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FOUNDED 1866

December 18, 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:

AT&T objects to the disclosure of its Confidential and Highly Confidential Information and Data to Mr. Bruce Kushnick under the *Data Collection Protective Order*,¹ *Modified Protective Order*,² and the *Second Protective Order*.³ AT&T previously stated its objection in an October 13, 2015 letter.⁴ Mr. Kushnick submitted a reply on October 22, 2015.⁵ Mr. Kushnick's reply serves only to confirm that he does not qualify to obtain the highly sensitive materials that are subject to the Protective Orders.

The materials to which Mr. Kushnick seeks access contain "competitively valuable information" that could significantly advantage "the competitive decision-making activities of

¹ 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*").

² 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*").

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

⁴ Letter from Rishi P. Chhatwal to Marlene H. Dortch, *Special Access for Price Cap Local Exchange Carriers, et al.*, WC Docket No. 05-25 (Oct. 13, 2015) ("*AT&T Objection*").

⁵ Letter from Bruce Kushnick to Marlene H. Dortch, *Special Access for Price Cap Local Exchange Carriers, et al.*, WC Docket No. 05-25 (Oct. 22, 2015) ("*Kushnick Reply*").

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any entity in competition with or in a business relationship with the submitting party.”⁶ For example, carriers were asked to submit to the Commission granular data regarding “locations with connections, prices charged to customers at the circuit-level, maps showing fiber routes and points of interconnection, revenues and expenditures.”⁷ As the Commission recognized, this type of detailed data “if released to competitors would allow those competitors to gain a significant advantage in the marketplace.”⁸ The Protective Orders were adopted to balance the Commission’s need for detailed data to assist in its policy-making function with the need to prevent the release of such commercially-sensitive data to the public. As the Commission explained, the Protective Orders “serve the dual purpose of protecting competitively valuable information while still permitting limited disclosure for a specific public purpose.”⁹

In the most recent phase of the data collections, however, the Commission went beyond simply adopting and supplementing the existing Protective Orders. In recognition of the large quantity and uniquely sensitive nature of the competitive information at issue,¹⁰ it took steps “above and beyond the restrictions contained in prior protective orders to secure this information” and prevent “public disclosure,” including creating a “secure central database” to house the information.¹¹ This secure database can only be accessed by “authorized persons who are Outside Counsel or Outside Consultants and not involved in Competitive Decision-Making.”¹² In addition, to limit “the risk of harm resulting from inadvertent disclosure” that is “significantly greater than is typically the case in a Commission proceeding,” the Commission imposed “additional restrictions” on viewing and removing data from the repository.¹³ And it adopted rigorous procedures for accessing the database that require public notice of persons who seek access and an opportunity for submitting parties to object to those persons’ review of the

⁶ *Data Collection Protective Order* ¶¶ 4-5; see also *id.* ¶ 27 (the categories of information collected include “information that is among a company’s most competitively sensitive business information”).

⁷ *Id.* ¶ 3.

⁸ *Id.* ¶ 4 (internal quotation omitted).

⁹ *Id.* ¶ 4 (quoting Report and Order, *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd. 24816, ¶ 9 (1998)).

¹⁰ *Id.* ¶ 7 (noting that the most recent data collection presented “unique challenges” for those submitting information”).

¹¹ *Id.* ¶¶ 8-10.

¹² *Id.* ¶ 13.

¹³ *Id.* ¶ 18.

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confidential information and data.¹⁴ While the ultimate goal of these safeguards is to ensure that the competitively-sensitive information does not fall into competitors' hands, the Commission recognized that any public disclosure or unauthorized release of the information is unacceptable because once the information escapes the confines of this proceeding, the Commission cannot prevent it from being acquired by competitors.

These stringent safeguards were essential to gaining the industry's support for the most recent data collection and its participation in the rulemaking. Without these protections that limit dissemination of competitive information to a small, screened group of individuals who will only use it in connection with this proceeding, submitting parties would have been reluctant to turn over their data.¹⁵ Correspondingly, when the submitting parties did turn over their data, they did so in reliance on the Commission's strict adherence to the procedures and protections it established to prevent release of their information. That reliance is crucial to the efficiency and effectiveness of the Commission's decision-making process. Indeed, if the industry were to lose confidence in the robustness of the Commission's procedures for protecting competitively sensitive confidential information, the existing protective order system (which has worked well) could easily devolve into routine and costly interlocutory litigation.¹⁶

Under those procedures and protections, Mr. Kushnick does not qualify to obtain access to the information covered by the Protective Orders. The *Data Collection Protective Order* provides 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."¹⁷ Mr. Kushnick cannot qualify as an outside counsel because he does not profess to be – and is not – an attorney. The biography he has posted on the website of the New Networks Institute mentions only an unspecified undergraduate degree and some graduate work.¹⁸

¹⁴ *Id.* ¶ 23.

¹⁵ See *Kushnick Reply* at 3 (acknowledging that the protective orders "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").

