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**REDACTED FOR PUBLIC INSPECTION - IN WC DOCKET NO. 05-25, RM-10593
before the Federal Communications Commission**

FILED/ACCEPTED

December 6, 2011

DEC - 6 2011

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

Re: AT&T Data Submitted in Response to Second Data Request in *Special Access NPRM*; WC Docket No. 05-25, RM-10593

AT&T Services, Inc., on behalf of its operating companies and affiliates, hereby submits data in response to the Commission's request that the public voluntarily submit data to assist the Commission in evaluating the issues raised in the *Special Access NPRM*.¹ Such data is being provided in the attached CD-ROMs. In preparing its response, AT&T has attempted to follow the instructions and present the data included in the voluntary information request, in the format requested, in the *Public Notice*. In a number of cases, AT&T was unable to provide all of the data requested and/or in the format requested because either it does not collect and store such data, or because of limitations in the way such data is stored in AT&T's systems. In our responses, attached hereto, we have sought to identify where we lacked sufficient information to provide the data requested. In addition, due to the volume of data requested, and the multitude of systems from which AT&T had to draw such data, we are unable to respond to all of the data requests at this time. We are submitting herewith responses to the data requested in Sections III.A.1. and III.A.2 (All Providers) and III.C. (CLEC Providers). We will supplement our response with additional data as soon as possible.

As discussed herein, AT&T's responses to some of the data requested by the Commission in the *Public Notice* contain some of AT&T's most commercially sensitive information (including, *inter alia*, information regarding the revenues AT&T derives from the sale of different services), the disclosure of which would place AT&T at a significant competitive disadvantage. Accordingly, AT&T has designated certain of its responses "Highly Confidential Information" subject to the protections of the *Second Protective Order* and the supplements to that order in the above-referenced docket, including the limitations on access to such information only to Outside Counsel of Record and Outside Consultants in this proceeding, and the prohibition on additional copying of such information.² To the extent the Commission

¹ *Competition Data Requested In Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, DA 11-1576 (rel. Sep. 19, 2011) (*Public Notice*).

² *Special Access Rates for Price Cap Local Exchange Carriers*, Second Protective Order, WC Docket No. 05-25, RM-10593, 25 FCC Rcd 17725 (2010) (*Second Protective Order*); *Special Access for Price Cap Local Exchange Carriers*, Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau, to Paul Margie, Wiltshire & Grannis LLP, 26 FCC Rcd 6571 (2011) (supplementing the Second Protective Order) (*Gillett Letter*).

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concludes that any such data fall outside the definition of “Highly Confidential Information” in the *Second Protective Order*, as supplemented,³ AT&T requests that the Commission amend that definition to include such data, information, documents, or portions of a document containing such information, and to afford such information the higher level of protection afforded under the *Second Protective Order* to “Highly Confidential Information.” Consistent with the terms of that *Second Protective Order*, AT&T has clearly identified the portions of its filing that contain Highly Confidential Information, and is submitting herewith a redacted copy of the filing, which do not contain either Highly Confidential or Confidential Information.

In addition, out of an abundance of caution, AT&T is claiming protection from disclosure of the information designated as “Highly Confidential Information” submitted herewith pursuant to exemption 4 of the Freedom of Information Act (FOIA), and the Commission’s rules, and requests that such information be withheld from public inspection except pursuant to the protections afforded to “Highly Confidential Information” in the *Second Protective Order*.⁴ Specifically, pursuant to the Commission’s decision in *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, GC Docket No. 96-55 (FCC 98-184), released Aug. 4, 1998 (“*Confidential Information Order*”) and in accordance with FOIA and the Commission’s Rules related to public information and inspection of records, e.g. 47 C.F.R. §§ 0.457 and 0.459, AT&T, on behalf of itself and its affiliates, hereby submits this request for confidential treatment of all information designated as Highly Confidential Information submitted herewith to the Commission in response to the *Public Notice*.

Statement pursuant to 47 C.F.R. § 0.459(b)

(1) Identification of the specific information for which confidential treatment is sought.

All of the information designated as “Highly Confidential Information” being submitted herewith in response to the *Public Notice* is confidential commercial information under Exemption 4 of the FOIA, 47 U.S.C. § 552(b)(4). Accordingly, pursuant to Commission Rule 0.459(a), AT&T requests that such information not be made routinely available for public inspection except pursuant to the protections afforded to Highly Confidential Information as provided in the *Second Protective Order* in the above-referenced docket. The information includes, *inter alia*, information regarding the revenues AT&T derives from the sale of different services.

(2) Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission.

The information is being provided to the Commission in response to the *Public Notice*.

(4) Explanation of the degree to which the information concerns a service that is subject to competition; and

³ *Second Protective Order* at ¶ 5-6 (stating that a submitting party may file under the *Second Protective Order* only those documents/data specifically authorized by the Bureau).

⁴ 5 U.S.C. § 552(b)(4); 47 C.F.R. § 0.457(d) (exempting from disclosure “[t]rade secrets and commercial or financial information obtained from any person and privileged or confidential”).

