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VIA ECFS and Regular Mail

Jeffrey J. Carlisle
Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

Re: AT&T's Objections to SBC's October 4, 2004, Designation of Employees to Have Access to Confidential Information in Docket Nos. 04-313, 01-338

Dear Mr. Carlisle:

AT&T has objected to disclosure of confidential information in this proceeding to Dorothy Attwood, James Smith, and Thomas Hughes of SBC. The sole basis for AT&T's objection is that their titles indicate that Ms. Attwood and Messrs. Smith and Hughes are involved in "competitive decision-making" and therefore they should not have access to confidential information. SBC respectfully requests that the Commission deny AT&T's objection as to allowing Messrs. Smith and Hughes access to confidential information under the terms of the Commission's *Protective Order* in this proceeding.¹

The Commission's *Protective Order* allows certain individuals access to competitive information provided that those individuals are not involved in competitive decision-making. *Protective Order* ¶ 2. The Commission further describes this proviso as prohibiting access to individuals whose "activities, association, and relationship with a client are not such as to involve such counsel's advice and participation in any or all of the client's business decisions made in light of similar or corresponding information about a competitor." *Id.* That restriction simply does not apply in this instance. Neither Messrs. Smith nor Hughes is involved in competitive decision-making on behalf of SBC.

Messrs. Smith and Hughes are employees in SBC's regulatory organization. As such, they are involved in the development and formulation of SBC's regulatory strategy, the development of SBC's regulatory positions, and the advocacy of those positions before the Commission. None of those activities are components of "competitive decision-making" as that phrase is generally used by the Commission and the federal courts. The Commission has acknowledged that its "competitive decision-making standard" comports with the test used by

¹ SBC hereby withdraws its request that Ms. Attwood have access to confidential information in this proceeding. In doing so, however, SBC does not concede that Ms. Attwood is involved in competitive decision-making or should not have access to confidential information in this or any other proceeding.

federal courts “in determining whether to permit in-house counsel access to confidential information.” Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., *Order Adopting Protective Order*, CC Docket No. 97-211, 13 FCC Rcd 11166, ¶ 5 (Jun 5, 1998). In delineating the same definition of competitive decision-making used by the Commission, federal decisions have specifically identified “pricing” and “product design” as the sort of decisions that fall within the ambit of competitive decision-making. See, e.g., *U.S. Steel Corporation v. U.S.*, 730 F.2d 1465, 1468 n. 3 (Fed. Cir. 1984). Neither Messrs. Smith nor Hughes is involved in those sorts of decisions on behalf of SBC. They are not involved in the design or development of SBC’s product offerings; they are not involved in pricing decisions as to SBC’s product offerings; they are not involved in the marketing of SBC’s product offerings. In short, they are not involved in competitive-decision making.

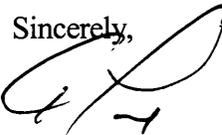
AT&T has made no attempt to demonstrate that Messrs. Smith or Hughes are involved in competitive decision-making. Rather, AT&T simply looked at the titles of Messrs. Smith and Hughes and concluded that “senior employees with positions nearly identical to these SBC employees are exactly the type of executives who can be expected to give ‘advice to inform business strategies or decisions,’ and, accordingly, should not be permitted access to competitive sensitive information filed with the Commission.” In support of its position, AT&T relies on a 1999 Order of the Program and Planning Division in the GTE/Bell Atlantic merger proceeding. *GTE Corp., Transferor and Bell Atlantic Corporation, Transferee for Consent to Transfer of Control*, 14 FCC Rcd. 3364, DA 99-373 (Feb. 23, 1999)(“*GTE Confidentiality Order*”). In that order, the Program and Planning Division denied access to confidential material to Sprint’s Vice President, Federal Regulatory Affairs and its Director, State Regulatory East. The Program and Planning Division was “unconvinced that, given their high positions within the company and the scope of federal and state regulation over the communications industry, Messrs. Kestenbaum and Dingwall do not provide advice or participate in the formulation of Sprint’s business decisions regarding compliance with state and federal regulations.” *Id.* ¶ 2. For several reasons, however, the *GTE Confidentiality Order* was unique to the proceeding in which it was issued and should not bar Messrs. Smith or Hughes from access to confidential information in this proceeding.

First, the *GTE Confidentiality Order* was issued in a merger proceeding rather than a general rulemaking. The nature of the proceeding and the data submitted thus suggested stronger precautions against the potential disclosure of business sensitive information. In addition, Sprint essentially conceded that its employees were involved in competitive decision-making by agreeing that it used input from its employees to “inform business strategies and decisions.” *Id.* Sprint, however, never precisely defined those decisions or how they fit within the description of competitive decision-making activities outlined by the Commission and federal courts.

Finally, the Policy and Program Planning Division’s language concerning “high positions” should be limited to the facts of that proceeding and should not reach as broadly as AT&T suggests. In essence, AT&T would have the Commission rule that above some threshold of seniority, all regulatory personnel are *ipso facto* involved in competitive decision-making and therefore may not have access to confidential information in Commission proceedings. There is no basis for such a broad pronouncement. Rather, the Commission should continue to require

substantive showings that specific individuals are involved in competitive decision-making before barring them from access to confidential information.

For all of the above reasons, SBC respectfully requests that the Commission deny AT&T's objections and allow Messrs. Smith and Hughes access to confidential information in this proceeding. If you have any questions, please do not hesitate to contact me at (202) 326-8895.

Sincerely,


Jim Lamoureux
Senior Counsel
SBC Telecommunications, Inc.

cc: David S. Petron (by email, facsimile, and U.S. Mail)