¹⁶ See, e.g., *CBS Corp. v. FCC*, 785 F.3d 699 (D.C. Cir. 2015).

¹⁷ *Data Collection Protective Order*, Appendix A, ¶ 5. Paragraph 9 provides access for certain administrative and clerical employees of Outside Counsel or Outside Consultants, such as paralegals. Mr. Kushnick is not and does not claim to be such an employee of any outside counsel or outside consultant in this proceeding.

¹⁸ See "About Bruce Kushnick," available at <http://newnetworks.com/about-bruce-kushnick/>.

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Nor does Mr. Kushnick qualify as an “Outside Consultant,” which is defined by the *Data Collection Protective Order* (Appendix A, ¶ 1) 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.

“Participant,” in turn, “means a person or entity that has filed, or has a good faith intention to file, material comments in this proceedings.”¹⁹ As AT&T demonstrated,²⁰ he cannot qualify under the first sentence of this definition because he has not been “retained” as an “outside” consultant in this proceeding. Indeed, Mr. Kushnick admits that New Networks Institute, the company he works for, does not have “outside” consultants.²¹ He asserts that New Networks has “effectively” hired him as a consultant,²² but the first sentence of the Commission’s definition expressly provides access only to consultants who are actually – not “effectively” – retained.

The second sentence of this definition provides access to consultants who are “employed by a non-commercial Participant” and who are not involved in competitive decision-making. Even assuming that New Networks Institute is a “non-commercial” entity, Mr. Kushnick cannot meet this definition because New Networks is not a “participant” in this proceeding. It is undisputed that Mr. Kushnick and New Networks have not participated in this proceeding until now – even though the proceeding began in 2005 and the initial protective order was put in place in 2010. It is only now, years later, that Mr. Kushnick contends that New Networks “does intend to participate in this proceeding and will do so in a meaningful way.”²³ But such a bare, self-serving assertion cannot satisfy the protective order’s standard that a “participant” is one who “has filed, or has a good faith intention to file, material comments in this proceedings,”²⁴ and Mr.

¹⁹ *Data Collection Protective Order*, Appendix A, ¶ 1.

²⁰ AT&T Objection at 2.

²¹ *Kushnick Reply* at 2, 4.

²² *Id.*

²³ *Id.* at 1; *see also id.* at 4 (“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”).

²⁴ *Data Collection Protective Order*, Appendix A, ¶ 1.

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Kushnick has offered no evidence of New Networks' good faith or ability to file material comments.²⁵

The absence of such evidence should be fatal to his request because the burden must be on the individual seeking access to the confidential information to demonstrate that he or she is employed as a consultant by an entity that has a "good faith" intention to file "material" comments. An applicant cannot satisfy this requirement merely by *asserting* that the entity has such an intention. If that were the case, then there effectively would be no standard at all and no limiting principle for who can gain access to the commercially sensitive data. This would completely eliminate the purpose and effectiveness of the carefully-crafted protective order, and leave those who complied with the Commission's data request vulnerable to disclosure of their competitively valuable information and substantial competitive harm. It is no answer that "NNI is not a competitor,"²⁶ because the risk that the protective order addresses is *any* release of the confidential information beyond this proceeding – through any party or in any manner – since information released by any means can find its way into competitors' hands.

Mr. Kushnick plainly has not met that burden in his reply submission. Even if his unsupported claim that New Networks Institute will now participate in the proceeding is correct, there is no evidence that he or New Networks has the capacity to participate in a "meaningful way" or file "material comments," two requirements of the protective order.²⁷ As the Commission has explained, the data at issue here present "unique challenges given the scale, volume and competitively sensitive nature of the information collected."²⁸ The dataset contains more than one hundred million records and billions of entries. To enable effective analyses of these data, the Commission and NORC (the entity that is hosting the secure database) have made sophisticated software programs such as SAS, Stata, ArcGIS and others available to those

²⁵ After seeking access to the confidential data in this proceeding, New Networks very recently (on December 16, 2015), filed a letter in more than a dozen Commission proceedings, including this one, alleging that Verizon's pricing of Plain Old Telephone service ("POTs") is discriminatory and not cost-based. Those submissions have little or no relevance to this proceeding. The only reference to this proceeding states: "[t]he proper calculation of costs is crucial to the proper pricing of dedicated special access." *Id.* at 6. But the Commission ended cost-based regulation of special access services decades ago in favor of price caps, and the highly confidential information at issue here does not contain the type of cost information about which the December 16 letter is concerned.

²⁶ *Kushnick Reply* at 4.

²⁷ *Data Collection Protective Order* ¶ 11; Appendix A, ¶ 1.

²⁸ *Id.* ¶ 18.

