

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of a Commission Inquiry into)	
the Possibility of Impairment without)	Case No. TO-2004-0207
Unbundled Local Circuit Switching When)	
Serving the Mass Market)	

SPRINTS MOTION TO MODIFY PROTECTIVE ORDER

COMES NOW Sprint Missouri, Inc. and Sprint Communications Company L.P

("Sprint") and for its Motion to Modify Protective Order hereby states as follows:

1. On November 6, 2003, the Commission adopted its Standard Protective Order in this case. The Standard Protective Order, amongst other things, prevents internal experts from reviewing Highly Confidential material. Specifically, Section C of the Standard Protective Order limits the availability of Highly Confidential material to attorneys and outside experts only:

C. Materials or information designated as HIGHLY CONFIDENTIAL may, at the option of the furnishing party, be made available only on the furnishing party's premises and may be reviewed only by attorneys or outside experts who have been retained for the purpose of this case, unless good cause can be shown for disclosure of the information off-premises and the designated information is delivered to the custody of the requesting party's attorney. Outside expert witnesses shall not be employees, officers or directors of any of the parties in this proceeding. No copies of such material or information shall be made and only limited notes may be taken, and such notes shall be treated as the HIGHLY CONFIDENTIAL information from which notes were taken.
(Emphasis Added)

Sprint believes that the Commission's Standard Protective Order should be modified to allow internal experts access to all information on the same terms as outside consultants.

2. Sprint employs personnel whose primary responsibility is to assist in commission proceedings. Under the Standard Protective Order, Sprint will be required to

forgo their expertise and hire outside consultants if Sprint wants to effectively participate in the case. Requiring a party to retain outside experts violates due process and has no legitimate justification. Failing to grant meaningful access to in-house experts violates due process because it deprives a party of the opportunity to be heard and defend, enforce and protect its legal rights. Further, there is no legitimate reason to distinguish between in-house and outside experts as there is absolutely no factual basis to conclude that in-house experts would be more likely to violate non-disclosure provisions than outside consultants. In most, if not all, cases the outside experts have repeatedly testified on behalf of the same party through the years. Therefore, there is no justification for treating outside experts differently than in-house experts. Such a distinction only raises questions about due process violations and must be avoided.

3. At issue in this motion is whether there is any legitimate basis to completely exclude internal experts from access to vital information in this case. For example, both Southwestern Bell Telephone Company d/b/a/ SBC Missouri ("SBC") and CenturyTel of Missouri, LLC and Spectra Group LLC d/b/a Century Tel ("CenturyTel") filed a pleading stating their intent to challenge the federal impairment presumption. Both SBC and CenturyTel marked as Highly Confidential the companies that had switches in the Missouri markets where they would be challenging the federal presumption. This is basic and fundamental information for this case. Further, the information is publicly *available* through the Local Exchange Routing Guide (LERG). However, Sprint's internal experts cannot be told that SBC and CenturyTel are relying on the information. This places Sprint in an untenable situation in this proceeding.

4. In any hearing conducted by the Commission, due process rights attach. *See e.g., Fischer v. Public Service Commission*, 645 S.W. 2d 39, 43 (Mo banc 1982). Due Process rights require that a litigant must have knowledge of the claims of his opponent and have a full opportunity to be heard and to defend, enforce and protect his rights. *Bever v. State Bd. Of Registration for Healing Arts*, 2001 WL 68307 (Mo. App. W.D. January 30, 2001). Due Process rights further require that administrative hearings be fair and consistent with elements of fair play. *State ex rel. Fischer v. PSC*, 645 S.W. 2d at 43. The Missouri courts have adopted a balancing test to assess violations of due process. This test evaluates the competing interest of (1) the private interest affected by the administrative action; (2) the risk of erroneous deprivation of this interest through the procedures used and the probable value of the procedural safeguards, and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional procedural requirements would entail. *Belton v. Board of Police Comm'rs*, 708 S.W. 2d 131, 137 (Mo. 1986); *Larocca v. State Bd. Of Registration for the Healing Arts*, 897 S.W. 2d 37, 43 (Mo. App. E.D. 1995).

5. In this case, the private interest affected by the Commission's action are Sprint's right to be heard under 386.420.1 RSMo, and Sprint's ability to participate in the determination of whether it can continue to pursue business based on unbundled network elements. The risk that Sprint will be deprived of these rights is great and the value of the procedural safeguard that prevents Sprint from reviewing the information is de minimus.

6. As mentioned above, if internal experts cannot review the highly confidential information that, as reflected in the initial filings, contain the basic facts of

this case, Sprint will not be able to effectively participate in the proceeding. While some may contend that the option of forgoing Sprint's full time employees in favor of outside consultants will allow participation, forcing Sprint to expend unnecessary and duplicative resources does not remedy the violations. This is particularly true when the value of the procedural safeguard in this case is examined.

