EXHIBIT D

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of		
	)	FCC 18-154
Warren Havens	)	FOIA Control No. 2014-664
Freedom of Information Act Request	)	

To: Office of the Secretary
Attn: Office of General Counsel
Via email to: FOIA-Appeal@fcc.gov
Email Cc to: Mr. David Senzel at OGC: David.Senzel@fcc.gov
Paper copy concurrently submitted by US mail to the Secretary

Errata Copy[*]
Regarding Freedom of Information Action

Protective Petition for Reconsideration
of MO&O, FCC 18-154, Regarding FOIA Control No. 2014-664

Warren Havens ("Petitioner" or "I") hereby timely files this petition for reconsideration, on the "protective" basis noted below (the "Recon") of the Commission's Memorandum Opinion and Order, FCC 18-154, dated October 31, 2018, responding to an application for review of FOIA Control Nos. 2014-664 (the "MO&O") filed by Havens (the "AppRev"). This Recon is by and filed by Havens concerning his Freedom of Information Request that the Commission designated with FOIA Control No. 2014-664 (the "Request").

Part 1

This is filed on the following "protective" basis. Petitioner understands that the time for submitting a petition for reconsideration regarding *any* aspect of the AppRev should be, or is permitted to be, after the *completion* of the further proceedings, or actions to complete, that Commission decided to cause in the MO&O, that is, after the FCC has completed action on the AppRev- both the aspects granted in the MO&O and subject to completion -- disclosure-delivery

[*] Errata copy: Additions in text boxes; deletions in strikeout; some case citations added for clarity; declaration moved up to preceding page; and if needed, a request to accept is added.

of formerly withheld records described in the AppRev (see par. 10: "Accordingly, we direct the Bureau to disclose Exhibits 38, 60, and 91 to Havens")[1] -- and aspects denied in the AppRev . However, since this is not entirely clear, this Recon is filed at this time to protect against an interpretation by the Commission contrary to this understanding, such that Petitioner has submitted at least a partial petition for Commission action, while reserving the right to file a petition for reconsideration later based on this understanding. This understanding is based on the following Commission decision subject to the following DC Circuit Court decision:

The Commission explains in *Quest v Farmers, Order on Reconsideration*, FCC 08-29 (emphasis in original on the word "***all***"; underlining added here):

> 6. We grant the Petition for Reconsideration in part by initiating additional proceedings that will allow us to rule on the merits of Qwest's arguments concerning the newly-identified evidence. 25/ We take no view at this time as to whether that evidence ultimately will persuade us to change our decision on the merits, but we believe that it is important to consider ***all*** the facts underlying this case. Accordingly, we therefore grant the Motion for Leave and Motion to Compel,26/ and direct Farmers to produce in this proceeding all documents that it submitted in discovery in the IUB Proceeding.
>
> [fn] 25/ If the Commission grants a petition for reconsideration in whole or in part, it need not rule on the merits immediately, but may "[o]rder such other proceedings as may be necessary or appropriate." 47 C.F.R. § 1.106(k)(iii). If the Commission does initiate further proceedings, "a ruling on the merits of the matter will be deferred pending completion of such proceedings. Following completion of such further proceedings, the Commission . . . may affirm, reverse, or modify its original order . . ." 47 C.F.R § 1.106(k)(2).
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> [fn] 26 / We disagree with Farmers' contention that Qwest's Motion to Compel is untimely. Consolidated Opposition at 8. As discussed in this Order, it appears possible that Farmers did not produce relevant evidence in response to discovery requests in this proceeding. Accordingly, we now initiate additional proceedings pursuant to section 1.106(k)(ii) of the Commission's rules to ensure the record here is complete.

[1] This disclosure has not taken place yet, and once it has, I may review records disclosed and actually delivered against the subject FOIA requests to determine if I believe the records provided are responsive, delivered in full and complete authentic documents, indicated other responsive records not included, etc. and whether the untimely disclosure (years late) is good cause for adjustment in FOIA fees charged. These are steps in the process of completion of the AppRev and the MO&O deciding on the AppRev.

