



July 1, 2011

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20534

Re: Ad Hoc Telecommunications Users Committee Response to NECA and JSI Objections to Request for Confidential Information filed in CC Docket 01-92; GN Docket No. 09-51; WC Docket Nos. 05-37, 07-135 and 10-90 (Data Related to Universal Service and Intercarrier Compensation Reform)

Dear Ms. Dortch:

Please find attached the Ad Hoc Telecommunications Users Committee's Response to objections filed by the National Exchange Carrier Association and John Staurulakis, Inc. to Ad Hoc's request for confidential information pursuant to the Protective Order in the above named dockets.

Any questions regarding this matter may be directed to Andrew M. Brown at the address and telephone number listed below, or by email at abrown@lb3law.com.

Sincerely,


Amanda J. Delgado

CC: Sharon Gillett, WCB, Federal Communications Commission
Kevin King, WCB, Federal Communications Commission
Lynne Hewitt Engledow, PPD, Federal Communications Commission
Marcus Maher, WCB, Federal Communications Commission
Ken Cartmell, Manager, Regulatory Affairs, John Staurulakis, Inc.
Regina McNeil, Vice President of Legal, General Counsel & Corporate Secretary, NECA

Copied parties served via E-mail.



July 1, 2011

Sharon E. Gillett
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: Ad Hoc Telecommunications Users Committee Response to NECA and JSI Objections to Request for Confidential Information filed in CC Docket 01-92; GN Docket No. 09-51; WC Docket Nos. 05-37, 07-135 and 10-90 (Data Related to Universal Service and Intercarrier Compensation Reform)

Dear Ms. Gillett:

Over the last several weeks, the Ad Hoc Telecommunications Users Committee (“Ad Hoc”), through its Outside Counsel, Levine, Blaszak, Block and Boothby, LLP (“LB3”), has requested access to confidential information filed by certain parties in the above-referenced dockets (the “USF/ICC Reform Proceeding”). The National Exchange Carrier Association (“NECA”) and John Staurulakis, Inc. (the “Objecting Parties”), representing regulated rate-of-return carriers, have refused to comply with the Bureau’s protective order in these dockets¹ and provide Ad Hoc with access to their confidential data. Citing the “sensitivity” of their information, they have filed formal objections to the disclosure of such information to Ad Hoc.² For the reasons detailed below, we respectfully request that the Bureau order the Objecting Parties to comply with the Protective Order.

Background

The Commission adopted a Protective Order governing access to confidential information in the USF/ ICC Reform Proceeding “to ensure that any confidential or proprietary documents submitted by a party ... are afforded

¹ *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, GN Docket No. 09-51; WC Docket Nos. 05-37, 07-135 and 10-90, Protective Order, 25 FCC Rcd 13160 (2010) (“Protective Order”).

² Letter from Ms. Regina McNeil, Vice President of Legal, General Counsel & Corporate Secretary, National Exchange Carrier Association, to Sharon Gillett, Chief, Wireline Competition Bureau (Jun. 10, 2011) (“NECA Objection”); Letter from Ken Cartmell, Manager, Regulatory Affairs, John Staurulakis, Inc. to Sharon Gillett, Chief, Wireline Competition Bureau (Jun. 27, 2011) (“JSI Objection”).



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adequate protection in these dockets.”³ In compliance with the requirements of the Protective Order, LB3 and Ad Hoc’s economic experts executed and timely filed Acknowledgments of Confidentiality which, under the terms of the Protective Order, permits review of confidential data entered in the record by a Submitting Party.⁴

Following receipt of the objections, Ad Hoc contacted the Objecting Parties in an effort to address informally (and without Commission intervention) any reasonable concerns underlying the Objecting Parties’ refusal to release the confidential information according to the process and subject to the protections set forth in the Protective Order. Both NECA and JSI were unwilling to withdraw their objections. They further indicated that their objections were not directed to Ad Hoc in particular, but to disclosure in general, and that they did not intend to disclose their confidential data to any non-governmental third party in the USF/ICC Reform Proceeding.

Enforcement of the Protective Order

The Commission’s Protective Order has already resolved the issues raised by the Objecting Parties in their objections. The Protective Order ensures adequate protection of confidential information by setting forth specific limitations on the use and disclosure of confidential information by other “Receiving Parties” in the proceeding.⁵ But most importantly, the Protective Order effectively balances two competing but equally important interests: a Submitting Party’s desire to protect sensitive information and a Reviewing Party’s legitimate need for access to such data in order to participate in the USF/ICC Reform Proceeding.⁶

³ Protective Order at 1, para. 1

⁴ The Acknowledgments of Ad Hoc’s Outside Counsel and economic experts can be viewed at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021034526> (filed via ECFS on Mar. 16, 2011).

