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October 8, 2004

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

Re: BellSouth's Response to Outstanding AT&T Objections to BellSouth Employees Designated to Have Access to Confidential Information, WC Docket No. 04-313, CC Docket No. 01-338

Dear Mr. Carlisle:

AT&T has objected to the disclosure of confidential information in this proceeding to Eric Fogle, BellSouth Director-Interconnection,¹ as well as to Jon Banks and Glenn T. Reynolds,² on the grounds that these individuals are involved in competitive decision-making as that term is used in the *Protective Order* in this case.³ None of these employees are involved in competitive decision-making as that term is used in the *Protective Order*, as they each individually certified, and AT&T has not rebutted these certifications.

¹ *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Objection of AT&T Corp. to BellSouth's Designation of Employees to Have Access to AT&T and other Parties' Confidential Information (Oct. 1, 2004) ("Fogle Objection") at 3. AT&T also objects to the disclosure of confidential information to Eric Fogle, an employee within BellSouth's Interconnection Services organization. BellSouth will respond to that objection separately, and will not provide access to AT&T's Confidential Information to Mr. Fogle, Mr. Ross, or Ms. Foshee until AT&T's objections are resolved.

² Letter from David S. Petron, Sidley Austin Brown & Wood, to Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, FCC (Oct. 5, 2004). ("Banks/Reynolds Objection").

³ *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338, Order, DA 04-3152 (Sept. 29, 2004) ("*Protective Order*").

AT&T states that the assistance it understands Mr. Fogle provides in connection with “developing BellSouth’s policies and position with regard to broadband and other products that are at issue in this proceeding” means that Mr. Fogle participates in some or all of BellSouth’s business decisions.⁴ AT&T also states its belief, based on Mr. Banks’ title of “Executive Vice President” and Mr. Reynolds’ title of “Vice President,” that the nature of these positions involves these individuals in giving advice that informs BellSouth’s business strategies and decisions.⁵ AT&T argues that Mr. Banks and Mr. Reynolds hold positions “nearly identical” to Sprint’s in-house “Vice President, Federal Regulatory Affairs” and “Director, State Regulatory/East,” who were denied access to confidential documents in a separate proceeding under a protective order like the one here.⁶

Mr. Fogle, Mr. Banks, and Mr. Reynolds are not engaged in “competitive decision making” as that term is used in the Commission’s protective orders. As the Commission has explained, it has adopted the “competitive decision-making” standard that has been adopted by federal courts.⁷ Specifically, the two federal court decisions relied on by the Commission when it incorporated this standard into its protective orders provide an important explanation as to what sorts of “business decisions” rise to the level of “competitive decision-making:”

The parties have referred to involvement in “competitive decisionmaking” as a basis for denial of access. The phrase would appear serviceable as shorthand for a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions (*pricing, product design, etc.*) made in light of similar or corresponding information about a competitor.⁸

⁴ Fogle Objection at 3.

⁵ Banks/Reynolds Objection at 2.

⁶ *Id.*

⁷ *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, *Order Adopting Protective Order*, 13 FCC Rcd 11166, 11168, ¶ 5 (1998) (“*WorldCom Order*”).

⁸ *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984), *cited in WorldCom Order*, 13 FCC Rcd at 11168, n.15. (emphasis added) (“*U.S. Steel*”).

Similarly, the Ninth Circuit Court of Appeals, also cited by the Commission in the *WorldCom Order*, has also defined “competitive decisionmaking” as “**advising on decisions about pricing or design** made in light of similar or corresponding information about a competitor.”⁹

AT&T has not alleged that Mr. Fogle, Mr. Banks, or Mr. Reynolds advise BellSouth on decisions about pricing or product design. Mr. Fogle assists with developing BellSouth's policies and position with regard to fiber and broadband technology and services deployment, including line-sharing, line-splitting, VoIP, and other next generation services, architectures and platforms in connection with BellSouth's regulatory proceedings. Although employed by BellSouth, he resides outside of BellSouth's service territories, in Ashland, Missouri, and does not participate in competitive product design or pricing decisions. He is not involved in promotions or other pricing activities implicating BellSouth's competitors. Mr. Fogle's advice is more in the nature of regulatory policy consultant retained for the purpose of developing BellSouth's positions in this and other regulatory proceedings. And while Mr. Banks and Mr. Reynolds are higher-ranking BellSouth employees than Mr. Fogle, they are not engaged in competitive decisionmaking. They do not participate in competitive product design or pricing decisions, but rather advise the Company on regulatory strategies.

