



April 30, 2014

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: GN Docket No. 12-353, Comment Sought on the Technological Transition of the Nation's Communications Infrastructure; GN Docket No. 13-5, Technology Transitions Policy Task Force

Dear Ms. Dortch:

Pursuant to the attached ruling by the Office of General Council, rendered April 30, 2014, I am filing the attached email of April 26<sup>th</sup>, 2014.

Respectfully submitted,

/s/ Harold Feld  
*Senior Vice President*  
PUBLIC KNOWLEDGE



Harold Feld &lt;hfeld@publicknowledge.org&gt;

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## Fwd: PK letter on confidentiality challenge

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Harold Feld &lt;hfeld@publicknowledge.org&gt;

Thu, Apr 24, 2014 at 7:30 PM

To: Joel Rabinovitz <Joel.Rabinovitz@fcc.gov>, Jonathan Sallet <jonathan.sallet@fcc.gov>  
Cc: "HEIMANN, CHRISTOPHER M (Legal)" <ch1541@att.com>, Jodie Griffin <jodie@publicknowledge.org>, Jim Bird <Jim.Bird@fcc.gov>, "BARBER, ROBERT C (Legal)" <rb2865@att.com>, "SIMONE, FRANK S" <fs6729@att.com>, Matthew DelNero <Matthew.DelNero@fcc.gov>, Tim Stelzig <Tim.Stelzig@fcc.gov>, John Bergmayer <john@publicknowledge.org>, Clarissa Ramon <cramon@publicknowledge.org>

Dear Christopher, et al.

I have been away for the last several weeks. I have now reviewed the information. I have cc:ed John Bergmayer and Clarissa Ramon of our office, the other signatories to the protective order at issue here, so that everyone at PK is fully informed as to the state of the record and what information requires redaction.

As I discussed below, I am puzzled on a number of fronts and have a multitude of question. I wish to make clear our desire to proceed with collegiality and to resolve an issue which is clearly a distraction. At the same time, I am concerned that Public Knowledge not waive any arguments with regard to the overall confidentiality of the information, particularly with regard to our contention (made in our initial challenge, and with regard to other instances of disclosure as well as in the current instance) that AT&T has waived confidentiality through its failure to adequately protect the information.

Fortunately, I have a suggested solution below. It is somewhat complicated so I will review the facts as I understand them and explain my concerns and, as you have done, seek official guidance from OGC on how to proceed.

First, however, I must say that I find it regrettable that you chose to begin this dialog with a formal email, cc:ed to FCC staff, rather than with a simple phone call. This gives rise to the concern that, absent direction from OGC, this entire email chain will need to be filed as an *ex parte* in this docket. I am also dismayed that, despite the fact that the situation arises from (a) your apparently mistaken filing in the public record of unredacted information in footnote 96; (b) your subsequent failure to detect this error for nearly 2 weeks; (c) your failure, when filing a redacted version, to indicate why you filed what was to all appearances an identical copy of the original filing -- apparently relying on interested parties to manually compare the two documents manually and notice the subtle change in footnote 96 of one of the several filed documents without any assistance from you; and, (d) your failure for more than 45 days to file the relevant motion with the FCC to substitute the new redacted version for the unredacted version -- your email appears to imply that my colleague Jodie Griffen could somehow find herself subject to sanction.

In the interest of an expeditious and amicable solution, however, I will assume this was an unintended consequence of your concern rather than an unfortunate and unprofessional attempt at intimidation. As you are, in effect, asking us to work with you rather than take this to formal motions in the public record I trust unfortunate phrases like "if I were in your position" will not be repeated in future correspondence -- particularly to staff.

Further, in an effort to speed amicable and swift resolution, I have cc:ed Jonathan Sallet, who as head of the task force and as General Counsel will now need to rule on this matter.

Finally, I must note that this is not a private matter between AT&T and PK, as AT&T counsel seem to believe. All interested parties, and the public at large, rely upon compliance with the FCC's open record regulations. ***It is not for AT&T -- or FCC staff for that matter -- to make private arrangements that curtail the rights of others or end run the open record required by law. Public Knowledge WILL NOT, in any way, assist in any attempt to undermine the public record in this matter*** even if gthis disclosure proves embarrassing to AT&T and/or its counsel.

For these reasons, our insistence that AT&T actually comply with the norms of motions practice and that the Commission issue public Orders that are part of the record is not mere formalism -- especially since AT&T

decided to bring this matter to the notice of OGC. Like AT&T, we desire to be guided by OGC and comply with the relevant rulings. At the same time, as a longstanding proponent of openness and transparency, Public Knowledge must make clear from the outset that our compliance with the rules must be clear, public and beyond reproach.

