

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Cingular Wireless, LLC)	
)	
Petition for Designation as)	
Eligible Telecommunications Carrier)	
in the State of Georgia)	
)	
To: Wireline Competition Bureau)	

REPLY COMMENTS OF TDS TELECOMMUNICATIONS CORP.
SUPPORTING TDS'S MOTION FOR PROTECTIVE ORDER

Shortly after TDS Telecommunications Corporation (“TDS”) filed its Freedom of Information Act Request and Motion for Protective Order (“Motion”),¹ the Commission granted a virtually identical motion in this docket filed by Embarq Corporation. The Commission’s Order (released February 8, 2007) required AT&T Mobility, LLC (“AT&T”) (formerly Cingular Wireless) to disclose information in its Service Improvement Plan (“SIP”) subject to a protective order as part of its petition for designation as an eligible telecommunications carrier (“ETC”) in Virginia.² In that Order, the Commission rejected the same arguments that AT&T raises here in

¹ TDS Telecommunications Corp.’s Motion for Protective Order, Freedom of Information Act Request, and Request for Extension of Time, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (Jan. 26, 2007).

² Protective Order, *Federal-State Joint Board on Universal Service, Petition of Cingular Wireless, LLC for Designation as an ETC in the Commonwealth of Virginia*, CC Docket No. 96-45 (Feb. 8, 2007) (*Embarq Protective Order*).

its Opposition to TDS's Motion.³ Because the Commission has already ruled on these questions, TDS respectfully requests that the Commission promptly grant its Motion.

Even if the Commission had not already decided the issue, the law is clear that "information in agency files or reports identified by the agency as relevant to the proceeding [must] be disclosed to the parties for adversarial comment."⁴ TDS cannot participate in this proceeding effectively without access to AT&T's proposed build-out plan, which is an indispensable prerequisite to ETC designation under Commission precedent.

AT&T arguments to the contrary are without merit. AT&T argues, for instance, that this proceeding is an "adjudication" despite the fact that the Commission has already expressly characterized it as a rulemaking. Moreover, AT&T's claims that the SIP is somehow uniquely sensitive in that it outlines AT&T's "future competitive plans" are contradicted both by the Commission's recent Order and by its routine adoption of protective orders for equally sensitive material in other contexts such as mergers.

AT&T's offer to release certain limited information such as the amount of universal service support it would expect to receive in Georgia does not, as the Commission recently ruled, provide a sufficient basis to assess the propriety of an ETC designation. As the Commission has held, "an applicant seeking ETC designation . . . must demonstrate in detail how high-cost support will be used for service improvements that would not occur absent receipt of such

³ Answer of AT&T Mobility LCC to TDS Telecommunications Corp.'s FOIA Request & Motion for a Protective Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (Feb. 23, 2007) (*AT&T Answer*).

⁴ *U.S. Lines, Inc. v. Fed. Maritime Comm'n.*, 584 F.2d 519, 534 (D.C. Cir. 1978). See also *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1023 (2d Cir. 1986) (reversing the Commission for failing to disclose "maps and studies" affording the parties "no opportunity to comment on their methodology or conclusions").

support.”⁵ A high-level recitation of funding totals and capital allocation does not satisfy this requirement. Moreover, and perhaps not coincidentally, the information AT&T offers falls short of providing a basis to assess whether AT&T will engage in “cream-skimming,” i.e., engaging in build-out only in the lowest cost areas.

Accordingly, the Commission should grant TDS’s Motion.