The Commission has consistently recognized that the decision of what type of access to permit for reviewing confidential material is a “balancing judgment” that “must be based on the circumstances presented” in individual proceedings.¹⁰ Indeed, the federal court decision articulating the “competitive decision-making standard” adopted by the Commission in its protective orders noted, in the context of evaluating access to in-house counsel:

[T]he factual circumstances surrounding each individual counsel's activities, association, and relationship with a party, whether counsel be in-house or retained, must govern any concern for inadvertent or accidental disclosure.

. . . Whether an unacceptable opportunity for inadvertent disclosure exists, however, must be determined, as above indicated, by the facts on a counsel-by-counsel basis, and cannot be determined solely by giving controlling weight to the classification of counsel as in-house rather than retained.¹¹

⁹ *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992), *cert. denied*, 506 U.S. 869 (1992) (emphasis added); see *WorldCom Order*, 13 FCC Rcd at 11168, n.15.

¹⁰ *WorldCom Order*, 13 FCC Rcd at 11169, ¶ 6. See also *U.S. Steel*, *supra*, note 8.

¹¹ *U.S. Steel*, 730 F.2d at 1468.

Here, the circumstances of this proceeding and the employees to whom AT&T objects are, in fairness, to be distinguished from the circumstances of the GTE/Bell Atlantic Merger and the “disqualification” of Mr. Kastenbaum. The circumstances of an unrestricted notice and comment rulemaking proceeding under the Administrative Procedure Act are substantially different than the circumstances presented by a merger proceeding involving competitive rivals. In this rulemaking under section 251, as here, the circumstances are much more akin to a BOC section 271-application proceeding; indeed, compliance with section 251 is an integral part of the section 271 checklist. And in the protective orders issued by the commission in the section 271-application proceedings, no “competitive decisionmaking” qualification was incorporated, either for lawyers or non-lawyers.¹²

Moreover, unlike the Sprint executive in the *GTE Order* cited by AT&T, BellSouth does not use Mr. Fogle’s, Mr. Banks’ or Mr. Reynolds’ advice to “inform business strategies or decisions,” specifically with regard to pricing and product design; rather, their advice is used to formulate regulatory strategies and decisions.¹³ “High positions within a company,” in the present circumstances, are not enough on their own to pose, as a matter of law, an “unacceptable opportunity for inadvertent disclosure; just as the federal courts have refused to determine access to confidential information by giving “controlling weight” to the classification of counsel as “in-house” rather than “retained,”¹⁴ the Commission should not, under the circumstances, give controlling weight to the classification of an individual designated in an Acknowledgement of Confidentiality as “highly positioned” within an entity.

For these reasons, BellSouth does not believe that AT&T has demonstrated that Mr. Fogle, Mr. Banks, and Mr. Reynolds are engaged in “competitive decisionmaking” either as that term is used in the *Protective Order*, or as it should be construed on the circumstances of this proceeding. However, given the “complexity, scale, and scope of issues to be addressed in this proceeding, in combination with both the compressed time-frame between comment and reply comment due dates,”¹⁵ and our belief that scarce Commission resources are best employed in

¹² See, e.g., *Application of BellSouth Corporation, Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, *Protective Order*, 17 FCC Rcd 2404, 2405, ¶ 3 (2002).

¹³ *In the Matter of GTE Corporation, Transferor and Bell Atlantic Corporation, Transferee; For Consent to Transfer of Control*, CC Docket No. 98-184, *Order Ruling on Joint Objections*, 14 FCC Rcd 3364, 3365, ¶ 2 (1999) (“*GTE Transfer Order*”).

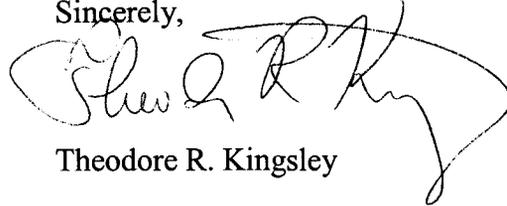
¹⁴ *U.S. Steel*, 730 F.2d at 1468.

¹⁵ *Protective Order*, ¶ 3.

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engaging the substantive issues raised in the current rulemaking, BellSouth respectfully withdraws its previously filed Acknowledgments of Confidentiality for these three employees, reserving its right to resubmit them if the need arises.

Sincerely,

A handwritten signature in black ink, appearing to read "Theodore R. Kingsley". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Theodore R. Kingsley

Enclosures

cc: Marlene H. Dortch, Secretary (via electronic filing)
Attached Service List

CERTIFICATE OF SERVICE

I, Juanita H. Lee, certify that on this 8th day of October 2004, I served copies of this filing letter via facsimile to outside counsel of record for the following parties:

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