

PUBLIC VERSION

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

In the Matter of

**AT&T MOBILITY LLC
1055 Lenox Park Blvd. NE
Atlanta, GA 30319
404-236-7895**

Complainant,

v.

**IOWA WIRELESS SERVICES, LLC
4135 NW Urbandale Drive
Urbandale, Iowa 50322**

Defendant.

Proceeding No. 15-259

File No. EB-15-MD-007

**MOTION TO COMPEL AT&T COMPLIANCE
WITH CONFIDENTIALITY ORDERS AND FOR
RELATED RELIEF**

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Dated: November 6, 2015

Iowa Wireless Services, LLC (“iWireless”), by its attorneys, hereby files its Motion to Compel AT&T Compliance with Confidentiality Orders and For Related Relief (“Motion”) with reference to the Formal Complaint (“Complaint”) of AT&T Mobility LLC (“AT&T”) dated October 20, 2015. As is set forth in detail below, AT&T repeatedly has exhibited an inexcusable disregard for explicit directives of the Commission staff (the “Staff”) [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL] The following is expressly shown.

i. Background

[BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]

² [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]

³ [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL]

[BEGIN CONFIDENTIAL] [REDACTED]

⁴ *Id.* at p.2 (Emphasis added).

⁵ *Id.* at note 2. [BEGIN CONFIDENTIAL] [REDACTED]

[END CONFIDENTIAL]

[REDACTED]

- [REDACTED]

- [REDACTED]

[REDACTED] [END CONFIDENTIAL]

- AT&T seeks to buttress its Complaint with a declarations by its officer Gram

⁶ See, e.g., Complaint at paras. 32 to 36.

⁷ Id. at paras. 37 to 38.

⁸ Id. at para. 39.

⁹ Id. at paras. 58 through 64.

Meadors, an Assistant Vice President of Alliance/Partnership, Wireless Roaming Strategy (the "Meadors Declaration").¹⁰ [BEGIN CONFIDENTIAL]

[REDACTED]

[REDACTED] [END

CONFIDENTIAL]

- AT&T also offers a declaration by an economist Jonathan Orszag (the "Orszag Declaration"). [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁰ See Formal Complaint, Declaration of Gram Meadors and Declaration of Jonathan Orszag.

¹¹ See, e.g., Meadors Declaration, paras. 18 to 21, 30 to 32, 38 to 39.

- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [END CONFIDENTIAL]

Notably, the fact that AT&T generally has marked the prohibited material in its submissions as "Confidential" does not cure these myriad, flagrant breaches.

[BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] [END CONFIDENTIAL] Other AT&T actions manifest an equally troubling neglect when it comes to respecting confidentiality:

- [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹² Orszag mistakenly refers in his Declaration to [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END CONFIDENTIAL]

¹³ See Proposed Findings of Fact at Section III.D and Proposed Conclusions of law at Section I.C and D.

¹⁴ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

[REDACTED]

[REDACTED] [END

CONFIDENTIAL] The most important reason for excluding settlement-related evidence under FRE 408 is to promote the amicable resolution of lawsuits.¹⁶ In order for settlement talks to be effective, parties must feel uninhibited in their communications; parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions won't show up in adversarial pleadings.¹⁷ The public policy considerations that support protecting the confidentiality of settlement negotiations in federal court cases apply with equal force in FCC complaint proceedings, which is why the FCC itself has acknowledged the "public policy favoring confidentiality of discussions to

¹⁵ See Meadors Declaration, Exhibit 9.

¹⁶ See *Affiliated Mfrs., Inc. v. Aluminum Co. of Am., Inc.*, 56 F.3d 521, 526 (3d Cir. 1995) (“[T]he policy behind Rule 408 is to encourage freedom of discussion with regard to compromise.”).

¹⁷ See *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003).

II. The Staff Must Sanction AT&T to Protect the Integrity of Its Processes

[BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL] The

Staff should impose additional sanctions for a variety of reasons:

First, and foremost, it would make a mockery of the vital confidentiality procedures [BEGIN CONFIDENTIAL] [REDACTED]

[END CONFIDENTIAL] if parties can ignore them with impunity. That is exactly what AT&T will have done if it can populate its Formal Complaint throughout with illicit information and not be obligated to take any corrective action or to suffer any sanction.