The records being provided to the Commission involve various telecommunications services provided by AT&T in competition with other carriers. Telecommunications is a highly competitive industry, and AT&T's services are subject to significant competition throughout the country. The presence of such competition and the likelihood of competitive injury threatened by release of the information provided to the Commission by AT&T should compel the Commission to withhold the information from public disclosure, except as provided in the *Second Protective Order*. *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987); *Frazer v. U.S. Forest Service*, 97 F.3d 367, 371 (9th Cir. 1996); *Gulf & Western Indus. v. U.S.*, 615 F.2d 527, 530 (D.C. Cir. 1979).

(3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged.

AT&T's responses to the data requested by the Commission in the *Public Notice* contain some of AT&T's most commercially sensitive information (including, *inter alia*, information regarding the revenues AT&T derives from the sale of different services), the disclosure of which would place AT&T at a significant competitive disadvantage.

(5) Explanation of how disclosure of the information could result in substantial competitive harm.

Exemption 4 requires a federal agency to withhold from public disclosure confidential or privileged commercial and financial information of a person unless there is an overriding public interest requiring disclosure, and the Commission has a longstanding policy of protecting the confidential commercial information of its regulatees under FOIA Exemption 4. Two lines of cases have evolved for determining whether agency records fall within Exemption 4. Under *Critical Mass*, commercial information that is voluntarily submitted to the Commission must be withheld from public disclosure if such information is not customarily disclosed to the public by the submitter.⁵ For materials not subject to *Critical Mass*, *National Parks* establishes a two part test for determining if information qualifies for withholding under Exemption 4.⁶ The first prong asks whether disclosing the information would impair the government's ability to obtain necessary information in the future. The second prong asks whether the competitive position of the person from whom the information was obtained would be impaired or substantially harmed. If the information meets the requirements of either prong, it is exempted from disclosure under Exemption 4. Whether under *Critical Mass* or *National Parks*, the information provided by AT&T falls within Exemption 4.

The materials designated as "Highly Confidential Information" and being provided to the Commission in response to the *Public Notice* are not customarily released to the public, are maintained on a confidential basis, and are not ordinarily disclosed to parties outside the company. Disclosure would subject AT&T to substantial competitive harm.

⁵ *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992).

⁶ *National Parks & Conservation Assoc. v. Morton*, 498 F.2d 765 D.C. Cir. (1974) ("*National Parks*").

The records being provided to the Commission contain information regarding the revenues AT&T derives from the sale of different services, and thus represent confidential commercial information that should not be released under the FOIA, except as provided in the *Second Protective Order*. Competitors could use the confidential information to assist in targeting their service offerings and enhancing their competitive positions, to the detriment of the competitive position of AT&T. See, e.g., *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109 (9th Cir. 1994).

Commission precedent has clearly found this type of information to be competitively sensitive and withholdable under Exemption 4.⁷ Specifically, the Commission has recognized that competitive harm can result from the disclosure of confidential business information that gives competitors insight into a company's costs, pricing plans, market strategies, and customer identities. See *In re Pan American Satellite Corporation*, FOIA Control Nos. 85-219, 86-38, 86-41, (May 2, 1986).⁸ The protective procedures established by the Commission and other governmental agencies recognize the need to keep such information confidential to the maximum extent possible. The Commission has provided the assurances that it is "sensitive to ensuring that the fulfillment of its regulatory responsibilities does not result in the unnecessary disclosure of information that might put its regulatees at a competitive disadvantage."⁹ Accordingly, AT&T requests that the information submitted herewith be withheld from public inspection except as provided in the *Second Protective Order* in the above-referenced docket.

If you have any questions concerning the foregoing, please contact the undersigned at 202-457-3058, or Linda Vandeloop, Director – Federal Regulatory at 202-457-3033.

⁷ See e.g. *In Matter of Pacific Bell Telephone Company Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD No. 00-23, DA 00-2618, November 20, 2000 (supporting confidentiality for collocation data); *Local Exchange Carrier's Rates, Terms and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport*; *Southwestern Bell Telephone Company*, 13 FCC Rcd 13615 (1998)(keeping administrative operating expenses confidential because it would provide insight into business strategies); *AT&T/McCaw Merger Applications* 9 FCC Rcd 2610 (1994)(keeping confidential accounting records showing account balance information); *NAACP Legal Defense Fund on Request for Inspection of Records* 45 RR 2d 1705 (1979)(keeping confidential records that contained employee salary information); *Mercury PCS II, LLC (Request for Inspection of Records) Omnipoint Corporation (Request for Confidential Treatment of Documents)*, FCC 00-241 (July 17, 2000)(keeping confidential marketing plans and strategy information).

⁸ Further, the Commission has ruled that not only should such data be protected, but also that information must be protected through which the competitively sensitive information can be determined. *Allnet Communications Services, Inc. Freedom of Information Act Request*, FOIA Control No. 92-149, Memorandum Opinion and Order (released August 17, 1993) at p. 3. The Commission's decision was upheld in a memorandum opinion of the U.S. Court of Appeals for the D.C. Circuit, which affirmed a U.S. District Court decision protecting the information. *Allnet Communications Services, Inc. v. FCC*, Case No. 92-5351 (memorandum opinion issued May 27, 1994, D.C. Cir.).

⁹ *Confidential Information Order* at ¶ 8.

Sincerely,

/s/ Christopher M. Heimann

cc: Andrew Mulitz

DOCKET NO.

05-25, 10593

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105 Room