7. First, it should be noted to Sprint's knowledge, no other state has imposed such barriers to participation as those contained in the Commission's Protective Order. Sprint is unaware of any other protective order that erects such substantial barriers to participation by in-house experts. This point is important because the other state commissions are conducting the same proceedings as the Commission in this case and the same information is being shared. For example, attached hereto at Exhibit A is an example of filings by SBC affiliates that discloses the competitive companies upon which SBC in Texas will rely in demonstrating non-impairment. Participants in the Texas proceedings, including Sprint's internal experts, are advised of these basic facts of the case. For that matter, the very same information that cannot be shared with internal experts in Missouri is being shared with the public in Texas. Furthermore, with respect to the Texas proceedings in which SBC filed what SBC in Missouri contends is highly confidential, internal experts also have access to highly confidential information. (See Protective Order at Attachment B). While opponents to Sprint's Motion to Modify may claim that the information that will be produced in this case is so confidential that its release to internal experts will cause lasting business damage, the fact that the *very same information* from other states is viewed by internal experts across the United States should strongly speak to the strengths of their claim.

8. Over and above the fact that the same type of information that will be produced in this case is viewed by internal experts in all other states, is the fact that there is no basis or law in fact to treat internal experts different than outside consultants. The past experience of the Commission has taught it that parties tend to repeatedly hire the very same consultants. Indeed, for example, Mr. Robert Schoonmaker has appeared as an outside consultant at almost every hearing in which the Small Telephone Company Group has participated for the last 15 years. Further, Dr. Debra Aron has appeared for SBC in Case Nos. TA-99-47, TO-2001-472 and TO-2001-467. While representing SBC in Missouri, she also represents them repeatedly throughout SBC's territories. Finally, the same is true of several competitive local exchange companies that have been repeatedly represented by Mr. Steve Turner. (See *e.g.*, Case Nos TO-2002-222, TO-2001-438 and TT-2001-298). Therefore, there is no basis for distinguishing between internal and external experts.

9. Indeed, the Commission has granted exceptions in the past to allow in-house cost experts to view highly confidential material. The Commission did so recently in its Second Order Regarding Protective Order, in Case No. TC-2002-190.¹ There the Commission ordered that Mid-Missouri "may designate internal subject-matter experts who shall have access to any traffic data or other evidence, despite its designation as 'Highly Confidential' by the sponsoring party, submitted as evidence in this proceeding on the same basis as outside consultants under the Protective Order adopted previously herein." The Standard Protective Order should be so modified for purposes of this important case as well.

¹ *Mid-Missouri Tel. Co. v. SWBT*, Second Order Regarding Protective Order, Case No. TC-2002-190 (December 5, 2002).

10. There is sufficient protection in the Standard Protective Order to prevent disclosure of proprietary information. Persons signing the Protective Order pledge not to "disclose such information for purposes of business or competition or any other purpose other than the purpose of preparation for and conduct of this proceeding and then solely as contemplated herein, and shall keep the information secure and in accordance with the purposes and intent of this order."

11. While Sprint recognizes that there will be confidential information exchanged in this case, the Commission needs to strike a balance between limiting access and allowing effective participation. As the above demonstrates, the Standard Protective Order does not strike that balance. Therefore, Sprint recommends that the Commission modify the Standard Protective Order to allow access to highly confidential designated information to employees who will be required to sign the same disclosure statement as outside counsel.

WHEREFORE, Sprint urges the Commission to adopt a Modified Protective Order in this Case that allows in-house experts the ability to review Highly Confidential material.

Respectfully submitted,

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The undersigned hereby certifies that a copy of the above and foregoing was served on each of the following parties by first-class/electronic/facsimile mail this 17th day of November, 2003:

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DOCKET NO. 28607

IMPAIRMENT ANALYSIS OF LOCAL	§	PUBLIC UTILITY COMMISSION
CIRCUIT SWITCHING FOR THE MASS	§	
MARKET	§	OF TEXAS

**SBC TEXAS'S PHASE I IDENTIFICATION OF
INITIAL AREAS FOR MASS MARKET SWITCHING**

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DOCKET NO. 28607

IMPAIRMENT ANALYSIS OF LOCAL § PUBLIC UTILITY COMMISSION
CIRCUIT SWITCHING FOR THE MASS §
MARKET § OF TEXAS

**SBC TEXAS'S PHASE I IDENTIFICATION OF
INITIAL AREAS FOR MASS MARKET SWITCHING**

Southwestern Bell Telephone, L.P., d/b/a/ SBC Texas ("SBC Texas"), in accordance with procedures set forth in Order No. 4, dated October 24, 2003, hereby identifies its Phase I initial areas for mass market switching.

I. BACKGROUND

In the *Triennial Review Order*, the FCC identified the mass market for local services as consisting "primarily of consumers of analog 'plain old telephone service' or 'POTS' that purchase only a limited number of POTS lines and can only economically be served via analog DS0 loops." *TRO* ¶ 286. The FCC then found, "on a national basis, that competing carriers are impaired without access to unbundled circuit switching for mass market customer." *Id.* The FCC also recognized, however, "that a more granular analysis may reveal that a particular market is not subject to impairment in the absence of unbundled local switching" (*id.* ¶ 461), and provided for the States to conduct that granular analysis.

