

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
AT&T Services, Inc. and)	
Pacific Bell Telephone Company)	
d/b/a SBC California)	
d/b/a AT&T California,)	
Complainants,)	
)	
v.)	File No. CSR-8066-P
)	
Cox Enterprises, Inc. and Cox)	
Communications, Inc.)	
Defendants.)	
)	
Program Access Complaint)	

ORDER

Adopted: October 2, 2008

Released: October 3, 2008

By the Chief, Media Bureau:

I. INTRODUCTION

1. On September 11, 2008, AT&T Services, Inc. and AT&T California (collectively "AT&T") commenced the above captioned program access proceeding against Cox Enterprises, Inc. and Cox Communications, Inc. (collectively "Cox") and simultaneously requested that the Commission enter a protective order.¹ For the reasons set forth below, we adopt the protective order, provided in Appendix A to this order, to ensure that certain highly confidential and competitively sensitive documents and information that may be submitted by the parties are afforded adequate protection.

II. BACKGROUND

2. We note that AT&T submitted a proposed model of a protective order for the Commission to use in this proceeding. This submission, according to AT&T, is based upon previously released protective orders as well as the Commission's recently revised model protective order for program access complaints.² AT&T has asserted that the proposed model protective order it submits has been negotiated with Cox and agreed to by both parties.

¹ Motion for Protective Order by AT&T, filed Sept. 11, 2008 ("Motion").

² Motion at 3-4 (citing *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-29, Report and Order, 22 FCC Rcd 17791, 17894-99 (2007)).

3. AT&T asserts its complaint contains confidential business data demonstrating the harm suffered by AT&T from the loss of Cox programming and also used for preliminary computation of damages.³ This business data includes AT&T's rate of sales penetration, cancellation and "churn" information, internal customer surveys, and subscriber revenue information from San Diego and/or other markets.⁴ Due to the highly confidential nature of such data, AT&T asserts it seeks enhanced protection that would limit access to such data to only the parties' outside counsel and counsel's consultants/employees.

4. AT&T contends that the information for which it seeks enhanced protection constitutes some of the most sensitive data pertaining to AT&T's business, the inadvertent or intentional disclosure of which to AT&T's competitors – including Cox – could have a devastating effect on AT&T's business and place it at a competitive disadvantage.⁵ As an example, AT&T submits that its granular customer data, including monthly data on numbers of customers, number of sales, number of service cancellations and "churn" data (on a market specific basis), as well as the results of its internal customer surveys, can be used to gauge customer demand for its services and to analyze the strengths and weaknesses of its service offerings.⁶ Likewise, AT&T asserts, its operational and financial data (*e.g.*, subscriber numbers by categories of service, and calculations of incremental or marginal fixed costs and revenues) are also likely to reveal AT&T's specific strengths, weaknesses, and strategies to Cox, its largest competitor in the San Diego market.⁷

5. AT&T further contends that competitors such as Cox would be able to use AT&T's penetration rate in a particular market or markets to target their own marketing and promotional efforts accordingly, while AT&T's revenue information could be used to derive AT&T's operating margin and gross margin information.⁸ AT&T argues that competitors could use its information to engage in tacit collusive behavior, resulting in a reduction in competition that would be contrary to the public interest.⁹

6. Finally, AT&T argues that a protective order will also protect Cox, as Cox may have to provide highly confidential business documents or evidence upon which its answer will rely, and because AT&T anticipates that some of the information subject to discovery in this matter may also include highly confidential business information from Cox.¹⁰

III. DISCUSSION

7. We believe that AT&T has justified its request for enhanced confidential treatment of its documents and also those of Cox. AT&T has provided adequate justification for its request, explaining with particularity why the information sought to be protected is so competitively sensitive that additional protection is warranted so that such information is closely guarded and not made available publicly. The information sought to be protected is necessary to the development of a more complete record on which

³ Motion at 1.

⁴ *Id.* at 2.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 2-3.

¹⁰ *Id.* at 3-4.

the Commission can base its decision in this proceeding. Furthermore, the protective order has been negotiated and agreed to between AT&T and Cox. Accordingly, we will adopt the Protective Order as negotiated and proposed by the parties and attached at Appendix A. Any party seeking access to highly confidential documents subject to this Protective Order shall request access pursuant to the terms of the Protective Order and must sign the Declaration provided as Attachment A to this Protective Order.

