

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)
)
Petitions of the Verizon Telephone Companies) WC Docket No. 06-172
for Forbearance Pursuant to 47 U.S.C. § 160(c))
in the Boston, New York, Philadelphia,)
Pittsburgh, Providence and Virginia Beach)
Statistical Areas)

**REPLY COMMENTS OF TIME WARNER TELECOM INC., CBeyond INC., AND
ONE COMMUNICATIONS CORP. ON MOTION TO COMPEL DISCLOSURE OF
CONFIDENTIAL INFORMATION AND MOTION TO DISMISS**

WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

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Time Warner Telecom, Inc. (“TWTC”), Cbeyond Inc., and One Communications Corp (“One”) by their attorneys, hereby submit these reply comments in response to the *Motion to Dismiss* and *Motion to Compel* in the above-referenced docket.¹

I. INTRODUCTION AND SUMMARY

In this proceeding, Verizon has attempted to cynically manipulate the treatment of confidential information to its advantage. In so doing, it has relied on evidence that is inadmissible and prevented interested parties from offering meaningful comments on its petitions. The Commission must not sanction this conduct.

First, as ACN *et al.* demonstrated in their *Motion to Dismiss*, Verizon’s interconnection agreements (“ICAs”) prohibit the disclosure of E911 data in this proceeding. Perhaps even more

¹ See *Pleading Cycle Established for Comments on Motion to Compel Disclosure of Confidential Information Pursuant to Protective Order and Motion to Dismiss*, Public Notice, DA 06-2056 (rel. Oct. 18, 2006); *Motion to Compel Disclosure of Confidential Information Pursuant to Protective Order*, filed by Broadview Networks Inc, *et al.*, WC Dkt. No. 06-172 (Oct. 11, 2006) (“*Motion to Compel*”); *Motion to Dismiss*, filed by ACN *et al.*, WC Dkt. No. (Oct. 16, 2006) (“*Motion to Dismiss*”).

seriously, Verizon has violated the protective order in the Verizon/MCI merger proceeding by (1) comparing the GeoTel data Verizon filed in this docket with confidential data filed by CLECs in the Verizon/MCI merger proceeding and (2) sharing CLECs' confidential data with Verizon marketing personnel who never signed (and were ineligible to sign) the protective order in that proceeding. Given Verizon's critical reliance in its petitions for forbearance on the data it has improperly filed and relied upon in this proceeding, the Commission should dismiss the petitions or at the very least strike the evidence in question (*i.e.*, the E911 and GeoTel data) from the record. Moreover, the Commission should refer Verizon's unlawful conduct to the enforcement bureau so that the Commission can investigate the full scope of violations and impose appropriate penalties.

To the extent the petitions remain pending, the FCC should grant the *Motion to Compel*. Verizon has no right to determine when and how parties may obtain confidential information filed in the record. Verizon may exercise market power over the telecommunications market in its region, but it still has not been granted the right to write the FCC's protective orders. Verizon's scheme to provide access only to requesting parties that have obtained affirmative consent from the companies whose information has been submitted by Verizon is much more restrictive than an FCC's protective order and likely will prevent full access to the confidential information in the record. If the *Motion to Compel* is not granted, parties will be placed at a substantial disadvantage to Verizon as only Verizon and the FCC will have full access to the entire docket in this proceeding. Moreover, Verizon's purported desire to limit access to other carriers' confidential information rings hollow in light of its willingness to improperly rely on and disclose highly confidential information CLECs submitted in the Verizon/MCI merger and the E911 information.

II. THE FCC SHOULD GRANT THE MOTION TO DISMISS BECAUSE VERIZON COLLECTED AND SUBMITTED E911 DATA IN VIOLATION OF ITS ICAs

Verizon's collection and submission of E911 data in this proceeding is barred by its ICAs. The data is confidential under the ICAs because, when the data is transmitted to Verizon, it is provided on a "customer specific," "location specific" and "facility specific"² basis, and it resides in Verizon's databases in such a form.³ In order to collect the underlying data that is the basis of the aggregated E911 data filed in the record, Verizon's declarants and/or other personnel would almost certainly have reviewed "customer specific" "location specific" and "facility specific" E911 data.⁴ This review and collection of granular E911 data violates the ICAs even if no E911 data were ever filed in the record.⁵

Verizon claims that it has not used this data in a manner that these agreements prohibit because it has not "used any of the E911 data for any marketing or other business practice" but rather "submitted these data to a regulatory authority."⁶ But the collection and submission of such data to a "regulatory authority" is itself a violation of Verizon's ICAs. For example,

² See e.g., TWTC New York ICA § 28.4.1 (attached hereto as Exhibit 1) defining confidential information as "all information...that is furnished by one party to the other party and that... contains customer specific, facility specific, or usage specific information."

