

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

RECEIVED

NOV 25 1998

In the Matter of)
)
GTE CORPORATION,)
Transferor)
)
and)
)
BELL ATLANTIC CORPORATION,)
Transferee)
)
For Consent to Transfer of Control.)

CC Docket No. 98-184
FCC MAIL ROOM

ORDER ADOPTING PROTECTIVE ORDER

Adopted: November 19, 1998

Released: November 19, 1998

By the Acting Deputy Chief, Common Carrier Bureau:

1. On October 2, 1998, Bell Atlantic Corporation (Bell Atlantic) and GTE Corporation (GTE) (together, Applicants) applied under Sections 214 and 310(d) of the Communications Act, 47 U.S.C. §§ 214 and 310(d), for Commission approval of the transfer of control to Bell Atlantic of licenses and authorizations controlled or requested by GTE or its affiliates or subsidiaries.¹ Responding to the Commission staff's pre-filing request, Bell Atlantic and GTE also submitted a proposed protective order that would allow third parties to review confidential or proprietary documents that Bell Atlantic or GTE may submit in support of their application.² Bell Atlantic and GTE subsequently filed a revised proposed protective order with the Common Carrier Bureau (Bureau) on October 7, 1998.³ The following day,

¹ See *In the Matter of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer of Control*, CC Docket No. 98-184, Application for Transfer of Control (filed October 2, 1998).

² *Id.* at Exhibit F.

³ Letter from G.R. Evans, Vice President, Federal Regulatory Affairs, Bell Atlantic, to Magalie Roman Salas, Secretary, FCC (October 7, 1998).

the Bureau issued a public notice requesting comments on a proposed protective order by October 15, 1998, and reply comments by October 22, 1998.⁴

2. Having reviewed the filings received during this comment period, the Bureau hereby enters the attached protective order (Exhibit A) to ensure that any confidential or proprietary documents submitted by Bell Atlantic and GTE are afforded adequate protection. The protective order adopted herein applies to any confidential documents filed with the Commission by Bell Atlantic or GTE in this proceeding. This Order does not 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 (FOIA) or otherwise.

3. Three parties to the proceeding, AT&T, GST Telecom Inc. (GST) and United States Cellular Corporation (USCC), filed comments regarding the Bureau's proposed protective order. AT&T does not object to the proposed protective order.⁵ GST objects to the provision in paragraph 3 of the proposed protective order that restricts access by in-house counsel to only those in-house counsel who "are not involved in competitive decision-making, *i.e.*, counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's business decisions made in light of similar or corresponding information about a competitor."⁶ GST asserts that this "competitive decision-making" limitation is too restrictive and could have the effect of restricting review by smaller competitive carriers whose in-house counsel may perform a variety of disparate functions.⁷ According to GST, the restriction leaves these smaller carriers in a position of relying on expensive outside counsel to handle the entire proceeding, or, at minimum, to rewrite drafts prepared by in-house counsel without access to the confidential information.⁸ GST also maintains that the phrase "made in light of similar or corresponding information about a competitor" is vague.⁹ For these reasons, GST requests that the Bureau

⁴ *GTE Corporation and Bell Atlantic Corporation Seek FCC Consent for a Proposed Transfer of Control and Commission Seeks Comment on Proposed Protective Order Filed by GTE and Bell Atlantic*, CC Docket No. 98-184, Public Notice, DA 98-2035 (rel. Oct. 8, 1998).

⁵ AT&T Comments at 1.

⁶ GST Comments at 2.

⁷ *See id.* at 2-4.

⁸ *Id.* at 4.

⁹ *Id.* at 3. For example, GST queries how a potential in-house counsel recipient will know whether he or she has any involvement in matters in which "similar or corresponding information" is utilized to make decisions

delete the competitive decision-making limitation. USCC, which holds minority partnership interests in certain of the wireless licensees involved in the proposed transfer of control, asks the Bureau to revise the proposed protective order to allow use of the confidential information acquired under the protective order in any proceeding to enforce contractual rights that may arise as a consequence of the merger of Bell Atlantic and GTE.¹⁰

4. Two parties to the proceeding filed reply comments. The Iroquois School District, located in Erie, Pennsylvania, did not express any views on the proposed protective order in their comments.¹¹ The Applicants reply that neither GST nor USCC offer a sound basis for their proposals to eliminate provisions from the proposed protective order.¹² The Applicants note that the competitive decision-making standard to which GST objects was included in the protective orders issued for the MCI/WorldCom merger and the SBC/Ameritech proposed merger, and is consistent with the standard adopted by federal courts.¹³ With regard to the use of confidential information, Applicants argue that USCC's use of the confidential information in any other state or federal court proceeding would violate the Commission's discovery rules contained in 47 C.F.R. §§ 1.731(b), (c).¹⁴

5. As we noted in the MCI/WorldCom proceeding, "the decision of what type of access to permit for reviewing confidential material is a balancing judgment, and there are costs on both sides of the equation."¹⁵ We recognize the concerns raised by GST that some in-house counsel of smaller competitive carriers may perform a variety of disparate functions that would preclude their review of confidential information under the proposed competitive decision-making standard for in-house counsel access to confidential information. However, we must weigh the parties' intended use of in-house counsel against the significant potential

without first seeing the pertinent information.

