

STATE OF NORTH DAKOTA
BEFORE THE PUBLIC SERVICE COMMISSION

APPLICATION OF NORTH DAKOTA
5 - KIDDER LIMITED PARTNERSHIP
TO PROTECT TRADE SECRET AND
CONFIDENTIAL INFORMATION
SUBMITTED WITH 2010 ETC
ANNUAL REPORT

CASE NO. _____
RECEIVED

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PUBLIC SERVICE COMMISSION

I. INTRODUCTION

North Dakota 5 - Kidder Limited Partnership (the "Company") submits this Application to Protect Trade Secret and Confidential Information in conjunction with its 2010 ETC Annual Report (the "Annual Report"). The Company requests that information contained in four exhibits to the Annual Report be treated as trade secret, proprietary, commercial, and financial information protected from public disclosure pursuant to N.D. Cent. Code § 44-04-18 *et seq.* Analogous information submitted by the Company with its 2007 annual filing was granted trade secret protection by the Commission in its *March 12 Order*.¹

The information which the Company requests be considered trade secret/confidential are Confidential Exhibits A-1, A-2, and A-3 to the Company's "USF Report" and Confidential Exhibit B-1 to the Company's "2009 ETC Outage Report." Consistent with N.D. Admin. Code § 69-02-09-02, these Exhibits are separately submitted in a sealed envelope marked Trade Secret. Public versions of the USF Report and the 2009 ETC Outage Report, with the trade secret/confidential information in the Exhibits redacted, have also been filed.

¹ *Badlands Cellular of North Dakota Limited Partnership, 2007 High-Cost Universal Service Support Annual Report, Case No. PU-07-587, North Dakota RSA No. 3 Limited Partnership, 2007 High-Cost Universal Service Support Annual Report, Case No. PU-07-588, North Central RSA 2 of ND Limited Partnership, 2007 High Cost Universal Service Support Annual Report, Case No. PU-07-590, North Dakota 5 - Kidder Limited Partnership, Case No. PU-07-591, Northwest Dakota Cellular of North Dakota Limited Partnership, Case No. PU-07-592, Bismarck MSA Limited Partnership, Case No. PU-07-593, Order Granting Trade Secret Protection (rel. March 12, 2008) ("March 12 Order").*

II. THE CONFIDENTIAL EXHIBITS

A. Confidential Exhibits A-1, A-2, and A-3 to the Company's USF Report

Confidential Exhibit A-1 is a table identifying specific construction or upgrade projects that the Company undertook in its Designated Area in 2009 in order to expand or improve service. Confidential Exhibit A-3 is a table identifying specific construction, maintenance, or upgrade projects the Company plans to undertake in its Designated Area in 2011. For each project on these tables, the Company has included the start and completion dates, the amount of investment made or expected to be made, the geographic location, and the estimated population served. Confidential Exhibit A-2 is a statement of the Company's 2009 network and operating expenses, as well as a projection of the Company's 2011 network and operating expenses.

B. Confidential Exhibit B-1 to the Company's ETC Outage Report

Confidential Exhibit B-1 to the ETC Outage Report includes certain specific information for each outage of over 30 minutes in duration experienced by the Company in its ETC-designated service area in 2009, including the geographic area, the start and end time, a description, the resolution, the services affected, the number of customers affected, and steps taken to prevent similar situations.

III. THE CONFIDENTIAL EXHIBITS ARE AFFORDED TRADE SECRET PROTECTION BY THE FCC AND UNDER NORTH DAKOTA LAW

North Dakota's Open Records Law (N.D.C.C. § 44-04-18 *et seq.*) provides that "Except as otherwise specifically provided by law, all records of a public entity [such as the Commission] are public records" and therefore must be made available. N.D.C.C. § 44-04-18(1) (emphasis added). The Open Records Law also contains a specific exception – Section 44-04-18.4(1) – which provides a safeguard for confidential information (the "Confidential Exception"). The information in the Confidential Exhibits falls within the "otherwise specifically provided by law"

exception because it information is treated as confidential by the regulations and orders of the Federal Communications Commission (“FCC”). Moreover, the information in the Confidential Exhibits falls within the statutorily-defined Confidential Exception.

