

PUBLIC VERSION

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October 1, 2018

By ECFS

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

Re: ***In the Matter of Iowa Network Access Division Tariff F.C.C. No. 1, WC Docket No. 18-60, Transmittal Nos. 36 & 38***

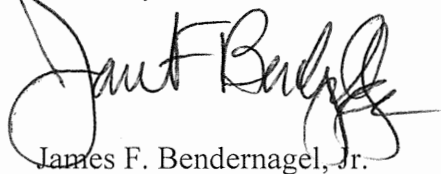
Dear Ms. Dortch:

AT&T Services, Inc. ("AT&T") submits for filing the **Public Version** of its Reply in support of its Renewed Motion to Amend Protective Order in the above-referenced proceeding. Consistent with the Commission's rules and the March 26, 2018 Protective Order entered by the Commission Staff, AT&T has redacted all "Confidential Information" from the **Public Version**, which it is filing by ECFS.

AT&T is also filing by hand with the Secretary's office one hard copy of the **Confidential Version** of this submission. In addition, copies of all versions of the submission are being served electronically on Aureon's counsel. Two copies are also being provided to Joseph Price at the Wireline Competition Bureau.

Please contact me if you have any questions regarding this matter.

Sincerely,



James F. Bendernagel, Jr.

# SIDLEY

Marlene H. Dortch

October 1, 2018

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## Enclosures

Joseph Price, FCC

Pam Arluk, FCC

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**PUBLIC VERSION  
REDACTED - FOR PUBLIC INSPECTION**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

**In the Matter of**

**Iowa Network Access Division  
Tariff F.C.C. No. 1**

**WC Docket No. 18-60**

**Transmittal Nos. 36 & 38**

**REPLY IN SUPPORT OF AT&T SERVICES, INC.'S  
RENEWED MOTION TO AMEND PROTECTIVE ORDER**

Pursuant to 47 C.F.R. § 1.45(c), AT&T Services, Inc. (“AT&T”) respectfully submits this Reply in support of its Renewed Motion to Amend the Commission’s March 26, 2018 Protective Order (“*Protective Order*”), and in response to the Opposition filed on September 24, 2018 by Iowa Network Services, Inc. d/b/a Aureon Network Services (“Aureon”).

**INTRODUCTION**

In its Opposition, Aureon does not deny that the central matter currently at issue relates to its allocation of network costs, particularly its Cable & Wire Facilities (“C&WF”) costs, nor does it dispute that AT&T’s cost expert, Daniel P. Rhinehart, and the declarations he has previously submitted, have played a key role in this proceeding with respect to that issue. Aureon also does not take issue with the fact that the “Confidential” network cost information it previously submitted was quite similar to the “Highly Confidential” network cost information it produced and permitted Mr. Rhinehart to review in the AT&T Complaint case. Further, it does not present any evidence whatsoever that Mr. Rhinehart has misused or mishandled any of the confidential information he has had access to in this proceeding, the Complaint case or in any of the many other rate case proceedings in which he has participated.

Instead, Aureon once again asserts, without any evidentiary support, that Mr. Rhinehart is “extensively” involved in AT&T’s competitive decision-making, and again expresses the concern (without any basis) that Mr. Rhinehart might either deliberately or inadvertently misuse confidential information in violation of the Protective Order. Opp. at 1, 3-6. And, as it did in opposing AT&T’s initial motion to amend the Protective Order,<sup>1</sup> Aureon asserts that the network cost information that it was directed in the *Rate Order*<sup>2</sup> to submit is more granular and thus even more competitively sensitive than the “Confidential” and “Highly Confidential” network cost information that it has already produced. Opp. at 6-7.

As explained in greater detail below, none of Aureon’s arguments in its Opposition are soundly based. While the network cost information that Aureon has now produced in response to the *Rate Order*’s directives is somewhat more detailed, it **[[BEGIN CONFIDENTIAL]]** [REDACTED]

[REDACTED] **[[END CONFIDENTIAL]]** Further, the concerns Aureon expresses about Mr. Rhinehart’s access to this information are baseless. Mr. Rhinehart is not involved in competitive decision-making, and there is absolutely no evidence that he would not fulfill his obligations under the Protective Order.

