

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, IA 50322

Defendant.

Proceeding No 15-259

File No. EB-15-MD-007

AT&T MOBILITY LLC'S OPPOSITION TO IWIRELESS' MOTION TO COMPEL

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Dated: November 16, 2015

I. INTRODUCTION

In yet another effort to delay resolution of AT&T’s request for commercially reasonable rates, Iowa Wireless Services, LLC (“iWireless”), by its Motion to Compel Compliance With Confidentiality Orders and For Related Relief (the “Motion”), seeks dismissal of AT&T’s Formal Complaint, a stay of all procedural dates, and, as a sanction, disqualification of AT&T’s expert witness Jonathan Orszag. iWireless argues that this relief is proper based on various alleged violations of the Commission’s confidentiality rules and the Staff’s July 9, 2015 order regarding the mediation process (the “July 9 Order”). iWireless seeks such relief even though Staff already has reviewed the Complaint for compliance with its rules and established a procedural schedule for resolving AT&T’s claims.¹ None of iWireless’ claims is soundly based.

iWireless’ principal argument is that **[BEGIN CONFIDENTIAL]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

iWireless’ other claims are similarly deficient. **[BEGIN CONFIDENTIAL]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ See FCC, Notice of Formal Complaint at 1-4 (Oct. 26, 2015).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[END CONFIDENTIAL]**

Finally, the Commission should not (i) suspend the briefing schedule that Staff recently established with respect to AT&T's Formal Complaint, (ii) disqualify AT&T's expert from further participation in this proceeding, (iii) require AT&T's lead negotiator to file a new declaration or (iv) impose any other sanction. The relief sought by iWireless would reward iWireless' efforts to delay resolution of AT&T's Formal Complaint but provide no benefit to the Commission or its regulations governing the provision of data and voice roaming services. As a result, the Commission should deny the Motion and direct iWireless to respond on the schedule established by Staff in its Letter Order dated October 29, 2015.²

II. BACKGROUND

The history of AT&T's dealings with iWireless is set forth in detail in AT&T's Formal Complaint. For purposes of this Opposition, the key events start **[BEGIN CONFIDENTIAL]**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

² **[BEGIN CONFIDENTIAL]** [REDACTED]
[REDACTED] **[END CONFIDENTIAL]**

³ **[BEGIN CONFIDENTIAL]** [REDACTED]
[REDACTED] **[END CONFIDENTIAL]**

[REDACTED]

[REDACTED] [END CONFIDENTIAL]

[BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL]

[BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

⁴ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

⁵ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

⁶ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

⁷ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

⁸ *See id.*

⁹ *See id.*

¹⁰ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

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

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

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

¹¹ [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END CONFIDENTIAL]

¹² [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END CONFIDENTIAL]

¹³ [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END CONFIDENTIAL]

¹⁴ *Id.*

¹⁵ *See id.*

¹⁶ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

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

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

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

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END CONFIDENTIAL]

²⁰ *See id.*

²¹ *See id.*

²² [BEGIN CONFIDENTIAL] [REDACTED] [END
CONFIDENTIAL]

²³ *Id.*

[REDACTED]

CONFIDENTIAL]

[BEGIN CONFIDENTIAL]

[REDACTED]

CONFIDENTIAL]

III. iWIRELESS' CLAIMS HAVE NO MERIT AND SHOULD BE REJECTED.

iWireless now argues that AT&T has violated the Commission's confidentiality rules and the Staff's July 9 Order by disclosing certain information in its Formal Complaint and supporting declarations, as well as in the parties' arbitration. As detailed below, none of these disclosures violates that directive, and accordingly, there is no basis for granting iWireless' requested relief or delaying resolution of AT&T's Formal Complaint seeking commercially reasonable wireless data roaming rates and just and reasonable wireless voice roaming rates. Consequently, it would be inappropriate to impose any sanction on AT&T, let alone the sanctions proposed by iWireless

²⁴ *Id.*

²⁵ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

²⁶ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

which would not promote the mediation process but instead are designed (i) to delay and complicate the Formal Complaint proceeding and (ii) interfere with AT&T's efforts to present relevant lay and expert testimony in support of its claims seeking data and voice roaming services on terms and conditions that comply with the Commission's rules.

