

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Forward-Looking Mechanism)	CC Docket No. 97-160
for High Cost Support for)	
Non-Rural LECs)	

PROTECTIVE ORDER

Adopted: July 27, 1998

Released: July 27, 1998

By the Deputy Chief, Common Carrier Bureau:

1. This Protective Order is intended to facilitate and expedite review of documents containing trade secrets and commercial or financial information submitted by a person or entity that are either privileged or confidential. It reflects the manner in which "Confidential Information," as that term is defined herein, is to be treated in this proceeding. The Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 C.F.R. § 0.442.

2. In the *Universal Service Order*, the Commission established, as one of the criterion in developing a forward-looking economic cost model to determine universal service support, that "all underlying data, formulae, computations, and software associated with the model should be available to all interested parties for review and comment."¹ In an effort to use the best possible data and increase the accuracy of the models, both HAI and BCPM have increasingly relied upon software and databases that are confidential. For example, HAI utilizes a preprocessing customer location module maintained by PNR that relies, in part, on confidential data, software, and algorithms. This Protective Order has been adopted to expedite the availability for review of the underlying confidential information in the above-referenced proceedings and to establish the parameters for the use and treatment of such information, as

¹ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776, 8915 (1997) (*Universal Service Order*), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *appeal pending in Texas Office of Public Utility Counsel v. FCC and USA*, No. 97-60421 (5th Cir. 1997).

follows:

3. Definitions.

a. Authorized Representative. An "Authorized Representative" is limited to:

- (1) Counsel for the Reviewing Parties to this proceeding, including in-house counsel actively engaged in the conduct of this proceeding and their associated attorneys, paralegals, clerical staff, and other employees, to the extent reasonably necessary to render professional services in this proceeding.
- (2) Specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding, except that disclosure to persons in a position to use this information for competitive commercial or business purposes shall be prohibited.
- (3) Any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper.

b. Commission. "Commission" means the Federal Communications Commission or any employee, consultant, or agent of the Commission acting pursuant to and within the scope of their official responsibilities to the Commission.

c. Confidential Information. "Confidential Information" means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the

Submitting Party has determined in good faith constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) and (ii) information submitted to the Commission by the Submitting Party and good faith falls within the items for treatment as Confidential Information. Confidential Information includes additional copies of notes and information derived from Confidential Information.

- d. Declaration. "Declaration" means Attachment A to this Protective Order.
- e. Reviewing Party. "Reviewing Party" means a person or entity participating in this proceeding or considering in good faith filing a document in this proceeding.
- f. Submitting Party. "Submitting Party" means a person or entity that submits information for which it seeks treatment as Confidential Information pursuant to this Protective Order.

4. Claim of Confidentiality. The Submitting Party may designate information as "Confidential Information" consistent with the definition of that term in paragraph 3 of this Protective Order. The Commission may, sua sponte or upon petition, pursuant to 47 C.F.R §§ 0.459 & 0.461, determine that all or part of the information claimed as "Confidential Information" is not entitled to such treatment. Each page or relevant portion of any document or information furnished subject to the terms of this Protective Order shall be clearly identified as "Confidential" by the Submitting Party.

5. Procedures for Claiming Information is Confidential. Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, "CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION - DO NOT RELEASE." Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, the Submitting Party shall

designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.

6. Storage of Confidential Information at the Commission. The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction. Notwithstanding the foregoing, inspection of Confidential Information by parties other than Commission staff shall occur pursuant to paragraph 9 of this Order and not on the premises of the Commission's offices.

7. Access to Confidential Information. Confidential Information shall only be made available to the Commission and to Authorized Representatives of the Reviewing Parties. Before any Authorized Representative of a Reviewing Party may obtain access to Confidential Information, such Authorized Representative must execute the attached Declaration. The Reviewing Party shall not be deemed, by reason of this Protective Order, to have waived the opportunity to argue before the Commission or any other appropriate body that any Confidential Information is not confidential or privileged in nature. Consultants or agents of the Commission may obtain access to Confidential Information only if they have signed a non-disclosure agreement or if they execute the attached Declaration.

8. An Authorized Representative of a Reviewing Party may disclose Confidential Information to other Authorized Representatives, as defined in paragraph 3 of this Order, only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Confidential Information, each Authorized Representative must execute the attached Declaration.

9. Inspection of Confidential Information. Confidential Information shall be maintained by the Submitting Party for inspection at a location designated by the Submitting Party. An Authorized Representative shall give the Submitting Party reasonable notice of its intent to review Confidential Information. The Reviewing Party shall not remove Confidential Information or copies thereof from the premises of the Submitting Party without the Submitting Party's permission, and shall comply with any reasonable terms that the Submitting Party places upon the removal of Confidential Information.