⁵ Protective Order at 3, para. 8.

⁶ Although the Commission has adopted protective orders in numerous rulemakings, it has previously stated its preference against keeping information secret and unavailable for public comment. See *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24844 (1998) (“*Examination of Confidentiality Policy*”). Given that access to confidential information in this proceeding is already



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By refusing to follow the procedures and protections established in the Protective Order, the Objecting Parties would repudiate the balance struck by the Bureau. They offer no persuasive explanation as to why the requirements of the Protective Order already put in place by the Commission are inadequate to preserve the confidentiality of the information they submit, nor do they offer any particular objection to the review of this information by Ad Hoc.

The Bureau put the Objecting Parties on notice that their data would be subject to review by third parties other than the Commission when the Bureau first requested the data. The Commission expressly stated in its data requests that content submitted in response would be subject to the terms of the Protective Order which gives parties who comply with its terms the ability to protect and to review confidential information submitted by other parties.⁷ Indeed, the whole purpose of the Protective Order is to establish “rules of the road” pursuant to which sensitive data will be provided to third parties for their review. And both Objecting Parties submitted their data subject to the terms of the Protective Order.⁸

The Objecting Parties seek to avoid compliance with the terms of the Protective Order by requesting confidential treatment of their data pursuant to the Commission rules relating to records “not routinely available for public

subject to restrictions on disclosure imposed by the Protective Order, the Commission need not aggravate the problem of suppressing information in the public record by permitting the Objecting Parties’ to prohibit *any* review of their data by other participants in the proceeding.

⁷ Letter from Sharon Gillett, Chief, Wireline Competition Bureau to Regina McNeil, Vice-President and General Counsel, NECA (Mar. 29, 2011) at 3 (“We understand that some of your members may consider this information to be proprietary. We remind you and your members that the Commission has a *protective order in place in this proceeding to protect those reasonable interests.*”) (italics added); *Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, 76 Fed. Reg. 11632 (rel. Feb. 9, 2011) (the “NPRM”) at para 572 & n.854 (“We recognize the commercially sensitive nature of this information, and *have established a protective order in this docket to permit the data to be provided subject to confidentiality protections.*”) (italics added).

⁸ Letter from Regina McNeil to Marlene H. Dortch, Secretary and Lynne Hewitt Engledow, PPD, Federal Communications Commission (filed May 25, 2011) at 1; Letter from Kenneth Cartmell, Manager, John Staurulakis, Inc., to Marlene Dortch, Secretary, Federal Communications Commission (filed May 25, 2011) at 1.



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inspection.”⁹ But the Bureau has already addressed the appropriate level of confidential treatment for sensitive data submitted in this docket by adopting the Protective Order. The rules cited by the Objecting Parties address FOIA requests by the general public, not requests for access to record evidence by a party who has complied with protective procedures set forth in an order adopted by the Commission.¹⁰

Finally, as their position has been communicated to us, the Objecting Parties do not object only to Ad Hoc’s request to review the data. They object to *any* third party having the opportunity to review the data as part of the USF/ICC Reform Proceeding. That position is inconsistent with the terms and purpose of the Protective Order as well as the ability of the Commission and participants in the proceeding to engage in a meaningful exploration of the issues raised and evidence introduced in the rulemaking.¹¹

Protecting the Integrity of the Rulemaking Process

The Commission must also enforce the access procedures in the Protective Order in order to comply with the requirements of the Administrative Procedures Act (“APA”). Under the APA, an agency is required to provide notice and an opportunity for the public to comment in rulemakings.¹² As the Commission has previously noted, “One purpose of the requirement that agencies disclose the documents it [sic] deems relevant to a proceeding ... is to ensure that interested parties have a full opportunity to participate in the

⁹ 47 C.F.R. § 0.457.

¹⁰ To the extent that the Commission entertains the Objecting Parties’ request for confidential treatment under 47 C.F.R. § 0.459(a), Ad Hoc hereby requests that the Commission consider this an objection to such confidential treatment pursuant to 47 C.F.R § 0.459(d)(1).

¹¹ The Commission has previously addressed parties’ specific concerns about the adequacy of measures contained in Commission protective orders by modifying protective orders to include additional measures rather than sustaining objections that would prohibit review of the confidential information by third parties. *See Applications Filed by Qwest Comm. Int’l, Inc. and CenturyTel, Inc.*, Protective Order, WC Docket No 10-110, 25 FCC Rcd 15238, 15238-39 (Oct. 29, 2010) (adopting a modified protective order that balanced “appropriate access to the public while protecting a Submitting Party’s competitively sensitive information”)

¹² 5 U.S.C § 553 (2011).