A. The Commission Is Entitled To Consider iWireless' [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

iWireless claims that AT&T violated the July 9 Order by disclosing in its Formal Complaint the terms of iWireless' [BEGIN CONFIDENTIAL] [REDACTED]. [END CONFIDENTIAL] See Motion at 4. However, there is no merit to this claim because iWireless has misconstrued the Staff's July 9 Order. As explained above, [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. [END CONFIDENTIAL]

[BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁷ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

²⁸ [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]. [END CONFIDENTIAL]

Further, interpreting the July 9 Order to prevent the Commission from considering iWireless' [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] as part of the Complaint process would create a dangerous precedent under which a party could simply refuse to make a proposal, force the counter-party to seek Commission assistance, and then shield from scrutiny any proposals made during the Staff-directed negotiation. Indeed, the fact that Staff already has reviewed the Complaint after it was initially filed and eliminated certain references to the parties' mediation session (while retaining references to the [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]) confirms that the [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] properly may be considered by the Commission during this proceeding.³⁰ The Commission likewise has addressed iWireless' request for sanctions by cautioning the parties not to reference materials from the mediation session "in future filings in this proceeding."³¹

[REDACTED]
[REDACTED] [END CONFIDENTIAL]

²⁹ See, e.g., [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END CONFIDENTIAL]

³⁰ Notice of Formal Complaint at 4 (Oct. 26, 2015) (striking from Complaint, inter alia, Complaint ¶ 39, which contained references to the mediation session).

³¹ See *id.*

[REDACTED]

[REDACTED] [END CONFIDENTIAL] Motion at 3 n.5. To the contrary, AT&T's clear purpose [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL] AT&T was left with no alternative but to file the Formal Complaint and seek interim relief.

Finally, iWireless' assertion that the [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] were subject to Federal Rule of Evidence 408 is meritless and does not preclude the Commission from considering the [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] Rule 408 does not foreclose evidence of settlement communications, including the terms of offers, when the parties' negotiations are the subject of the proceeding.³⁷ Rather, there is "extensive case law finding Rule 408 inapplicable [for such purposes]."³⁸ That is, Rule 408 does not bar evidence of the parties' negotiations and offers where, as here, the disputed issues include whether iWireless has been negotiating in good faith, and whether its proposals satisfy the Commission's commercial reasonableness and just and reasonable requirements.³⁹

³⁷ See Fed. R. Evid. 408(b) ("The court may admit this evidence for another purpose"); 2 WEINSTEIN'S FEDERAL EVIDENCE § 408.08[1] ("[T]he rule allows evidence of offers or agreements of compromise to prove a consequential, material fact in issue other than validity of the claim or its amount."); *Am. Cellular Corp. v. BellSouth Telecomm'cns, Inc.*, 22 FCC Rcd 1083, ¶ 29 n.100 (2007) ("FRE 408 . . . bars only such references that are proffered to prove or disprove liability and/or damages.").

³⁸ Fed. R. Evid. 408 Advisory Committee's Note.

³⁹ See *Athey v. Farmers Ins. Exchange*, 234 F.3d 357, 362 (8th Cir. 2000) (insurer's settlement offer was properly admitted to prove insurer's bad faith), cited with approval in Fed. R. Evid. 408 Advisory Committee's Note; *MacCaskill v. United States*, 834 F. Supp. 14, 18 n.9 (D.D.C.

In fact, allowing a party to insulate its proposals from Commission review by citing Rule 408 would undermine the Commission’s “commercial reasonableness” and “just and reasonable” standards, because the exclusion of such evidence would make it impossible for the Commission to “consider claims regarding the commercial reasonableness of the negotiations, providers’ conduct, and the terms and conditions of the proffered data roaming arrangement.”⁴⁰ In fact, under iWireless’ view of Rule 408, the Commission could not examine “whether the host provider has responded to the request for negotiation, whether it has engaged in a persistent pattern of stonewalling behavior, and the length of time since the initial request; [and] whether the terms and conditions offered by the host provider are so unreasonable as to be tantamount to a refusal to offer a data roaming arrangement.”⁴¹ Thus, a party could effectively shield its bad-faith negotiating conduct from Commission scrutiny simply by invoking Rule 408. Neither Rule 408 nor the Commission’s rules countenances such an absurd result.

C. There is No Merit to iWireless’ Claims Regarding Mr. Meadors’ Declaration

There is also no merit to iWireless claim that Mr. Meadors’ declaration includes confidential mediation communications. As both Staff and iWireless know, Mr. Meadors is AT&T’s lead negotiator for roaming agreements. As such, he has been heavily involved in AT&T’s negotiations with iWireless and in the mediation process. Despite that involvement, he did not disclose any information in his declaration that was subject to the Staff’s July 9 Order. Rather his testimony related to his dealings with iWireless and the reasonableness of the

1993) (rule did not prohibit use of settlement negotiations to show that plaintiffs’ claim was handled in arbitrary way by government).