Accordingly, the Commission should grant AT&T’s motion to amend and permit Mr. Rhinehart to review the network cost information that Aureon has designated as “Confidential.”<sup>3</sup>

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<sup>1</sup> AT&T previously submitted a motion to amend the *Protective Order*, which Aureon opposed. See AT&T Motion to Amend Protective Order and for Expedited Ruling (dated Apr. 23, 2018) (“Mot.”); Aureon Opposition (dated Apr. 30, 2018) (“Initial Opp.”); AT&T Reply in Support of Motion to Amend (dated May 2, 2018); AT&T Supp. Reply in Support of Motion to Amend (dated May 30, 2018); Aureon Response to AT&T Supp. Reply (dated June 4, 2018).

<sup>2</sup> Memorandum Opinion and Order, *In the Matter of Iowa Network Access Division Tariff F.C.C. No. 1*, 2018 WL 3641034 (rel. July 31, 2018) (“*Rate Order*”).

<sup>3</sup> As to the ability of inside consultants of other parties to obtain access to such information, the Commission should handle such requests on a specific case basis (as it has done with Mr.

## ARGUMENT

As AT&T has previously explained, the Commission has already adopted a Model Protective Order to govern tariff investigation proceedings, and that order expressly permits internal consultants such as Mr. Rhinehart to review confidential information, provided that those consultants are needed to “furnish technical or other expert advice” and are informed of their obligations under the protective order. *See Confidential Information Policy Statement*, ¶ 40 (“the protective order to be used in tariff review proceedings will be the one adopted in this proceeding”); *id.*, App’x C, ¶¶ 6-7 (protective order permitting “Authorized Representatives” to access confidential information).<sup>4</sup> Moreover, the Commission has repeatedly made clear that “tariff proceedings are historically open, and the supporting cost data historically has been available for public inspection.”<sup>5</sup>

Because tariff proceedings are historically open, the Commission has emphasized that confidentiality will be “granted only in the rarest of instances.” *Confidential Information Policy Statement*, ¶ 40. And it is *Aureon*’s burden—not AT&T’s—to justify any “additional degree of protection” it wishes to have afforded to its confidential information, and to “specify the modifications to the model protective order that it believes to be necessary” when filing its request

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Rhinehart) and, if that inside consultant is not involved in competitive decision-making, has not previously mishandled confidential information and is willing to abide by the Protective Order, that individual should also be granted access to *Aureon*’s “Confidential” information.

<sup>4</sup> *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816 ¶ 34 (1998) (“*Confidential Information Policy Statement*”).

<sup>5</sup> *Applications of Charter Commc’ns et al.*, 30 FCC Rcd. 10360, ¶ 8 (2015) (“*Charter*”); *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Notice of Inquiry and Notice of Proposed Rulemaking, 11 FCC Rcd. 12406, ¶¶ 42-43 (1996) (“*Confidential Information Policy Notice*”) (“The Commission has generally made tariff support material publicly available.”).

for confidential treatment. *Id.* ¶ 26. Where such requests are made, the Commission may then “seek comment from the other parties,” and “streamlined filings are likely to be suspended if the Commission is unable to determine the lawfulness of the tariff within the appropriate time frame without public participation.” *Confidential Information Policy Statement*, ¶¶ 26, 40.

As shown below, none of the arguments presented by Aureon justify a greater level of protection as it relates to Mr. Rhinehart.

**First**, there is no merit to Aureon’s claim that Mr. Rhinehart is engaged in competitive decision-making. Attached as Exhibits A and B hereto are copies of the Acknowledgements of Confidentiality to the Protective Order in this proceeding, signed by Mr. Rhinehart, attesting to the fact that he is not engaged in competitive decision-making and agreeing to abide by the terms of the Protective Order. Further, nowhere in the various declarations that Mr. Rhinehart has submitted in this proceeding and in the Complaint case is there any suggestion that Mr. Rhinehart is currently involved in competitive decision-making with respect to any of the services potentially at issue in this proceeding. In fact, his current principal area of responsibility (i.e., pole attachment issues) does not relate to any of those services.

Additionally, none of the testimony excerpts or references from other cases, which are attached to Aureon’s Opposition, support Aureon’s claims. Opp. at 3-5, Exs. A-E. In no instance did Mr. Rhinehart state that he was engaged in competitive decision-making. It should further be noted that none of those cases involved the services potentially at issue here and, in any event, all of those proceedings took place years ago. And, contrary to Aureon’s claim, the fact that a cost witness opines as to the competitive impact of a rate or other practice does not mean that that expert is engaged in competitive decision-making.

