

**BEFORE THE**  
Federal Communications Commission  
**WASHINGTON, D.C.**

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Unbundled Access to Network Elements	)	CC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
	)	

**EMERGENCY REQUEST OF ALTS FOR A LIMITED  
MODIFICATION OF INTERIM PROTECTIVE ORDER**

The Association for Local Telecommunications Services (“ALTS”) hereby requests a limited modification of the Common Carrier Bureau’s *Interim Protective Order* in the non-rural universal service support proceeding.<sup>1</sup> ALTS seeks to use the Confidential Line Count Information subject to the *Interim Protective Order* in the Commission’s *Triennial Review Remand*<sup>2</sup> proceeding for the sole purpose of reviewing the possible correlation between access line density and impairment for unbundled dedicated interoffice transport.

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<sup>1</sup> See *Federal-State Joint Board on Universal Service*, Interim Protective Order, 15 FCC Rcd 10183 (2000) (“*Interim Protective Order*”).

<sup>2</sup> *Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, FCC 04-179 (2004) (“*Triennial Review Remand NPRM*”).

## DISCUSSION

On April 7, 2000 in CC Docket No. 96-45, the Common Carrier Bureau issued an *Interim Protective Order* governing the terms and conditions under which parties may obtain access to the number of access lines per wire center data submitted in that proceeding. *See Interim Protective Order*. The line count data was submitted and used as part of the development of a forward-looking cost model to determine the appropriate level of USF support. By the original terms of the *Interim Protective Order*, the covered material could only be used, “for the purpose of reviewing the underlying information and verifying the results of the forward-looking cost mechanism.” *Id.* ¶ 11. In making the data available subject to the *Interim Protective Order*, the Commission recognized that it was necessary that all parties to that proceeding have access to the data to enable them to “conduct [their] own analysis.” *Id.* ¶ 12.<sup>3</sup>

Since its initial adoption, the *Interim Protective Order* has been modified twice to expand the ways in which parties may use the covered data. First, on December 6, 2001, pursuant to a request by NASUCA,<sup>4</sup> the Bureau modified the *Interim Protective Order* to permit parties to use the data in the CALLS proceeding to produce loop cost studies and to evaluate cost studies submitted by the ILECs in that proceeding.<sup>5</sup> The Commission recognized that, without access to the confidential information, NASUCA (and other parties) would have been unable to rebut the

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<sup>3</sup> Similarly, the Commission has held elsewhere that fairness to other parties is an important factor in determining whether those parties can view confidential information. *See Examination of Current Policy Concerning the Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, ¶ 16 (1998) (“*Confidentiality Order*”) (“Frequently, the basis for requiring submitters to disclose information is to ensure fairness to the other parties in the proceeding.”).

<sup>4</sup> *See Request of the National Association of State Utility Consumer Advocates for a Limited Modification of Interim Protective Order (IPO)*, CC Dkt. Nos. 96-262, 94-1 (filed Nov. 21, 2001).

<sup>5</sup> *See Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Federal-State Joint Board on Universal Service*, Order, 16 FCC Rcd 21356 (2001).

ILECs' own filings based on the same confidential information.<sup>6</sup> Second, on May 6, 2002, the Commission again granted a NASUCA request for a limited expansion of the use to which parties may put the data subject to the *Interim Protective Order*. Specifically, in the CALLS remand proceeding, NASUCA requested access to the data for purposes of commenting on whether the universal service subsidy expansion in the CALLS order was appropriately set at \$650 million.<sup>7</sup> Again, the Commission responded to the obvious inequity and harm to the administrative process that would result if the ILECs were permitted sole access to data that was essential to analyzing the appropriate outcome of a rulemaking proceeding by granting the second NASUCA petition.<sup>8</sup>

The instant request is equally meritorious. In assessing whether to make confidential information available, the Commission applies the so-called "persuasive showing" test under which the Commission balances the public interest advanced by disclosure against any potential harm to private parties.<sup>9</sup> Here the balance clearly favors disclosure. On the one hand, disclosure

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<sup>6</sup> See *id.* ¶ 3 ("NASUCA states that it intends to use the Confidential Line Count Information only to produce loop cost studies and to evaluate the data and cost studies submitted by other carriers in the SLC cap cost review proceeding.").

<sup>7</sup> See *Request of the National Association of State Utility Consumer Advocates for a Second Limited Modification of the Interim Protective Order (IPO)*, CC Dkt. Nos. 96-262, 94-1, 99-249, 96-45 (filed Jan. 14, 2002).

<sup>8</sup> See *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low Volume Long Distance Users, Federal-State Joint Board on Universal Service*, Order, 17 FCC Rcd 8252, ¶ 7 (2002) ("The Bureau finds that granting access to the Confidential Line Count Information will allow parties to develop the most complete possible record in the *CALLS Order* remand proceeding and give interested parties the opportunity to fully respond through the *ex parte* process.").