I. THE COMMISSION HAS ALREADY RULED ON THE QUESTIONS RAISED BY TDS’S MOTION.

In a proceeding virtually identical to the instant one, Embarq filed a FOIA Request and Motion for Protective Order asking to review the SIP filed by AT&T (then Cingular) in connection to its petition for ETC designation in Virginia. In granting Embarq’s request, the Commission rejected the very same arguments made again in this proceeding by AT&T, as well as AT&T’s offer to disclose only limited information:

We have considered Cingular’s opposition. Because of the nature of this proceeding, we find it appropriate to grant access to Exhibit E *in its entirety*, subject to the terms of this Protective Order. *Only by providing parties with the ability to fully comment on the Cingular Petition in its entirety will we develop the complete record necessary to fully analyze the merits of the Petition.* By restricting access pursuant to the Protective Order, we provide sufficient safeguards to protect the confidential information contained in the Cingular Petition.⁶

Apparently recognizing that there is no difference between Embarq’s motion and TDS’s, AT&T scarcely acknowledges, much less distinguishes, the Commission’s Order of February 8, 2007.⁷ The Commission should grant TDS’s Motion on the basis of this Order alone.

⁵ Report and Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 20 FCC Rcd. 6371, ¶ 23 (2005) (“*ETC Designation Order*”).

⁶ *Embarq Protective Order*, ¶ 3 (emphasis added).

⁷ See *AT&T Answer*, at 1 n.2.

II. AN ETC DESIGNATION PROCEEDING IS A RULEMAKING.

Even if the Commission had not granted a nearly identical motion in a nearly identical proceeding just last month, the Commission would have ample basis to grant TDS's Motion. According to AT&T's own reply, the Commission should only credit AT&T's arguments if this proceeding is an adjudication.⁸ AT&T is surely correct. Due to its prospective nature and focus on considerations of policy, however, this proceeding is *clearly* a rulemaking.

As the D.C. Circuit has held: "It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [in a] critical degree, is known only to the agency."⁹ AT&T, however, argues that ETC designation proceedings are not rulemakings, but are instead adjudications because they constitute "an agency determination of particular . . . rather than general applicability."¹⁰ AT&T's theory is contradicted by the Commission's characterization of this proceeding and runs directly against the definition of a rulemaking articulated by Justice Scalia in *Bowen v. Georgetown University Hospital*.

As Justice Scalia explained in *Bowen*, the difference between a rulemaking and an adjudication does not turn on the number of persons affected, but rather on whether the agency action is forward-looking and invokes considerations of policy:

[T]he entire [Administrative Procedure] Act is based upon a dichotomy between rule making and adjudication. . . . Rule

⁸ *Id.* at 5.

⁹ *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert denied*, 417 U.S. 921 (1974).

¹⁰ *AT&T Answer* at 6 (citing Jacob A. Stein, Glenn A. Mitchell, & Basil J. Mezines, ADMINISTRATIVE LAW § 33.01[1], at 33-3 (2006); Charles Allen Wright & Charles H. Koch, Jr., 32 FEDERAL PRACTICE & PROCEDURE § 8122.

making is agency action which regulates the future conduct of *either groups of persons or a single person*; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. . . . Conversely, adjudication is concerned with the determination of past and present rights and liabilities.¹¹

The Commission's characterization of this proceeding as a rulemaking is the correct one. Rather than determine "past and present rights and liabilities," ETC designation proceedings look to future rights through the lens of policy. Further, the Commission expressly identified the ETC designation proceeding as a rulemaking in its Public Notice seeking comment. Specifically, the Commission stated: "Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments."¹² Section 1.415 states: "After notice of proposed *rulemaking* is issued, the Commission will afford interested persons an opportunity to participate *in the rulemaking* proceeding."¹³ Likewise § 1.419 provides: "Comments, replies, and other documents filed *in a rulemaking* proceeding shall conform to the requirement of §1.49."¹⁴

¹¹ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (Scalia, J., concurring); *see also id.* ("Of particular importance is the fact that 'rule' includes agency statements *not only of general applicability but also those of particular applicability applying either to a class or to a single person.*") (emphasis added). Justice Scalia relies on the 1947 Attorney General's Manual on the Administrative Procedure Act, to which the Supreme Court has "repeatedly given great weight." *Id.* (citing *e.g.*, *Steadman v. SEC*, 450 U.S. 91, 103, n. 22 (1981); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, n. 31 (1979); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978)).

¹² Public Notice, "The Wireline Competition Bureau Invites Parties to Comment on the Petition of Cingular Wireless, LLC for Designation as an Eligible Telecommunications Carrier in the State of Georgia," CC Docket No. 96-45 (rel. Jan. 23, 2007).

