

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
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Technology Transitions)	GN Docket No. 13-5
)	
)	
AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition)	GN Docket No. 12-353

**AT&T’s REPLY TO CHALLENGE TO CONFIDENTIALITY DESIGNATION BY
PUBLIC KNOWLEDGE AND THE NATIONAL CONSUMER LAW CENTER**

AT&T Services, Inc., on behalf of its affiliates (collectively referred to herein as “AT&T”), hereby replies to the joint challenge by Public Knowledge (PK) and the National Consumer Law Center (NCLC) (collectively “Challengers”), to AT&T’s designation of certain portions of its trial proposal as confidential or highly confidential.¹ AT&T does not oppose the Challenge as it relates to certain information regarding the percentage of Carbon Hill’s population that will have access to AT&T’s IP-based services that was inadvertently disclosed in a press briefing. However, as discussed below, the Challenge’s request for public disclosure of the timeline under which the trial will be conducted should be rejected, as that information is highly confidential and entitled to protection from disclosure under both Exemption 4 of the Freedom of Information Act (“FOIA”) and the *Second Protective Order*.

¹ Challenge To Confidentiality Designation Of Public Knowledge And The National Consumer Law Center On Behalf Of Its Low-Income Clients, filed on April 8, 2014 in *Technology Transitions*, GN Docket No. 13-5, *AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket No. 12-353 (“Challenge”).

In the *Second Protective Order* for this proceeding the Commission established procedures to protect information “provided by service providers and others that may be highly confidential.”² The Commission defined “Highly Confidential information” as:

Information that is not otherwise available from publicly available sources; that the Submitting Party has kept strictly confidential; that is subject to protection under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Commission’s implementing rules; that the Submitting Party claims constitutes some of its most sensitive business data which, if released to competitors or those with whom the Submitting Part does business, would allow those persons to gain a significant advantage in the marketplace or in negotiations; and that it is described in Appendix A to this Second Protective Order, as the same may be amended from time to time.

The Commission also required parties seeking to designate documents and information as Highly Confidential to obtain written approval of the Commission staff, based on staff’s preliminary determination, prior to such designation.

AT&T followed this process and obtained the necessary pre-approval from staff with respect to the trial timeline.³ Challengers now argue that staff erred in preliminary concluding that the trial timeline is highly confidential. They base their claim entirely on the assertion that this information falls outside of FOIA Exemption 4, and go so far as to claim that the trial timeline is not entitled to protection even under the basic *Protective Order*.

Challengers are wrong. FOIA 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. AT&T’s trial timeline includes the dates that AT&T plans to grandfather and later withdraw each of its TDM-based services, as

² *Technology Transitions*, GN Docket No. 13-5, *AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket No. 12-353, Second Protective Order at ¶ 1 (rel. Feb. 27, 2014) (“*Second Protective Order*”).

³ *Id.* at ¶ 2.

well as the dates AT&T plans to offer certain IP-based services or enhancements to replace each TDM-based service that is currently offered in the trial wire centers. This information falls squarely within Exemption 4 of FOIA and the *Second Protective Order* insofar as it is information that is not publicly available and its disclosure would give AT&T's competitors a significant advantage in the marketplace. Moreover, there is no overriding public need for disclosure at this juncture because AT&T has every incentive, and, indeed, has committed in its Wire Center Operating Plan to, provide public outreach regarding the TDM-to-IP transition. It also is required by law to file to obtain Commission approval through the Section 214 application process prior to discontinuing any service.

Challengers maintain that the trial timeline is not commercial information under the theory that "Research designs made in a non-commercial setting do not constitute ... commercial or financial information."⁴ They rely for this argument on *Washington Research Project, Inc. v. Department of Health, Education, and Welfare*, which involved FOIA requests for information relating to grant applications by non-commercial scientists that were approved and funded by the National Institute of Mental Health.⁵ But the holding in that case – "that a non-commercial scientist's research design is not literally a trade secret or item of commercial information, for it defies common sense to pretend that the scientist is engaged in trade or commerce."⁶ -- is completely inapt because AT&T *is* engaged in trade or commerce and, indeed, faces competition from providers who are intent on winning the business of AT&T's customers, including those in the trial areas.

⁴ Challenge at 13.

⁵ *Washington Research Project, Inc. v. Dep't of Health, Educ. & Welfare*, 504 F.2d 238 (D.C. Cir. 1974), cert. denied 421 U.S. 963.

⁶ *Id.* at 244.

Courts have consistently held that the term “commercial” in Exemption 4 be given its ordinary meaning, i.e. of or relating to commerce.⁷ There is no question that information regarding the time frames that AT&T plans to transition its TDM-based services and begin significant marketing efforts to sell its IP-based products is an intricate part of AT&T’s planned commercial operations for the wire centers in question. This information is clearly commercial.

