question of fact. The Protective Order has been modified, however, to contractually stipulate that an injunction may be issued in the case of an ongoing or threatened breach of its terms.

#### **G. Protective Order, Next Steps**

In response to the suggested edits of CalTel, TURN, Sprint, and the remaining Respondents, the Protective Order contains language from these parties, as well as modifications in response to their concerns. Pursuant to the authority delegated by OII Ordering Paragraph 10, the Protective Order attached as an Exhibit to this Ruling is hereby adopted. As modified from time to time

(particularly as to Appendices A.1 and A.2), it will govern the exchange, use, filing and service of confidential information in this proceeding.<sup>19</sup>

Within five business days of this Ruling, parties may contest the “Commission Only” and “Highly Confidential” designations described above. Replies may be filed two business days after that. If a follow-on Ruling does not issue before March 15, 2016, the first date set for production of information and documents in this case, Respondents and other Submitting Parties are directed to serve all their responses on Commission staff, and on the service list to the full extent possible, with confidential information to those parties who have filed the appropriate (uncontested) Acknowledgment, unless the information is claimed to be “Commission Only.”

#### **H. Service and Filing Requirements, Other Clarifications**

The OII states (at Section 13, page 18) that, for all documents served, parties “must also provide a paper copy to the Assigned Commissioner and ALJ. The electronic copy should be in Microsoft Word or Excel formats to the extent possible.” Additionally, specifically with regard to the Information Request responses, Ordering Paragraph 4 requires:

Respondents and other Parties shall serve one copy of their complete, unredacted Responses each on the Assigned Commissioner, Assigned ALJ, Director of the Commission’s Communications Division, and the Assistant General Counsel for Telecommunications, or their designees, in hard copy and electronically. Parties should present their Responses to the Information Requests in the form of prepared testimony, with accompanying exhibits as appropriate (see Rule 13.8).

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<sup>19</sup> In the event of substantive and material changes in the Protective Order, Amended Acknowledgments may be required. Changes to Appendices A.1 and A.2 are presumed to be not sufficiently material to require an Amended Acknowledgment.



This Ruling clarifies this language in several ways: (1) electronic service of complete and unredacted responses to the OII Information Requests should be made on all Commission staff, and on the service list generally to the extent consistent with the attached Protective Order; (2) hard-copy service need not be made at this time on the Assistant General Counsel for Telecommunications; (3) hard-copy service on the Assigned Commissioner shall be made through her telecommunications advisor John Reynolds, and service on the Director of the Communications Division shall be made to analyst Michael Pierce; and (4) notwithstanding the above, service of complex and extensive data responses (over 100 pages in printed form), may be made in electronic form only.

All responses to Information Requests shall be Bates-stamped or otherwise uniquely and clearly numbered, the response should identify any further documents submitted as part of the response, and an index to voluminous materials shall be provided on request.

**IT IS SO RULED.**

Dated March 4, 2016, at San Francisco, California.

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/s/ MARYAM EBKE for  
Karl Bemesderfer  
Administrative Law Judge

**ATTACHED EXHIBIT  
PROTECTIVE ORDER**

**Protective Order**  
**Investigation 15-11-007**

1. In this Protective Order, we adopt procedures to limit access to confidential information that is served or filed in this proceeding, I.15-11- 007 (OII). We anticipate that parties' access to and discussion of such information will assist in developing a complete record on which to base the Commission's findings, conclusions and decision in this matter. While we are mindful of the potentially sensitive nature of data related to matters in this proceeding, we are also mindful of the right of the parties to participate in this proceeding in a robust and meaningful way, which in turn will help the Commission fulfill its duty to monitor the public communications network. We therefore will make such information available to parties<sup>1</sup> in this proceeding, but only pursuant to this Protective Order. We conclude that the procedures we adopt in this Protective Order give appropriate access to parties while protecting confidential information from improper disclosure, and that the procedures thereby serve the public interest.

2. The Acknowledgement Requirement of this Protective Order does not apply to the Commission's Office of Ratepayer Advocates, as that Office is bound instead by the confidentiality requirements of Pub. Utils. Code § 583 and General Order 66-C. Otherwise, this Protective Order applies to Carrier and to Non-Carrier Parties, as defined below.

3. Definitions: as used herein, capitalized terms shall have the following meanings:

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<sup>1</sup> Parties are determined pursuant to Rule 1.4 of the Commission's Rules of Practice and Procedure. *See* OII at Section 14 and Ordering Paragraph 7.