8. The attached Protective Order reflects AT&T's desire, given the highly confidential nature of the information at issue, to preclude employees of AT&T and Cox from access to such information. This is consistent with past Commission action involving protective orders relating to highly confidential information. Nevertheless, we do not intend by this Order to prejudge this issue. If either party believes that it is necessary for purposes of effectively adjudicating this proceeding that specific employees be granted access to the highly confidential information subject to the Protective Order, it may file a motion to amend the Protective Order. At a minimum, such motion should include: (i) the title, name, and job description for each employee for which access to the highly confidential information is sought; (ii) the reason why that employee's access to the highly confidential information is necessary to the effective adjudication of this proceeding; and (iii) why experts and consultants outside of that party's employ cannot perform the same function. In no event will access be granted to employees in a position to use the highly confidential information for competitive commercial or business purposes.

9. In addition to Section 3 of the attached Protective Order, we clarify that a party filing documents under seal with the Commission that contain Highly Confidential Information ("Highly Confidential Filing") must file one copy of the Highly Confidential Filing and, where feasible, two copies of the Highly Confidential Filing in redacted form ("Redacted Highly Confidential Filing"). A Highly Confidential Filing must be accompanied by a cover letter stating: "**HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN AT&T SERVICES, INC. v. COXCOM, INC., CSR-8066-P before the Federal Communications Commission**", and each page of this document containing Highly Confidential Information shall be stamped with the same statement. Redacted Highly Confidential Filings must also be accompanied by a cover letter stating: "**REDACTED -- FOR PUBLIC INSPECTION**", and the cover letter should also state that the Submitting Party is filing an unredacted version of the same documents.

10. Given the need for the Protective Order in this proceeding, AT&T has only served a redacted version of its complaint upon Cox.¹¹ AT&T has therefore requested that Cox be granted an extension of time to file its answer in order to provide Cox with enough time to file its Declarations pursuant to the Protective Order and to receive and review an unredacted version of AT&T's complaint.¹² The Commission has also been informed that the parties have agreed to extend the time for Cox to file its Answer until October 27, 2008. Given these considerations, the Commission will grant AT&T's request for an extension of time and permit Cox to file its Answer on or before October 27, 2008.

¹¹ *Id.* at 4.

¹² *Id.*

IV. ORDERING CLAUSES

11. Accordingly, we **ADOPT AND ISSUE** the Protective Order attached at APPENDIX A pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i) and (j), Sections 0.457(d) and 76.1003(k) of the Commission's rules, 47 C.F.R. §§ 0.457(d) and 76.1003(k), and Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and such Protective Order is effective upon its adoption; and

12. We **GRANT** Cox Enterprises, Inc. and Cox Communications, Inc. an extension until October 27, 2008 to file its Answer to the Complaint filed by AT&T Services, Inc. and AT&T California.

13. These actions are taken pursuant to authority delegated by Section 0.283 of the Commission's rules.¹³

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Chief, Media Bureau

¹³ 47 C.F.R. §0.283.

APPENDIX A**PROTECTIVE ORDER**

This Protective Order is intended to facilitate and expedite the review of documents submitted in this proceeding that contain trade secrets and privileged or confidential commercial or financial information. It establishes the manner in which “Highly Confidential Information,” as that term is defined herein, is to be treated. This Order is not intended to constitute a resolution of the merits concerning whether any Highly Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 C.F.R. § 0.442.

1. Definitions.

a. Commission. “Commission ” means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

b. Declaration. “Declaration” means Attachment A to this Protective Order.

c. Highly Confidential Information. “Highly Confidential Information” means (i) operational, financial, and customer data, including granular sales, cancellation, and churn data as well as revenue information and customer survey data; (ii) any program carriage contract or program carriage offer, or any part thereof; (iii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets or commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4); and (iv) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Highly Confidential Information. Highly Confidential Information includes additional copies of, notes, and information derived from Highly Confidential Information.

d. Outside Counsel of Record. “Outside Counsel of Record” means the firm(s) of attorneys, or sole practitioner(s), as the case may be, representing either complainants AT&T Services Inc. and AT&T California (“AT&T”) or defendant CoxCom, Inc. (“Cox”) in this proceeding. For the avoidance of doubt, Outside Counsel of Record shall exclude any employee of either AT&T or Cox.

e. Submitting Party. “Submitting Party” means AT&T or Cox to the extent they submit information for which that party seeks confidential treatment of Highly Confidential Information pursuant to this Protective Order.

