October 22, 2015

Bruce Kushnick, Executive Director
New Networks Institute

Via ECFS
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
October 13, 2015

Re: Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25 and RM-10593; Response to AT&T and Verizon Objections to Disclosure of Confidential or Highly Confidential Information to Mr. Kushnick Under the Governing Protective Orders

Dear Secretary Dortch:

New Networks Institute submits this Reply to the Objection to Disclosure of Confidential and Highly Confidential Information by AT&T. This Reply also addresses Verizon's "me too" objection. The objections should be overruled and access should be permitted. New Networks does intend to participate in this proceeding and will do so in a meaningful way. New Network's input will assist the Commission in its evaluation of the evidence and its determination of the proper outcomes regarding the rules for special access services and rates. New Networks can do so, however, only if Mr. Kushnick – who is the expert and analyst New Networks will use – is allowed access to the protected information pursuant to the applicable Protective Orders ("POs").

New Networks has a justiciable interest and certainly has administrative standing

New Networks Institute ("NNI") was founded in 1992 as a market research firm, focusing on the public interest, in order to gather information, assess that information and provide reports available to the public, regulators and other policy-makers regarding the impact of changes or other developments in the telecommunications industry on subscribers. The NNI team has produced a long series of such reports. Many have been shared with regulators, including this Commission. NNI has also filed comments and complaints with the Commission on a host of subjects, including some where special access was directly or indirectly involved. The NNI team has considerable expertise when it comes to assembling, assimilating and assessing massive amounts of detailed technical or accounting information. NNI organizes the information and synthesizes it for proper analysis and draws conclusions from the data that allows those who are concerned about basic users and their welfare can draw the proper conclusions regarding whether desired outcomes have been obtained and if not why that is so. NNI then typically makes

recommendations regarding necessary practice, rules or other changes that are necessary to protect subscribers and ensure that they receive adequate service at a fair price.

NNI's Executive Director is Bruce Kushnick, the individual that executed the protective order certifications in issue and the person that would access the protected materials in issue. Mr. Kushnick has committed in writing to abide by the terms of these protective orders. He has 34 years of experience in the telecommunications industry and is well qualified as an expert. He will be able to understand the information in issue, conduct an analysis and generate a report containing findings and recommendations that will be filed[1] with the Commission. The input will be valuable and useful.

NNI is a market research firm, focusing exclusively on telecommunications issues and the public interest. NNI does not provide competitive communications service of any kind, on a common carrier or private basis. NNI does not have "outside counsel" or an "outside expert." Everything is in-house. That is not a problem, however, precisely because NNI is not a competitor and therefore cannot use any protected information for competitive purposes.

NNI does not have a competitive dog in the fight between ILECs and competitive providers. NNI, its members and those who donate to NNI do, however, buy communications service from all of these providers. NNI and its members are each an "interested person" and will be "affected" by any decision in this case. NNI, of course, will also advocate on behalf of the general body of subscribers who purchase service from ILECs and the competitive providers who obtain special access service as an input to their own retail service output. NNI, therefore, wants to bring a leash to the industry's dog party to prevent these players from biting their customers (including NNI and its members), and has every right to do so. NNI most certainly has "administrative standing"[2] to participate as a party.

Response to AT&T and Verizon Contentions

AT&T's Objection appears to contend that under the POs only actual competitors can have access to protected information. AT&T also seems to be arguing that if the information is Highly Confidential ("HC"), the party must retain outside counsel and/or or outside experts (as opposed to "in house") and only the outside representatives can view the HC information. AT&T's position seems to be that public interest groups – who are not "competitors" – cannot see protected information at all, even through outside counsel and outside experts. Verizon's "me-too" adopts AT&T's argument. The incumbents' contentions that public interest organizations should be denied the opportunity to meaningful participation in Commission proceedings because they cannot see the very information that will be used to form factual, policy and legal conclusions is not correct, nor is it proper from a public interest perspective. FCC proceedings cannot be closed to all but the big companies who are regulated by the Commission and provide

[1] All protected information will be redacted from any publicly-filed materials, consistent with the requirements in the applicable POs.