"Acknowledgement" means the Acknowledgement of Confidentiality attached as **Appendix B** hereto.

“Carrier Parties“ mean those telephone corporations and affiliates listed in Ordering Paragraph 3 of the OII, communications providers that subsequently seek and obtain party status in this proceeding, and communications providers that provide information for use in this proceeding even if they do not seek or obtain formal party status.

“Commission Only Information” means Highly Confidential Information or Documents for which no precedent or authority would allow dissemination outside the Commission or other public regulatory bodies, as set forth in **Appendix A.1** of this document. At the current time, we include in **Appendix A.1** only the Form 477 information (and extensions of Form 477 information) required by Information Requests 5-7 of OII Appendix B, except where the FCC has made that data public. Notwithstanding any other provision of this Protective Order, the information and documents referenced in **Appendix A.1** may only be provided to Commission staff, staff may not provide disaggregated data from these documents to anyone outside the Commission, and ORA may only use disaggregated data from Commission Only documents consistent with the Ruling that accompanies this Protective Order.

"Competitive Decision-Making" means that activities, association, or relationship with a Carrier Party or other communications provider, that involves advice about or participation in, business decisions or analysis underlying business decisions of the Carrier Party or other communications provider.

“Confidential Document” means a document containing Confidential Information.

"Confidential Information" means information that is demonstrably confidential, that the Submitting Party after inquiry believes to be unavailable to the public (whether on the Internet, in published reports, or elsewhere), not widely available in the telecommunications industry, and, if revealed, would place the Submitting Party at an unfair business disadvantage.

“Counsel" means In-House Counsel and Outside Counsel of Record.

“Employee” means a person employed by a party to this proceeding or employed by an affiliated entity and who is actively engaged in the conduct of this proceeding, provided that such person is not involved in Competitive Decision-Making.

“Highly Confidential Document” means a document containing Highly Confidential Information.

“Highly Confidential Information” mean a Confidential Document or Information that the Submitting Party has kept strictly confidential, that contains highly detailed or granular customer or geographic information, and that the Submitting Party claims constitutes some of its most sensitive business data, to the extent that it should only be shared with competing Carrier Parties’ Outside Counsel and Consultants who have signed a filed Acknowledgment. Such Highly Confidential Documents and Information are listed and described in **Appendix A.1** to this Protective Order, as the same may be amended from time to time.

"In-House Counsel" means an attorney employed by a party to this proceeding or by an entity affiliated with a party to this proceeding, and who is actively engaged in the conduct of this proceeding, provided that such attorney is not involved in Competitive Decision-Making.

“Non- Carrier Party” refers to either (1) a consumer group or other organizations not representing carriers or Carrier Parties and not engaged in a telecommunications-related business, including employees, outside counsel and outside consultants; or (2) a trade association and its employees, counsel and consultants not involved in the Competitive Decision-Making of any Carrier Party or other communications provider, whether or not that Carrier Party or communications provider is a client or member of the trade association.

"Outside Counsel of Record" or "Outside Counsel" means the attorney(s), firm(s) of attorneys, or sole practitioner(s), as the case may be, representing a party in this proceeding, provided that such attorneys are not employees of the party, and are not involved in Competitive Decision-Making for a Carrier Party or other communications provider. The term "Outside Counsel of Record" includes any attorney representing a Non-Carrier Party in this proceeding, provided that such attorney is not involved in Competitive Decision-Making for a Carrier Party or other California communications provider.

"Outside Consultant" means a consultant or expert retained for the purpose of assisting Counsel or a party in this proceeding, provided that such consultant or expert is not involved in Competitive Decision-Making. The term "Outside Consultant" includes any consultant or expert employed by a noncommercial party in this proceeding, provided that such consultant or expert is not involved in Competitive Decision-Making.

"Redacted Confidential Document" means a copy of a Stamped Confidential Document where the Confidential Information has been redacted.

"Redacted Highly Confidential Document" means a copy of a Stamped Highly Confidential Document where the Highly Confidential Information has been redacted.

"Reviewing Representative" means a party or a party's Counsel, Employee or Outside Consultant who has obtained access to Stamped Confidential Documents or to Stamped Highly Confidential Documents pursuant to paragraphs 5 and 6 of this Protective Order.