¹⁰ USCC Comments at 2-3.

¹¹ To the extent that the Iroquois School District comments express views regarding the merits of the transfer of control, they will be considered as substantive comments addressing the transfer applications.

¹² Applicants' Reply Comments at 1.

¹³ *Id.* at 2-3 (citing *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984); *Brown Bag Software v. Symatec Corp.*, 960 F.2d 1465, 1470 (9th Cir.), *cert. denied* 506 U.S. 869 (1992)).

¹⁴ *Id.* at 3.

¹⁵ *In the Matter of Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Order Adopting Protective Order, DA 98-1072 (rel. June 5, 1998) (*MCI/WorldCom Order Adopting Protective Order*), at para. 6 (quotation omitted).

competitive harm to Bell Atlantic and GTE that would arise from disclosure of their highly valuable and confidential business information to persons involved in the competitive decision-making process of their rivals. As occurred in the MCI/WorldCom proceeding, we expect that commenters in this proceeding may seek access to highly sensitive documents containing proprietary information, such as future business plans, customer names, usage patterns, locations, and traffic volumes.¹⁶ We find that the competitive decision-making limitation properly balances Bell Atlantic and GTE's interests in protecting this sensitive business information from competitors with the interests of the public in accessing this information. Bell Atlantic and GTE correctly observe that this competitive decision-making standard has been adopted by federal courts in determining whether to permit in-house counsel access to confidential information,¹⁷ and is the same standard adopted by the Bureau in the WorldCom/MCI and SBC/Ameritech Protective Orders after evaluating arguments similar to those presented here.¹⁸ We conclude that the sensitive nature of the confidential business information at issue precludes our granting of GST's request to remove the competitive decision-making limitation for in-house counsel access to confidential information.¹⁹

6. We also decline USCC's request for the Bureau to specify that confidential information obtained in this merger review proceeding may be used in contractual proceedings between private parties. As a general matter, the Bureau allows information subject to a protective order to be used only in the proceeding in which it was submitted.²⁰ In fulfilling its regulatory responsibilities, the Bureau is careful to avoid unnecessary disclosure of competitively sensitive materials.²¹ USCC has not provided a compelling reason why the Bureau should depart from this longstanding Commission practice in the instant proceeding. Accordingly, we hold that parties may use confidential information obtained under this

¹⁶ See *id.* at para. 5.

¹⁷ See *supra*, note 12.

¹⁸ See *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corp., Transferor, to SBC Communications, Inc., Transferee*, CC Docket No. 98-141, Order Adopting Protective Order, DA 98-1952 (rel. Sept. 28, 1998), at Exhibit A, para. 3; *MCI/WorldCom Order Adopting Protective Order* at Exhibit A, para. 3.

¹⁹ Moreover, we note that GST is not without the benefit of outside counsel, as reflected by its use of outside counsel in the submission of its comments on the proposed protective order.

²⁰ *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, GC Docket No. 96-55, Report and Order, FCC 98-184 (rel. Aug. 4, 1998), at para. 31.

²¹ See *id.* at para. 8.

protective order solely for the preparation and conduct of this proceeding before the Commission, any subsequent judicial proceeding arising directly from this proceeding, and in connection with communications and submissions to the Department of Justice as they pertain to that agency's review of the antitrust aspects of the proposed merger of Bell Atlantic and GTE. Parties may not use such confidential information for any other purpose, including business, governmental, commercial, or other administrative, regulatory or judicial proceedings.

7. Accordingly, after considering the arguments made by GST and USCC, we reject their claims and adopt the protective order that was proposed in the October 8, 1998 public notice without any substantive change.

8. Bell Atlantic shall make available for review the documents subject to this protective order at the offices of Bell Atlantic, 1300 I Street NW, Suite 400 West, Washington, D.C. 20006 (Don Evans, contact). GTE shall make available for review the documents subject to this protective order at the offices of GTE, 1850 M Street NW, Suite 1200, Washington, D.C. 20036 (Alan Ciamporcero, contact). Parties reviewing these documents will be provided the following alternatives: 1) parties will be provided adequate opportunity to inspect the documents on site; 2) parties may inspect the documents on site with the ability to request copies, at cost, of all or some of the documents, other than those marked as "Copying Prohibited;" or 3) parties may request a complete set, at cost, of copies of the documents, other than those marked as "Copying Prohibited," allowing two days after the request is made for receipt of the copies. If a complete set of documents will be requested, parties are encouraged to make such request at the time they submit the Acknowledgment of Confidentiality. This will allow parties the opportunity to begin reviewing the documents at the end of the five-day period referenced in paragraph 5 of the protective order. All copies of documents that are removed from the Bell Atlantic or GTE offices will bear an original confidential stamp and must be returned in accordance with the terms of the protective order.