### **Procedural Problem For PK Given That AT&T Has Not Officially Sought Highly Confidential Treatment of Footnote 96.**

To begin, I am genuinely unsure how PK can even comply with AT&T's request for us to withdraw and resubmit the *ex parte* when AT&T has not withdrawn (or sought to withdraw) the unredacted footnote 96 from the record. Our diligent search of the record can find no motion by AT&T to classify the information accidentally disclosed in footnote 96, and at issue here as, Highly Confidential. True, a version of the Petition with information in footnote 96 redacted was apparently filed with the Commission on March 11, two weeks after the filing of the original Petition. No one at PK (or, as far as I know, anywhere else) was alerted to this filing. Nor did the filing include a cover letter or erratum statement indicating how the March 11 version of the Petition differed from the February 28 or requesting substitution.

It seems much to ask parties to intuit from this mysterious second filing a request for Highly Confidential treatment from the subtle alteration of a single footnote. More importantly for the instant problem, however, the failure of any actual request from AT&T to either remove the unredacted information or seek Highly Confidential treatment of the information (despite the accidental -- and ongoing -- disclosure) creates something of a problem for PK with regard to our *ex parte* of April 23. We can hardly file a motion to withdraw and substitute a redacted version when AT&T has not even sought to have the information in question removed from the public record. Legally, as far as I can tell, there is nothing to redact because AT&T has utterly failed to make the necessary legal filing requesting that the information be removed from the record and that the information be treated as confidential. Indeed, the AT&T document erroneously disclosing the information continued to be available publicly when last I checked at 4 p.m. today.

You can, I hope, see our dilemma. PK is obligated to file an *ex parte* making public a summary of relevant information, and quoting documents relevantly filed. See 47 C.F.R. 1.1206(b)(1). I only last month publicly took some folks to task on Twitter for their failure to comply fully with the Commission's rule. How on Earth do we style a motion to substitute a redacted version of the *ex parte* when AT&T has not even filed a motion to substitute the redacted version of the original application? And what do we redact when the information is (a) still in the public record, and (b) AT&T has made not officially sought classification of the information -- despite discovering the public disclosure of the information at least 45 days ago?

### **PK Does Not Wish To Waive The Argument That AT&T Has Waived Privilege By Apparently Failing To Take Corrective Action for 45 Days.**

In addition to this procedural problem, I have a concern about waiving a potent legal argument with regard to our challenge. In addition to our substantive challenge that the timeline is not confidential, we have also challenged the designation of the timeline as "Highly Confidential" because AT&T has failed to treat the information in a confidential manner. That was, in fact, the essence of the *ex parte* and why we quoted the relevant passage from the unredacted version of the public record (which, as noted above, is *still* in the public record as of 4 p.m. today).

As I said above, I am sympathetic to an accidental disclosure and conscious of our duty as attorneys not to take undue advantage of the errors that are all too common in the electronic age. At the same time, there *is* a responsibility for attorneys to take timely corrective action to resolve such accidental disclosures, to respect the Commission's rules and record by filing motions so that parties in interest may adequately respond, and failure to take such actions (and follow appropriate process) on discovery of the accidental disclosure constitutes a waiver of confidentiality.

Indeed, it is with no irony that I observe that the apparent failure of AT&T to take any remedial action for **45 days** following the initial discovery of the accidental disclosure of the information would appear to be a significant argument in our favor. Neither personal sympathy nor professional comity can supersede my responsibility to zealously represent my employer Public Knowledge, and take full advantage of this argument that circumstance has presented to us.

On the other hand, it is entirely possible that AT&T has been acting pursuant to instructions from staff (although

the failure to file a suitable motion with the redacted version seems exceedingly odd). Even if the failure were on the part of staff for failing to substitute the version with the unredacted footnote 96 for the redacted version of footnote 96, a motion setting forth the error (and giving party opponents the opportunity to challenge the assertion of confidentiality on the grounds of waiver-through-failure-to-adequately-protect-the-information). We are not talking a momentary slip. For 12 days, the supposedly Highly Confidential information was laced in the record and downloaded by interested parties and reporters. Even had AT&T filed a motion with the repaired version on March 11, a strong argument for waiver of confidentiality would exist. The apparent failure of AT&T to file any motion to correct the record (whatever communications may have been made privately to staff to which we (and other parties in interest) are not privy) further underscores the argument of waiver.

Nevertheless, if AT&T has acted pursuant to instructions from staff -- a possibility I must acknowledge, although the failure of any motions or *ex parte* of any such conversations if such conversations did take place and such instructions were given raises its own concerns -- it would be wrong for PK to penalize AT&T.

## Proposed Solution

Balancing all these things, I propose the following resolution.

A. AT&T file a formal motion requesting the Commission replace the initially filed document with unredacted Note 96 with the version filed March 11, 2014, containing the redacted information. In this interest of comity and reaching an amicable solution, Public Knowledge will not object to this substitution, although Public Knowledge reserves the right to supplement its challenge and in no way waives any argument with regard to (a) the inappropriate classification of the timeline as Confidential or Highly Confidential; (b) argument that AT&T has waived confidentiality by its failure to take appropriate steps to discover the disclosure in a timely fashion, or address the disclosure in a reasonable way following the discovery of the disclosure; or, (c) any other argument arising from these events.