<sup>9</sup> See 47 C.F.R. §§ 0.457(d)(1), (d)(2) (permitting inspection of trade secrets and confidential commercial and financial information upon a "persuasive showing as to the reasons for inspection."). This test is the FCC's implementation of the Supreme Court's ruling in *FCC v. Schreiber* permitting disclosure of confidential trade secrets by an agency, "upon a balancing of the public and private interests involved." *FCC v. Schreiber*, 381 U.S. 279, 292 (1965). As the Commission explains, "A case-by-case determination [of whether information should be permitted to be inspected] is appropriate because it requires a balancing of... the type of proceeding, the relevance of the information, and the nature of the information.... The Commission's current rules contemplate that the Commission will engage in a balancing of the public and private interests when determining whether the 'persuasive

would unquestionably promote the public interest. ALTS plans to use the information to assess the level of impairment competitors experience in the absence of unbundled interoffice transport. One possible proxy for determining impairment for dedicated interoffice transport is access line density for wire centers on either end of an interoffice transport route. But without access to access line per wire center data, competitors cannot assess whether there is in fact a reliable correlation between interoffice transport impairment and access line density.<sup>10</sup> Only the ILECs will be able to use access line density information to analyze interoffice transport impairment and to propose impairment tests. Accordingly, without the disclosures requested herein, the Commission will not have the benefit of competitors' analysis and arguments, and the public debate and record regarding impairment will accordingly will be incomplete and one-sided.<sup>11</sup>

While the public interest heavily favors the limited disclosure ALTS seeks, the impact on the private interest of the companies possessing the data at issue will be minor, since ALTS intends to comply fully with all of the provisions of the *Interim Protective Order* restricting the disclosure of the Confidential Line Count Information. ALTS also agrees that, in any filing, it

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showing' standard has been met. That balancing may well take into account the type of proceeding involved, whether the requestor is a party to the proceeding..." *Confidentiality Order* ¶ 16.

<sup>10</sup> Moreover, without access to this data, ALTS members will be unable to assess proposals made by other parties that seek to tie access line density to impairment for interoffice transport. For example, the ILECs themselves have in the past proposed impairment tests in this proceeding based on access line density. *See* Reply Comments of BellSouth, CC Dkt. Nos. 01-338, 96-98, 98-147 at 103 (filed Jul. 17, 2002) (alleging availability of competitive interoffice transport by wire-center); Reply Comments of SBC Communications Inc., CC Dkt. Nos. 01-338, 96-98, 98-147 at 153 (filed Jul. 17, 2002) (asserting no impairment in wire centers that, among other things, serve over 15,000 business lines or more).

<sup>11</sup> The Commission has in the past found that it is in the public interest to permit disclosure of confidential information so that parties could oppose filings based on that information in a pending proceeding. *See MCI Telecommunications Corp.; On Request for Inspection of Records*, Memorandum Opinion and Order, 58 RR 2d 187 (1985). There, the Commission held that even though it might "injure AT&T competitively," MCI was entitled to view confidential information to pursue its claim in upcoming special access proceedings that "AT&T [can] obtain facilities for transport or so-called 'access-like' services at rates substantially lower than those which MCI and other interexchange carriers can obtain under special access tariffs." *Id.* ¶¶ 8-9. It was important that MCI "have access to this information to press its claim in an informed manner..." *Id.* ¶ 10.

will avoid describing access line densities associated with any particular wire center.

Furthermore, ALTS will request confidential treatment of its filings that rely on Confidential Line Count information.

Finally, it is important to emphasize that there is no practical way for ALTS members to obtain access line per wire center data on a national basis other than from the Commission. A survey of the ALTS membership revealed that none of the ALTS members has anything close to reliable data for access line density per wire center on either a national basis or even for the largest urban areas. Furthermore, although the Commission has made available estimates of access lines per wire-center,<sup>12</sup> it is impossible to know how accurate those estimates are since they were developed based on public data obtained from non-ILEC sources and may now be fairly out-dated.<sup>13</sup>

### REQUEST

Based on the foregoing, ALTS requests that the Commission modify paragraph 11 of the modified *Interim Protective Order* and make any other appropriate changes needed to permit the use of the Confidential Line Count Data for the purpose of analyzing and filing submissions regarding competitors' impairment without access to unbundled network elements in the *Triennial Review Remand* proceeding. Given the impending deadlines for filing comments in the *Triennial Review Remand* proceeding, ALTS also requests that the Commission rule on the instant request on an expedited basis. The truncated timeframe applicable to this proceeding

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<sup>12</sup> See "Line Count Data and Results From January 20, 2000 Posting," available at <http://www.fcc.gov/wcb/tapd/hcpm/welcome.html>.