⁴⁰ Second Report and Order, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, ¶ 79 (Apr. 7, 2011).

⁴¹ *Id.* ¶ 86.

proposals that iWireless made *outside of the mediation*.⁴² Further, iWireless' argument that anyone with knowledge of the mediation is tainted by the "fruits of a poisonous tree" would, if accepted, mean that Commission Staff involved in the mediation could not consider or resolve the Formal Complaint. That would be particularly inappropriate where, as here, the discussion of materials challenged by iWireless in Mr. Meadors Declaration is fairly limited and contained. Mr. Meadors' declaration should not be stricken.

D. There is No Merit to iWireless' Claims Regarding Mr. Orszag's Declaration

Likewise, there is no merit to iWireless' claims regarding Mr. Orszag and his declaration. As Staff is aware, Mr. Orszag has submitted testimony in various roaming proceedings on behalf of AT&T. In particular, redacted copies of his declarations in the WCX proceeding are filed in the Commission's public docket for that case.

In each of the roaming proceedings in which he has been involved, Mr. Orszag has evaluated the commercial reasonableness of the competing data roaming proposals based primarily on analysis of price data relating to the various reference points identified by the Commission in its roaming decisions. His participation in this case has been no different. Like his other work, Mr. Orszag provided economic analyses of the commercial reasonableness of both iWireless' proposals and AT&T's proposal. In his declaration, he did not address any proposal made at the [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] mediation nor did he reference the parties' mediation statements.

⁴² There is also no merit to iWireless' claim that Mr. Meadors disclosed confidential information to iWireless' majority shareholder, T-Mobile, and that iWireless thus was justified [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] Motion at 5. In any event, that issue is subject to a separate arbitration proceeding.

Further, iWireless' claim that Mr. Orszag did not participate in the mediation process and thus should not have access to any information exchanged is simply false. While neither Mr. Orszag nor his staff was present at the mediation, his firm, Compass/Lexecon, was intricately involved in AT&T's preparation for that mediation. The sharing of information with a retained economic expert does not violate any limitation imposed by the Commission.

Finally, iWireless provides no legitimate basis for excluding Mr. Orszag from participating in this proceeding. As with Mr. Meadors' Declaration, the Orszag Declaration's discussion of materials challenged by iWireless in its Motion is limited and self-contained. Additionally, no purpose would be served by excluding Mr. Orszag from testifying other than to impose on AT&T the added cost and delay associated with retaining another expert who would review the relevant data and provide opinions based on the same factual record reviewed by Mr. Orszag and thereby needlessly delaying resolution of AT&T's Formal Complaint.

E. There is No Merit to iWireless' Claims Regarding Purported Disclosures Relating to the T-Mobile Mediation

iWireless asserts that AT&T's counsel violated confidentiality restrictions imposed in connection with AT&T's mediation with T-Mobile. That is wrong. At no point in his discussions with iWireless' counsel did counsel for AT&T disclose any information about the substance of the discussions that took place or the information that was exchanged during the course of the AT&T/T-Mobile mediation. The entire conversation between counsel related to the procedures that Staff had used in connection with that mediation and the fact that the mediation had ended. Further, at no point did iWireless' counsel suggest that there was anything improper about those disclosures. iWireless' complaints about AT&T's statements regarding the T-Mobile mediation are therefore without merit.

F. There is No Merit to iWireless' Claims Regarding Purported Disclosures in the Pending Arbitration

Finally, there is no merit to iWireless's claims regarding the disclosures that AT&T made in the parties' arbitration. In fact, [BEGIN CONFIDENTIAL] [REDACTED]

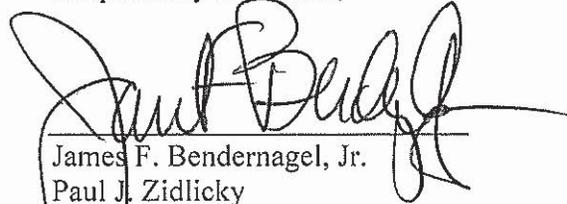
[REDACTED] [END

CONFIDENTIAL]

IV. CONCLUSION

In sum, there is no merit to any of iWireless' assertions, and accordingly (i) its Motion, including its request for sanctions, should be denied, and (ii) iWireless should be directed to respond to AT&T's Formal Complaint on the current procedural schedule.

Respectfully submitted,



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Dated: November 16, 2015

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2015, I caused the foregoing Opposition to be served on Defendant and provided to the Commission as indicated below.

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