A. The FCC Treats this Information as Confidential

The “term ‘law’ as used in [N.D.C.C. § 44-04-18(1)] includes federal statutes and applicable federal regulations, as well as state law.” N.D. Op. Atty. Gen. L-32, 1998 WL 1058327 (Mar. 30, 1998). The information in the Confidential Exhibits is stated to be confidential by the FCC under 47 C.F.R. §§ 0.457 and 0.459 and its orders. *See, e.g., Cingular Order*,² ¶ 1 (granting a protective order to keep service improvement plan information like that contained in Confidential Exhibits A-1, A-2, and A-3 confidential); *Corr Order*³ ¶ 1 (same); *Outage Order*⁴ ¶ 3 (explaining why outage information similar to that contained in Confidential Exhibit B-1 is considered confidential for reasons of national security). In its *March 12 Order*, the Commission found that “the information in [the Company’s 2007] Confidential Exhibits A-1, A-2, A-3, and C-1 [containing outage information] is protected under federal regulation.” *March 12 Order* at 5. Accordingly, the Commission should consider the Company’s current Confidential Exhibits to be confidential under the exception in N.D.C.C. § 44-04-18(1) for information “otherwise specifically provided by law” as non-public.

² *In the Matter of Federal-State Joint Board on Universal Service, Petition of Cingular Wireless, LLC for Designation as an Eligible Telecommunications Carrier in the State of Georgia, Protective Order*, CC Docket No. 96-45, *Order*, DA 07-3627 (rel. Aug. 15, 2007) (“*Cingular Order*”).

³ *In the Matter of Federal-State Joint Board on Universal Service, Corr Wireless Communications, LLC Petition for Designation as an Eligible Telecommunications Carrier in the State of Alabama, Protective Order*, CC Docket No. 96-45, *Order*, DA 07-3629 (rel. Aug. 15, 2007) (“*Corr Order*”).

⁴ *In the Matter of New Part 4 of the Commission’s Rules Concerning Disruptions to Communications*, ET Docket No. 04-35, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-188, 19 FCC Rcd. 16830 (rel. Aug. 19, 2004) (“*Outage Order*”).

B. The Confidential Exhibits Fall Within the Confidential Exception

Section 44-04-18.4(1)'s Confidential Exception provides as follows: "(1) Trade secret, proprietary, commercial, and financial information is confidential if it is (2) of a privileged nature and (3) it has not been previously publicly disclosed." (emphasis and numbering added).

"Trade secret" is defined as follows:

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, technical know how or process, that:

1. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons that can obtain economic value from its disclosure or use; and
2. Is the subject of efforts that are reasonable under the circumstances to maintain the secrecy of the information.

N.D.C.C. § 44.04-18.4.⁵

The Confidential Exhibits meet each element of the Confidential Exception under North Dakota Statutes. First, they fall squarely within the definition of a "trade secret." If the Company's competitors obtained the information contained in the Confidential Exhibits, the competitors could obtain economic value from the disclosure. Given this potential, the Company closely safeguards the information by prohibiting employee disclosure and restricting access to the information. Second, the information in the Confidential Exhibits is "of a privileged nature" because "disclosure of the information is likely ... to cause substantial harm to the competitive position of the person from whom the information was obtained." *See* N.D. Op. Atty. Gen. L-77, 1998 WL 1058291 (June 17, 1998). The Company would be substantially harmed if the Confidential Exhibits' information were made public. Finally, the information in the Confidential Exhibits has not previously been disclosed. Therefore, as the Commission found in

⁵ *See also* N.D.C.C. § 47-25.1-01, which provides a nearly identical definition of "trade secret."

its *March 12 Order*, the information found in Confidential Exhibits A-1, A-2, A-3 and B-1 qualifies for confidential treatment under N.D.C.C. § 44-04-18.4.

IV. CONCLUSION

The Company respectfully requests that Confidential Exhibits A-1, A-2, A-3, and B-1 be held confidential pursuant to N.D.C.C. § 44-04-18 *et seq.*, consistent with the *March 12 Order*.

Respectfully submitted,

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