

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

In the Matter of

Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area

WC Docket No. 04-223

In the Matter of

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

WC Docket No. 06-172

MOTION TO MODIFY PROTECTIVE ORDER

Pursuant to paragraph 12 of the *Protective Order*¹ in WC Docket No. 04-223, the Verizon telephone companies (“Verizon”)² request that the Commission modify the *Protective Order* to permit Verizon to access and to use confidential information contained in the non-public version of the Commission’s Memorandum Opinion and Order in WC Docket No. 04-223 (the *Omaha Forbearance Order*³) in its challenge to the Commission’s Memorandum Opinion and Order in

¹ Protective Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 19 FCC Rcd 11377 (Wireline Comp. Bur. 2004) (“*Protective Order*”).

² The Verizon telephone companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

³ Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415

WC Docket No. 06-172 (the *MSA Forbearance Order*⁴). Specifically, Verizon requests permission (i) for its outside appellate and in-house counsel who have signed the *Protective Order* to obtain and review copies of the complete, unredacted version of the *Omaha Forbearance Order*; (ii) to provide the court of appeals with that unredacted order; and (iii) to refer to, and quote from, that unredacted order in its submissions to the court of appeals. Verizon would file the unredacted order, and any brief containing references to that order, under seal, pursuant to the same procedures used by that court to protect that information in the court proceedings on the *Omaha Forbearance Order*. Although this motion seeks relief only from the *Protective Order* in the *Omaha Forbearance* docket, Verizon files this motion in the *MSA Forbearance* docket as well, so that all parties that might participate in the judicial proceeding are aware of Verizon's intent to provide the court with the unredacted version of the *Omaha Forbearance Order*.

1. In WC Docket No. 04-223, Qwest Corporation sought forbearance from, among other obligations, unbundling requirements and dominant-carrier regulations in the Omaha Metropolitan Statistical Area ("MSA"). The Commission entered the *Protective Order* to ensure appropriate treatment of confidential information submitted in the proceeding. That order prohibits the use of confidential information in "other administrative or judicial proceedings," *Protective Order* ¶ 7, and further states that its provisions survive the conclusion of the proceeding, *see id.* ¶ 11. In the *Omaha Forbearance Order*, the Commission granted Qwest's

(2005) ("*Omaha Forbearance Order*"), *petition for review dismissed in part and denied in part, Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

⁴ Memorandum Opinion and Order, *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*, WC Docket No. 06-172, FCC 07-212 (rel. Dec. 5, 2007) ("*MSA Forbearance Order*"), *petition for review pending*, No. 08-1012 (D.C. Cir. filed Jan. 14, 2008).

petition for forbearance in part, deciding to forbear from requiring Qwest to provide unbundled loops and transport in certain wire centers in the Omaha MSA and from applying dominant-carrier regulations for mass-market switched access and broadband services in Qwest's service territory in that MSA. *See Omaha Forbearance Order* ¶ 2. The public version of the *Omaha Forbearance Order*, however, contains numerous redactions of information on which the Commission relied in reaching those determinations. *See, e.g., id.* ¶ 66.

2. In WC Docket No. 06-172, Verizon filed petitions for forbearance with respect to six MSAs, seeking relief similar to the relief the Commission granted in the *Omaha Forbearance Order*. In the *MSA Forbearance Order*, the Commission denied Verizon's petitions for forbearance and, in so doing, relied on portions of the *Omaha Forbearance Order* that contain redacted confidential information. *See, e.g., MSA Forbearance Order* ¶ 37 n.113 (citing *Omaha Forbearance Order* ¶ 66). On January 14, 2008, Verizon filed a petition for review of the *MSA Forbearance Order* in the United States Court of Appeals for the D.C. Circuit.

3. Verizon requests that the Commission modify the *Protective Order* to permit Verizon to access and to use, in the manner specified above, confidential information contained in the non-public version of the *Omaha Forbearance Order* in its appeal of the *MSA Forbearance Order*. In that appeal, Verizon intends to argue, among other things, that the Commission acted unlawfully in the *MSA Forbearance Order* in departing, without sufficient explanation, from the *Omaha Forbearance Order*. If Verizon cannot provide the D.C. Circuit with the actual data on which the Commission relied in the *Omaha Forbearance Order*, it will be unable effectively to argue that the Commission's denial of Verizon's petitions for forbearance cannot be reconciled with that prior order. *See, e.g., Global Crossing Telecomms., Inc. v. FCC*, 259 F.3d 740, 746 (D.C. Cir. 2001) (an agency "departing from precedent is obligated to supply

a reasoned analysis for the change”) (internal quotation marks omitted). Basic principles of due process prohibit the Commission from frustrating Verizon’s right to seek judicial review of the *MSA Forbearance Order* by prohibiting use of the information on which it based its decision in the *Omaha Forbearance Order*. See, e.g., *Jifry v. FAA*, 370 F.3d 1174, 1183 (D.C. Cir. 2004) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a *meaningful* manner.”) (internal quotation marks omitted; emphasis added).