¹³ 47 C.F.R. § 1.415(a) (emphasis added).

¹⁴ *Id.* at § 1.419.

The Commission was thus correct to characterize this proceeding as a rulemaking and, because AT&T readily concedes that “[r]ule making proceedings are, of course, another matter,”¹⁵ the release of the SIP is wholly appropriate.

III. THE SIP IS NOT UNIQUELY CONFIDENTIAL.

AT&T acknowledges that the Commission routinely produces information subject to protective orders in the context of licensing applications, unbundling disputes, and mergers of all types of license holders.¹⁶ Indeed, the Commission has developed a Model Protective Order for this exact purpose.¹⁷ AT&T claims, however, that its SIP is somehow “far more sensitive” than information produced in these other contexts. Specifically, AT&T claims that “such information would not afford a competitor or supplier such a detailed window into a carrier’s *future* competitive plans, while simultaneously locking the carrier into those plans.”¹⁸

AT&T’s arguments lack merit: the Commission allowed a protective order for precisely such information in the past month in an ETC proceeding. The Commission also adopted a similar order during the AOL/Time Warner merger proceeding. There, the Commission stated: “We expect that the commenters in this proceeding may seek access to confidential information submitted by AOL and Time Warner, which may include *highly sensitive information, such as future business plans.*”¹⁹ Similarly, in order to “protect the right of the public to participate in

¹⁵ *AT&T Answer* at 5 n.12.

¹⁶ *AT&T Answer* at 9.

¹⁷ See Report & Order, *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, GC Docket No. 96-55 (1998).

¹⁸ *AT&T Answer* at 9 (emphasis in original).

¹⁹ Protective Order, *In the Matter of Applications of America Online, Inc. and Time Warner, Inc., for Transfer of Control*, CS Docket No. 00-30 (Apr. 6, 2000).

[the EchoStar merger] proceeding in a meaningful way,” the Commission granted access to competitively sensitive documents “such as *future business and marketing plans*.”²⁰ In short, there is nothing special about AT&T’s future plans that merits exception.²¹

²⁰ Order Adopting Second Protective Order, *In the Matter of EchoStar Communications Corp.*, CS Docket No. 01-348 (Apr. 24, 2002). *See also* Protective Order, *Application of Qwest Communications International, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 For Authorization to Provide In-Region, InterLATA Services in Arizona*, WC Docket 03-194 (Sept. 4, 2003) (Section 271 context).

AT&T is also mistaken to rely on *Qwest v. FCC*, 229 F.3d 1172 (D.C. Cir. 2000). The *Qwest* court merely remanded a determination because the Commission failed to “consider plausible alternatives and discount them before resorting to the release of raw audit data.” *Id.* at 1184. In this case, the proceeding relies heavily on the SIP and hence there are no plausible alternatives to discount. The only alternative is to deny TDS and others the ability to participate and comment in a meaningful manner, in contravention of Commission rules and long-standing D.C. Circuit precedent. *See, e.g., National Black Media Coalition v. FCC*, 791 F.2d at 1023; *Fed. Maritime Comm’n.*, 584 F.2d at 534.

²¹ The difference cannot be that AT&T is “locked in” to its future plans. Unfortunately, due to the lack of meaningful monitoring, ETCs are seldom held to the promises they make in order to secure funding.

CONCLUSION

TDS respectfully requests access to the information included in Exhibit E of AT&T's ETC petition for the state of Georgia pursuant, if necessary, to a protective order.

Respectfully Submitted,

A handwritten signature in black ink that reads "John Blevins". The signature is written in a cursive style and is centered below the text "Respectfully Submitted,".

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Dated: March 7, 2007

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CERTIFICATE OF SERVICE

I, John Blevins, hereby certify that on this 7th day of March 2007, I caused copies of the foregoing **REPLY COMMENTS OF TDS TELECOMMUNICATIONS CORP. SUPPORTING TDS' MOTION FOR PROTECTIVE ORDER** to be served on the following:

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