10. Copies of Confidential Information. The Reviewing Party must obtain the permission and comply with the terms of the Submitting Party in obtaining copies of Confidential Information. The Submitting Party may charge a reasonable copying fee not to exceed twenty five cents per page. Authorized Representatives may, upon obtaining the permission of the Submitting Party, make additional copies of Confidential Information but only to the extent

required and solely for the preparation and use in this proceeding. Subject to any additional conditions imposed by the Submitting Party, Authorized Representatives must maintain a written record of any additional copies made and provide this record to the Submitting Party upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Confidential Information shall keep the documents properly secured at all times. At the conclusion of these proceedings, the Reviewing Party shall return the Confidential Information (and any copies thereof) to the Submitting Party, or shall destroy such materials and notify the Submitting Party in writing that it has destroyed such materials in accordance with paragraph 19 of this Order.

11. Filing of Declaration. Counsel for Reviewing Parties shall provide to the Submitting Party and the Commission a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed, or by any other deadline that may be prescribed by the Commission.

12. Use of Confidential Information. Reviewing Parties shall use the Confidential Information only in the above-referenced proceeding for the purpose of reviewing the underlying information and analyzing the reliability of the forward-looking cost models submitted in this proceeding. Confidential Information shall not be used by any person granted access under this Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review), shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

13. No patent, copyright, trademark or other intellectual property rights are licensed, granted, or otherwise transferred by this Order or any disclosure hereunder, except for the right to use information in accordance with this Order. Confidential Information shall at all times remain the property of the Submitting Party. Confidential Information that is properly obtained by the Reviewing Party, however, may be used to conduct its own analyses using the Confidential Information. Moreover, any such calculations or other analyses performed by Reviewing Party using Confidential Information, the outcomes of which do not reveal protected information, shall not be considered part of the Confidential Information nor shall said calculations and analyses be the property of the Submitting Party.

14. Pleadings Using Confidential Information. Submitting Parties and Reviewing Parties may, in any pleadings that they file in this proceeding, reference Confidential Information, but only if they comply with the following procedures:

- a. Any portions of the pleadings that contain or disclose Confidential

Information must be physically segregated from the remainder of the pleadings and filed under seal;

- b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;
- c. Each page or portion of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: "Confidential Information included pursuant to Protective Order, CC Docket Nos. 96-45; 97-160;" and
- d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, the Submitting Party, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Submitting Party or a Reviewing Party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. A Submitting Party or a Reviewing Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notation required by subsection c of this paragraph is not removed.

15. Disclosure. In the event that the Reviewing Party desires to disclose Confidential Information to any person to whom disclosure is not authorized by this Order or wishes to include, use or disclose the substance of Confidential Information in testimony or exhibits, examination or cross-examination on the public record of this proceeding, or wishes to object to the designation of certain information or materials as Confidential Information, Reviewing Party will notify counsel for Submitting Party, in writing no less than four (4) working days prior to making any disclosure or objection, and identify with particularity the Confidential Information it wishes to use or disclose.

16. If the Submitting Party objects to such proposed reclassification or disclosure, Submitting Party shall notify Reviewing Party, in writing, of its position and the reasons therefor no more than four (4) working days subsequent to receipt of the notice described in paragraph 15, above. Thereafter, Submitting Party may request a determination from the Commission regarding the manner in which the Commission should allow Reviewing Party to use such Confidential Information.

17. Dispute Resolution. The Submitting Party and Reviewing Party agree that they

will undertake good-faith negotiations concerning the disclosure of Confidential Information if any party finds that the terms of this Order impede the balance between the need to protect the commercial interest in the Confidential Information and the requirements of the Commission. After undertaking such negotiations, and upon failing to reach a mutually satisfactory resolution, Submitting Party and Reviewing Party agree to seek the assistance of Commission's staff in resolving the dispute. If there is no mutually agreeable resolution after negotiations and conferring with the staff, any party make take the issue to the Commission for resolution.

18. Violations of Protective Order. Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure or use of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The Violating Party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such 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 attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

19. Termination of Proceeding. Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall destroy or return to the Submitting Party all Confidential Information as well as all copies and derivative materials made, and shall certify in writing served on the Commission and the Submitting Party that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party. Any Confidential Information contained in any copies of pleadings retained by counsel to a Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with paragraphs 10 and 12 of this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

20. No Waiver of Confidentiality. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental

disclosure of Confidential Information shall not be deemed a waiver of the privilege.

21. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information.

22. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Party, executing the attached Declaration, and the Submitting Party.

23. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j) and 47 C.F.R. § 0.457(d).

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Deputy Chief, Common Carrier Bureau

Attachment A:

DECLARATION

In the Matter of Federal-State Joint Board on Universal Service, Forward-Looking Mechanism for High Cost Support for Non-Rural LECs (CC Docket Nos. 96-45, 97-160).

I, _____, hereby declare under penalty of perjury that I have read the Protective Order that has been entered by the Common Carrier Bureau in this proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Common Carrier Bureau. I acknowledge that this Protective Order is also a binding agreement with the Submitting Party.

(signed) _____
(printed name) _____
(representing) _____
(title) _____
(employer) _____
(address) _____
(phone) _____
(date) _____