Specifically, this Commission must find, in this nine-month proceeding, that CLECs are not impaired without access to local circuit switching on an unbundled basis in any market where either of two local switching triggers is satisfied. 47 C.F.R. § 51.319(d)(2)(iii)(A). The *self-provisioning trigger* is satisfied if three or more unaffiliated competing providers, including intermodal providers of service comparable in quality to the service provided by SBC Texas, are serving mass-market customers with their own local switches in the subject market. *Id.*

§ 51.319(d)(2)(iii)(A)(1). The *competitive wholesale facilities trigger* is satisfied if two or more unaffiliated competing providers, again including intermodal providers, offer wholesale local switching service to customers serving DS0 capacity loops in the subject market using their own switches. *Id.* § 51.319(d)(2)(iii)(A)(2).

If neither of the two local switching triggers is satisfied, the Commission must nonetheless find that CLECs are not impaired without access to unbundled local circuit switching in the subject market if self-provisioning of local switching is economic based on certain enumerated criteria (“potential deployment test”). *Id.* § 51.319(d)(2)(iii)(B). Those criteria include evidence of actual deployment, operational barriers and economic barriers, all as described in § 51.319(d)(2)(iii)(B)(1) through (3).

Finally, if neither local switching trigger is satisfied and the potential deployment test is not met, the Commission is to consider whether the impairment would be cured by rolling access to local circuit switching on an unbundled basis for a period of 90 days or more. *Id.* § 51.319(d)(2)(iii)(C).

II. IDENTIFICATION OF SBC TEXAS’S PHASE I INITIAL AREAS

A. Identification of Areas of the State

SBC Texas will seek in this proceeding a finding that CLECs are not impaired without access to unbundled local circuit switching to serve mass-market customers in the following areas in SBC Texas’s service territory:

- Austin-Round Rock MSA¹
- Corpus Christi MSA
- Dallas-Fort Worth-Arlington MSA

¹ Metropolitan Statistical Area (“MSA”) (as defined by the Office of Management and Budget, OMB Bulletin No. 03-04, June 6, 2003).

- Houston-Baytown-Sugar Land MSA
- San Antonio MSA

SBC Texas believes that the evidence will establish that in each of those areas, the self-provisioning trigger or competitive wholesale facilities trigger is met.

B. Identification of Switch Owners or Operators

The following switch owners or operators (or their successors or affiliates) are those that at this time SBC Texas can identify as causing the triggers to be met in the above-referenced areas:

- Allegiance Telecom of Texas, Inc.
- AMA Communications LLC d/b/a AMA*TechTel Communications
- AT&T Communications of Texas, L.P., AT&T Communications of the Southwest, Inc.
- American Telco, Inc.
- Bestline Communications, LP aka Austin Bestline Company
- Birch Telecom of Texas Ltd., LLP
- Cable Plus Company, L.P.
- CoServ, L.L.C d/b/a CoServ Communications, now operating under the following: Denton Telecom Partners I LP, d/b/a AdvanTEX Communications
- Comcast Phone Texas, LLC
- FiberWave Telecom, Inc.
- Grande Communications Network, Inc.
- ICG Communications, Inc.
- Intermedia Communications, Inc.
- Kingsgate Telephone, Inc.

- KMC Telecom, Inc.
- Level 3 Communications, LLC
- Logix Communications Corporation
- McLeodUSA Telecommunications Services, Inc.
- Millennium Telcom, L.L.C. d/b/a One Source Communications
- NTS Communications, Inc.
- TechTel Communications
- Teligent Services, Inc.
- Tex-Link Communications, Inc.
- Time Warner Telecom of Texas, L.P.
- Westel, Inc.
- Winstar Communications, LLC, Winstar Wireless of Texas, Inc.
- MCI WorldCom Communications, Inc.
- XO Texas, Inc. fka Nextlink, Inc.
- Xspedius Management Co. Switched Services, L.L.C.

SBC Texas reserves the right, following adequate discovery, to add to or delete from the foregoing lists of areas or switch owners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all persons who have filed Motions to Intervene or Notices of Participation in this proceeding on this 27th day of October, 2003.

DOCKET NO. 28744

IMPAIRMENT ANALYSIS FOR	§	PUBLIC UTILITY COMMISSION
DEDICATED TRANSPORT	§	
	§	OF TEXAS

DOCKET NO. 28745

IMPAIRMENT ANALYSIS OF	§	PUBLIC UTILITY COMMISSION
ENTERPRISE MARKET LOOP	§	
FACILITIES	§	OF TEXAS

ORDER NO. 6
MEMORALIZING RULINGS ON PARTY STATUS
AND ISSUING PROTECTIVE ORDER

At the prehearing conference held on November 6, 2003, the undersigned Administrative Law Judge issued the following rulings regarding Motions to Intervene. The Motions to Intervene of the State of Texas, the Office of Public Utility Counsel, and Texas.Net, Inc. were granted. The Motion to Intervene of TEXALTEL was denied.

The attached Protective Order is hereby issued for Docket No. 28744 and Docket No. 28745.

SIGNED AT AUSTIN, TEXAS on the _____ day of November 2003.

