BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of the Proposed Amendments to 4 CSR 240-2.135, Confidential Information	**File No. AX-2017-0068**

COMMENTS OF THE MISSOURI CABLE TELECOMMUNICATIONS ASSOCIATION

Comes now the Missouri Cable Telecommunications Association (the "MCTA") and submits these Comments in response to the publication in the Missouri Register of proposed revisions to the Missouri Public Service Commission's (the "Commission") confidential information rule. The MCTA appreciates the opportunity to participate in this proceeding and the Commission's efforts to simplify and promote consistent application of 4 CSR 240-2.135. While largely supportive of the proposed revisions, the MCTA is concerned that 4 CSR 240-2.135 as amended: (a) could be construed to allow competing parties to gain access to "highly confidential" information, including extremely sensitive information the disclosure of which has been restricted by the Federal Communications Commission (the "FCC"); (b) does not prohibit access to such confidential information by employees of competing parties who are engaged in strategic marketing and planning; and (c) does not preserve the ability of submitting entities to identify specific conditions pursuant to which they would agree to access to their highly confidential information by other parties. Accordingly, the MCTA proposes the following clarifications and revisions to address these deficiencies and mitigate the risks that may arise when parties submit confidential and highly confidential information.

I. THE COMMISSION SHOULD CLARIFY THAT A PARTY SEEKING HIGHLY CONFIDENTIAL TREATMENT MAY REQUEST A PROTECTIVE ORDER THAT PREVENTS THE DISCLOSURE OF CERTAIN INFORMATION TO OTHER PARTIES

Both 4 CSR 240-2.135 as it presently exists and the Commission's proposed rule revisions appropriately provide an opportunity for a submitting party to seek protection of "highly confidential" information, by filing a motion:

> explaining what information must be protected, the harm to the disclosing entity or the public that might result from disclosure of the information, and an explanation of how the information may be disclosed to the parties that require the information while protecting the interests of the disclosing entity and the public.

(Emphasis added.) The clear intent of the rule, with which the MCTA wholeheartedly agrees, is that parties have an opportunity to advocate the terms and conditions for protection of such information will be granted. The Commission and submitting parties should be able to seek and confer on appropriate conditions that will govern disclosure. MCTA is concerned, however, that, some parties may contend that the phrase "an explanation of how the information may be disclosed to the parties" means that the disclosure of "highly confidential" information is required *in every instance* to opposing or competing parties and that conditions under which disclosure of such information may occur must be offered. While some disclosure of "highly confidential" information may be appropriate, there are certain types of information that should not be shared with competing parties at all – such as information that the FCC has prohibited from disclosure to parties other than state public utility commissions and their personnel. Accordingly, the MCTA requests that the Commission clarify that, in re-adopting the language setting forth the requirements pertaining to motions for protective orders relating to "highly confidential" information, submitting parties may request and demonstrate the need for even greater protections, including conditions other than those described in 4 CSR 240-2.135.

An example of such information is Form 477 data, which provides the FCC with specific and detailed data concerning voice and broadband subscribership and the distribution and connections of broadband service customers by "speed tier," *i.e.*, by bandwidth. Such data, by providing information regarding residential and business customers, respectively, at the census tract level, provides an unprecedented level of geographic market penetration information that goes to the center of communications network investments and competitive strategies. Disclosure of Form 477 data to competitors would risk destroying the market value of such information by providing extraordinary insight into past and future business decisions, giving party participants unfair advantages in marketing competing services. Such disclosure would allow competing providers to target their services, including through promotions intended to undercut the submitting party's most popular offerings in specific areas. Accordingly, voice and broadband providers are careful to preserve such Form 477 data as among their most sensitive commercial trade secret information.