"Stamped Confidential Document" means any document, or any part thereof, that contains Confidential Information and that bears the legend (or which otherwise shall have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) "CONFIDENTIAL INFORMATION -- SUBJECT TO PROTECTIVE ORDER IN I.15-11-007." The term "document" means any written, recorded, electronically stored, or graphic material, whether produced or created by the Submitting Party or another person. By designating a document a "Stamped Confidential Document," a Submitting Party certifies that it contains Confidential Information as defined above.

Only those portions of a document containing Confidential Information should be so designated.

"Stamped Highly Confidential Document" means any document, or any part thereof, that contains Highly Confidential Information and that bears the legend (or which otherwise shall have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) "HIGHLY CONFIDENTIAL INFORMATION -- SUBJECT TO PROTECTIVE ORDER IN I.15-11-007." The term "document" means any written, recorded, electronically stored, or graphic material, whether produced or

created by the Submitting Party or another person. By designating a document a "Stamped Highly Confidential Document," a Submitting Party certifies that it contains Highly Confidential Information, as defined herein.

"Submitting Party" means a party which produces Confidential Information and/or Highly Confidential Information in response to Information Requests or discovery requests in this proceeding.

4. Submitting Party's Obligations in Designating Documents. By this Protective Order, the Commission has modified its standing procedures for the submission of information claimed to be confidential (Rule 11.4), in order to facilitate the prompt filing and full exchange of information in this proceeding. When filing such documents, the Submitting Party is not required to file a motion for submission of information and documents under seal. However, the designation of any document or information as Confidential or Highly Confidential shall constitute a representation by the Submitting Party, subject to the Commission's Rule 1.1, that the Stamped Confidential or Highly Confidential Documents meet the requirements set forth herein for such designations. The Submitting Party's designation of a document as "Confidential" or Highly Confidential" means that Party is prepared to certify: (1) that the public release of these materials would place the responding carrier at an unfair business disadvantage, and (2) that, after reasonable inquiry, the Submitting Party has no knowledge of the public availability of such information or document, and believes that the information or document is not found in the public record, i.e., is not known to be accessible to the public, whether on responding party's website, on the website of the Securities & Exchange Commission or other government agency, in the publicly available reports of those government agencies, in the online or published versions of industry reports, or in other publications available to the public, or a substantial part of the public. Only those portions of a document containing Confidential or Highly Confidential Information should be so designated (consistent with further guidance provided in the adopting Ruling). After meeting

and conferring, parties may object to a Submitting Party's designation by written or oral motion.

5. Procedure for Obtaining Access to Confidential Documents and Information under this Protective Order. Only a Non-Respondent Party, Respondent Carrier Party's In-House Counsel, Outside Counsel and Consultants, and other representatives not involved in Competitive Decision-Making may access Stamped Confidential Documents and Confidential Information. Any person seeking access to Stamped Confidential Documents and Confidential Information shall sign and date the Acknowledgment agreeing to be bound by the terms and conditions of the Protective Order; and the party on whose behalf the person seeks such access shall file the Acknowledgment in the proceeding and electronically serve it pursuant to Rule 1.10 of the Commission's Rules of Practice and Procedure. Each Submitting Party may file an objection to the disclosure of its Stamped Confidential Documents or Confidential Information to any such person no later than three business days from the date that the Acknowledgment was filed. Until any such objection is resolved by the assigned Administrative Law Judge or a law and motion Administrative Law Judge, a person subject to an objection from a Submitting Party shall not have access to Stamped Confidential Documents or Confidential Information. The provisions of this paragraph shall not be construed to apply to the Commission or its staff.

6. Procedure for Obtaining Access to Stamped Highly Confidential Documents and Highly Confidential Information. Only a Carrier Party's Outside Counsel of Record, Outside Consultants (including experts) whom they retain to assist them in this proceeding, and the Outside Counsel's and Outside Consultants' employees, may access Stamped Highly Confidential Documents and Highly Confidential Information. For Non-Carrier Parties, only authorized employees and agents who have signed and filed the Acknowledgment may access Stamped Highly Confidential Documents and Highly Confidential Information. Any person seeking access to Stamped Highly Confidential Documents and Highly Confidential



Information shall sign and date the Acknowledgment agreeing to be bound by the terms and conditions of the Protective Order; and the party on whose behalf the person seeks such access shall file the Acknowledgment in the proceeding and electronically serve it pursuant to Rule 1.10 of the Commission's Rules of Practice and Procedure. Each Submitting Party may file an objection to the disclosure of its Stamped Highly Confidential Documents or Highly Confidential Information to any such person no later than three business days of the date that the Acknowledgment was filed. Until any such objection is resolved by the assigned Administrative Law Judge or a law and motion Administrative Law Judge, a person subject to an objection from a Submitting Party shall not have access to Stamped Highly Confidential Documents or Highly Confidential Information. The provisions of this paragraph shall not be construed to apply to the Commission or its staff.