*Second*, Aureon’s discussion of the competitive decision-making standard is inapposite. The Commission has been very hesitant to impose a blanket exclusion on in-house experts because “such limitations may unreasonably preclude a party from utilizing individuals, consistent with its needs and resources, who can provide the requisite expertise to examine the documents.” *Confidential Information Policy Statement*, ¶ 26. The Model Protective Order accordingly permits in-house consultants, like Mr. Rhinehart, to access confidential information, provided they agree not to use that information “for competitive business purposes.” *Id.*, App’x C, ¶ 11. Aureon has embraced this standard in other proceedings, representing to the Commission that it needed to “rely upon [its in-house experts’] technical and accounting expertise” to review AT&T’s confidential data.<sup>6</sup>

Aureon now takes the opposite view and claims that permitting access to its data by inside consultants is “inconsistent with” the competitive decision-making standard. Opp. at 5. This is not true. To begin, the cases Aureon cites are court cases, not cases involving the Commission’s rules, which generally permit inside consultants not involved in competitive decision-making to have access to confidential information. *See* discussion above. Further, those cases (when viewed from that perspective) support AT&T’s position. To begin, the court in *FTC v. Whole Foods Market, Inc.* actually *permitted* in-house counsel to access confidential information. 2007 WL 2059741, \*3 (D.D.C. July 6, 2007). There, the in-house representative: (1) submitted a sworn declaration along with the motion to amend the protective order; (2) agreed in the declaration to become subject to the Court’s jurisdiction and to not make use of confidential information; and (3)

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<sup>6</sup> Letter from James U. Troup and Tony S. Lee (Counsel for Aureon) to Christopher Killion (Commission), at 1 (dated Feb. 17, 2017) (attached as Exhibit 1 to AT&T Motion to Amend).

was not a competitive decision-maker, under the evidence presented. *Id.* at \*2-3. These are precisely the conditions AT&T proposes herein.<sup>7</sup>

Further, the fact that the Protective Order in this proceeding generally excludes inside consultants from reviewing confidential information does not mean the Commission cannot make an exception for good cause shown. As AT&T explains in its Renewed Motion to Amend, such circumstances exist here. The matters currently at issue relates directly to Mr. Rhinehart's prior submissions. Mr. Rhinehart had access (with Aureon's agreement) to similar information in the Complaint case and, on the basis of that access, presented testimony relating to the central remaining issues in this proceeding. *See* Renewed Mot. at 5-6. Additionally, there is no evidence that any "Confidential" material was misused or mishandled. Consequently, good cause exists.

As AT&T pointed out in its initial Motion and Reply, the factors at play in the *Charter* case have no application here. This case does not involve a situation in which the Commission would be embracing "an essentially content-free standard that will allow it to expose a company's most commercially sensitive information to the public whenever it feels like it." *See* Pai Stmt., 30 FCC Rcd. at 10401. Further, nothing in AT&T's motion has any effect on the Commission's authority to adopt, in a different proceeding, a protective order with more stringent protections on the dissemination of confidential information. As to the information in dispute here, Mr. Rhinehart has long had access to the same type of information, and AT&T has plainly made a "persuasive showing as to the reason for inspection" by Mr. Rhinehart. *Charter*, 30 FCC Rcd. at 10399.

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<sup>7</sup> Similarly, the court in *U.S. Steel Corp. v. United States* rejected the notion that all in-house counsel should be barred from accessing confidential information. 730 F.2d 1465, 1469 (Fed. Cir. 1984). Instead, the court ruled that a more nuanced approach was required, and that the protective order should be "developed in light of the particular counsel's relationship and activities, not solely on a counsel's status as in-house or retained."). *Id.* at 1468.



*Third*, Aureon’s assertion that the information that it is now required to submit pursuant to the *Rate Order* is more granular, and thus more competitively sensitive, does not warrant the blanket protection that Aureon is insisting it have with respect to Mr. Rhinehart’s access. To start, Aureon made similar claims in opposing AT&T’s earlier motion, and Aureon’s claims did not pan out. More specifically, Aureon claimed that “[t]he information to be produced here is far broader than that produced in the Complaint Proceeding and – importantly – includes highly sensitive information from Aureon’s, unregulated, competitive ‘Network Division’ that was not produced in the Complaint Proceeding.” Initial Opp. at 1 (emphasis included).