<sup>13</sup> See *Federal-State Joint Board on Universal Service, Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, Tenth Report and Order, ¶¶ 49, 51, 14 FCC Rcd 20156 (1999) (discussing the adoption of the "National Access Line Model" submitted by PNR and the publicly available data it employs as a proxy as the best way for "estimating the demand for service at each location, and for allocating customer locations to wire centers.").

mandates that, as with NASUCA's previous two requests to modify the *Interim Protective Order*, the present request not be subject to a notice-and-comment cycle.

In addition, once the Commission issues its ruling modifying the *Interim Protective Order* as requested herein and a party submits the relevant declarations to USAC, the Commission should immediately, or as soon as practicable, direct USAC to send, via e-mail or other electronic means, the most recent set of Confidential Line Count Information to the requesting party. This requirement is necessary because otherwise USAC may interpret its existing procedures as requiring only that it produce the data within 6-20 days from the date a party submits a request to USAC.<sup>14</sup> Given that the comment and reply deadlines are only 21 and 14 days respectively from publication in the Federal Register in the *Triennial Review Remand* proceeding, application of the 6-20 day timeframe could make it all but impossible for competitors to use the data in comments or even reply comments. Finally, ALTS also requests that this filing serve as "reasonable notice of [ALTS members'] intent to review Confidential Line Count Information,"<sup>15</sup> to the parties<sup>16</sup> that have submitted the data and that, once this request is granted, the Commission direct USAC to waive its 5 day waiting period between notice and disclosure.<sup>17</sup>

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<sup>14</sup> See "Access to Wire Center Confidential Line Information," available at <http://www.universalservice.org/hc/process/proc/wcdata.asp> ("*USAC Conditions*") ("USAC will make every effort to schedule an appointment to provide access to the requested WC CLCI within not less than six (6) days nor more than twenty (20) days of receipt of the notice at the USAC office in Washington, D.C.").

<sup>15</sup> *Interim Protective Order* ¶ 8.

<sup>16</sup> In accordance with the request that this filing be treated as notice to parties that have submitted confidential material, ALTS has served this filing on those parties *via* overnight mail and facsimile, as explained in the attached certificate of service.

<sup>17</sup> See *USAC Conditions* ("All appropriate submitting parties who furnished WC CLCI in confidence will be notified by the requesting authorized representative at the time that the request for disclosure is submitted to USAC, and will be afforded five (5) days notice of the disclosure of their CLCI.").

**CONCLUSION**

For the reasons herein, the Wireline Competition Bureau should modify the *Interim Protective Order* as requested.

Respectfully submitted,

/s/Thomas Jones

Thomas Jones

Jonathan Lechter\*

**WILLKIE FARR & GALLAGHER LLP**

1875 K Street, N.W.

Washington, D.C. 20006

(202) 303-1000

ATTORNEYS FOR THE ASSOCIATION FOR  
LOCAL TELECOMMUNICATIONS SERVICES

September 8th, 2004

\* Admitted in Maryland only

**CERTIFICATE OF SERVICE**

I, Thomas Jones, do hereby certify that on this 8<sup>th</sup> day of September, 2004, I caused to be served a true and correct copy of the forgoing Emergency Request of the Association of Local Telecommunications Services for a Modification of Interim Protective Order by delivering copies thereof by overnight delivery and facsimile to the following:

Dee May Verizon 1300 I St. N.W. Suite 400 West Washington, D.C. 20006	David G. Cartwright SBC Telecommunications Inc. 1401 I St. N.W. Suite 1100 Washington, D.C. 20005
Jeff Lindsey Sprint Corporation 401 9 <sup>th</sup> St. N.W. Suite 400 Washington, D.C. 20004	Glenn T. Reynolds BellSouth Telecommunications Inc. 1133 21 <sup>st</sup> St. N.W. Suite 900 Washington, D.C. 20036- 3351
Melissa E. Newman Qwest 607 14 <sup>th</sup> St. N.W. Suite 950 Washington, D.C. 20005	Leonard A. Steinberg Alaska Communications Systems Group, Inc. 600 Telephone Avenue, MS65 Anchorage, Alaska 99503
Jeffrey Carlisle* Chief Wireline Competition Bureau Federal Communications Commission 445 12 <sup>th</sup> Street, S.W. Washington, D.C. 20554	Katie King* Wireline Competition Bureau Federal Communications Commission 445 12 <sup>th</sup> Street, S.W. Washington, D.C. 20554
Narda Jones* Acting Chief Telecommunications Access Policy Division Federal Communications Commission 445 12 <sup>th</sup> Street, S.W. Washington, D.C. 20554	Richard Lerner* Associate Bureau Chief Wireline Competition Bureau Federal Communications Commission 445 12 <sup>th</sup> Street, S.W. Washington, D.C. 20554

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/s/Thomas Jones

\*via e-mail