BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Proposed Rule To Establish a Procedure for Handling Confidential Information in Commission Proceedings.	))))	Case No. AX-2003-0404

AT&T MISSOURI'S COMMENTS ON PROPOSED RULE REGARDING HANDLING OF HIGHLY CONFIDENTIAL AND PROPRIETARY INFORMATION

AT&T Missouri[1] respectfully submits these Comments regarding the Commission's proposed "Confidential Information" Rule 2.135 (4 CSR 240-2.135),[2] as published in the Missouri Register on July 3, 2006 (31 Mo. Reg. 982-984). AT&T Missouri also offers specific "red-lined" edits to the rule reflecting its comments, in the attached document.

SUMMARY

Most of the provisions of the Commission's proposed "Confidential Information" rule are worthwhile and should be adopted. First, as a result of its self-executing nature, the rule would advance administrative efficiency by eliminating the present practice of securing an "order from the [C]ommission" on an ad hoc basis in pending cases. Second, the proposed rule in many respects incorporates the informed input of several telecommunications industry members, including AT&T Missouri, all of whom agreed that confidential information warrants protection from inappropriate disclosure. AT&T Missouri suggests that the rule should be further modified in four limited, but important, respects:

- The definitions of the two types of information deemed confidential – "proprietary information" and "highly confidential information" need to be more

[1] Southwestern Bell Telephone, L. P. d/b/a AT&T Missouri ("AT&T Missouri").

[2] All citations and other references herein to particular provisions of the proposed rule are meant to refer to 4 CSR 240-2.135.

finely tuned in order to reflect the terminology of the Commission's current standard protective order and better ensure the protection of information warranting confidential treatment (subpart 1).

- Like the practice proposed with regard to the treatment of confidential information included in testimony (subpart (11)), the party that designates information as confidential in the discovery context (subpart (2)), should be made to justify that designation if challenged. However, as in the case of testimonial designations, which are governed by subpart (10), the party that designates information as confidential in the discovery context should not have to explain the reasons for the designation in the first instance. Thus, language to that effect should be deleted from subpart (2).
- The Commission's Staff and OPC[3] should be required to list the names of employees who have access to information designated as confidential (subpart 19), a modest and reasonable measure in light of other of the rule's provisions which apply only to other parties to a case. This is a requirement under the Commission's current Protective Order and should be a requirement under the proposed rule.
- There is no need for, and the governing law precludes enforcement of, the rule's provisions that would confer upon the Commission broad authority to impose sanctions or recover penalties from a party for violations of the Confidential Information rule.

[3] The Office of the Public Counsel ("OPC").

COMMENTS REGARDING SPECIFIC SUBPARTS OF THE PROPOSED RULE

Subpart (1) – This subpart is intended to define the two levels of protection afforded confidential information, i.e., "proprietary information" and "highly confidential information." While the subpart largely replicates paragraph A of the Commission's current standard protective order, it appropriately adds two additional classes of highly confidential information: "marketing analysis or other market-specific information relating to goods or services purchased or acquired for use by a company in providing services to customers" (subpart (1)(B)(4)) and "information relating to the security of a company's facilities." (subpart (1)(B)(7)).

On the other hand, the proposed rule would alter or delete certain language which has long been a part of paragraph A of the Commission's standard protective order and about which there have been no disputes in AT&T Missouri's experience. Thus, AT&T Missouri offers specific edits to clarify that, among other things, highly confidential information includes "material or documents that contain" information relating to specific customers (subpart (1)(B)(1)); "employee-sensitive information" (subpart (1)(B)(2)); and, strategies "employed, to be employed, or under consideration" in contract negotiations (subpart (1)(B)(6)). This information constitutes private business information not otherwise available to the public that is developed at the effort and expense of a company. Such information is generally protected even within a company and warrants no less protection in the proposed rule as is provided for in the current standard protective order.

Should the Commission adopt these proposed edits, the resulting subpart of the rule would retain paragraph A's current provisions intact, while adding the two classes of information referenced above, both of which clearly warrant protection from inappropriate disclosure.

Subpart (2)(B) – This subpart would allow a motion to be filed challenging designations of confidential information made in discovery, following the moving party's first complying with the provisions of 4 CSR 240-2.090(8). These provisions require counsel's good faith attempt to resolve the disagreement, a certification stated in any motion challenging the designation that he or she did so, and a telephonic conference with the presiding judge and opposing counsel. AT&T Missouri supports these provisions.

