STATE OF NORTH DAKOTA

BEFORE THE PUBLIC SERVICE COMMISSION

APPLICATION OF NORTHWEST DAKOTA CELLULAR OF NORTH DAKOTA LIMITED PARTNERSHIP TO PROTECT TRADE SECRET AND CONFIDENTIAL INFORMATION IN 2016 FORM 481 ETC REPORT

CASE NO.

RECEIVED
JUN 30 2016
NORTH DAKOTA
PUBLIC SERVICE COMMISSION

I. INTRODUCTION

Northwest Dakota Cellular of North Dakota Limited Partnership (the "Company") submits this Application to Protect Trade Secret and Confidential Information contained in its 2016 Form 481 ETC Report (the "Form 481 Report"). The Company requests that certain information in the Form 481 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 previous ETC compliance filings 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 is (1) outage reporting information on worksheet 200 of the Form 481; (2) the number of complaints per 1,000 customers, on line 420 of page 400 of the Form 481; and (3) the Company's report on use of support, in attachment 112 of the Form 481 (collectively, the "Confidential Information"). Consistent with N.D. Admin. Code § 69-02-09-02, the trade secret/confidential version of the Form 481 Report is separately submitted in a sealed envelope

[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*").

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marked "Protected information - Private." A public version of the Form 481 Report, with the Confidential Information redacted, has also been filed.

II. THE CONFIDENTIAL INFORMATION IS 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 Confidential Information falls within the "otherwise specifically provided by law" exception because it is treated as confidential by the regulations and orders of the Federal Communications Commission ("FCC"). Moreover, the Confidential Information 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 Confidential Information 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] (granting a protective order to keep service improvement plan information like that contained in Attachment 112 confidential); *Corr Order*[3] (same); *Outage Order*[4] (explaining why network outage

[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*").

information is considered confidential for reasons of national security). In its *March 12 Order*, the Commission found that information nearly identical in nature to the Confidential Information "is protected under federal regulation." *March 12 Order* at 5. Accordingly, the Commission should consider the Company's current Confidential Information 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.

B. The Confidential Information Falls 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 Information meets each element of the Confidential Exception under North Dakota Statutes. First, it all falls squarely within the definition of a "trade secret." If the Company's competitors obtained the Confidential Information, the competitors could obtain economic value from the disclosure. Given this potential, the Company closely safeguards the Confidential Information by prohibiting employee disclosure and restricting access to it. Second,

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[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*").

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

the Confidential Information 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 Information were made public. Finally, the Confidential Information has not previously been disclosed. Therefore, as the Commission found in its *March 12 Order*, the Confidential Information qualifies for confidential treatment under N.D.C.C. § 44-04-18.4.

III. CONCLUSION

The Company respectfully requests that the Confidential Information be held confidential pursuant to N.D.C.C. § 44-04-18 *et seq.*, consistent with the *March 12 Order*.

Respectfully submitted,

BRIGGS AND MORGAN, P.A.

Dated: June 30, 2016

By _____

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