On this subject, the DC Circuit Court explains in *Farmers & Merchants Mut. Tel. Co. v. FCC,* 668 F.3d 714 (2011) (underling added):

> The Commission granted in part Qwest's petition for partial reconsideration..... In its order, the Commission initiated additional proceedings to compel production of and to consider previously undisclosed evidence. Qwest's Second Supplement to Petition for Reconsideration was submitted as part of the additional proceedings, and was not, the Commission maintains, a separate petition for reconsideration of an order, decision, report, or action taken by the Commission. The Commission's interpretation of section 405 and its rule, see 47 C.F.R. § 1.106, as allowing it to defer a ruling on the merits pending completion of the additional proceedings appears reasonable and entitled to deference,

In this regard, see footnote 1 above. After the completion of those matters, the App Rev~~iew~~ and MO&O decision on it will be ripe for any petition for reconsideration on any aspect of the MO&O, under the above-explained Petitioner ~~understating~~ understanding. But for the protective purposes noted above, Petitioner submits the following.

Part 2

Subject to Part 1 above, Petitioner submits the following, reserving all rights presented in Part 1 above: The MO&O is in error and the errors should be corrected, as follows:

1. Generally, the MO&O did not address some of the substantive presentations of facts and law in the AppReview (shown by a review of the two), and not doing so is error that should be corrected under requirements of the Administrative Procedures Act and Due Process calling for written reasoned decisions on a disputed case before the agency.[2] The MO&O did not address and show why the withheld documents can be deemed subject to right of Maritime requiring withholding, where the AppReview showed facts and law otherwise:

Specifically:

[2] U.S. CONST. amend. V. And see *Kerry v. Din,* 576 U.S. ___ (2015); *Hamdi v. Rumsfeld,* 542 U. S. 507, 533 (2004) (plurality opinion); *Dexter v. Colvin*, 731 F.3d 977; Friendly, "Some Kind of a Hearing," 123 U. Pa. L. Rev. 1267, 1278–1281 (1975).

2. In par. 10, the MO&O states: "Havens provides no evidence to the contrary," but is it is vague what that means to apply to, since Havens did provide evidence in the AppRew contrary to withholding claims and facts of Maritime. (See "Due Process" above.)

3. The MO&O includes (underlining and text in brackets added) (footnotes in original deleted):

> 12. We further find that the record before us does not establish that other withheld material has [1] lost its confidential status [2] because Maritime has terminated operation at its site-based Automated Maritime Telecommunications system facilities. We agree with Maritime that information about completed or even unexecuted or abandoned activities may still contain competitively sensitive information concerning business operations and strategies.[28] Maritime states that Exhibits 45 and 46 are agreements between Maritime and Evergreen School District involving incumbent facilities still at issue in the Maritime proceeding.[29] Likewise, according to Maritime, Exhibits 51, 52, and 53 are agreements between Maritime and Pinnacle Wireless, Inc. involving incumbent facilities still at issue in the Maritime proceeding and also involving a geographic authorization.[30] Given the [3] status of these facilities, we find that financial and business information about them remains confidential, especially considering that the information concerns entities other than Maritime.

Addressing the bracketed items: [1] Maritime did *not* show *nor* did the MO&O that Maritime ever had any [2] operations it chose to terminate ("Maritime has terminated operation...") for the vast majority of the subject site-based AMTS licenses (and not for any of them on a timely basis). Rather, Petitioner asserted that the official record in the Maritime proceeding is clear that Maritime shows no evidence that these licenses had any "facilities" that were constructed at all, and its years-late admission of "permanent" "abandonment" of them (that caused "automatic termination" of them) is clearly not any evidence or assertion of the existence of any constructed licenses and facilities. [3] The [3] status is clear in the records of the proceeding, indicated herein, and this leads to lack of a basis to withhold the withheld records.

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[3] These licenses or stations records were found by Havens and the "Havens companies" in the Maritime Proceeding, in the range of 90 boxes, and scanned and made available to ALJ Sippel and the Enforcement Bureau-- the core evidence in the proceeding (that ended up being only on Issue G in the HDO, FCC 11-64) -- but the ALJ and the EB would not take action to obtain and

4. The MO&O includes (underlining and text in brackets added) (footnotes in original deleted):

> 14. Finally, we reject Havens's contention that we should grant his request because he needs the withheld material for use as a party to the Maritime proceeding. Havens [1] is not, in fact, a party to the proceeding, having been expelled from the proceeding by the Presiding Judge.[33] Moreover, as Maritime points out, when he was a party, Havens had [2] recourse through the Protective Order for his counsel to access the confidential information he has sought through his FOIA request. In any event, under the FOIA, a requester's intention to use information in litigation is irrelevant to whether a FOIA request should be granted.[34] [3]