In the *MSA Forbearance Order*, the Commission denied a request to modify the first protective order in that proceeding to allow the use of *all* confidential information submitted in the proceeding in all future Commission proceedings. See *MSA Forbearance Order* ¶ 13 n.42.⁵ In correctly rejecting that sweeping request, the Commission noted that altering the protective order as requested “would likely discourage parties from submitting sensitive proprietary information to the Commission in future proceedings” because “such a modification would require entities that submitted information pursuant to protective order in one proceeding to monitor *all future Commission proceedings*, whether or not they had an interest in such proceedings, to ensure that their confidential information was not improperly used or disclosed.” *MSA Forbearance Order* ¶ 13 n.42 (emphasis added). The Commission further asserted that modification of the *MSA Forbearance* protective order was unnecessary because “the public versions of the Commission’s prior forbearance orders adequately disclose the analytical

⁵ See also Order, *Access Charge Reform*, 17 FCC Rcd 8252, ¶ 9 (Chief, Wireline Comp. Bur. 2002) (“*Access Charge Reform Order*”) (denying alternative request to modify protective order to permit use of confidential information in all future Commission proceedings); Report and Order, *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, ¶ 31 (1998) (“*Confidential Information Order*”) (adopting model protective order and declining “routinely” to permit use of confidential information from one proceeding in all future proceedings).

framework it has applied to the specific facts and evidence in the record of such proceedings.”

Id.

That rationale does not justify the denial of this motion. First, the relief sought here is much more narrow than the relief addressed in the *MSA Forbearance Order*. Verizon requests authority to use only information redacted from the public version of the Commission’s *order*; it does not seek to use other confidential information filed in the docket but not redacted from the public order. Further, Verizon seeks permission to use the information at issue *only* for purposes of its petition for review of the *MSA Forbearance Order*. Therefore, Verizon’s motion does not implicate the concern identified in the *MSA Forbearance Order*: Granting this request would impose no onerous monitoring obligation on parties that submitted confidential information in the *Omaha Forbearance* docket, because the proceeding in which the information will be used is known to all (namely, the D.C. Circuit proceeding on Verizon’s petition for review of the *MSA Forbearance Order*), as is the set of information that Verizon seeks permission to use (namely, information redacted from the public version of the *Omaha Forbearance Order*). Moreover, the relief sought here is consistent with past decisions modifying a protective order in one proceeding to permit the use of confidential information in a specified, second proceeding where the moving party showed — as Verizon has shown here — that the confidential information in question would aid in the resolution of issues involved in the second proceeding.⁶

Finally, the Commission’s assertion in the *MSA Forbearance Order* that the Commission’s orders adequately disclose their “analytical framework” — even if critical data

⁶ See *Access Charge Reform Order* ¶ 7; see also *Confidential Information Order* ¶ 31 (adopting model protective order and, while declining “routinely” to permit use of confidential information from one proceeding in other proceedings, stating that a “party seeking to use protected information obtained in one proceeding in another proceeding may file a petition with the Commission explaining why such use of the protected information is appropriate”).

remain redacted — does not justify denying this request. For purposes of Verizon’s petition for review, it intends to contend, among other things, that the Commission has effectively altered its analytical framework (without adequate explanation), insofar as it has applied its forbearance analysis to achieve disparate results based on similar facts. If Verizon cannot inform the court of appeals of the actual facts on which the Commission relied in the *Omaha Forbearance Order*, it will be unable effectively to make that contention.

4. Counsel for Verizon has contacted counsel for Qwest Corporation and counsel for Cox Communications, Inc. to request their consent to Verizon’s use of their confidential information contained in the *Omaha Forbearance Order*. Counsel for Qwest has authorized us to state that Qwest consents to the relief sought herein. If Verizon receives consent from Cox, it will inform the Commission, as consent from both Qwest and Cox would make the granting of this motion a purely ministerial act. *See, e.g., MSA Forbearance Order* ¶ 13 n.42 (noting that “parties are free to consent to the public disclosure of certain confidential information”). In all events, Verizon’s due process rights to challenge a Commission order cannot be contingent on the beneficence of third parties.

5. To ensure that Verizon is able fully to litigate its challenges to the *MSA Forbearance Order*, Verizon respectfully requests that the Commission act on this motion by February 8, 2008. If the Commission does not grant this motion by that date, Verizon will deem it denied and seek comparable relief from the D.C. Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of January 2008, I caused copies of the foregoing Motion To Modify Protective Order to be served upon each of the following by first-class mail, postage prepaid:

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