PUBLIC UTILITY COMMISSION OF TEXAS

MICHAEL E. FIELD
DIRECTOR, DOCKET MANAGEMENT
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DOCKET NO. 28744

IMPAIRMENT ANALYSIS FOR	§	PUBLIC UTILITY COMMISSION
DEDICATED TRANSPORT	§	OF TEXAS
	§	

PROTECTIVE ORDER

In the above-styled proceeding, it is anticipated that the parties may designate certain documents and information to be confidential and exempt from public disclosure under the Public Information Act, Tex. Gov't Code Ann. §§ 552.002-552.353 (Vernon 1994 & Supp. 2003). Therefore, a Protective Order covering such documents and information should be entered to facilitate timely submission of information in this proceeding and in any discovery conducted in this proceeding.

This Protective Order shall govern the production of information and documents in this proceeding until such time as this Protective Order is modified by subsequent order of the presiding officer, the Commission, or a court of competent jurisdiction.

Nothing in this Protective Order shall be deemed a waiver of a Party's rights or obligations in responding to a discovery request.

DEFINITIONS

- 1) "Administrative Procedure Act" means TEX GOV'T CODE ANN. §§ 2001.001-2001.902.
- 2) "Commission" or "PUC" means the Public Utility Commission of Texas.
- 3) "Confidential Material" means any document, including but not limited to documents stored or encoded on a computer disk or other similar electronic or magnetic medium, produced to a party and submitted to the Commission in this Proceeding that the Producing Party claims is proprietary or confidential under P.U.C. SUBST. R. 22.142 and/or exempt from public disclosure under the Public Information Act. Confidential Material **includes** not only designated material but also the substance of the information contained in the material as

well as a Reviewing Party's notes, memoranda, description, report, summary, or statement about the substance of the material, or other information regarding or derived from the Confidential Material unless such notes are limited to a description of the document and a general characterization of its subject matter in a manner that does not state any substantive information contained in the document. Confidential Material does not include material contained in the public files of the Commission or any federal or state agency, court, or local government authority that is subject to disclosure under the Act, or a similar statute, nor shall it include or material that at the time it is produced in this Proceeding or prior thereto is or was public knowledge, or which becomes public knowledge other than through disclosure in violation of this Protective Order. Confidential Material does not include material found by the Presiding Officer not to merit the protection afforded Confidential Material under the terms of this Protective Order.

- 4) "OAG" means the State of Texas by and through the Office of the Attorney General of Texas, and any employee thereof, to the extent it is a Party in this Proceeding.
- 5) "OPUC" means the Texas Office of Public Utility Counsel, and any employee thereof, to the extent it is a Party in this Proceeding.
- 6) "Party" means any party to this Proceeding and includes, without limitation, any and all employees, contractors, consultants, subject matter experts, or agents of the party as well as those of any parent, subsidiary, or affiliate of the party. OPUC and the OAG shall be deemed Parties, to the extent so designated by the Presiding Officer.
- 7) "Presiding Officer" has the meaning set forth in P.U.C. PROC. R. 22.2(34). A Presiding Officer has the authority set forth in P.U.C. PROC. R. 22.202.
- 8) "Proceeding" means PUC Docket No. 28744.
- 9) "Producing Party" means a Party that produces and submits Confidential Material in this Proceeding in accordance with this Protective Order. To the extent that a non-party to this Proceeding is required in response to a subpoena or other authorized discovery request to produce and submit Confidential Material, the non-party may obtain the protections of this Protective Order by following the procedures set forth herein.
- 10) "Public Information Act" means the Texas Government Code §§ 552.001-552.353.

- 11) "P.U.C. PROC. R." means the Commission's Procedural Rules as codified in 16 TEX. ADMIN. CODE CH. 22.
- 12) "P.U.C. SUBST. R." means the Commission's Substantive Rules as codified in 16 TEX. ADMIN. CODE CH. 26.
- 13) "Reviewing Party" means a Party that receives and reviews Confidential Material produced in this Proceeding in accordance with this Protective Order.
- 14) "Reviewing Party Representative" means a person(s) authorized to review Confidential Material on behalf of a Reviewing Party and who has signed the Confidential Material Certification (Attachment A) prior to reviewing Confidential Material. Designation by a Reviewing Party of Reviewing Party Representatives is limited as follows:
- a) Confidential Material. Reviewing Party Representatives authorized to review Confidential Material shall be limited to the following: (i) Reviewing Party's counsel; (ii) employees of the Reviewing Party who are either appearing as witnesses in this Proceeding or directly assisting others in their work as witnesses or counsel in this proceeding; and (iii) independent consultants acting under the direction of the Reviewing Party's counsel and directly engaged in this Proceeding. Notwithstanding the foregoing, Confidential Material Reviewing Party Representatives **do not** include persons involved in the sale or marketing of the Reviewing Party's products or services, unless the Producing Party, upon request, gives prior written authorization, which shall not be unreasonably withheld, for a prohibited person(s) to review Confidential Material. If the Producing Party refuses to give such written authorization, the Reviewing Party may, for good cause shown, request an order from the Presiding Officer allowing a prohibited person(s) to review Confidential Information. The Producing Party shall be given the opportunity to respond to the Reviewing Party's request before an order is issued.
 - b) Small Company. Notwithstanding anything to the contrary in this definition, Reviewing Party Representatives authorized to review Confidential Material on behalf of a Small Company shall be limited to the following: (i) Small Company's counsel or, if the Small Company is not represented by counsel, a member of the Small Company's senior management; (ii) its employees or witness(es); and (iii) independent consultants acting

under the direction of the Small Company's counsel or senior management and directly engaged in this Proceeding. A Small Company's designated Small Company Reviewing Party Representatives **do not** include individuals primarily involved in the sale or marketing of the Small Company's products or services, unless the Producing Party, upon request, gives prior written authorization for a prohibited person(s) to review Confidential Material. If the Producing Party refuses to give such written authorization, the Reviewing Party may, for good cause shown, request an order from the Presiding Officer allowing a prohibited person(s) to review Confidential Material. The Producing Party shall be given the opportunity to respond to the Small Company's request before an order is issued.