Addressing the bracketed items: [1] A person or entity has legal standing to be active in FCC adjudications if they are a "~~party~~ person aggrieved" even if they are not active in all phases, and that applies to Havens as to this Maritime proceeding. Actual injury, i.e., of a "~~party~~ person aggrieved" (as meant in 47 USC ~~492~~ 402(b) (10) suffices for the purpose of establishing party standing, including because financial injury is cognizable under the Act, see *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940). See also 1.225(b). [2] FCC rules of formal hearings provide that a party in a formal hearing is to use FOIA requests to seek Commission records for the hearing. That is a rule: § 1.325(b) (also see 1.225(b)): A protective order cannot trump a rule or make it disabled. Havens properly used FOIA requests for this Maritime proceeding following the applicable rule. In addition, a pro se person can be in a hearing proceeding, as Havens was, and cannot equitably be barred from access ~~in~~ under a protective order as was the case here. That clearly violates required due process.[4]

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review this core evidence. This has been documented in the proceeding, docket 11-71, with related positions of Maritime that it has allowed these records to be destroyed, which was a false statement under perjury, as also shown in the proceeding. The proceeding gives no explanation as to why the ALJ and the EB acted in this way, avoiding the key evidence of decisional importance. This was duty abdications and ~~A~~ also caused extensive delays and prejudice.

[4] See *Whitserve v Computer*, Ruling on Protective Orders, USDC CT, Civ No. 3:04-cv-01897 (2006) (copy attached below, and copy at: https://ecf.ctd.uscourts.gov/cgi-bin/show_public_doc?2004cv1897-189), citing: *WhitServe LLC v. Computer*, Civ No. 3:04-cv-

Respectfully,

/s/
Warren Havens, Requestor / Petitioner

Declaration

I, Warren C. Havens, hereby declare, under penalty of perjury, that the foregoing filing was prepared pursuant to my direction and control and that all the factual statements and representations contained herein are true and correct to the best of my knowledge.

/s/

_____
Warren Havens, Requestor
Date: November 30, 2018

Errata Copy Request to Accept

I request acceptance, if needed, of this Errata copy with error corrections and some case citations added: (i) for a more full and complete record in the public interest, as to the FCC proceeding involved and as to the public policy purposes of FOIA, and (ii) because the due date of Friday November 30, 2018 was complied with by the initially filed copy, and this Errata copy is filed and will be served for arrival at the Commission and to the served parties at the same time as the initially filed copy, because the initially filed copy was completed and filed, and placed with the US Postal Service, after the close of business on Friday November 30, 2018, which will thus be postmarked and go out of my local post office on the same day as this Errata copy, Saturday December 1, 2018.

/s/

_____
Warren Havens, Requestor
Date: December 1, 2018

01897, 2005 U.S. Dist. LEXIS 38408, at *4-8 (2005); 28 U.S.C. § 1654; *O'Reilly v. New York Times Co.,* 692 F.2d 863 (2d Cir. 1982); *Iannaccone v. Law*, 142 F.3d 553 (2d Cir. 1998).

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

WHITSERVE LLC,
- Plaintiff

v. **CIVIL NO. 3:04-cv-01897 (CFD)**

COMPUTER PATENT ANNUITIES NORTH AMERICA, LLC, ET AL,
- Defendants

RULING ON CROSS-MOTIONS FOR PROTECTIVE ORDERS

On December 20, 2005 Defendants-Counterclaimants and Third Party Plaintiffs Computer Patent Annuities North America, LLC and Computer Patent Annuities LP (collectively "CPA") moved for the issuance of a Protective Order to govern discovery in this case [Dkt. #62]. On November 7, 2005 Plaintiff, Counterclaimant and Third-Party Defendants WhitServe LLC, St. Onge Steward Johnston & Reens LLC ("St. Onge") and Wesley W. Whitmyer ("Whitmyer") (collectively "WhitServe" or "the WhitServe parties") moved for the issuance of their own version of a protective order [Dkt. #73]. The competing proposed protective orders were then taken under advisement by the court. On December 22, 2006 the court denied CPA's Motion to Disqualify Whitmyer from representing himself *pro se*. One of the major points of contention in the parties' original