B. Although Public Knowledge will not itself object to the substitution *per se*, Public Knowledge **cannot waive the rights of other parties in interest to oppose AT&T's motion**. Nor should OGC act on AT&T's motion until such time as parties to this proceeding have been given the right to respond and challenge AT&T's motion -- unless AT&T can demonstrate for good cause why the documents (after nearly 60 days of public availability and already in the hands of interested parties and reporters) must be immediately substituted.

C. If the Commission grants AT&T's request for substitution and grant of Confidential or Highly Confidential status, Public Knowledge will file a redacted *ex parte*. PK will not, of course, need to file a *Motion* but will provide a cover letter explaining the reason for the substitution so that the public record will remain complete and the rights of all parties will not be prejudiced by failure to maintain a full and complete record.

D. Furthermore, although there is no logical reason to withhold the Public Knowledge *ex parte* from the public record in light of AT&T's failure to request confidential treatment of the material at issue and in light of AT&T's own failure to seek to replace the unredacted version with the redacted version, Public Knowledge will --in the interest of comity and amicable resolution of this matter -- consent to the FCC designating Public Knowledge's April 23, 2014 *ex parte* as confidential until AT&T files its motion or until May 1, 2014 -- whichever is later.

## Request For Commission Ruling

Because it is unclear whether this communication constitutes a substantive pleading subject to the *ex parte* rules, or if this constitutes a procedural conference among parties, Public Knowledge requests an explicit ruling from OGC as to whether this email response, and all other emails in this chain, must be submitted into the public record.

## Conclusion

Again, I wish to assure both AT&T and Commission staff of our desire to resolve this swiftly and amicably. But I will not have it suggested or insinuated that any Public Knowledge staff should be the subject of disciplinary action or censure, nor will Public Knowledge take part in efforts to undermine the public record through failure to comply with the FCC's rules and procedures. Since AT&T has elected to cc FCC staff on this email chain, we must resolve the matter formally as discussed above. Hopefully, in the event additional issues develop, AT&T counsel will seek to contact counsel directly before involving FCC staff.

Sincerely,

Harold Feld, Senior VP  
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Promoting a Creative & Connected Future.



Harold Feld &lt;hfeld@publicknowledge.org&gt;

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## Fwd: PK letter on confidentiality challenge

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**Joel Rabinovitz** <Joel.Rabinovitz@fcc.gov>

Wed, Apr 30, 2014 at 4:06 PM

To: Harold Feld &lt;hfeld@publicknowledge.org&gt;

Cc: "HEIMANN, CHRISTOPHER M (Legal)" &lt;ch1541@att.com&gt;, Jodie Griffin &lt;jodie@publicknowledge.org&gt;, "BARBER, ROBERT C (Legal)" &lt;rb2865@att.com&gt;, "SIMONE, FRANK S" &lt;fs6729@att.com&gt;, John Bergmayer &lt;john@publicknowledge.org&gt;, Clarissa Ramon &lt;cramon@publicknowledge.org&gt;, Jonathan Sallet &lt;Jonathan.Sallet@fcc.gov&gt;, Suzanne Tetreault &lt;Suzanne.Tetreault@fcc.gov&gt;, Jim Bird &lt;Jim.Bird@fcc.gov&gt;, Matthew DelNero &lt;Matthew.DelNero@fcc.gov&gt;, Tim Stelzig &lt;Tim.Stelzig@fcc.gov&gt;

Harold,

You have asked for a ruling by the Office of General Counsel as to whether your email response and others in the chain must be filed in the public record. We conclude that your email does constitute an ex parte presentation under the Commission's rules, 47 C.F.R. § 1.1202(a), and thus should be submitted in the record. We conclude that the prior emails constitute inquiries concerning compliance with procedural matters where the procedural matter is not an area of controversy in the proceeding, and so do not fall within the definition of ex parte "presentations."

**Joel A. Rabinovitz****Attorney-Advisor****FCC, Office of General Counsel****202-418-0689****From:** Harold Feld [mailto:[hfeld@publicknowledge.org](mailto:hfeld@publicknowledge.org)]**Sent:** Thursday, April 24, 2014 7:30 PM**To:** Joel Rabinovitz; Jonathan Sallet**Cc:** HEIMANN, CHRISTOPHER M (Legal); Jodie Griffin; Jim Bird; BARBER, ROBERT C (Legal); SIMONE, FRANK S; Matthew DelNero; Tim Stelzig; John Bergmayer; Clarissa Ramon**Subject:** Re: PK letter on confidentiality challenge

Dear Christopher, et al.

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