However, at least with respect to Aureon’s network cost information, that did not occur. As AT&T pointed out in its Renewed Motion to Amend, Aureon simply **[[BEGIN CONFIDENTIAL]]** [REDACTED]

**[[END CONFIDENTIAL]]** Renewed Mot. at 8. Interestingly, in its current opposition, Aureon does not take issue with that characterization. Instead, it simply repeats its earlier prediction, claiming that “[t]he risk of improper use and disclosure by Aureon’s business rivals is particularly acute given the highly sensitive nature of the information that Aureon is providing as part of its revised tariff filing.” Opp. at 6.

A review of the material that Aureon has now produced as part of its September 24 Revised Tariff Filing also does not support Aureon’s claim. **[[BEGIN CONFIDENTIAL]]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED] **[[END CONFIDENTIAL]]**

As AT&T has previously explained, if there are specific documents that contain the names of specific customers subscribing to specific services, the configuration of such services, or other highly sensitive information Aureon should identify that material and ask for specific protection. It should not, however, be able to use the Protective Order to shield from review aggregated information regarding its network (such as summary tables) or other material where the highly sensitive information has been redacted or removed. **[[BEGIN CONFIDENTIAL]]** [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] **[[END CONFIDENTIAL]]**

*Fourth*, Aureon's claim that AT&T should have engaged an outside expert to review Aureon's "Confidential" network cost data overlooks the parties' prior dealings regarding the protective order in the Complaint case and otherwise is not soundly based. A significant factor contributing to AT&T's decision to have Mr. Rhinehart analyze Aureon's "Confidential" and "Highly Confidential" information stems from that fact that Aureon insisted at the start of the AT&T Complaint case that its senior business executives be granted access to AT&T's "Confidential" and "Highly Confidential" information. AT&T initially opposed that proposal but later acquiesced, thereby permitting those senior Aureon executives to have access to the AT&T "Confidential" and "Highly Confidential" produced in the Complaint case.

Having so established the ground rules, AT&T decided to use Mr. Rhinehart to review Aureon's "Confidential" and "Highly Confidential" information relating to Aureon's prior tariff

filings, and in that connection, Mr. Rhinehart spent significant time reviewing that data, prepared three separate Complaint case declarations and attended the deposition of Aureon's cost witness. All of this occurred with Aureon's full knowledge and without objection. Indeed, it was only after the Commission issued a separate Protective Order in this proceeding (which did not permit inside consultants to have access to "Confidential" data) that Aureon changed its position.

Following issuance of the Protective Order, AT&T immediately filed a motion to amend the Protective Order, explaining the situation and pointing out that the Commission's model rules permitted such access. *See* Mot. at 6-8. The Commission, however, did not decide that motion, and as a consequence, Mr. Rhinehart did not have access to the "Confidential" network information Aureon filed in this proceeding. Fortunately, Mr. Rhinehart had full access to very similar network cost data produced in the Complaint case. Consequently, in the rate case, AT&T was able to respond effectively to Aureon's network cost presentation and point out its significant weaknesses.

In the *Rate Order*, the Commission agreed with many of those weaknesses, rejected Aureon's cost of service rate calculations, and directed Aureon to submit a Revised Tariff and address a number of the problems that Mr. Rhinehart had identified and explained. Contrary to Aureon's claim, however, Mr. Rhinehart's ability to do that was not the result of the level of access provided in this proceeding, but was due to his having access to the same type of information in the Complaint Case.

The claim that AT&T should be required to incur the expense of an outside expert to review the costs underlying the tariff for a service Aureon insists AT&T is required to take is particularly galling. As is now clear, Aureon has been using an unreasonable cost allocation methodology since at least 2006 and, as a consequence, AT&T has been charged excessive rates for CEA service

throughout that period. Worse yet, Aureon is now contending that AT&T should pay an outside expert (rather than use Mr. Rhinehart) to evaluate its latest rate calculations. There is no need or justification for imposing that additional cost on AT&T.

*Fifth*, Aureon's speculation that Mr. Rhinehart might somehow ignore his obligations under the Protective Order and either deliberately or inadvertently misuse Aureon's "Confidential" network cost information is groundless. As Aureon is fully aware, Mr. Rhinehart has had access to Aureon "Confidential" and "Highly Confidential" network cost information for more than a year, and there is no evidence that he has misused or mishandled that data. Further, Mr. Rhinehart has been a testifying expert for AT&T for more than two decades during which time he has had access to the confidential data of numerous entities that either compete or do business with AT&T, and there is no evidence that he has mishandled any of that data. In addition, he has signed declarations in this proceeding agreeing to abide by the terms of the Protective Order. Accordingly, there is no basis to question Mr. Rhinehart's integrity.