proposed protective orders revolved around whether Mr. Whitmyer would be permitted to see documents labeled "attorney's eyes only." CPA alleged that Mr. Whitmyer was a direct competitor and that it would be destructive to their business to allow him access to highly confidential information. With this dispute in mind the court determined that the best procedure would be to allow the parties to reformulate their proposed protective orders with knowledge that Mr. Whitmyer would be permitted to represent himself. It was the court's hope that the parties would come back with a stipulated agreement that would both allow Mr. Whitmyer sufficient access to discovery and protect CPA's confidential information. But the parties have since resubmitted proposed protective orders [Dkts. #175, 181] and, unfortunately, appear to have remained steadfast to their original positions. With the exceptions and modifications outlined below WhitServe's revised proposed protective order **[Dkt. #181]** is **ACCEPTED, ADOPTED and SO ORDERED.**

I. Discussion

A review of the proposed protective orders and the supporting submissions reveals three major points of contention: 1) whether Wesley Whitmyer will be permitted access to "Highly Confidential/Attorney's Eyes Only" material; 2) whether CPA's British counsel, Marks & Clerk, should be given access to discovery materials; and 3) the procedures used to designate materials either

"Confidential" or "Highly Confidential."

A. Whitmyer's Access to Attorney's Eyes Only Material

A court may issue a protective order only after the moving party demonstrates good cause. Fed. R. Civ. P. 26(c); In re Agent Orange Prod. Liab. Litig., 821 F.2d 139, 145 (2d Cir. 1987). To establish good cause under Rule 26(c), courts require a "particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." Havens v. Metro. Life Ins. Co. (In re Akron Beacon Journal), No. 94 Civ. 1402, 1995 U.S. Dist. LEXIS 5183, at *10 (S.D.N.Y. April 20, 1995)(quoting Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986)). The trial court is given broad discretion regarding whether to issue a protective order. Dove v. Atl. Capital Corp., 963 F.2d 15, 19 (2d Cir. 1992)(grant and nature of protection is singularly within the district court's discretion) However, the district court should balance "the hardship to the party against whom discovery is sought against the probative value of the information to the other party." 6 Moore's Federal Practice § 26.101 (Matthew Bender 3d. ed.); See also Brown v. City of Oneonta, 160 F.R.D. 18, 20-21 (N.D.N.Y. 1995).

After a careful comparison of the hardships in this case the court concludes that Mr. Whitmyer should be granted access to all discovery materials. Arguably this is a close call, which is why

the court had hoped the parties would come to some sort of amicable resolution. However, being now confronted with a second set of opposing protective orders the court concludes that WhitServe's proposed order provides a fair and adequate balance of the competing interests.

CPA has made strong allegations claiming that Whitmyer is a direct competitor and a developer of computer systems similar to that which CPA also develops. Thus there is a danger that Whitmyer himself may use the information for a competitive advantage. Further, Mr. Whitmyer is an attorney for St. Onge and the sole shareholder in WhitServe. As such there is a further risk that Mr. Whitmyer will either intentionally or unintentionally disseminate protected information to individuals not covered by the protective order. These hardships must be weighed against the potential probative value of the materials to Mr. Whitmyer.

The court finds that the probative value of the discovery materials outweighs the hardships to CPA. Because Mr. Whitmyer has been named as an individual party in this litigation, and because he has chosen to represent himself, he must be granted access to the materials necessary to defend himself. Were he not permitted access to all information, Whitmyer would be put at a disadvantage *vis a vis* all other litigants in this action. The scale is further tipped in Whitmyer's favor because he has been brought individually into this case by virtue of CPA's own actions. CPA chose to assert

counterclaims against Whitmyer and St. Onge. As such, CPA must now accept the consequences of their decision.

CPA has supplied the court with one case that supports their proposal. Schlafly v. Public Key Partners, No. C-94 20512 SW (PVT), slip op. (N.D. Cal. July, 18 1995). That case and this one have similarities. In Schlafly the court found that the *pro se* plaintiff was a direct competitor to the defendant who was moving for a protective order. Id. at 3-4. Public Key Partners, the defendant, sought to prohibit the *pro se* plaintiff from accessing discovery materials designated "attorney's eyes only." Id. The defendant proposed a protective order that gave the plaintiff the right to retain an "independent expert consultant" to view "attorney's eyes only" material and advise the plaintiff accordingly. Id. at 2. The court granted the defendant's motion and advised plaintiff to "seek legal counsel or an independent expert consultant as provided in the Protective Order." Id. at 4.