³ That is of course necessarily true, or else Verizon could not adequately direct emergency personnel to each customer's location.

⁴ Only Verizon knows exactly the manner in which it has collected and viewed the E911 data, and Verizon should be required to explain to the FCC how it did so.

⁵ See e.g., One Pennsylvania ICA § 28.5.2 (attached hereto as Exhibit 2) ("Confidential information shall be disclosed only to those directors, officers and employees of the Receiving Party and the Receiving Party's affiliates that have a need to know the Confidential Information for the purpose of performing under this agreement.").

⁶ Verizon Opposition to Motion to Dismiss, WC Dkt. No. 06-172 at 2 (filed Oct. 30, 2006) ("*Opposition to Motion to Dismiss*").

TWTC's ICA with Verizon in New York states that Verizon "shall use [TWTC's] Proprietary Information *only for performing the covenants contained in this Agreement.*" (emphasis added) See TWTC New York ICA § 28.4.2.⁷ Clearly, Verizon's declarants do not need access to TWTC's and One's E911 data and Verizon does not need to file this data in the present proceeding to perform its duties under the ICAs.

Verizon further argues that its template ICA lists exceptions to Verizon's duty not to disclose confidential information under its agreements. See *Opposition to Motion to Deny* n.9. But neither TWTC's nor One's ICAs with Verizon contain exceptions that would permit Verizon to collect and then file confidential information in a regulatory proceeding.⁸ Like Cox's ICA, many of TWTC and One's ICAs have exceptions that permit the disclosure of information "that is already public, that is developed independently by the receiving party or that the receiving party is required to disclosure under applicable law."⁹ As Cox explains, none of these exceptions applies to Verizon's disclosure in this instance.

Verizon argues that the states, not the FCC, should determine whether Verizon has violated its ICAs. See *Opposition to Motion to Deny* at 8. But the FCC shares jurisdiction with the states to interpret and enforce interconnection agreements.¹⁰ Furthermore, the FCC has the

⁷ Many of One's ICAs have almost identical language.

⁸ See e.g., One Pennsylvania ICA § 28.5.3; TWTC New York ICA § 28.4.3.

⁹ Cox Comments, WC Dkt. No. 06-172 (filed Nov. 1, 2006) ("*Cox Comments*"); see also e.g., One Pennsylvania ICA § 28.5.3; TWTC New York ICA § 28.4.3.

¹⁰ See *Core Communications, Inc. and Z-Tel Communications, Inc., v. SBC Communications Inc., et al.*, Memorandum Opinion and Order, 18 FCC Rcd 7568, ¶ 13 (2003) (holding that the FCC has "jurisdiction to adjudicate" violations of ICAs that "is concurrent with state jurisdiction to interpret and enforce interconnection agreements.")

authority to take such actions as are “necessary in the execution of its functions” (47 U.S.C. § 4(i)), which in this case means ensuring that Verizon rely only on appropriately submitted data in seeking forbearance. The FCC is therefore able to assess and address as appropriate ICA violations in this proceeding. In so doing, the only possible conclusion is that Verizon has blatantly ignored the terms of its ICAs.

Moreover, the consequences of Verizon’s violation of its ICAs are substantial. Indeed, some ICAs describe the extent of damages that may result from an unauthorized disclosure of confidential information. *See e.g.*, One Pennsylvania ICA § 28.5.6 (“The parties acknowledge that any disclosure or misappropriation of Confidential Information in violation of this Agreement could cause irreparable harm, the amount of which may be extremely difficult to determine, thus potentially making any remedy at law or damages inadequate.”). This is language that Verizon itself agreed to.

Furthermore, Verizon places critical reliance on the E911 data in question. As the movants explain, the confidential E911 data “runs throughout the entirety of the petitions and the violations are numerous and substantial.” *Motion to Dismiss* at 6. Indeed, allowing Verizon to proceed with its petition in reliance on the E911 data would exacerbate the harm experienced by those carriers whose ICAs have been breached and confidential data compromised.