- 15) "Reviewing Period" means the period commencing with the entry of this Protective Order and continuing until the expiration of the Commission's plenary jurisdiction in this Proceeding. The Reviewing Period shall reopen if the Commission regains jurisdiction due to a remand as provided by law.
- 16) "Small Company" means a Reviewing Party with fewer than 2000 employees, including the employees of affiliates within a common holding company.
- 17) "Staff" means any Commission employee.

GENERAL PROVISIONS

- 18) Submission of Confidential Material to the Commission. Confidential Material shall be submitted by a Producing Party to the Commission in accordance with P.U.C. PROC. R. 22.71(d) and this Protective Order.
- 19) Production of Confidential Material to a Reviewing Party. Confidential Material shall be produced by a Producing Party to a Reviewing Party in accordance with this Protective Order.
- 20) Protection of Confidential Material from Unauthorized Disclosure. Any use of Confidential Material and all notices, applications, responses or other correspondence between Parties, the Commission, Staff, OPUC, OAG, and the Presiding Officer shall be made in a manner that protects Confidential Material from unauthorized disclosure.

- 21) Applicability of this Protective Order to Staff, OPUC, and the OAG. Except as otherwise provided herein, the terms of this Protective Order are applicable to Staff, OPUC, and the OAG. Staff, OPUC, the OAG, and other persons employed or retained by them who are directly engaged in this Proceeding shall be authorized, without limitation, to review Confidential Material provided the person(s) has signed in advance the appropriate Certification (Attachment A). The Commission's Confidential Documents Manager shall be responsible for securing and protecting from disclosure Confidential Material in the Commission's custody and control and ensuring that only authorized Staff are allowed to review Confidential Material.
- 22) Exemption from Disclosure. Confidential Material received by the Commission in accordance with this Protective Order shall be treated by the Commission as exempt from public disclosure until and unless such Confidential Material is determined to be public information as the result of a Public Information Decision by the Open Records Division of the OAG (OAG-ORD).
- 23) Public Information Act Requests. In the event of a Public Information Act Request to the Commission, OPUC, or the OAG seeking disclosure of Confidential Material, the party in receipt of the request shall notify the Producing Party and furnish a copy of the requested Confidential Material in its custody and control to the OAG-ORD together with a copy of this Protective Order. Notification to the Producing Party may be provided simultaneously with the delivery of the Confidential Material to the OAG-ORD. Additionally, the Commission, OPUC, or the OAG shall, pursuant to Public Information Act §§ 552.301-552.308, timely request an OAG-ORD decision as to whether the Confidential Material requested falls within any of the exemptions identified in the Public Information Act. Pursuant to Public Information Act §§ 552.304 and 552.305(b), the Producing Party may submit in writing to the OAG-ORD its reasons for claiming the Confidential Material requested is exempt from public disclosure. The recipient of the request for disclosure may contest the Producing Party's claim of exemption pursuant to Public Information Act § 552.305(c) in a separate communication to the OAG-ORD.
- 24) Procedures for Production of Confidential Material. The Producing Party shall provide one copy of Confidential Material responsive to a discovery request to a Reviewing Party in

accordance with this Protective Order at the address set forth in the discovery request. Subject to modification by agreement, the Producing Party shall in its response to a discovery request provide the Reviewing Party with an estimate of the number of pages of Confidential Material to be produced. A Reviewing Party shall reimburse the Producing Party for the reasonable and customary cost of copying the documents.

25) Confidential Material may only be reviewed during the Reviewing Period. Confidential Material admitted into the evidentiary record or accompanying the evidentiary record as offers of proof in this Proceeding may be reviewed throughout the Reviewing Period, including any appellate proceedings arising from this or subject to this Proceeding.

26) Confidential Material to be Used Solely for the Purposes of This Proceeding. Confidential Material produced to Reviewing Parties shall be used solely for the purposes of this Proceeding, except as otherwise agreed between a Producing Party and a Reviewing Party. Access to Confidential Material may not be used in the furtherance of any other purpose, including, without limitation: (i) any other pending or potential proceeding involving any claim, complaint, or other grievance of whatever nature, except appellate review proceedings that may arise from or be subject to these proceedings; or (ii) any business or competitive endeavor of whatever nature. Because of their statutory regulatory obligations, these restrictions do not apply to Staff or OPUC.