*Finally*, Aureon's claim that AT&T's motion should be denied because Sprint has filed a motion seeking access for a yet unnamed inside cost consultant is nonsense. That issue should be decided after Sprint provides the identity of its inside consultant and that person attests that he or she is not engaged in competitive decision-making and is willing to abide by the terms of the Protective Order.

### **CONCLUSION**

For these reasons and the reasons set forth in AT&T's prior submissions, the Commission should grant AT&T's motion and permit Mr. Rhinehart to have access, under the Protective Order, to the network cost information that Aureon has designated as "Confidential."

**PUBLIC VERSION**  
**REDACTED - FOR PUBLIC INSPECTION**

Respectfully submitted,

/s/ James F. Bendernagel, Jr.  
James F. Bendernagel, Jr.

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Dated: October 1, 2018

*Counsel for AT&T Services, Inc.*

# **Exhibit A**

**Daniel P. Rhinehart  
Acknowledgment of  
Confidentiality**

## APPENDIX A

## Acknowledgment of Confidentiality

WC Docket No. 18-60

I am seeking access to Confidential Information.

I hereby acknowledge that I have received and read a copy of the foregoing Protective Order in the above-captioned proceeding, and I understand it.

I agree that I am bound by the Protective Order and that I shall not disclose or use Stamped Confidential Documents or Confidential Information except as allowed by the Protective Order.

I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission (Commission). I further acknowledge that the Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of Counsel or Consultants from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to confidential information in this or any other Commission proceeding.

I acknowledge that nothing in the Protective Order limits any other rights and remedies available to a Submitting Party at law or in equity against me if I use Confidential Information in a manner not authorized by this Protective Order.

I certify that I am not involved in Competitive Decision-Making.

Without limiting the foregoing, to the extent that I have any employment, affiliation, or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or advocacy organization), I acknowledge specifically that my access to any information obtained as a result of the Protective Order is due solely to my capacity as Counsel ~~or Consultant or Outside Consultant to a party or as an employee of Counsel, Outside Consultant, or Outside Firm, and I agree that I will not use~~ such information in any other capacity. *OK*

I acknowledge that it is my obligation to ensure that Stamped Confidential Documents are not duplicated except as specifically permitted by the terms of the Protective Order and to ensure that there is no disclosure of Confidential Information in my possession, in the possession of those who work for me, or in the possession of other Support Personnel, except as provided in the Protective Order.

I certify that I have verified that there are in place procedures at my firm or office to prevent unauthorized disclosure of Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Protective Order.

Executed this 27 day of September, 2018.

*David P Rhinehart*  
[Name] David P Rhinehart  
[Position] Director - Regulatory  
[Firm] AT&T Services, Inc  
[Telephone] 214-729-7948  
[Party] AT&T

# **Exhibit B**

**Daniel P. Rhinehart**  
**Recipient Acknowledgment**



**Confidential Memorandum Opinion and Order**  
**Recipient Acknowledgment**  
**Iowa Network Access Division Tariff F.C.C. No. 1,**  
**WC Docket No. 18-60, Transmittal No. 36**

By signing below, you certify that you are Counsel or ~~Outside~~ <sup>OK</sup> Consultant (as those terms are defined in the Protective Order) and are a signatory of the Protective Order in WC Docket No. 18-60. You agree that you will not make any photocopies of the unredacted version of the Memorandum Opinion and Order (the "Order") in this proceeding and that, as required by the Protective Order, you will not share any Confidential or Highly Confidential Information (howsoever designated in the Order) except as provided for in the Protective Order. You acknowledge the provisions of the Protective Order do not terminate at the conclusion of this proceeding. You further acknowledge that any use of the Confidential or Highly Confidential Information contained in the unredacted version of the Order that violates any term or condition found in the Protective Order constitutes a violation of an order of the Federal Communications Commission.

I acknowledge that I have read the above paragraph and agree to its terms. I attach or have previously provided a copy of my signed Acknowledgement from the Protective Order and confirm that such Acknowledgement has not been challenged and remains in full force and effect.

By: *Daniel P Rhinehart*  
Name: Daniel P Rhinehart  
Title: Director - Regulatory  
Organization: AT&T Services, Inc.

Date: 9/27/18

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 1, 2018, I caused a copy of the foregoing Reply in Support of AT&T Services, Inc.'s Renewed Motion to Amend Protective Order to be served via email on the following:

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Respectfully submitted,

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Spencer Driscoll