For all of these reasons, the Commission should not permit Verizon to rely on the E911 data at issue in its pending petitions. The appropriate means of addressing Verizon’s unlawful reliance on E911 data is for the FCC to dismiss the petitions without prejudice, leaving Verizon free to refile new petitions that do not contain proprietary information. In all events, the Commission must strike the E911 data from the record in this proceeding.

III. THE FCC SHOULD GRANT THE MOTION TO DISMISS BECAUSE VERIZON HAS VIOLATED THE PROTECTIVE ORDER IN THE VERIZON/MCI MERGER PROCEEDING

Verizon has also violated the protective order in the Verizon/MCI merger proceeding in numerous ways, providing a separate ground for dismissal. Verizon's declarants explain that, in comparison to the publicly available GeoTel data submitted by Verizon, "[d]uring the course of the Verizon/MCI merger...Verizon received other confidential sources of data that showed additional CLEC fiber..."¹¹ The purpose of Verizon's declarants' statement is clearly to prove that the GeoTel data does not show the full scope of competitive deployment in the markets subject to its petitions. Therefore, argues Verizon, the FCC should assume that competitive deployment is actually greater than the GeoTel data indicates. In order to make that argument, the declarants must have reviewed third party confidential data filed in the Verizon/MCI proceeding. The declarants' review of such confidential data is a "knowing and intentional" violation of the Verizon/MCI protective order because "persons obtaining access to Confidential Information...under the [Verizon/MCI] Protective Order shall use that information solely" for the merger proceeding and any judicial proceeding arising therein and, "except as provided herein, shall not use such documents or information for any other purpose..."¹²

Even more seriously, a review of the acknowledgements of confidentiality filed by Verizon in the Verizon/MCI merger proceeding indicates that none of Verizon's declarants in

¹¹ See e.g., Declaration of Quintin Lew *et al.* ¶ 10 ("NY Decl."), attached to Petition of the Verizon Telephone Companies for Forbearance in the New York MSA, WC Dkt. No. 06-172 (filed Sept. 6, 2006).

¹² *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control et al.*, Order, 20 FCC Rcd 5232, Appendix A ¶ 2 (2005) ("Protective Order").

this proceeding signed the protective order in the Verizon/MCI merger proceeding. Therefore, even if Verizon's declarants learned of this data during the pendency of the merger proceeding, Verizon apparently violated the protective order by granting access to these three Verizon employees. That none of the declarants signed the protective order is not surprising as they clearly do not qualify to do so under the protective order in the Verizon/MCI merger proceeding. Based on their job descriptions in paragraphs 1-3 of the declarations, all three declarants are involved in marketing, business market analysis and competitive decision-making.¹³ These are exactly the kinds of employees that are precluded from accessing confidential information under the Verizon/MCI merger protective order.¹⁴ Therefore, those parties that filed data in the Verizon/MCI proceeding have already suffered substantial competitive harm regardless of whether Verizon's petitions are dismissed.

In attempting to deflect attention from its obvious failure to comply with the Verizon/MCI merger proceeding protective order, Verizon lamely states that "it did not submit here any of the data that it obtained during the course of the Verizon/MCI proceeding."

Opposition to Motion to Deny at 9. But whether or not Verizon filed confidential data from the

¹³ See e.g., *NY Decl.* ¶ 1 ("My name is Quintin Lew....I am responsible for competitive analysis as well as the product management of our special access products...I have over 20 years of experience with Verizon or its predecessors in most areas of marketing, strategic planning, and business development."); *id.* ¶ 2. (My name is Julie Verses...My current responsibilities include alternate channel development, multicultural sales and marketing, market research and marketing analytics, as well as competitive intelligence."); *id.* ¶ 3 (My name is Patrick Garzillo...I also support the development of key marketing strategies).

¹⁴ See *Protective Order* ¶ 4 (restricting access to (1) counsel, (2) outside consultants, "provided that the outside consultants or experts are not involved in the analysis underlying the business decisions of any competitor of any Submitting Party nor participate directly in those business decisions"; (3) paralegals or certain other employees of counsel; (4) clerical employees of counsel; and (5) third party contractors performing clerical functions).

merger in this proceeding is irrelevant to Verizon's violation of the Verizon/MCI protective order. As explained, the violation in question arises from unauthorized disclosure to and use of confidential information by Verizon employees.