However, proposed subpart (2) should be made consistent with proposed subparts (10) and (11), which relate to the treatment of confidential information in testimony. Specifically, subpart (10) states that a party "may designate portions of prefiled or live testimony as proprietary or highly confidential" and does not require that the party state its reasons for doing so at the outset, unlike subpart (2)(B), which would include such a requirement in the discovery context. Subpart (11)(A) further states: "If the designation of the testimony is challenged, the party asserting that the information is proprietary or highly confidential must, not later than ten (10) days, unless a shorter time is ordered, file a pleading establishing the specific nature of the information that it seeks to protect and establishing the harm that may occur if that information is disclosed to the public."

For the same reason that the party designating information as confidential should not be required to state its reasons when it files testimony, it should not be required to do so when responding to discovery. It is sufficient in both contexts that a party can challenge the designation, in which case the party designating the information as confidential must file a pleading "establishing the specific nature of the information that it seeks to protect and establishing the harm that may occur if that information is disclosed," as is provided for in proposed subpart (11)(A). Before a challenge to a designation is filed, the party challenging the

designation must comply with the requirements of subpart (2)(B) by attempting to resolve the dispute informally.

In addition, subpart (2)(B), like subpart (11), should expressly allow the party whose designation is challenged a period of not less than ten days in which to file a response to the challenge. There is no reason to afford a responding party a shorter period in the context of designations made in discovery than in the context of designations made in testimony.

Finally, service of electronic pleadings is today regarded as complete "upon actual receipt," pursuant to Commission Rule 2.080(17)(C)(3), but service by regular mail is regarded as complete "upon mailing," pursuant to Commission Rule 2.080(17)(C)(1). Thus, proposed subpart (2)(B) should require motions to be served electronically so that the responding party's time to respond is not cut unduly short because it was received by mail.

Subpart (19) – AT&T Missouri offers additional language that would require Staff and Public Counsel to provide a list of the names of their employees who will have access to designated information. Such language is currently provided in the Commission's standard protective order (at paragraph W), but has not been carried forward to the proposed rule. Entities having confidential information should be informed of the name of each individual who has access to such information, regardless of whether access is had by a person working for another business entity or a government entity.

Subpart (21) – The Commission should delete from this subpart language that would allow the Commission to impose unspecified sanctions "against any party or person that violates any provision of this rule, pursuant to Rule 61.01 of the Missouri Rules of Civil Procedure" and to seek to recover penalties. First, AT&T Missouri knows of no abuse of designations of

material as confidential that would warrant adopting a specific rule to address them. Thus, there is no demonstrated need for this rule.

Second, the proposed rule would allow sanctions or penalties without regard to whether the rule violation was, for example, material, unreasonable or made in bad faith. Sanctions should not be predicated on violations which might nonetheless be immaterial, not made in bad faith, or inadvertent or otherwise excuseable in the circumstances.

Third, to the extent that the rule would allow the Commission to award attorney fees or impose monetary sanctions, the Commission is without legal authority to do so. Case law holds that since the Commission has no power to declare or enforce any principle of law or equity, it cannot determine damages or award pecuniary relief, American Petroleum Exchange v. Public Service Commission, 172 S.W. 2d 952, 955 (Mo. 1943), nor can it enter a money judgment. Wilshire Construction Co. v. Union Electric Co., 463 S.W. 2d 903, 905 (Mo. 1971); State of Mo. ex rel. GS Technologies Operating Co., Inc. v. Public Service Commission, 116 S.W. 3d 680, 696 (Mo. App. W.D. 2003).[4]

Finally, present Commission rule 2.090(1), while subject to the limitations noted above, already states that "[s]anctions for abuse of the discovery process or failure to comply with commission orders regarding discovery shall be the same as those provided for in the rules of civil procedure" governing civil actions in the circuit court. The proposed rule is thus unnecessary given that there has been no demonstration that the current rule has been shown to be ineffective or otherwise unsatisfactory in practice.

[4] The Commission's own Staff has observed that "the Commission may consider whether the utilities involved have violated any statutes, rules, orders or tariffs. However, '[t]he Commission has no jurisdiction to promulgate an order requiring a pecuniary reparation or refund.'" Shurin v. Xspedius, Case No. TC-2005-0266, Staff Investigation, filed April 26, 2005, at p. 3, citing, DeMaranville v. Fee Fee Trunk Sewer, Inc., 573 S.W. 2d 674, 676 (Mo. App. 1978).

CONCLUSION

AT&T Missouri respectfully submits the foregoing comments for the Commission's consideration, and further requests that the Commission accept AT&T Missouri's attached edits to specific subparts of proposed rule 2.135.

Respectfully submitted,

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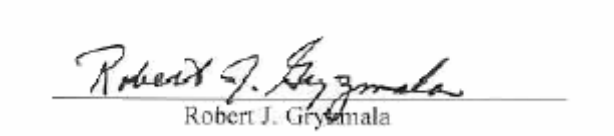
CERTIFICATE OF SERVICE

Copies of this document were served on each of the following by e-mail on August 2, 2006.



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