27) Receipt of Confidential Material. Only the Reviewing Party's counsel of record and/or designated recipients who sign and provide a Statement of Receipt (Attachment B) to the Producing Party may receive Confidential Information from the Producing Party or make copies thereof. A new Statement of Receipt must be executed and provided to the Producing Party each time the Reviewing Party receives Confidential Material or makes a copy of Confidential Material. Persons executing a Statement of Receipt shall be responsible for securing and protecting from disclosure Confidential Material in their custody and control and ensuring that only Reviewing Party Representatives are allowed to review Confidential Material. (Note: Execution of a Statement of Receipt does not authorize a person(s) to review Confidential Material. A Reviewing Party Representative is not required to sign a Statement of Receipt unless that person also receives Confidential Material from a Producing Party.)

- 28) Review of Confidential Material. Only Reviewing Party Representatives are authorized to review Confidential Material. Reviewing Party Representatives shall be responsible for securing and protecting from disclosure Confidential Material that is in their custody and control during the Reviewing Period.
- 29) Transmission of Confidential Material. Confidential Material may be transmitted via the Internet, Intranet, facsimile transmission, U.S. mail, or overnight delivery service. Confidential Material that is transmitted shall be treated as a copy of the Confidential Material. The Reviewing Party shall be responsible for ensuring that transmitted Confidential Material is received only by persons that have signed a Statement of Receipt (Attachment B) and reviewed only by Reviewing Party Representatives.
- 30) Commission Copies of Confidential Material. In the event the Presiding Officer requests additional copies of Confidential Material such copies shall be delivered to the Commission's Confidential Documents Manager by 3:00 p.m. on the first business day after the request is made unless otherwise approved by the Presiding Officer. Copies shall be labeled in accordance with P.U.C. PROC. R. 22.71(d) and this Protective Order. Multiple copies of the same material shall be grouped together as one set to ensure individual tracking of such material.
- 31) Storage and Maintenance of Confidential Material by the Commission. The Commission shall store and maintain Confidential Material in accordance with P.U.C. PROC. R. 22.71(d) and the Commission's Legal & Enforcement Division's Procedures for Processing Confidential Material, and shall be withheld from review of any Staff not bound by the terms of this Protective Order, unless such Confidential Material is released from the restrictions of this Protective Order either through agreement of the parties, as a result of a Public Information Act decision by the OAG-ORD, or, after notice to the parties, pursuant to an order of the Presiding Officer, the Commission, or a court having jurisdiction.
- 32) Staff's review of Confidential Material shall be in accordance with this Protective Order and the Commission's Legal & Enforcement Division's Internal Operating Procedures for Reviewing and Handling of Confidential Materials.

- 33) At the request of a PUC Commissioner, or his or her staff, Confidential Material may be provided by Staff to the PUC Commissioner. The Commissioners and their staff shall be informed of the existence and terms of this Protective Order and shall observe the restrictions contained herein.
- 34) Good Faith Use of Confidential Material. To the extent that such efforts will not damage a Party's presentation of its position in this Proceeding, each Party shall use its best efforts to phrase deposition and other discovery questions, prefiled testimony, questions asked on live examination of a witness, briefs, other pleadings, oral argument and any other use of Confidential Material in a way which will eliminate or minimize the need for Confidential Material to be submitted under seal.
- 35) Good Faith Use of Confidential Material at the Hearing on the Merits. A Reviewing Party intending to use Confidential Material at the hearing on the merits, other than for purposes of cross-examination or impeachment, shall timely notify the Producing Party and the Presiding Officer, identifying with particularity the Confidential Material to be referenced. The Parties will work cooperatively to determine if certain limited, summary material that would otherwise fit the definition of Confidential Material may be designated as "not-confidential" for use in any hearing associated with this Proceeding.
- 36) Procedures for Introducing Confidential Material into the Record in this Proceeding. If a Party seeks to introduce Confidential Material into the record in this Proceeding as part of any written testimony, exhibit, brief, motion or other type of pleading, the Confidential Material shall be filed and served under seal and marked "CONFIDENTIAL MATERIAL UNDER SEAL". The Presiding Officer may subsequently, on his/her own motion or on motion of a party, issue a ruling respecting whether or not the inclusion, incorporation or reference to Confidential Material is such that such submission should remain under seal. The Party asserting confidentiality bears the burden of proving that the alleged Confidential Material should be admitted under seal. If it becomes necessary, or at the request of a Party, the Presiding Officer may order additional guidelines addressing the procedures and standards for admissibility of Confidential Material. If filing before a judicial body, the filing party: (i) shall notify the Producing Party within sufficient time to allow the Producing

Party to seek a temporary sealing order; and (ii) shall otherwise follow the procedures set forth in Texas Rule of Civil Procedure 76A.

