

Re: Confidentiality of Information in Experimental License Application
File No. 0068-EX-PL-2016
Date Filed: 02/04/2016

Attached to this letter is a confidential version of experimental license application file no. 0068-EX-PL-2016 and a redacted, public version of this same license application that was filed on February 5, 2016, Pursuant to the Federal Communication Commission's ("Commission") 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 the Freedom of Information Act ("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 Services Inc. ("AT&T") submits this request for confidential treatment of technical equipment information submitted with this experimental license application. The confidential and proprietary information is highlighted in the application and exhibits.

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

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

In the experimental license application, AT&T seeks a license to conduct fixed and mobile testing in the 3400-3600 MHz, 3700-4200 MHz, 14500-15350 MHz, and 27500-28500 MHz frequency bands with various types of experimental wireless equipment from multiple manufacturers. Applicant's testing and the expected experimental equipment would support potential fifth generation (5G) multi-gigabyte per second (Gbps) applications for fixed and mobile wireless communication networks at higher transmission rates and lower latency than is currently available. The experimental testing to be performed under this license would lead to innovation in equipment and services.

Section 5.55(c)(1) of the Commission's rules require applicants for an experimental license to provide specific information as to proposed equipment, power, antenna height, and operating frequencies, some of which is proprietary and confidential. Among the specific equipment and technology information that an applicant for an experimental license must provide are proposed, frequency tolerance, mean peak, base station and mobile effective radiated power (ERP) and transmit power, orientation in the horizontal plane, orientation in the vertical plane, maximum beam width at ½ power point (horizontal), and maximum beam width at ½ power point (vertical). Although some of this information remains to be determined, the equipment and technology information highlighted in the experimental license application is proprietary trade secret, competitively sensitive, and confidential under Exemption 4 of the FOIA, 5 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, even when added at a later date.

(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 was submitted in an exhibit with technical equipment and testing information submitted with experimental license application file no. 0068-EX-PL-2016.

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

AT&T and its equipment manufacturers are subject to substantial competition. Although the equipment and services that will be used in the testing are still being developed, they are expected to lead to material developments in products and services in competitive market in the United States and possibly elsewhere. The presence of such competition and the likelihood of competitive injury threatened by release of detailed equipment and testing information redacted in experimental license application file no. 0068-EX-PL-2016 should compel the Commission to withhold the information from public disclosure.¹

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

(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.² For materials not subject to *Critical Mass*, *National Parks* establishes a two part test for determining if information qualifies for withholding under Exemption 4.³ 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. Under both *Critical Mass* and *National Parks*, the information provided by AT&T falls within Exemption 4.

The redacted equipment and technology information provided in experimental license application file no. 0068-EX-PL-2016 is not customarily released to the public and is maintained on a confidential basis. Moreover, to the extent that this information is provided to AT&T by equipment manufacturers, it is not provided for disclosure outside of AT&T while the equipment is under development. Disclosure would subject AT&T and equipment manufacturers to competitive harm, as it would provide reveal key technological information from which

¹ *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).

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

³ *National Parks & Conservation Assoc. v. Morton*, 498 F.2d 765 D.C. Cir. (1974) ("*National Parks*").

competitors determine their strategies and business plans. 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 and its equipment manufacturers.⁴

Commission precedent has clearly found competitively sensitive information to be withholdable under Exemption 4.⁵ 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.⁶ 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."⁷

Disclosure also will impair the Commission's ability to obtain similar information in the future. It would thus hamper the general ability of the Commission to conduct investigations and enforcement proceedings and to rely on the cooperation of parties involved in those proceedings, which would necessarily impair the Commission's ability to obtain documents and information in investigations and enforcement proceedings. It would, in short, undermine the agency's "effective execution of its statutory responsibilities."⁸

⁴ See, e.g., *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109 (9th Cir. 1994).

⁵ See, e.g., *Pacific Bell Telephone Company Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD No. 00-23, DA 00-2618 (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 (2000) (keeping confidential marketing plans and strategy information).

⁶ See *Pan American Satellite Corporation*, FOIA Control Nos. 85-219, 86-38, 86-41 (1986). 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, at 3 (1993). 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.).

⁷ *Confidential Information Order* at ¶ 8.

⁸ *9 to 5 Org. for Women Ofce Workers v. Board of Governors*, 721 F.2d 1, 11 (1st Cir. 1983). See also *Africa Fund v. Mosbacher*, No. 92- 289, 1993 WL 183736 at *7 (S.D.N.Y. May 26, 1993).

- (6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure; and**
- (7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties.**

The information that AT&T has redacted from experimental license application file no. 0068-EX-PL-2016 is maintained on a confidential basis by AT&T and its equipment manufacturers and they have taken steps to ensure that the confidentiality is maintained. The information is not ordinarily disclosed to parties outside the company. Company practices instruct employees not to disclose such information outside the company and restrict access to this information on a need-to-know basis. The information redacted by AT&T in experimental license application file no. 0068-EX-PL-2016 is considered confidential under agreements between AT&T and manufacturers providing AT&T with proposed equipment for testing and those agreements require the parties to protect the confidentiality of information about equipment and technology under development.

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

The information provided in experimental license application file no. 0068-EX-PL-2016 must be kept confidential for an indefinite period. Confidential treatment must be afforded these materials as long as they would provide a basis for competitors of AT&T and its equipment manufacturers' competitors to gain insight into the equipment and technology being developed. AT&T cannot determine at this time any date on which the information would become "stale" for such a purpose.

Conclusion

For all the foregoing reasons AT&T requests that the Commission withhold from public disclosure pursuant to Section 0.459 of the its Rules the proprietary commercial and trade secret information redacted by AT&T in experimental license application file no. 0068-EX-PL-2016. If the Commission is unable for any reason to keep this information confidential, AT&T respectfully requests that the Commission promptly notify AT&T and return the information pursuant to Section 0.459(e) of the Rules.

(disclosure would impinge upon agency's receipt of substantial information that potential exporters voluntarily submit when seeking export licenses and that the agency finds invaluable in making policy and maintaining effective export controls).