If Verizon's serious violations are permitted to stand without consequence, it would only encourage further violations of the FCC's protective orders. At a minimum, Verizon should be subject to an enforcement bureau action for its flagrant disregard of the Commission's protective order. Moreover, if the petitions are not dismissed outright, all GeoTel data filed by Verizon should be stricken from the record. The GeoTel data has now become "contaminated" by the declarants' access to data filed in the Verizon/MCI proceeding and the only appropriate remedy would be its removal from the record.

IV. IF THE FCC DOES NOT GRANT THE MOTION TO DISMISS, THE MOTION TO COMPEL MUST BE GRANTED

Finally, Verizon continues to withhold third party confidential information from commenters in violation of the protective order in this proceeding. Thus, if the FCC allows the petitions to remain pending, it should grant the *Motion to Compel*.

Verizon argues that the *Motion to Compel* should be denied because Verizon has in fact made the E911 information available to requesting parties. Verizon states that it has provided requesting parties a list of third parties whose information it has submitted. If requesting parties obtain the third party's permission, Verizon will purportedly provide the third party data to the requesting party.¹⁵ These assertions do not cure Verizon's violation of the protective order in this case.

¹⁵ See Verizon Opposition to Motion to Compel, WC Dkt. No. 06-172 at 2 (filed Oct. 30, 2006) ("*Opposition to Motion to Compel*").

To begin with, Verizon's sudden change of heart on this matter is a day late and a dollar short. Until Verizon's October 30 *Opposition to Motion to Compel*, neither a list of parties whose data had been filed in the record nor a mechanism to obtain their consent in a manner acceptable to Verizon was ever offered to the undersigned counsel. In addition, when counsel from Bingham McCutcheon first protested Verizon's failure to disclose confidential data, Verizon responded that it would not disclose third party data under any circumstances.¹⁶ If Verizon changed its position, it had a responsibility to provide notice to those parties who had already received confidential information of such change.

In any case, Verizon's offer of access does not result in compliance with the protective order. Through its scheme, Verizon has essentially created a second protective order, the terms of which Verizon has established and which will likely preclude access to third parties' confidential material. Under a typical protective order, including the protective order in this proceeding and in the Verizon/MCI merger proceeding, the lack of an objection from the party whose confidential information has been included in the record ("Affected Party") within five days of being served with an acknowledgement of confidentiality means that the requesting party may obtain the Affected Party's confidential information.¹⁷ The Affected Party may generally only object to such access if the party seeking access does not comply with the rules of the protective order. For example, if the protective order indicates only that counsel and consultants

¹⁶ See Letter of Sherry Ingram, Verizon, to Patrick Donovan, Bingham McCutcheon, Sept 25, 2006, attached to Letter of Joseph Jackson, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-172 (filed Oct. 26, 2006).

¹⁷ See *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Protective Order, 21 FCC Rcd 10177, ¶ 3(b) (2006); *Protective Order* ¶ 7.

may obtain confidential information, then an Affected Party could rightfully object to the requesting party's VP of marketing obtaining confidential information. The FCC has structured the protective order in this proceeding in this manner so that Affected Parties may not arbitrarily deny legitimate personnel, such as outside counsel, access to confidential data that has become part of the administrative record. Verizon's alternative scheme would permit Affected Parties to deny interested parties access for any or no reason. Indeed, these parties could simply ignore any requests for access, and they may have little incentive to assist parties seeking access to the information in this proceeding. Compliance with Verizon's scheme would of course be in addition to parties signing the FCC's protective order.¹⁸

In a display of extreme hubris, Verizon argues that, because competitors have not explained "as to why they consider [the withheld data] critical, or how they would use them," (*Opposition to Motion to Compel* at 3) carriers are not entitled to such information. It is not up to Verizon to decide under what circumstances confidential information should be withheld from requesting carriers; that balance has already been appropriately struck by the FCC in its protective order. Moreover, the need to view this data is plain. As explained by Cox, many carriers whose E911 information has been placed in the docket may not have the resources to rebut arguments made in reliance on such information. Moreover, "it is not difficult, for instance, to imagine, Verizon arguing that a party's claims are incorrect because it has not accounted for all the data in the proceeding, an argument that a party without access to that data would be unable to rebut." *Cox Comments* at n.16.

¹⁸ A reasonable alternative to Verizon's scheme would be to serve Affected parties with acknowledgements of confidentiality. Those parties could of course object if the requesting party does not comply with the protective order.