Nor is there any merit to Challengers’ further contention that public disclosure of the trials’ proposed timeline “gives competitors no commercial advantage[.]”⁸ As an initial matter, that is not the test for determining whether to withhold commercial information that has been supplied to a federal agency voluntarily. Rather, under the test established by the D.C. Circuit in *Critical Mass*, “financial or commercial information provided to the Government on a voluntary basis is ‘confidential’ for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.”⁹ This test reflects the concern that the release of such information could jeopardize the government’s ability to obtain similar information in the future from the same source or of a similar type if providers feared competitors getting the information. In other words, providers would be reluctant to voluntarily

⁷ See *Public Citizen Health Research Group v. Food and Drug Admin.* 704 F.2d 1280, 1290 (D.C. Cir. 1983); *Washington Post Co. v. United States Department of Health & Human Services*, 690 F.2d 252, 266 (D.C.Cir.1982); *Board of Trade v. Commodity Futures Trading Commission*, 627 F.2d 392, 403 (D.C.Cir.1980) (all of which hold that the terms “commercial” and “financial” in exemption 4 should be given their ordinary meanings). The Commission itself has recognized that, for purposes of Exemption 4, “records are ‘commercial’ as long as the submitter has a commercial interest in them.” *Robert J. Butler*, 6 FCC Rcd 5414, 5415 (1991) (citing. *Public Citizen Health Research Group*).

⁸ Challenge at 14- at 15.

⁹ *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir, 1992) (en banc) (“*Critical Mass*”).

hand over competitive information, thus impairing the government's ability to obtain complete and accurate information.¹⁰

There can be no question that the information here meets the requirements of *Critical Mass*. AT&T does not customarily disclose product migration timeframes, such as the ones at issues here, to the public until its services reach the implementation phase. Indeed, AT&T's employees are not permitted to share such information outside of AT&T without first obtaining a non-disclosure agreement. Accordingly, despite the fact that AT&T announced that it plans to conduct wire center trials, the details of the product migrations associated with those trials -- including the proposed timelines for filing Section 214 applications to grandfather and ultimately sunset the underlying services -- have been maintained on a confidential basis within AT&T. And that information was submitted to the FCC with the expectation that confidentiality would be maintained. The release of this information under these circumstances undoubtedly would deter AT&T (as well as other parties considering participating in these trials or even conducting their own) from submitting such detailed information to the Commission, thus adversely affecting the Commission's ability to properly monitor these and other experiments, if not the larger transition.

Even if the "competitive harm" test was applicable, there can be no question that disclosure of this information meets it, as the release would subject AT&T to substantial competitive harm.¹¹ As the D.C. District Court put it, "Business and marketing plans *by their*

¹⁰ *Id.* at 879.

¹¹ See *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Thus, even if AT&T was deemed to have been compelled to submit this information, it would be protected from disclosure under Exemption 4 because the such disclosure would "cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.*

nature usually contain information that would cause competitive harm if disclosed.”¹² That is plainly the case here. As noted in AT&T’s Wire Center Trial Operating Plan, there are at least seven competitive service providers in both the Carbon Hill and Kings Point wire centers.¹³ Information regarding the timelines underlying AT&T’s customer migration plans for specific services, including when it plans to grandfather and ultimately cease offering specific TDM services, and its marketing plans for replacement products, is precisely the type of information these competitors could and would use to develop responsive business and marketing strategies that target affected customers. As such, it is quintessentially the kind of competitively sensitive confidential commercial information that Exemption 4 was designed to protect,¹⁴ and for which the Commission established the Highly Confidential designation in the *Second Protective Order*. In the *Competitive Common Carrier* proceeding the Commission found that “effective competition is *clearly curtailed* when firms are required to give advance notice of innovative marketing plans. . . .”¹⁵ So, too, competition would be clearly curtailed if AT&T was required to publicly disclose at this juncture its operational and marketing timeline for migrating customers from TDM to IP services.

¹² *National Community Reinvestment Coalition v. National Credit Union Admin.* 290 F.Supp.2d 124, 135 (D.D.C.2003) (emphasis added).

¹³ See AT&T Wire Center Trial Operating Plan at p. 9.

¹⁴ See, e.g., *National Community Reinvestment Coalition* 290 F.Supp.2d at 135 (finding that disclosure of credit union “community action plans -- marketing plans that were required to be submitted to federal agency under repealed regulation -- would likely have resulted in substantial competitive harm to credit unions, in light of actual competition they faced, and therefore undisclosed portions of those marketing would have qualified as “confidential” information that was exempt under FOIA).

¹⁵ See *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities*, First Report and Order, 85 F.C.C.2d 1, at ¶ 12 (1980) (“*Competitive Common Carrier Order*”) (“emphasis added”).

Challengers further argue that the trial timelines “are critical to public review and input in this proceeding.”¹⁶ AT&T recognizes that its customers have an interest in knowing the dates that AT&T proposes to begin grandfathering and sunseting TDM-based services so that they can prepare for the transition. But the issue is not *whether* this information will be disclosed to the public, but *when*. At this juncture, the trial is strictly voluntary; no customers are about to lose their TDM service without their knowledge or consent. Equally important, AT&T has every interest in educating its customers about the IP transition so that they embrace the promise of IP services. That is why AT&T stated in its Wire Center Trial Operating Plan that it is committed to ensuring its customers are “fully educated and informed” about the technology transition and has proposed comprehensive customer outreach plans for AT&T’s customers as well as the affected communities at large.¹⁷ Moreover, and in all events, AT&T cannot withdraw its interstate TDM-based services without first filing and obtaining Commission approval of a Section 214 application. That application will be put out for public comment and requires AT&T to send a notice to affected customers. Thus, those that will be affected by the transition and others will have ample notice of the trials’ timelines.

¹⁶ Challenge at 6.

¹⁷ See AT&T Wire Center Trial Operating Plan at pp. 16 – 20.

For all of the reasons discussed above, the Commission should reject the Challenge with respect to AT&T's proposed trial timeline, and continue to protect that information from public disclosure and to accord it the Highly Confidential designation provided by the *Second Protective Order*.

Respectfully Submitted,

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