9. Any party seeking access to confidential documents subject to this protective order shall request access pursuant to paragraph 5 of the protective order.

FEDERAL COMMUNICATIONS COMMISSION



Lisa M. Zaina
Acting Deputy Chief, Common Carrier Bureau

EXHIBIT A**PROTECTIVE ORDER**

1. On October 2, 1998, Bell Atlantic Corporation (Bell Atlantic) and GTE Corporation (GTE) filed joint applications with the Federal Communications Commission (the Commission) pursuant to Sections 214 and 310 of the Communications Act to transfer control of GTE's FCC authorizations to Bell Atlantic. The Commission anticipates that it may seek documents in this proceeding from Bell Atlantic and GTE (individually or collectively, the Submitting Party) that contain proprietary or confidential information, and, therefore, should be made available pursuant to a protective order. Consequently, the Bureau enters this Protective Order to ensure that the documents considered by the Submitting Party to be confidential and proprietary are afforded protection. This Order does not 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 (FOIA) or otherwise.

2. *Non-Disclosure of Stamped Confidential Documents.* Except with the prior written consent of the Submitting Party, or as hereinafter provided under this Order, neither a Stamped Confidential Document nor the contents thereof may be disclosed by a reviewing party to any person. A "Stamped Confidential Document" shall mean any document that bears the legend (or which otherwise shall have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) "CONFIDENTIAL INFORMATION - SUBJECT TO PROTECTIVE ORDER IN CC Docket No. 98-184 before the Federal Communications Commission" to signify that it contains information that the Submitting Party believes should be subject to protection under FOIA and the Commission's implementing rules unless the Commission determines, *sua sponte* or by petition, pursuant to sections 0.459 or 0.461 of its rules that any such document is not entitled to confidential treatment. For purposes of this order, the term "document" means all written, recorded, electronically stored, or graphic material, whether produced or created by a party or another person.

3. *Permissible Disclosure.* Subject to the requirements of paragraph 5, Stamped Confidential Documents may be reviewed by outside counsel of record and in-house counsel who are actively engaged in the conduct of this proceeding, provided that those in-house counsel seeking access are not involved in competitive decision-making, *i.e.*, counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's business decisions made in light of similar or corresponding information about a competitor. Subject to the requirements of paragraph 5 and subject to the obligation to secure the confidentiality of Stamped Confidential Documents in accordance with the terms of this order, such counsel may disclose Stamped Confidential Documents to: (i) the partners, associates, secretaries, paralegal assistants, and employees of such counsel to the extent reasonably necessary to render professional services in this proceeding; ii) Commission officials involved in this proceeding; (iii) outside consultants or

experts retained for the purpose of assisting counsel in these proceedings and who are not involved in the analysis underlying the business decisions and who do not participate directly in the business decisions of any competitor of any Submitting Party; (iv) employees of such counsel involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving data or designing programs for handling data connected with this proceeding; and (v) employees of third-party contractors performing one or more of these functions. The Submitting Party shall make available for review the Stamped Confidential Documents at the offices of Bell Atlantic, 1300 I Street, NW, Suite 400 West, Washington, DC 20006 (Don Evans, contact) and at the offices of GTE, 1850 M Street NW, Suite 1200, Washington, DC 20036 (Alan Ciamporcero, contact).

4. *Access to Confidential Documents.* Counsel described in paragraph 3 shall have the obligation to ensure that access to Stamped Confidential Documents is strictly limited as prescribed in this order. Such counsel shall further have the obligation to ensure (i) that Stamped Confidential Documents are used only as provided in this order; and (ii) that Stamped Confidential Documents are not duplicated except as necessary for filing at the Commission under seal as provided in paragraph 7.

5. *Procedures for Obtaining Access to Confidential Documents.* In all cases where access to Stamped Confidential Documents is permitted pursuant to paragraph 3, and before reviewing or having access to any Stamped Confidential Documents, each person seeking such access shall execute the Acknowledgment of Confidentiality to the Commission and to each Submitting Party so that it is received by each Submitting Party five business days prior to such person's reviewing or having access to any such Stamped Confidential Documents. Each Submitting Party shall have an opportunity to object to the disclosure of Stamped Confidential Documents to any such persons. Any objection must be filed at the Commission and served on counsel representing, retaining or employing such person within three business days after receiving a copy of that person's Acknowledgment of Confidentiality. Until any such objection is resolved by the Commission and any court of competent jurisdiction prior to any disclosure, and unless that objection is resolved in favor of the person seeking access, persons subject to an objection from a Submitting Party shall not have access to Stamped Confidential Documents.