Second, [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

²⁰ [BEGIN CONFIDENTIAL] [REDACTED]

[END CONFIDENTIAL]

[REDACTED] [END CONFIDENTIAL] In effect, this shifts to iWireless the burden of identifying and clarifying all of the inappropriate information. This also shifts to iWireless the risk that it will fail to respond to a claim that it mistakenly believes the Staff will disregard. Clearly, the offending party AT&T should bear the entire burden of purging its Complaint of all information [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]

Third, [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED] [END CONFIDENTIAL] Striking the references [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END CONFIDENTIAL] does not remedy the facts that the opinions and conclusions stated in these declarations are “fruits of a poisonous tree” and also must be stricken.

Fourth, the Staff does not specifically address the fact that AT&T has disregarded the confidentiality strictures of FRE 408 and has disclosed confidential communications made in the Complaint proceeding [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED] [END CONFIDENTIAL]

Fifth, [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] [END CONFIDENTIAL]

This aspect of the violation has not been adequately addressed.

Sixth, deeming material to be stricken, without requiring the offending party to purge it from the record, does not alter the fact that the improperly included material remains in plain view and accessible as part of the record in this proceeding. It is hard for a decision maker to disregard material that was improperly filed even when it has been removed from the pleadings. It is nigh impossible to completely ignore information that remains a part of the proceedings and which the decision maker constantly is reminded of whenever pleadings are reviewed.

In sum, [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL] The only way that the Commission can protect the integrity of its processes is to impose additional sanctions on AT&T.

III. The Relief iWireless is Seeking

The Staff should take the following steps to [BEGIN CONFIDENTIAL]

[REDACTED] [END CONFIDENTIAL]

Dismissal of the Complaint *In Toto* – The only way to properly assure that the burden of this breach of confidentiality falls on the offending party (AT&T) is for the Commission to dismiss the Complaint in its entirety. The dismissal can be without prejudice to refiling. This will force AT&T – rather than iWireless or the

Commission -- to purge the pleading of all material that has been wrongfully included [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] In taking this action, the Commission should make clear that, [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL] and in violation of Federal Rule of Evidence 408, AT&T also must reform any and all declarant testimony that is derived from, based upon or alludes to the excludable material.

Stay of all Procedural Dates – The procedural schedule [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL] should be suspended unless and until AT&T files a formal complaint that fully complies with the applicable confidentiality requirements. However, iWireless is not asking that [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] iWireless will abide by its earlier commitments [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [END CONFIDENTIAL]

Disqualification of Declarant Jonathan Orszag – The only adequate remedy for AT&T's breach of its obligation not to disclose [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] is for the FCC to disqualify Jonathan Orszag as a witness. His testimony has been tainted by the improper disclosure and AT&T cannot unring

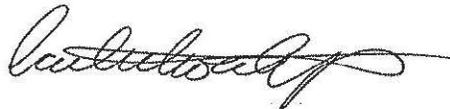
that bell. Since this is a situation of AT&T's own making, it cannot complain about having to find a witness that has not been sullied by the improper voluntary disclosure by AT&T [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]

IV. Conclusion

For the foregoing reasons, iWireless requests that the Staff grant this Motion and the relief that is requested.

By:



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PROPOSED ORDER

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[PROPOSED] ORDER

Adopted: _____, 2015

Released: _____, 2015

By the Market Disputes Resolution Division, Enforcement Bureau:

1. On November 6, 2015, Iowa Wireless Services, LLC filed its Motion to Compel AT&T Compliance with Confidentiality Orders and For Related Relief (the "Motion").
2. The Motion is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Market Disputes Resolution Division Enforcement Bureau

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2015, I caused the foregoing Motion to Compel AT&T Compliance With Confidentiality Orders and For Related Relief be served on AT&T and provided to the Commission as indicated below.

Marlene H. Dortch
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Via Hand Delivery – hard copy of the Confidential Version
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