The FCC and federal courts have long recognized the competitive sensitivity of subscribership and connections data submitted to the FCC on Form 477.[1] Although the FCC publishes aggregate data and broadband deployment information derived from Form 477, the FCC presents that data in a manner which does not specifically link a particular provider to its numbers of subscribers and connections for a specific census tract. Significantly, the FCC's process for sharing Form 477 data provides for disclosure to only state public utility commissions and their personnel. Even then, state public utility commissions that wish to obtain

[1] *See, e.g., Modernizing the FCC Form 477 Data Program*, Report and Order, 28 FCC Rcd 9887, 9921-22 (2013); *Local Competition and Broadband Reporting*, Report and Order, 15 FCC Rcd 7717, 7757–62 (2000); *Local Telephone Competition and Broadband Reporting*, Report and Order, 19 FCC Rcd 22340, 22352–53 (2004); *Center for Public Integrity v. FCC*, 505 F. Supp. 2d 106 (D.D.C.2007).

state-specific FCC Form 477 data must execute and file a data-sharing agreement with the FCC.[2] Pursuant to that data-sharing agreement, states must follow federal confidentiality laws to the extent that such federal laws impose a higher standard than applicable state law.[3]

Another example of the FCC's heightened confidentiality requirements concerns Network Outage Reporting System ("NORS") data. The reporting of outage data by communications providers is governed by 47 C.F.R. 4.9. The FCC has ruled that individual outage reports are disclosable only under the procedures set forth in 47 C.F.R. Section 0.461.[4] In addition, the FCC's submission process for NORS reports requires verification via username and password in order to access the NORS reporting system, and submission of such reports occurs only via a secure server.[5] At this point, the FCC has not identified conditions under which disclosure of such information is permitted outside of that agency. However, the FCC has reaffirmed its view that NORS data should be presumed confidential and shielded from public inspection, and has proposed that states requesting to receive direct access to NORS must certify that they will keep the data confidential and that they have in place confidentiality protections at least equivalent to the federal Freedom of Information Act.[6]

There almost certainly are and will be other examples of instances in which information is of such heightened sensitivity that added measures should be taken to limit its disclosure, even

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[2] *See Wireline and Competition Bureau Announces Revised Procedures for State Public Utility Commissions to Access Non-public FCC Form 477 Data for their Respective States*, WC Docket No. 11-10, DA 16-1177 (rel. Oct. 13, 2016) (attached hereto as Exhibit "A").

[3] *Id.* See also "State Regulatory Commission Access to State-Specific FCC Form 477 Data" (attached hereto as Exhibit "B").

[4] *See Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers*, Report and Order, 27 FCC Rcd. 15168 at ¶ 112 (2012).

[5] *See* Network Outage Reporting System, https://www.fcc.gov/nors/outage/StartUp.cfm (last accessed Jan. 19, 2017).

[6] *Amendments to Part 4 of the Commission's Rules Concerning Disruptions to Communications; New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, 30 FCC Rcd. 3206 at ¶ 51 (2015).

as to those persons and conditions otherwise expressly recognized in 4 CSR 240-2.135. The MCTA merely requests the Commission to not foreclose the range of limitations to the disclosure of highly confidential information that may be considered and imposed.

The MCTA also is concerned that the proposed rule revisions in Subsection (4)(A) add that, "[w]hile a motion is pending, the information about which such a claim is made *may be disclosed* only *to the attorneys of record or to outside experts* that have been retained for the purpose of the case." (Emphasis added.) Similar to the concerns expressed above, subpart (A) is unclear as to whether the Commission would require the full disclosure of such information in *all* instances or if the Commission may permit the party seeking such highly confidential protection in a given instance to disclose *only* the subject matter of the information. Because of the highly sensitive nature of the types of information discussed above, in some instances it may be inconsistent with federal requirements if the Commission were to compel parties to engage in some disclosure of information to other parties. Accordingly, the MCTA recommends that the Commission amend or clarify its proposed rule at Subsection (4) so that, "while a motion is pending" for protective treatment, the "subject matter and description of the information about which such a claim is made shall be disclosed to the attorneys of record or to outside experts that have been retained for the purpose of the case." The rule may be further amended to add that, "If necessary for resolution of the motion, a representative sample of the information for which protection is sought may be reviewed *in camera*, subject to such conditions as may be appropriate."

