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FILED THROUGH ELECTRONIC TARIFF FILING SYSTEM

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th, S.W.
Washington, DC 20554

RE: Nevada Bell Telephone Company Confidential Documents; Tariff F.C.C. No. 1, Transmittal No. 281 Request for Confidential Treatment

Dear Ms. Dortch:

AT&T Communications Inc., on behalf of its affiliate Nevada Bell Telephone Company (NBTC), hereby submits a request for confidential treatment of cost support data filed in conjunction with Transmittal No. 281, which involves NBTC's tariff filing for the provision of cross-connect service for AT&T Dedicated Ethernet Service.

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

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

AT&T requests that the pages marked "Proprietary Information" be treated on a confidential basis, 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) (rel. Aug. 4, 1998) (Confidential Information Order).

The attached document for which confidential treatment is being requested contains commercially sensitive information including labor rates and other expenses.

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

Nevada Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 281

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

The detailed cost information provided by AT&T displays the breakdown of operating expenses (including labor costs).

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

AT&T's services are subject to competition by numerous competitive carriers. These competitors could use AT&T's cost information in an effort to become more cost efficient, thereby giving them a competitive advantage over AT&T.

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

The cost information (including labor expenses and other network related expenses) that AT&T provides in this filing would enable AT&T's competitors to significantly undermine AT&T's ability to effectively compete in the marketplace. For example, AT&T's competitors could use the cost information to determine AT&T's labor rates or its annual cost factor for central office circuit equipment. The labor rate is particularly sensitive because it is used not only for the services in this filing, but is also used to produce cost studies for other competitive services, such as DS1 and DS3 services.

Importantly, AT&T's cost data can quickly reveal to a competitor if it is more or less cost efficient than AT&T in a particular market. If AT&T is the most efficient provider, potential competitors know immediately that they will be more likely to maximize profits if they are geared toward satisfying some specific niche demand. This clearly benefits AT&T's competitors as they design marketing strategies aimed at capturing as much of AT&T's business as possible.

(6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure; and

This information has been maintained on a confidential basis within AT&T and would not ordinarily be disclosed to parties outside the company.

(7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties.

This information has been maintained on a confidential basis within AT&T and would not ordinarily be disclosed to parties outside the company.

(8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure.

The material must be held from public disclosure for an indefinite period. Confidential treatment must be afforded the materials as long as the costs in question would provide a basis for competitors to gain insight into AT&T's pricing decisions. AT&T cannot determine at this time any date on which these costs would become "stale" for such a purpose.

(9) Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

AT&T's cost support data represents confidential commercial information that should not be released under the FOIA. Telecommunications is a highly competitive industry. 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. *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987); *Frazee 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). There is no basis in this case to vitiate the important public policies incorporated in the Commission's rules allowing for confidential protection of data.

Two lines of cases have evolved for determining whether agency records fall within Exemption 4. Under *Critical Mass v. NRC*, 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.¹ For materials not subject to *Critical Mass*, *National Parks & Conservation Assoc. v. Morton* establishes a two part test for determining if information qualifies for withholding under Exemption 4.² 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 viewed under either *Critical Mass* or *National Parks*, AT&T's cost support data falls within Exemption 4.

The information in question is not customarily released to the public, it is maintained on a confidential basis, and it is not ordinarily disclosed to parties outside the company. Disclosure of the information also would impair the Commission's ability to obtain necessary information in the future. Finally, disclosure would subject AT&T to substantial competitive harm. As described above, the cost support data includes details that competitors could use to formulate anticompetitive pricing strategies, to the detriment 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 4.³

¹ *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) ("*Critical Mass*").

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

³ *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

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, revenues, 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).⁴

Protective Order Requested

AT&T requests that the cost support information be placed under the Protective Order designated under CC docket No. 96-187, Report and Order (F.C.C. 97-32, released January 31, 1997 (Streamlining Order) and the Order on Review released October 14, 1997, in the matter of Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal Nos. 2646, 2647, 2649 and 2656.

AT&T acknowledges that the Bureau is directed by the Commission's Confidential Information Order, at paras. 35-42, to routinely employ the standard protective order detailed in the Confidential Information Order for materials submitted under a request for confidential treatment unless complete confidentiality is requested. If any person (other than an agency employee working directly on the matter in connection with which these documents are submitted) requests an inspection or requests a copy of the documents or any portion of them other than under the terms of an appropriate protective order, please give me sufficient advance notice prior to any such disclosure to allow AT&T to pursue appropriate remedies to preserve the confidentiality of the information.

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).

⁴ Further, the Commission has ruled that not only should such data be protected, but also that information that explains and analyzes in detail such information must be protected to ensure the competitively sensitive information cannot 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. 5. 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.).

Any confidential information required to be produced under the terms of an appropriate order shall be maintained and made available for inspection at the following locations:

Nevada Bell Telephone Company

Debra L. Clemens
1120 20th St, N.W.
Suite 1000
Washington, D.C. 20036

Scott Murray
Four AT&T Plaza
Suite 9-A23
Dallas, Texas 75202

Very truly yours,

/s/ Keith M. Krom