- 37) Third Party Claim of Confidentiality. A third party's claim of confidentiality does not alter a Producing Party's obligation under this Protective Order to supply Confidential Material that is within the Producing Party's custody and control. The Parties shall work in good faith to obtain the consent of a third party to produce material the third party claims is Confidential Material.
- 38) Continuation of Disclosure Restrictions After a Reviewing Party is no Longer Engaged in this Proceeding. In the event a Reviewing Party is no longer engaged in this Proceeding, all Confidential Material shall be returned to the Producing Party or destroyed in accordance with this Protective Order. A former Reviewing Party shall continue to be bound by this Protective Order.
- 39) Return or Destruction of Confidential Material. At the conclusion of this Proceeding and any appeals or remands thereof, Confidential Material, except for materials made a part of the record in this Proceeding or relied upon in the Presiding Officer's orders in this Proceeding, shall be returned to the Producing Party or destroyed, at the option of the Producing Party, within thirty (30) days following receipt of notice from the Producing Party, absent a contrary order of the Presiding Officer or the Commission, or agreement of the Parties. After the return or destruction of Confidential Material by a Reviewing Party, counsel for such party must provide to each Producing Party from whom it received Confidential Material a letter that, to the best of counsel's knowledge, all Confidential Material has been returned or destroyed. Record copies of Confidential Material submitted to the Commission shall be retained in accordance with the Commission's Record Retention Schedule (see P.U.C. PROC. R. 22.71(d) (6)). Working copies of Confidential Material received by the Commission's Confidential Documents Manager shall be returned or destroyed, after notice to the Producing Party, in accordance with the Commission's Legal & Enforcement Division's Internal Procedures for Processing Confidential Material.
- 40) Sanctions Available for Abuse of Confidential Material Designation. If the presiding officer finds that a producing party unreasonably designated material as Confidential Material or

unreasonably attempted to prevent disclosure, the Presiding Officer may sanction the producing party pursuant to P.U.C. PROC. R. 22.161.

- 41) Breach of Protective Order. The Parties agree that money damages are an inadequate remedy for any unauthorized disclosure of Confidential Material and further recognize that such unauthorized disclosure may result in irreparable harm. In the event of a breach of the provisions of this Protective Order, the Producing Party shall be entitled to any extraordinary remedies for unauthorized disclosure, including a temporary or permanent injunction against such breach, without any requirements to post bond as a condition of such relief as may be required to enforce the provisions of this Protective Order. In addition to injunctive relief, the Producing Party shall be entitled to pursue any other form of relief to which it is entitled.
- 42) Other Rights Reserved. This Protective Order does not constitute a waiver of a Party's right to contest a Confidential Material designation or to seek further disclosure of Confidential Material in accordance with the procedures set forth in this Protective Order. This Protective Order does not constitute a waiver of a Party's right to object to the admissibility of Confidential Material at the hearing on the merits or limit its right to cross-examine a Party on any applicable grounds.

CONFIDENTIAL MATERIAL

- 43) Procedures for Designation. Prior to producing to a Reviewing Party and submitting to the Commission material in this Proceeding, the Producing Party may designate any portion or all of the materials Confidential Material by labeling the material: "CONFIDENTIAL MATERIAL PROVIDED PURSUANT TO THE PROTECTIVE ORDER ISSUED IN DOCKET NO. 28744" or words to this effect, and either Bates Stamping each page of the designated material or otherwise marking the designated material in a manner that allows for easy identification and tracking.
- 44) Statement of Exemptions. On or before the date Confidential Material is produced, the Producing Party shall file in this Proceeding and serve on each Reviewing Party a Statement of Exemptions, including a supporting affidavit(s), indicating:
- (i) any and all exemptions provided for in the Public Information Act that the Producing Party claims are applicable to the Confidential Material; and

(ii) that counsel for the Producing Party has made a good faith review of the designated material and determined that the material is Confidential Material and exempt from public disclosure under the claimed exemptions.

45) Procedures for Copying and Tracking Confidential Material. A Reviewing Party may make copies of Confidential Material as needed for use in this Proceeding provided that a Tracking Log(s) (Attachment C) is maintained for all copies and that the copies are kept in accordance with this Protective Order. Only a person who has signed a Statement of Receipt (Attachment B) on behalf of a Reviewing Party is authorized to make copies of the Confidential Material in his or her custody and control. (Note: Only the Commission's Confidential Documents Manager may copy Confidential Material for the Commission in accordance with this paragraph.)

46) Procedures for Copying and Tracking Copies of Voluminous Confidential Material. Confidential Material that is also voluminous material, as defined in P.U.C. PROC. R. 22.144(h), shall be produced for inspection and copying accordance with P.U.C. PROC. R. 22.144(h) and this Protective Order. Voluminous Confidential Material shall be made available at a location(s) in Austin, Texas, provided by the Producing Party, or at a mutually agreed upon location(s), Monday through Friday, 9:00 a.m. to 5:00 p.m. (except on State or Federal holidays), and at other mutually convenient times upon reasonable request. The Reviewing Party may make copies of voluminous Confidential Material as needed for use in this Proceeding provided that a Tracking Log(s) (Attachment C) is created for all copies and that the copies are kept in accordance with this Protective Order. Only a person who has signed a Statement of Receipt (Attachment B) on behalf of the Reviewing Party is authorized to make copies of voluminous Confidential Material.

DISCLOSURE OF CONFIDENTIAL MATERIAL AND CHALLENGES TO CONFIDENTIAL MATERIAL DESIGNATION

47) Additional disclosure of Confidential Material or a challenge to the designation of any material as Confidential Material shall be made to the Presiding Officer. Nothing in this Protective Order shall preclude the Presiding Officer, the Commission, or Staff from raising on their own motion a challenge to the designation of any material as Confidential Material.