6. *Requests for Additional Disclosure.* If any person requests disclosure of Stamped Confidential Documents outside the terms of this protective order, such requests will be treated in accordance with sections 0.442 and 0.461 of the Commission's rules.

7. *Use of Confidential Information.* Counsel described in paragraph 3 may, in any documents that they file in this proceeding, reference information found in Stamped Confidential Documents or derived therefrom (hereinafter, "Confidential Information"), but only if they comply with the following procedure:

- a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings;
- b. The portions of pleadings containing or disclosing Confidential Information must be covered by a separate letter to the Secretary of the Commission referencing this Protective Order;
- c. Each page 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 No. 98-184;" and
- d. The confidential portion(s) of the pleading shall be served upon the Secretary of the Commission and each Submitting Party. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File. A 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. Parties may provide courtesy copies under seal of pleadings containing Confidential Information to Commission staff.

8. *No Waiver of Confidentiality.* Disclosure of Confidential Information as provided herein by any person shall not be deemed a waiver by any Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. 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 by a Submitting Party shall not be deemed a waiver of any privilege or entitlement as long as the Submitting Party takes prompt remedial action.

9. *Subpoena by Courts or Other Agencies.* If a court or another administrative agency subpoenas or orders production of Stamped Confidential Documents or Confidential Information that a party has obtained under terms of this order, such party shall promptly notify each Submitting Party of the pendency of such subpoena or order. Consistent with the independent authority of any court or administrative agency, such notification must be accomplished such that the Submitting Party has a full opportunity to oppose such production prior to the production or disclosure of any Stamped Confidential Document or Confidential Information.

10. *Client Consultation.* Nothing in this order shall prevent or otherwise restrict counsel from rendering advice to their clients relating to the conduct of this proceeding and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying

generally on examination of Stamped Confidential Documents; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not disclose Stamped Confidential Documents or Confidential Information.

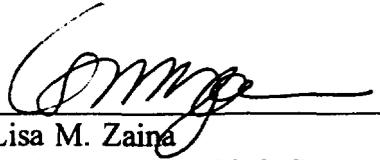
11. *Violations of Protective Order.* Persons obtaining access to Stamped Confidential Documents or Confidential Information under this order shall use the information solely for the preparation and conduct of this proceeding as delimited in paragraphs 4, 7, and 10, and any subsequent judicial proceeding arising directly from this proceeding and, except as provided herein, shall not use such information for any other purpose, including business, governmental, commercial, or other administrative, regulatory or judicial proceedings. Parties will be permitted to use these materials in connection with communications and submissions to the Department of Justice as they pertain to that agency's review of the antitrust aspects of the proposed merger of Bell Atlantic and GTE. Should a party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, that party shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order.

12. *Prohibited Copying.* If, in the judgment of the Submitting Party, a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited," and no copies of such document, in any form, shall be made. Application for relief from this restriction against copying may be made to the Commission, with notice to counsel for the Submitting Party.

13. *Termination of Proceeding.* The provisions of this order shall not terminate at the conclusion of this proceeding. Within two weeks after conclusion of this proceeding (which includes any administrative or judicial review), Stamped Confidential Documents and all copies of same shall be returned to the Submitting Party. No material whatsoever derived from Stamped Confidential Documents may be retained by any person having access thereto, except counsel to a party in this proceeding (as described in paragraph 3) may retain, under the continuing strictures of this order, two copies of pleadings containing confidential information prepared on behalf of that party. All counsel of record shall make certification of compliance herewith and shall deliver the same to counsel for the Submitting Party not more than three weeks after conclusion of this proceeding.

14. *Authority.* This Order is issued pursuant to Section 4(i), 214(a), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 214(a), and 310(d), Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under Section 0.261 of the Commission's rules, 47 C.F.R. § 0.261, and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read 'L. Zaina', written over a horizontal line.

Lisa M. Zaina
Acting Deputy Chief, Common Carrier Bureau

Appendix A

ACKNOWLEDGEMENT OF CONFIDENTIALITY

I hereby acknowledge that I have received and read a copy of the foregoing Protective Order in the above-captioned proceeding and I understand it. I agree that I am bound by this Order and that I shall not disclose or use documents or information designated as "CONFIDENTIAL INFORMATION" or any information gained therefrom except as allowed by the Order. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission.

Without limiting the foregoing, to the extent that I have any employment, affiliation or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or public interest organization), I acknowledge specifically that my access to any information obtained as a result of the order is due solely to my capacity as counsel to a party or other person described in paragraph 3 of the foregoing Protective Order and that I will not use such information in any other capacity nor will I disclose such information except as specifically provided in the order.

Executed at _____ this __ day of _____, 199_.

Signature

Title