Verizon's claim that it is restricting access to third party confidential data because it wants to zealously protect these parties' data rings hollow. As explained, Verizon has ignored even appropriately established constraints on access to proprietary information when it serves its purposes. Moreover, Verizon has provided parties that have signed the protective order in this proceeding with significant amounts of third party confidential data. For example, in the redacted version of the petition, Verizon completely removed copies (i.e., Verizon filed a blank piece of paper) of fiber maps depicting the location of fiber transport networks by carrier.¹⁹ Although it is not entirely clear whether this information is "confidential" as it was obtained from GeoTel, Verizon obviously believed that this information should be confidential as it was redacted in the public version. However, in the confidential version of the petitions obtained by the undersigned counsel, each of the maps is fully visible with each carrier's (not just those represented by undersigned counsel) fiber network shown.²⁰ Verizon does not and could not explain how third party confidential E911 data is somehow more confidential than third party fiber deployment data. This inconsistency only underscores the fact that it should be up to the FCC, not Verizon, to determine when and how requesting parties can obtain access to confidential material filed in the docket.

V. CONCLUSION

For the reasons explained above, the *Motion to Deny* should be granted. If the petitions are not denied in their entirety, the FCC should grant the *Motion to Compel*.

¹⁹ See *NY Decl.* (public version) exh. 5.

²⁰ See *NY Decl.* (confidential version), exh 5, page 1.

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
TIME WARNER TELECOM, CBeyond AND
ONE COMMUNICATIONS

November 6, 2006

Exhibit 1

Time Warner Telecom/Verizon New York Interconnection Agreement

28.4 Confidentiality

28.4.1 All information, including but not limited to specifications, microfilm, photocopies, magnetic disks, magnetic tapes, drawings, sketches, models, samples, tools, technical information, data, employee records, maps, financial reports, and market data, that is furnished by one Party to the other Party and that:

- (a) contains customer specific, facility specific, or usage specific information, other than customer information communicated for the purpose of publication or directory database inclusion, or
- (b) is in written, graphic, electromagnetic, or other tangible form and marked at the time of delivery as "Confidential" or "Proprietary," or
- (c) is communicated orally and declared to the receiving Party at the time of delivery, and by written notice given to the receiving Party within ten (10) days after delivery, to be "Confidential" or "Proprietary" (collectively referred to as "Proprietary Information"), shall remain the property of the disclosing Party.

28.4.2 Each Party shall keep all of the other Party's Proprietary Information confidential in the same manner it holds its own Proprietary Information confidential (which in all cases shall be no less than in a commercially reasonable manner) and shall use the other Party's Proprietary Information only for performing the covenants contained in this Agreement. Neither Party shall use the other Party's Proprietary Information for any other purpose except upon such terms and conditions as may be agreed upon between the Parties in writing or to enforce its rights hereunder (provided that the Party wishing to disclose the other Party's Proprietary Information submits the same to the Commission or courts of competent jurisdiction, as applicable, under a request for a protective order).

28.4.3 Unless otherwise agreed, the obligations of confidentiality and non-use set forth in this Agreement do not apply to such Proprietary Information that:

- (a) was, at the time of receipt, already known to the receiving Party free of any obligation to keep it confidential as evidenced by written records prepared prior to delivery by the disclosing Party; or
- (b) is or becomes publicly known through no wrongful act of the receiving Party; or
- (c) is rightfully received from a third person having no direct or indirect secrecy or confidentiality obligation to the disclosing Party with respect to such information; or
- (d) is independently developed by an employee, agent, or contractor of the receiving Party that is not involved in any manner with the provision of services pursuant to this Agreement and does not have any direct or indirect access to the Proprietary

Information; or

(e) is approved for release by written authorization of the disclosing Party; or

(f) is required to be made public by the receiving Party pursuant to Applicable Law, provided that the receiving Party shall have made commercially reasonable efforts to give adequate notice of the requirement to the disclosing Party in order to enable the disclosing Party to seek protective orders.

28.4.4 Following termination or expiration of this Agreement, and upon request by the disclosing Party, the receiving Party shall return all tangible copies of Proprietary Information, whether written, graphic, electromagnetic or otherwise, except that the receiving Party may retain one copy for archival purposes only.

28.4.5 Notwithstanding any other provision of this Agreement, the provisions of this Section 28.4 shall apply to all Proprietary Information furnished by either Party to the other in furtherance of the purpose of this Agreement, even if furnished before the Effective Date.