- 48) Procedures for Seeking Disclosure of Confidential Material or Change in Confidential Material Designation. A Reviewing Party seeking to disclose Confidential Material to any person to whom disclosure is not authorized by this Protective Order, or change the designation of specific Confidential Material by alleging, for example, that such material has entered the public domain, shall first confer with the Producing Party in a good-faith effort to resolve the matter prior to seeking a decision from the Presiding Officer. A Reviewing Party unable to resolve the issue by conference, may file a motion requesting the proposed disclosure or change in designation, including therein a certificate attesting to the Reviewing Party's attempt to resolve the issue by conference.
- 49) Procedures to Contest Disclosure or Change in Designation. A Producing Party opposing a motion to disclose or change the designation of Confidential Material, shall file with the Commission a response to the Reviewing Party's motion within five (5) working days after receiving the motion. Within five (5) working days after the Producing Party files its objection, the Reviewing Party may file a response, which shall include a certificate stating that the counsel for the Reviewing Party has reviewed the Confidential Material in dispute and, without disclosing such material, the reasons the Confidential Material should be allowed to be disclosed or not be designated as confidential under current legal standards and this Protective Order.
- 50) Procedures for Presiding Officer Determination Regarding Disclosure or Change in Designation. If the Producing Party fails to file a timely response, the Reviewing Party's motion shall be granted. Upon the request of either the Producing Party or the Reviewing Party, or upon the Presiding Officer's own initiative, the presiding officer may, but need not, conduct a prehearing conference prior ruling on the Reviewing Party's motion. The burden is on the Producing Party to show that the proposed disclosure or change in designation is inappropriate.
- 51) Maintenance of Confidential Material During Periods Specified for Challenging Various Orders. Any Party electing to challenge, a Presiding Officer's determination allowing for disclosure or a change in designation shall have a period of ten (10) days from: (i) the date of an unfavorable order; or (ii) if the Commission does not rule on an appeal of an interim order, the date an appeal of an interim order to the Commission is overruled by operation of

law, to obtain a favorable ruling in state district court. Any Party challenging a state district court determination allowing disclosure or a change in designation shall have an additional period of ten (10) days from the date of the order to obtain a favorable ruling from a state appeals court. Finally, any Party challenging a determination of a state appeals court allowing disclosure or a change in designation shall have an additional period of ten (10) days from the date of the order to obtain a favorable ruling from the state supreme court or other appellate court. The Confidential Material that is the subject of the Parties' dispute shall be maintained in accordance with this Protective Order during the periods for challenging the various orders referenced in this paragraph. For purposes of this paragraph, a favorable ruling of a state district court, state appeals court, Supreme Court or other appellate court includes any order extending the deadlines set forth in this paragraph.

SIGNED AT AUSTIN, TEXAS on the _____ day of November 2003.

PUBLIC UTILITY COMMISSION OF TEXAS

**MICHAEL E. FIELD
DIRECTOR, DOCKET MANAGEMENT
POLICY DEVELOPMENT DIVISION**

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ATTACHMENT A
CONFIDENTIAL MATERIAL CERTIFICATION

I certify that I am eligible to review Confidential Material under the terms of the Protective Order entered in this Proceeding. I further certify my understanding that Confidential Material is being provided to me pursuant to the terms and restrictions of the Protective Order entered in this Proceeding, and that I have read the Protective Order and agree to be bound by its terms. I understand that the contents of the Confidential Material, any notes, memoranda, or any other form of information regarding or derived from the Confidential Material shall not be disclosed to anyone other than in accordance with the Protective Order, and shall be used solely for the purpose of this Proceeding. I acknowledge that the obligations imposed by this certification are pursuant to such Protective Order, provided however that if the information contained in the Confidential Material is obtained from independent public sources, this certification shall not apply. I acknowledge that the unauthorized disclosure or improper use of any Confidential Material, whether in written form or orally, may result in serious and irreparable harm to the Producing Party's competitive interests. I also understand and agree that any breach of this Certification may subject me and/or the party I represent to sanctions.

Signature

Party Represented

Printed Name

Employer if different from Party Represented

Title

Address and Telephone Number

Date

ATTACHMENT B

ACKNOWLEDGEMENT OF RECEIPT OF CONFIDENTIAL MATERIAL

I, _____, acknowledge receipt of the original copy of Confidential Material listed below and agree to maintain such material in accordance with the terms of the Protective Order entered in this Docket. The Confidential Material that I am receiving shall remain in my custody and control except when being reviewed by a Reviewing Party Representative.,.

Document Identification	No. of Copies	Confidential Material

Signature

Party Represented

Printed Name

Employer if different from Party Represented

Title

Address and Telephone Number

Date

ATTACHMENT C

TRACKING LOG FOR COPIES OF CONFIDENTIAL MATERIAL

The Confidential Material listed below have been copied pursuant to the terms of the Protective Order entered in this Docket.

Document Identification	No. of Copies	Confidential Material

Signature

Party Represented

Printed Name

Employer if different from Party Represented

Title

Address and Telephone Number