Schlafly is distinguishable from the current case in at least one major respect. In that case, the defendant could not have avoided litigating against a direct competitor who was also *a pro se* party. In this case CPA did have such a choice and chose to assert claims against Mr. Whitmyer as an individual. Moreover, in the court's view there is an even more compelling reason not to follow the Schlafly ruling. The decision in Schlafly ignores the well-settled law granting all civil litigants the unequivocal right

of self-representation outlined by this court in its previous ruling. WhitServe LLC v. Computer Patents Annuities N. Am. LLC, NO. 3:04-cv-01897 (CFD), 2005 U.S. Dist. LEXIS 38408, at *4-8 (D. Conn. Dec., 22 2005); See Also 28 U.S.C. § 1654; O'Reilly v. New York Times Co., 692 F.2d 863 (2d Cir. 1982); Iannaccone v. Law, 142 F.3d 553 (2d Cir. 1998). In "suggesting" that the *pro se* plaintiff obtain counsel or an independent expert, the court essentially ruled that the plaintiff no longer had the right to full self-representation. At the very least, the court insinuated that if the plaintiff continued to assert his statutory right to self-representation he would be doing so severely hampered by a lack of information. Granting a party the right to represent himself while refusing him access to the tools necessary to accomplish that representation renders the right meaningless. This court is unwilling to similarly hamstring Whitmyer. Therefore, Mr. Whitmyer will be given access to all discovery materials including those designated "attorney's eyes only."

B. Marks & Clerk's Access to Discovery Material

CPA's protective order would allow the law firm of Marks & Clerk Solicitors access to all discovery materials. CPA represents that Marks & Clerk are "British attorneys to CPA LP." WhitServe's protective order would not allow Marks & Clerk access to any documents covered under the protective order. They argue that Marks & Clerk should not have access to confidential-protected

information because they are not the attorneys of record and are not subject to the personal jurisdiction of this court.

WhitServe's argument is well taken. There is no reason why Marks & Clerk should be granted access to protected information when CPA is already adequately represented by two American law firms. Therefore, under the present circumstances, Marks & Clerk will be prohibited from accessing material covered under the protective order. However, if Marks & Clerk files an appearance, it will be permitted the same access to protected information as Day, Berry and Howard LLP and Shiff Hardin LLP.

C. Designation of Material

Both proposed protective orders call for a two tier scheme under which materials will either be categorized as "confidential/protected" or "highly confidential/attorney's eyes only." The only truly substantive difference between the two proposed orders is that WhitServe's refers to "Schedule A" which pre-delineates specific classes of documents as falling within either protected category level. CPA argues that such a list adds an unnecessary layer of possible contention which will only lead to further disputes. The court agrees. WhitServe's "Schedule A" is excluded from the protective order. Each party will exercise good faith when labeling documents in accordance with the protective order.

II. Conclusion

Based on the reasons stated herein, WhitServe's Proposed Protective Order [Dkt. #181], as modified in accordance with this ruling, is **ACCEPTED ADOPTED and SO ORDERED.** The protective order is now binding on the parties. The parties shall file within thirty days a joint stipulated protective order in accordance with this ruling. This is not a recommended ruling. This is a non-dispositive ruling and order reviewable pursuant to the "clearly erroneous" standard of review. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 6(a), (e) and 72(a); and Rule 2 of the Local Rules for U.S. Magistrate Judges. As such, it is an order of the court. See 28 U.S.C. § 636(b)(written objections to ruling must be filed within ten days after service of same).

IT IS SO ORDERED.

Dated at Hartford, Connecticut this 21st day of April, 2006.

/s/ Thomas P. Smith
Thomas P. Smith
United States Magistrate Judge

Certificate of Service

I, Warren C. Havens, certify that I have, on this 30th day of November 2018, caused to be served, by placing into the USPS mail system with first-class postage affixed, unless otherwise noted, a copy of the foregoing filing, to the following:[5]

Robert J. Keller
Law Offices of Robert J. Keller, P.C.
P.O. Box 33428 - Farragut Station
Washington, D.C. 20033-3428
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Wilkinson Barker Knauer, LLP
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Counsel for Choctaw

/s/
_____
Warren Havens

This Errata Copy is served as above, on December 1, 2018.

/s/
_____
Warren Havens

[5] The mailed copy being placed into a USPS drop-box today may not be processed by the USPS until the next business day.