II. THE COMMISSION SHOULD PROHIBIT CERTAIN EMPLOYEES OF PARTY PARTICIPANTS FROM OBTAINING ACCESS TO CONFIDENTIAL INFORMATION, REGARDLESS OF WHETHER THESE PERSONS CERTIFY NOT TO DISCLOSE SUCH INFORMATION

The Commission's rules allow employees of party participants to act as subject-matter experts for attorneys of record or to file testimony in a proceeding. The rules also allow these employees to review confidential information so long as these employees certify to their identity, including name, title or position, job classification, permanent address, and other information. However, the rules fail to recognize that certain employees should not have access to confidential information under any circumstances because the disclosure of confidential information to such individuals could have direct, adverse consequences to the detriment of the disclosing party. To address this issue, the MCTA recommends that the Commission revise its rule to include language at proposed Subsection (6) as follows:

> "No such person may be an officer, director or employee concerned with marketing or strategic planning of competitive products and services of the party or any subsidiary or affiliate of the party receiving the information. Information claimed to be confidential also shall not be disclosed to individual members of a trade association to the extent these individuals are concerned with marketing or strategic planning of products or services competitive to the party producing such information. No confidential information made available by a party shall be used or disclosed for the purposes of business or competition, or for any purpose other than for purposes of the proceeding in which the information is produced."

Other commissions have recognized that there is a real and immediate threat to competition when a party discloses confidential information to persons engaged in marketing or strategic planning of products or services.[7] By adding language that would clarify that the disclosure of

[7] *See, e.g.*, Colorado Department of Regulatory Agencies, Public Utilities Commission, Rules of Practice and Procedure at 4 CCR 723-1 Section 1101(h); *Sprint Communications Company, L.P. v. CenturyTel of Northwest Arkansas, LLC d/b/a CenturyLink*, Expedited Joint Motion for Protective Order, 12064C, 2013 WL 623266 (Ark.P.S.C. Feb. 7, 2013); *Consideration of the Revenue Requirement of the Alaska Exchange Carriers Association, Inc., To Be Included in Intrastate Interexchange Access Charges*, U-00-49, Order No. 32000 WL 36270706 (Alaska P.U.C. July 26, 2000).

confidential information is permitted only to employees that do not have direct marketing and strategic planning duties, the Commission will substantially lessen the chances for anti-competitive behavior and misuse of the information.

III. THE COMMISSION SHOULD CONTINUE TO LIMIT THE CONDITIONS UNDER WHICH HIGHLY CONFIDENTIAL INFORMATION CAN BE REVIEWED

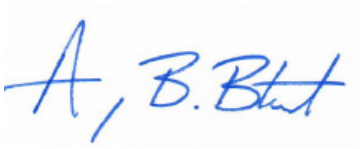
The Commission's revisions delete current Subsection (5), whose subparts provide for a submitting party to advocate the conditions under which highly confidential information may be reviewed.[8] The MCTA believes the current provisions found at Subsection (5) should continue to be available to the disclosure of "highly confidential" information.

Highly confidential information is information deserving protection beyond what is afforded to confidential information. As such, disclosing parties have a greater interest in limiting the opportunity for such information to be mishandled by unaffiliated recipients. Subsection (5) contemplates that certain information should only be subject to review by either attorneys or outside experts who are not employees and that this information should only be disclosed under very stringent conditions. MCTA believes that the conditions necessitating the current Subsection (5) continue to exist, and recommends that the Commission continue to recognize that the benefit of the rule outweighs any perceived burden that would cause the Commission to strike it.

[8] *See* 4 CSR 240-2.135(5)(A)-(F).

Respectfully submitted this 2nd day of February, 2017.

MISSOURI CABLE TELECOMMUNICATIONS ASSOCIATION



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