[2] We need not worry at this juncture whether NNI would have "judicial standing" in the event of a petition for review.

service to the public. The public ultimately suffers or enjoys the brunt of the FCC's decisions. The Communications Act is there to protect the public from the carriers rather than the other way around.[3]

The POs in issue serve two purposes. The information in issue is indeed competitively sensitive. The POs allow the Commission to gather (and participants to review) information that might otherwise not be available at all if it was not given proper protection from public disclosure under the Freedom of Information Act. The justification for precluding public disclosure is that it is "competitively sensitive" commercial or financial information under 5 U.S.C. §552(b)(4). The PO allows the Commission to receive sensitive information while still shielding it from public disclosure. But *some* of the participants are competitors, and the disclosing parties have a legitimate concern that recipients who compete with the disclosing party might take the information and use it for untoward, competitive purposes rather than merely to participate in this proceeding. That is why, for example, authorized parties must commit in writing that they will not use the information for competitive purposes.

The disclosing party's interest, and the exceptions, are all focused on keeping the information **from competitors**. Similarly the discovery-related protection in the context of adjudications is to prevent a party that is a **competitor** in litigation with the disclosing party from obtaining information in a civil case for purposes of litigation and then strategically using that information for purposes outside of the litigation, for competitive gain.

These concerns have no force when a public interest group such as NNI is the one receiving the information. NNI is not a competitor, so it cannot use the information for competitive gain. The only legitimate concern is that NNI (or any other public interest group) might get the information and then make it public – whereupon a competitor learns it – or otherwise give it to a competitor.

HC information is so sensitive that additional mechanisms are appropriate to protect the disclosing party's commercial or financial information from potential misuse by competitors. A **competitor** must get HC information only through outside representatives, to give an added layer of protection against misuse. But there is not and should not be any requirement that a public interest group have outside representation, nor is or should there be a limitation for disclosure of HC information to only outside representatives for public interest groups.

[3] "The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. By § 402(b) (2), Congress gave the right of appeal to persons 'aggrieved or whose interests are adversely affected' by Commission action. * * * But these private litigants have standing only as representatives of the public interest." *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1001 (D.C. Cir. 1966) *quoting Federal Communications Commission v. Sanders Radio Station*, 309 U.S. 470, 477, 642, 60 S. Ct. 693, 698, 84 L. Ed. 869, 1037, *Associated Industries of New York State, Inc. v. Ickes*, 134 F.2d 694, 703 (2d Cir. 1943), vacated as moot, 320 U.S. 707, 64 S. Ct. 74, 88 L. Ed. 414 (1943) and *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14, 62 S. Ct. 875, 86 L. Ed. 1229 (1942).

In this case, NNI is not a competitor. Nor does it have outside counsel or experts. Everything is in house. Bruce Kushnick has effectively been "hired" by New Networks Institute to analyze the data. No competitive concerns arise, so long as Kushnick commits to not making the information public or disclosing to a competitor. That has already occurred through the certification.

Reading the Protective Order the way AT&T and Verizon propose would functionally mean that no public interest group that has only inside representation and no outside representation can ever have access to HC information, which effectively bars public interest groups from meaningfully participating in the case. The POs do and should be read to allow NNI and all other public interest groups to have access so long as the person executing the certification agrees to abide by, and does abide by, the use and disclosure restrictions. NNI and Mr. Kushnick have, and will.

AT&T and Verizon mention that NNI has not previously participated in this case and did not indicate that it intended to. The certification form did not have a place for "I want to play and promise to bring my best game." But Mr. Kushnick would not have promised to use the protected information only for participatory purposes if NNI was not going to actually use it in the case. If AT&T is trying to communicate some fear that Mr. Kushnick will not abide by the orders it needs to say that directly, and provide a reasonable basis for that fear. NNI and its representative Mr. Kushnick will – as we must based on the PO certification – only use the information for purposes of participation in this case. NNI affirmatively states that it does indeed plan to participate with meaningful comments and other filings and reports that rely, in material part, on the information.[4]

There was no deadline to appear in this case, and it is still open for public participation. The certifications were timely filed. NNI cannot meaningfully participate on a going forward basis unless we get access to the information in the first place. That does mean, of course, that NNI can reasonably be expected to, and will follow up and participate as this case proceeds.

NNI respectfully requests that the AT&T and Verizon objections be overruled and that Mr. Kushnick be allowed access to the protected information, subject to the requirements in the applicable POs.

Respecfully Sumbitted
New Networks Institute
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[4] Again, however, all of the requirements in the PO will be followed regarding publicly-filed materials.