28.5 Choice of Law

The construction, interpretation and performance of this Agreement shall be governed by and construed in accordance with the laws of the state in which this Agreement is to be performed, except for its conflicts of laws provisions. In addition, insofar as and to the extent federal law may apply, federal law will control.

28.6 Taxes

28.6.1 In General. With respect to any purchase hereunder of services, facilities or arrangements, if any federal, state or local tax, fee, surcharge or other tax-like charge (a "Tax") is required or permitted by Applicable Law to be collected from the purchasing Party by the providing Party, then (i) the providing Party shall properly bill the purchasing Party for such Tax, (ii) the purchasing Party shall timely remit such Tax to the providing Party and (iii) the providing Party shall timely remit such collected Tax to the applicable taxing authority.

28.6.2 Taxes Imposed on the Providing Party With respect to any purchase hereunder of services, facilities or arrangements, if any federal, state or local Tax is imposed by Applicable Law on the receipts of the providing Party, and such Applicable Law permits the providing Party to exclude certain receipts received from sales for resale to a public utility, distributor, telephone company, local exchange carrier, Telecommunications company or other communications company ("Telecommunications Company"), such exclusion being based solely on the fact that the purchasing Party is also subject to a tax based upon receipts ("Receipts Tax"), then the purchasing Party (i) shall provide the providing Party with notice in writing in accordance with Section 28.6.6 of this Agreement of its intent to pay the Receipts Tax and (ii) shall timely pay the Receipts Tax to the applicable tax authority.

Exhibit 2

One Communications/Verizon Pennsylvania Interconnection Agreement

commercially reasonable terms, and both Parties shall proceed to perform with dispatch once the cause(s) are removed or cease.

28.3.2 Notwithstanding Section 28.3.1, when a delay or other failure to perform is caused by the delay or failure of that Party's subcontractors, vendors or suppliers to provide products or services to the Party, that Party shall take all steps necessary to avoid delays by obtaining substitute products and services from other persons on commercially reasonable terms and shall utilize such substitute products in providing service to its customers (including ANTC) in a non-discriminatory manner and in parity with the utilization of scarce resources for itself and its Affiliates.

28.3.3 The Parties shall cooperate to limit the impact of a *Force Majeure* Event. Such cooperation shall include taking such actions as agreed in the Joint Grooming Process and providing advance warning of a potential *Force Majeure* Event, if possible.

28.4 Prevention of Unauthorized Use

28.4.1 The Parties agree to cooperate to prevent, identify, and cure unauthorized use or fraud. Each Party shall make available to the other Party fraud prevention features (including prevention, detection, or control functionality) in accordance with applicable Tariffs or as otherwise mutually agreed.

28.4.2 Both Parties shall use all reasonable efforts to prevent, monitor and cure fraud and unauthorized use. Until such time as partitioned access to fraud prevention, detection and control functionality within pertinent Operations Support Systems, such as the LIDB fraud alert and monitoring system, is made available to ANTC, BA shall, whenever fraud alert indicators are activated on ANTC accounts, use all reasonable efforts to immediately inform ANTC of any indications of fraud. The Parties agree to work together to establish processes and mechanisms regarding the provision of such information and to develop fraud detection and prevention systems that will benefit both Parties.

28.5 Confidentiality

28.5.1 Confidential Information means all information, including but not limited to specifications, microfilm, photocopies, magnetic disks, magnetic tapes, drawings, sketches, models, samples, tools, technical information, data, employee records, maps, financial reports, and market data, furnished or made available by one Party (the "Disclosing Party") to the other Party (the "Receiving Party"): (i) in written, graphic, electromagnetic, or other tangible form and marked at the time of delivery as "Confidential" or "Proprietary," or (ii) communicated orally and declared to the Receiving Party at the time of delivery, and by written notice given to the Receiving Party within ten (10) days after delivery, to be "Confidential" or "Proprietary". Each Party shall have the right to correct an inadvertent failure to identify information as Confidential Information pursuant to (i) above by giving written notification within thirty (30) days after the information is disclosed. The Receiving Party shall, from that time forward, treat such information as Confidential Information.