7. Use of Confidential Information and Highly Confidential Information.

Persons obtaining access to Confidential Information (including Stamped Confidential Documents) or Highly Confidential Information (including Stamped Highly Confidential Documents) under this Protective Order shall use the information solely for the preparation and conduct of this proceeding before the Commission and any subsequent judicial proceeding arising directly from this proceeding and, except as provided herein, shall not use such documents or information for any other purpose, including without limitation business, governmental, or commercial purposes, or in other administrative, regulatory or judicial proceedings. The provisions of this paragraph shall not be construed to apply to the Commission or its staff.

8. Permissible Disclosure. A Reviewing Representative may discuss and share the contents of the Stamped Confidential Documents, Confidential Information, Stamped Highly Confidential Documents, and Highly Confidential Information with another Reviewing Representative who has obtained access to such documents pursuant to this Protective Order and with the Commission and its staff (subject to

applicable ex parte rules). A Submitting Party's Stamped Confidential Documents, Confidential Information, Stamped Highly Confidential Documents, and Highly Confidential Information may also be disclosed to Employees and Counsel of the Submitting Party. Subject to the requirements of paragraph 7, a Reviewing Representative may disclose Stamped Confidential Documents and Confidential Information to: (1) paralegals or other employees of such Reviewing Party assisting them in this proceeding; and (2) employees of third-party contractors of the Reviewing Party involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving documents or data or designing programs for handling data connected with this proceeding, or performing other clerical or ministerial functions with regard to documents connected with this proceeding. An outside Reviewing Representative of a Carrier Party may only disclose Stamped Highly Confidential Documents and Highly Confidential Information to other outside representatives of a Carrier Party who themselves have signed a filed Acknowledgement, certifying that they are an Outside Counsel, Outside Consultant, or employee of same. A Reviewing Representative of a Non-Carrier Party may not disclose Stamped Highly Confidential Documents or Highly Confidential Information to anyone besides the Submitting Party, the Commission and its staff, employees of the Non-Carrier Party, and other Non-Carrier Party Reviewing Representatives or Outside Consultants who have signed the appropriately filed Acknowledgment.

9. Filings with the Commission. A party may in any document that it files in this proceeding disclose Confidential Information or Highly Confidential Information, and may attach Stamped Confidential Documents or Stamped Highly Confidential Documents to such filing, only if it files the Confidential Information or Highly Confidential Information (and attachments) under seal. Such filings shall employ the form of cover page attached hereto as Appendix C. A party may make one Confidential/Highly Confidential filing, in addition to its public filings, rather than

make separate Confidential and Highly Confidential filings. The Confidential/Highly Confidential filing may be served on Outside Counsel or a Non-Carrier Party pursuant to paragraph 6 above. (Outside Counsel may redact the Highly Confidential data and provide to inside counsel, who has signed appropriate Acknowledgment.) For purposes of this proceeding only, parties are relieved of the Rule 11.4 requirement to file a motion seeking confidential treatment for Confidential and Highly Confidential Information (and attached Stamped Confidential Documents or Stamped Highly Confidential Documents, if any).

10. Service of Documents Containing Stamped Confidential and Highly Confidential Data. Parties shall serve documents containing Stamped Confidential and Stamped Highly Confidential Data or attachments of Stamped Confidential and Stamped Highly Confidential Documents, only on those Reviewing Representatives that have signed the appropriately filed Acknowledgement. Parties serving documents containing such Information shall only be obligated to produce two versions of their documents: a Confidential/Highly Confidential version, and a redacted public version. The Confidential/Highly Confidential filing may be served on Outside Counsel or a Non-Carrier Party pursuant to paragraph 6 above. (Outside Counsel may redact the Highly Confidential data and provide to inside counsel, who has signed appropriate Acknowledgment.) The Submitting Party shall serve the public redacted version on all parties to the proceeding, as listed in the Commission's official Service List.

11. Non-Disclosure of Stamped Confidential Documents and Stamped Highly Confidential Documents. Except with the prior written consent of the Submitting Party, or, after notice to the Submitting Party and opportunity to be heard, upon further order or ruling of the Commission, the assigned Commissioner, the assigned Administrative Law Judge, or a law and motion Administrative Law Judge, neither a Stamped Confidential Document nor any Confidential Information, nor a Stamped Highly Confidential Document, nor any Highly Confidential Information may be

disclosed further.