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seeking to analyze the data.²⁹ The Commission also stated that its own analysis of the data will likely include “panel regressions,” and that it “expect[s]” that reviewing parties “will want to conduct similar econometric analyses.”³⁰ Mr. Kushnick has not shown that he is familiar with any of these software programs, has the ability to conduct econometric analyses, or can effectively analyze such a complex data set. His *Reply* states that “[t]he NNI team has considerable expertise when it comes to assembling, assimilating and assessing massive amounts of detailed technical or accounting information,”³¹ but does not state that Mr. Kushnick has any such experience or expertise – and he is the only member of the “NNI team” who has sought access to the protected data.

Nor is there any evidence of such experience or expertise in materials filed by Mr. Kushnick and his organization in prior Commission proceedings. A search of ECFS identified approximately a few dozen proceedings in which New Networks Institute, Mr. Kushnick, or the affiliated “TeleTruth” made a filing. None contain any analyses of complex data. Instead, these past filings are primarily non-analytical compilations of links to websites, versions of blog posts or, in many cases, simply attacks on other parties before the Commission.³² None of these past filings demonstrate that these parties have any ability – or interest – in analyzing massive amounts of data to constructively participate in a rulemaking.

Unlike academic experts who sometimes seek access to confidential information, Mr. Kushnick’s main occupation appears to be authoring blog posts that appear on websites including the websites for New Networks Institute, Tele-Truth, and the Huffington Post. In addition, much of his work product promotes books he has authored. Given that Mr. Kushnick’s main occupation appears to be writing for publicly available websites and authoring books, there is a heightened concern that giving him access to the highly competitively sensitive information collected by the Commission could result in his disclosing such information through his public writings on purpose or inadvertently. In this regard, Mr. Kushnick has made clear in his blog

²⁹ *Id.* ¶ 17.

³⁰ *Id.* ¶ 9.

³¹ *Kushnick Reply* at 1.

³² See, e.g., New Networks Institute & Teletruth Petition for Investigation, *Framework for Broadband Internet Service*, GN Docket No. 10-127 (filed Jan. 13, 2015) (petition for investigation of Verizon); *Comments Invited on Application of Verizon New Jersey Inc. and Verizon New York Inc. to Discontinue Domestic Telecommunications Services*, WC Docket 13-150 (filed July 24, 2013) (complaint about Verizon fiber optic upgrades); *Comments of New Networks Institute, Advanced Telecommunications Notice of Proposed Rulemaking*, CC Docket No. 98-147 (filed Sept. 25, 1998) (complaints about Baby Bell telephone companies).

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writings that he believes special access information should be public, another obvious basis for concern.³³ At the very least, once Mr. Kushnick were permitted to see the data, it would be difficult to “un-ring the bell,” and to prevent his knowledge of those data from affecting his publicly written blog posts and books, potentially resulting in inadvertent but nonetheless harmful disclosure of highly confidential data.

There is a further concern as to who will actually have access to these data. Mr. Kushnick works for NNI as well as Tele-Truth, both of which appear to be for-profit enterprises, but the entities or individuals who fund their operations are unknown. Given this lack of transparency,³⁴ and the broader agenda that Mr. Kushnick and his organizations appear to be pursuing collectively, the Commission should exercise caution in evaluating his request. When a person who has previously shown no interest in a decade-old proceeding suddenly seeks access to a newly collected mass of highly competitively sensitive information, that person should bear the burden of demonstrating whether such disclosure is appropriate – especially in the context of the more stringent protections here and the lack of transparency in who is behind Mr. Kushnick’s organizations. It is the right of Mr. Kushnick and/or his organizations to file comments in this proceeding on any and all issues, but he is not entitled to access competitively sensitive information in contravention of the text of the protective orders under which AT&T and other providers have submitted data to the Commission.

As AT&T demonstrated in its initial objection,³⁵ the *Second Protective Order* also limits access in essentially the same way as the *Data Collection Protective Order*, and contains virtually the same definitions. Accordingly, the foregoing analysis also establishes that Mr. Kushnick is not entitled to confidential information pursuant to that order. In addition, 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

³³ See Bruce Kushnick, “AT&T to FCC: Stop Kushnick From Examining the Special Access Data,” Huffington Post (Oct. 15, 2015) available at <http://www.huffingtonpost.com/bruce-kushnick/att-to-fcc-stop-kushnick-b-8308888.html> (“We agree that some of this data is competitor-sensitive, but the problem becomes - the FCC stopped collecting the data and did not mandate that the incumbent phone companies, like AT&T, disclose basic information about the number of working access lines or the pricing, which is now based on contracts and does not have to be made public.”).

³⁴ TeleTruth does not reveal its full Board of Advisors because, according to its website, “Other Advisors wish to remain anonymous.” See “About TeleTruth” available at <http://www.teletruth.org/About/boa.html> (accessed Nov. 16, 2015).

³⁵ AT&T Objection at 3.

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consultants or experts were “retained for the purpose of assisting Counsel.”³⁶ Mr. Kushnick is not entitled to access confidential materials pursuant to this order because he is not an attorney. Nor has he made any claim that either he or his organizations are assisting any attorneys.

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,

/s/ Christopher T. Shenk

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³⁶ *Modified Protective Order* ¶ 10.