28.5.2 BA shall not use any information provided by ANTC regarding ANTC's customers for any marketing purpose or disclose such information to anyone in a marketing capacity except to the extent permitted by Applicable Law. All Confidential Information shall be held in strict confidence by the Receiving Party and in no less than the same confidential manner it holds its own Confidential Information. Confidential Information shall be used by the Receiving Party only for the purpose of performing under this Agreement. Confidential Information shall be disclosed only to those directors, officers and employees of the Receiving Party and the Receiving Party's affiliates that have a need to know the Confidential Information for the purpose of performing under this Agreement. If the Receiving Party wishes to disclose the Confidential Information to a third party agent or contractor, such disclosure must be mutually agreed to in writing by the Parties, and the agent or contractor must execute a non-disclosure agreement comparable in scope to the terms of this subsection. Neither Party shall use the other Party's Confidential Information for any other purpose except upon such terms and conditions as may be agreed upon between the Parties in writing.

28.5.3 Unless otherwise agreed, the obligations of confidentiality and non-use set forth in this Subsection 28.5 do not apply to such Confidential Information that:

(a) was, at the time of receipt, already known to the Receiving Party free of any obligation to keep it confidential; or

(b) is or becomes publicly known through no wrongful act of or breach of this Agreement by the Receiving Party or the Receiving Party's affiliates, or the directors, officers, agents, employees, or contractors of the Receiving Party or the Receiving Party's affiliates; or

(c) is rightfully received from a third person having no direct or indirect secrecy or confidentiality obligation to the Disclosing Party with respect to such information; or

(d) is independently developed by the Receiving Party; or

(e) is approved for release by written authorization of the Disclosing Party; or

(f) is required to be made public by the Receiving Party pursuant to any governmental authority or by Applicable Law, provided that the Receiving Party shall give notice prior to the disclosure of the Confidential Information to the Disclosing Party to enable the Disclosing Party to seek protective orders.

28.5.4 The Parties shall maintain in strict confidence all Confidential Information for a period of five years from the date of disclosure of such Confidential Information, or five (5) years from the date of expiration of this Agreement (including any renewal terms), whichever is longer. Each Party's obligations to safeguard Confidential Information disclosed prior to the

expiration, cancellation or termination of this Agreement shall survive such expiration, cancellation or termination.

28.5.5 All Confidential Information shall remain the property of the Disclosing Party. Upon request by the Disclosing Party, the Receiving Party shall return within thirty (30) days of such a request, all Confidential Information, whether written, graphic, electromagnetic or otherwise.

28.5.6 The Parties acknowledge that any disclosure or misappropriation of Confidential Information in violation of this Agreement could cause irreparable harm, the amount of which may be extremely difficult to determine, thus potentially making any remedy at law or in damages inadequate. Each Party, therefore, agrees that the other Party shall have the right to apply to any court of competent jurisdiction for an order restraining any breach or threatened breach of this Section and for any other equitable relief as such other Party deems appropriate. This right shall be in addition to any other remedy available at law or in equity.

28.5.7. The provisions of this Section shall not be construed to be in derogation of, or to constitute a waiver by a Party of, any right with regard to protection of the confidentiality of information of the Party or its customers provided by Applicable Law, including but not limited to 47 U.S.C. Section 222 and any FCC Regulations issued pursuant thereto. Each Party will comply fully with its obligations under Applicable Law (i) to protect the confidentiality of CPNI, and (ii) to disclose CPNI to the other Party.

28.6 Choice of Law

The construction, interpretation and performance of this Agreement shall be governed by and construed in accordance with the laws of the state in which this Agreement is to be performed, except for its conflicts of laws provisions. In addition, insofar as and to the extent federal law may apply, federal law will control.

28.7 Taxes

28.7.1 In General With respect to any purchase hereunder of services, facilities or arrangements, if any federal, state or local tax, fee, surcharge or other tax-like charge (a "Tax") is required or permitted by Applicable Law to be collected from the purchasing Party by the providing Party, then (i) the providing Party shall properly bill the purchasing Party for such Tax, (ii) the purchasing Party shall timely remit such Tax to the providing Party and (iii) the providing Party shall timely remit such collected Tax to the applicable taxing authority.

28.7.2 Taxes Imposed on the Providing Party With respect to any purchase hereunder of services, facilities or arrangements, if any federal, state or local Tax is imposed by Applicable Law on the receipts of the providing Party, which Law permits the providing Party to exclude certain receipts received from sales for resale to a public utility, distributor, telephone company, local exchange carrier, telecommunications company or other communications company ("Telecommunications Company"), such exclusion being based solely on the fact that