12. Protection of Stamped Confidential Documents, Confidential Information, Stamped Highly Confidential Documents, and Highly Confidential Information. A Reviewing Representative shall have the obligation to ensure that access to Stamped Confidential Documents, Confidential Information, Stamped Highly Confidential Documents, and Highly Confidential Information is strictly limited as prescribed in this Protective Order. A Reviewing Representative shall further have the obligation to ensure that Stamped Confidential Documents, Confidential Information, Stamped Highly Confidential Documents, and Highly Confidential Information are used only as provided in this Protective Order.

13. Client Consultation. Nothing in this Protective Order shall prevent or otherwise restrict Counsel from rendering advice to their clients relating to the conduct of this proceeding and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of Stamped Confidential Documents, Confidential Information, Stamped Highly Confidential Documents, or Highly Confidential Information; provided, however, that in rendering such advice and otherwise communicating with such client, Counsel shall not disclose Stamped Confidential Documents, Confidential Information, Stamped Highly Confidential Documents, or Highly Confidential Information, unless the client representative has signed an Acknowledgement pursuant to the restrictions in this Protective Order and is not involved in Competitive Decision-Making. Nothing in this paragraph shall be interpreted as authorizing counsel involved in Competitive Decision-Making to have access to Confidential Information, Stamped Confidential Documents, Highly Confidential Information or Stamped Highly Confidential Documents.

14. No Waiver of Confidentiality. Disclosure of Confidential Information, Stamped Confidential Documents, Highly Confidential Information or Stamped Highly Confidential Documents as provided herein by any person shall not be

deemed a waiver by any Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information, Stamped Confidential Documents, Highly Confidential Information or Stamped Highly Confidential Documents. Reviewing Representatives, by viewing this material, agree: (1) not to assert any such waiver; (2) not to use Confidential Information, Stamped Confidential Documents, Highly Confidential Information or Stamped Highly Confidential Documents to seek disclosure in any other proceeding; and (3) that accidental disclosure of Confidential Information, Stamped Confidential Documents, Highly Confidential Information or Stamped Highly Confidential Documents by a Submitting Party or any receiving party shall not be deemed a waiver of any privilege or entitlement as long as the Submitting Party takes prompt remedial action.

15. Subpoena by Courts, Departments, or Agencies. If a court, or a federal or state department or agency issues a subpoena for or orders the production of Stamped Confidential Documents, Confidential Information, Stamped Highly Confidential Documents, or Highly Confidential Information that a party has obtained under terms of this Protective Order, such party shall promptly notify each Submitting Party of the pendency of such subpoena or order. Consistent with the independent authority of any court, department or agency, such notification must be accomplished such that the Submitting Party has a full opportunity to oppose such production prior to the production or disclosure of any Stamped Confidential Document, Confidential Information, Stamped Highly Confidential Document, or Highly Confidential Information.

16. Violations of Protective Order. Should a Reviewing Representative violate any of the terms of this Protective Order, such Reviewing Representative shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure of Confidential Information or Highly Confidential Information, the violating person shall take all

necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of Counsel from practice before the Commission, forfeitures, cease and desist orders, denial of further access to Confidential Information or Highly Confidential Information in this or any other Commission proceeding, and other financial or non-financial sanctions. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or in equity against any person using Confidential Information or Highly Confidential Information in a manner not authorized by this Protective Order. The Parties acknowledge and agree that any violation or threatened violation of this Agreement may be enjoined and restrained by an order of this Commission or a court of competent jurisdiction, and that irreparable injury may be presumed for that purpose.

17. Termination of Proceeding. The provisions of this Protective Order shall not terminate at the conclusion of this proceeding. Within two weeks after conclusion of this proceeding and any administrative or judicial review, Reviewing Representatives shall destroy or return to the Submitting Party Stamped Confidential Documents and Stamped Highly Confidential Documents and all copies of the same. No material whatsoever derived from Stamped Confidential Documents or Stamped Highly Confidential Documents may be retained by any person having access thereto, except Counsel and/or Outside Counsel may retain, under the continuing strictures of this Protective Order, two copies of pleadings (one of which may be in electronic format) prepared in whole or in part by that counsel, and that contain Confidential Information or Highly Confidential Information. All Counsel shall certify compliance with these terms and shall deliver such certification to Counsel for the Submitting Party not more than three weeks after conclusion of this proceeding. The provisions of this paragraph regarding retention of Stamped Confidential Documents, Stamped Highly Confidential Documents, and

copies of the same, and Confidential Information and Highly Confidential Information shall not apply to the Commission or its staff, although such Documents and Information will continue to be protected by Public Utilities Code § 583 and General Order 66-C.

