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FOUNDED 1866

October 13, 2015

Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: AT&T's Objection To Disclosure Of Confidential Or Highly Confidential Information To Mr. Kushnick Under the Governing Protective Orders, WC Docket No. 05-25, RM-10593

Dear Ms. Dortch:

Pursuant to the Public Notice released by the Federal Communications Commission ("Commission") on October 7, 2015,¹ AT&T respectfully objects to the disclosure of its Confidential and Highly Confidential Information and Data to Mr. Bruce Kushnick under the *Data Collection Protective Order*.² In addition, AT&T notes that Mr. Kushnick also filed with the Commission Acknowledgements of Confidentiality seeking access to Confidential and Highly Confidential Information under the *Modified Protective Order* and the *Second Protective Order*.³ AT&T also objects to the disclosure of its Confidential and Highly Confidential Information and Data to Mr. Kushnick under these orders.⁴

¹ Public Notice, *Additional Parties Seeking Access To Data and Information Filed in Response to the Special Access Data Collection*, WC Docket No. 05-25, RM-10593, DA 15-1149 (Oct. 7, 2015) ("October 7 Public Notice").

² Order and Data Collection Protective Order, *In re Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, DA 14-1424 (rel. Oct. 1, 2014) ("*Data Collection Protective Order*").

³ See Second Protective Order, *In re Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, DA 10-2419 (rel. Dec. 27, 2010) ("*Second Protective Order*"); Modified Protective Order, *In re Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, DA 10-2075 (rel. Oct. 28, 2010) ("*Modified Protective Order*").

⁴ AT&T is submitting this objection to Mr. Kushnick's Acknowledgments of Confidentiality under the *Modified Protective Order* and *Second Protective Order* even though Mr. Kushnick has not yet served AT&T with those Acknowledgements of Confidentiality as required by those orders. According to Mr. Kushnick's submission, as reported in ECFS, Mr. Kushnick sent his

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Neither Mr. Kushnick nor his company (New Networks Institute) are participants in this proceeding. They have made no submissions in this case (other than their submission seeking access to Confidential and Highly Confidential Information and Data). Nor does Mr. Kushnick represent or otherwise consult for any participant to this proceeding. As such, there is no legitimate reason for Mr. Kushnick to have access to the highly sensitive business materials AT&T has submitted to the Commission under the governing Protective Orders. And, Mr. Kushnick clearly does not qualify to obtain such materials under those Protective Orders.

Data Collection Protective Order. The *Data Collection Protective Order* states that “[a]ccess to Highly Confidential Information (including Stamped Highly Confidential Documents) is limited to Outside Counsel of Record, Outside Consultants, and those employees of Outside Counsel and Outside Consultants described in paragraph 9.”⁵ Mr. Kushnick clearly is not “Outside Counsel” for any Participant in this proceeding. Nor is he an Outside Consultant.⁶ The Order defines “Outside Consultant” as follows:

“Outside Consultant” means a consultant or expert retained for the purpose of assisting Outside Counsel or a Participant in this proceeding, provided that such consultant or expert is not involved in Competitive Decision-Making. The term “Outside Consultant” includes any consultant or expert employed by a non-commercial Participant in this proceeding, provided that such consultant or expert is not involved in Competitive Decision-Making.⁷

Mr. Kushnick does not satisfy the first sentence in this definition because he has not been “retained for the purpose of assisting Outside Counsel or a Participant in this proceeding.” Mr. Kushnick does not satisfy the second sentence in this definition because he is not employed by a

Acknowledgments of Confidentiality via e-mail to David L. Lawson of Sidley Austin. But in May 2015, Mr. Lawson left Sidley Austin and withdrew from this proceeding, and the e-mail address used by Mr. Kushnick is no longer active. On April 30, 2015, Mr. Lawson submitted a letter in this proceeding stating that any communications should instead be sent to the undersigned. See Letter from David L. Lawson to Marlene H. Dortch, WC Docket No. 05-25, RM-10593 (April 30, 2015).

⁵ *Data Collection Protective Order*, Appendix A, ¶ 5.

⁶ Paragraph 9 provides access for employees of Outside Counsel or Outside Consultants. Mr. Kushnick is neither. *Id.* ¶ 9.

⁷ *Id.*, Appendix A, ¶ 1.

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non-commercial Participant in this proceeding. Mr. Kushnick is employed by New Networks Institute, which is not a Participant in this proceeding.⁸

The Second Protective Order. The *Second Protective Order*, also limits access to Highly Confidential Information to Outside Counsel and Outside Consultants, and adopts virtually the same definitions for Outside Counsel and Outside Consultants as the *Data Collection Protective Order*. Accordingly for the reasons stated above, Mr. Kushnick is not eligible to obtain Confidential or Highly Confidential Information pursuant to the *Second Protective Order*.

Modified Protective Order. Under the *Modified Protective Order*, Confidential Information may be obtained only by Counsel, who in, turn may share those materials with outside consultants or experts, but only if those outside consultants or experts were “retained for the purpose of assisting Counsel.”⁹ Accordingly, Mr. Kushnick is not entitled to directly access Confidential Documents. Counsel for New Networks Institute must request those materials, and such Counsel could share those materials with Mr. Kushnick only if it could establish that Mr. Kushnick was retained to assist such Counsel in this proceeding. None of these pre-requisites exists here. Mr. Kushnick, therefore, is not entitled to access Confidential or Highly Confidential Information under the *Modified Protective Order*.

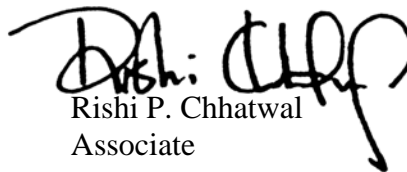
⁸ A “Participant” is “a person or entity that has filed, or has a good faith intention to file, *material* comments in this proceeding” (emphasis added). *Id.* New Networks Institute has never filed any comments at all, material or otherwise, and Mr. Kushnick’s submission does not assert that New Networks Institute intends to file comments. That alone is ample grounds to bar disclosure of this highly sensitive material. Moreover, even if New Networks Institute and Mr. Kushnick attempted to make such a good faith showing, a simple statement expressing an intention to file comments would not be sufficient. Given that New Networks Institute has never participated in this proceeding and has no obvious interest or expertise, it would be incumbent on Mr. Kushnick to demonstrate that New Networks Institute has the means and the capacity to submit *material* comments – *i.e.*, comments that could make use of the voluminous data here in ways that could make a meaningful contribution to the Commission’s analysis in this proceeding. The data submissions here contain some of these companies’ most sensitive competitive information, and in recognition of that fact, the Commission’s protective orders strictly limit access to the smallest possible circle of outside counsel and consultants. Providing access to those data to any individual that simply shows up and says “I want to file comments” would eviscerate those protections and would result in over-broad dissemination of critically sensitive business information that the parties submitted with the good faith understanding that their dissemination would be extremely limited by the governing Protective Orders.

⁹ *Modified Protective Order* ¶ 10.

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For the foregoing reasons, AT&T objects to the Acknowledgments of Confidentiality filed by Mr. Bruce Kushnick and requests that the Commission decline to authorize Mr. Kushnick's access to Confidential or Highly Confidential Information and Data in this proceeding.

Respectfully submitted,


Rishi P. Chhatwal
Associate

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