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proceeding by providing a different perspective on materials that may be relied upon by the agency.”¹³ Interested parties to a proceeding may not be deprived of the opportunity to challenge information submitted by other parties.¹⁴

In this case, Ad Hoc has a direct interest in reviewing and analyzing the data of the Objecting Parties and presents no competitive threat to the Objecting Parties. Ad Hoc’s membership is comprised exclusively of large business end users that annually purchase billions of dollars in telecommunications and related equipment and services. Ad Hoc does not admit carriers as members who might be competitors of the regulated rate of return carriers represented by the Objecting Parties. Accordingly, disclosure of the underlying cost data to Ad Hoc does not present any special risk of exposing competitively sensitive information, as the Objecting Parties (using identical language) suggest.¹⁵

Many of the Commission’s proposals for near term reforms to the USF, including the setting of a rebuttable per-line cap, and changes to intercarrier compensation rates require the submission and evaluation of significant amounts of data from the regulated rate-of-return carriers represented by the Objecting Parties. The Objecting Parties cannot reasonably rely on evidence to support their positions on these issues and then refuse to allow other parties to examine the evidence upon which their positions are based. As large purchasers of telecommunications services, Ad Hoc’s members are currently large contributors to the USF and (indirect) payors of ICC charges by virtue of the significant payments they make to carriers for telecommunications services.¹⁶ Ad Hoc member companies will be directly affected by the reforms ultimately adopted by the Commission in this proceeding. Therefore, Ad Hoc has a profound interest in analyzing the data submitted by the Objecting Parties and providing its analysis to the Commission. Similarly, the Commission has a profound interest in obtaining the analysis of third parties, such as Ad Hoc, as it determines the scope and shape of reforms proposed in the NPRM.

¹³ *Examination of Confidentiality Policy*, 13 FCC Rcd at 24844 (citations omitted).

¹⁴ *Id.*, citing *Westinghouse Elec. Corp. v. United States Nuclear Reg. Comm’n.*, 555 F.2d 82, 95 (D.C. Cir. 1977).

¹⁵ NECA Objection at 2; JSI Objection at 3.

¹⁶ See Comments of Ad Hoc Telecommunications Users Committee on the Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 (filed Apr. 18, 2011) (“Ad Hoc Comments”) at 2.



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Finally, the Commission should dismiss NECA's absurd claim that "[g]iven the public comment period is now closed, there is no justification for releasing the data at this time." Much of the data in question was, of course, submitted by NECA on May 25, 2011, nearly a month after the pleading cycle initially established by the Commission had closed, making it impossible to provide analysis at that time. As NECA is well aware, analysis of the data and guidance to the Commission can be provided as part of the *ex parte* process, the results of which are made public and filed in the record via ECFS.

Conclusion

We urge the Commission to require the Objecting Parties to comply with the terms of the Protective Order adopted by the Commission. The issues associated with the preservation of the confidentiality of sensitive data have already been comprehensively addressed by the adoption of the Protective Order, and the refusal by the Objecting Parties to release any data to any party pursuant to the terms of the Protective Order undermines the Commission's authority to conduct a thorough rulemaking in compliance with its statutory obligations.

We request that the Commission resolve this matter expeditiously. The Commission's aggressive timeframe in the USF/ICC Reform Proceeding makes any delay on the resolution of this issue and receipt of the required data potentially prejudicial to Ad Hoc's ability to fully participate in the proceeding and undermines the procedural soundness of any final order in this docket.

In the event that the Commission does not require the Objecting Parties to disclose the requested data pursuant to the terms of the Protective Order, we note that the objection filed by JSI was not made in a timely fashion in accordance with the requirements of the Protective Order and request that the Commission deny JSI's objection. Ad Hoc requested the data on Tuesday, June 21, 2011 and provided a hyperlink to the executed and filed copies of the Acknowledgments of Confidentiality of the relevant parties. JSI first notified Ad Hoc's counsel of its objection on Monday, June 27, 2011 and made its filing with the Commission on the same date. The Protective Order specifically requires that objections to requests for confidential information be made "within three business days" after receiving a copy of the Acknowledgment of the person



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seeking access to the information.¹⁷ Therefore, we request that the Commission dismiss JSI's request as untimely.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Andrew M. Brown', with a stylized flourish at the end.

Andrew M. Brown
*Counsel to the Ad Hoc Telecommunications
Users Committee*

¹⁷ Protective Order at 3, para 6.