## **APPENDIX A.1**

### **“Commission Only” Information and Documents**

As specified in this Protective Order, the Commission “Commission Only Information” means Highly Confidential Information or Documents for which no precedent or authority would allow dissemination outside the Commission or other public regulatory bodies. At the current time, we include in this category only the following document:

1. Carrier Parties’ Form 477 data for California, as submitted to FCC, and required pursuant to OII Information Requests 5-7, including the subparts of those Requests, and submitted Form 477 data required by separate Information Requests served on competing carriers, except that such Form 477 data *shall not include* broadband and any other deployment data not designated as confidential by the FCC.

## **APPENDIX A.2**

### **Highly Confidential Information and Documents**

As specified in this Protective Order, only information and documents set forth in this Attachment, and that otherwise meet the definition of Highly Confidential Information or Highly Confidential Documents may be designated as Highly Confidential. This Appendix is currently empty, and will be updated as necessary.



## **APPENDIX B**

### **Acknowledgment of Confidentiality Investigation 15-11-007**

I hereby acknowledge that I have received and read a copy of the foregoing Protective Order in the above-captioned proceeding, and I understand it. I agree that I am bound by the Protective Order, as it may be modified from time to time consistent with paragraph 1 above (particularly as to Appendices A.1 and A.2), and that I shall not disclose or use Stamped Confidential Documents, Confidential Information, Stamped Highly Confidential Documents, or Highly Confidential Information except as allowed by the Protective Order.

I acknowledge that a violation of the Protective Order is a violation of an order of the California Public Utilities Commission.

I certify that I am not involved in Competitive Decision-Making.

Without limiting the foregoing, to the extent that I have any employment, affiliation, or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or advocacy organization), I acknowledge specifically that my access to any information obtained as a result of the Protective Order is due solely to my capacity as Counsel or Outside Consultant to a party or as a person described in paragraph [8] of the foregoing Protective Order and agree that I will not use such information in any other capacity.

I certify that I have verified that there are in place procedures at my firm or office to prevent unauthorized disclosure of Stamped Confidential Documents, Confidential Information, Stamped Highly Confidential Documents, and Highly Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Protective Order.

[Fill in and initial the following as appropriate]: I certify that I seek access to Confidential Information, Stamped Confidential Documents, Highly Confidential Information, and/or Stamped Highly Confidential Documents on behalf of the following party: \_\_\_\_\_

and in the following role:

\_\_\_\_\_ In-house Counsel or Employee of a Respondent Carrier Party identified above, or a Carrier Party representative described in paragraph 4 of the Protective Order, seeking access to Stamped Confidential Documents and Confidential Information only.

\_\_\_\_\_ Outside Counsel or Outside Consultant retained by the Respondent Carrier Party identified above, or an employee of such Carrier Party's Outside Counsel or Outside Consultant, as described in paragraph 5 of the Protective Order, seeking access to Stamped Confidential Documents, Confidential Information, Stamped Highly Confidential Documents, and Highly Confidential Information.

\_\_\_\_\_ Representative of, a Non-Carrier Party, including but not limited to Counsel, Outside Consultant and Employee of that Non-Carrier Party.

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

---

[Name]  
[Position and Company]  
[Address]  
[Telephone]

**(END OF APPENDIX B)**

**APPENDIX C**  
**FILING TEMPLATE FOR CONFIDENTIAL**  
**INFORMATION**

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Order Instituting Investigation into the State  
of Competition Among Telecommunications  
Providers in California, and to Consider and  
Resolve Questions raised in the Limited  
Rehearing of Decision 08-09-042.

Investigation 15-11-007  
(Filed November 5, 2015)

CONFIDENTIAL MATERIALS CONTAINED  
WITHIN THE OPENING/CLOSING BRIEF [OR OTHER FILING] OF  
IS FILED UNDER SEAL PURSUANT TO THE RULING OF ADMINISTRATIVE  
LAW JUDGE KARL J. BEMESDERFER  
DATED MARCH \_\_, 2016

A FINE LAW FIRM, LLC  
1234 MAIN ST.  
YOUR TOWN CA  
T-  
EMAIL