2. Claim of Confidentiality. The Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R. §§ 0.459 & 0.461, determine that all or part of the information claimed as “Highly Confidential Information” pursuant to the definitions in paragraph 1 of this Protective Order is

not entitled to such treatment, but prior to making such a determination, the Commission shall afford the Submitting Party notice and opportunity to comment. Any party that did not file the Highly Confidential Information but that has completed the attached Declaration shall have three (3) business days from the date it receives notice that such Highly Confidential Information has been filed to file a petition opposing such Highly Confidential treatment. The Submitting Party shall have three (3) business days from the date it receives the other party's opposition to file its reply to such opposition.

3. Procedures for Claiming Information is Highly Confidential. Highly Confidential Information submitted to the Commission shall bear on the front page in bold print, "**HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN AT&T SERVICES, INC. v. COXCOM, INC., CSR-8066-P before the Federal Communications Commission.**" Highly Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Highly Confidential Information and non-confidential information, the Submitting Party shall designate the specific portions of the document claimed to contain Highly Confidential Information and shall, where feasible, also submit a redacted version not containing Highly Confidential Information. By designating information as "Highly Confidential Information," a Submitting Party signifies that it has determined in good faith that the information should be subject to protection under FOIA, the Commission's implementing rules, and this Protective Order.

4. Storage of Highly Confidential Information at the Commission. The Secretary of the Commission or other Commission staff to whom Highly Confidential Information is submitted shall place the Highly Confidential Information in a non-public file. Highly Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Highly Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

5. Permissible Disclosure. Subject to the requirements of paragraph 8, a party's Highly Confidential Information may be reviewed by the other party's Outside Counsel of Record. Subject to the requirements of paragraph 8, Outside Counsel of Record may disclose Highly Confidential Information to: (1) outside consultants or experts retained for the purpose of assisting Outside Counsel of Record in this proceeding, *provided that* such outside consultants or experts are not employees of AT&T or Cox (as relevant) and are not involved in the analysis underlying the business decisions of any competitor of the Submitting Party and do not participate directly in those business decisions; (2) paralegals or other employees of such Outside Counsel of Record not described in clause 3 of this paragraph 5 assisting Outside Counsel of Record in this proceeding; and (3) employees of such Outside Counsel of Record involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving documents or data or designing programs for handling data connected with this proceeding, or performing other clerical or ministerial functions with regard to documents connected with this proceeding. Individuals who have obtained access to Highly Confidential Information in accordance with the provisions of this paragraph 5 and paragraph 8 may discuss and share the contents of such Highly Confidential Information with any other person who has also obtained access in

accordance with the provisions of this paragraph 5 and paragraph 8, and with the Commission and its staff. Except with the prior written consent of the relevant Submitting Party, or as otherwise provided under this Protective Order, no Highly Confidential Information may be disclosed by parties executing the attached Declaration to any person other than the Commission and its staff. Subject to the procedures and requirements described in this paragraph 5 and paragraph 8, the Commission may disclose Highly Confidential Information to outside experts or consultants retained by the Commission to assist in this proceeding.

6. Protection of Highly Confidential Information. Persons described in paragraph 5 shall have the obligation to ensure that access to Highly Confidential Information is strictly limited as prescribed in this Protective Order. Such persons shall further have the obligation to ensure that: (1) Highly Confidential Information is used only as provided in this Protective Order; and (2) documents containing such Highly Confidential Information are not duplicated except as necessary for filing at the Commission under seal as provided in paragraph 11 below.

7. Prohibited Copying. If, in the judgment of a Submitting Party, a document contains information so sensitive that it should not be copied by anyone, even given its designation as Highly Confidential Information, it shall bear the additional legend “Copying Prohibited,” and no copies of such document, in any form, shall be made. Application for relief from this restriction against copying may be made to the Commission, with notice to Outside Counsel of Record for the Submitting Party.

8. Procedures for Obtaining Access to Highly Confidential Information. In all cases where access to Highly Confidential Information is permitted pursuant to paragraph 5, before reviewing or having access to any Highly Confidential Information, each person seeking such access shall execute the Declaration in Attachment A and file it with the Commission and serve it upon the Submitting Party through their Outside Counsel of Record, so that the Declaration is received by the Submitting Party at least five (5) business days prior to such person’s reviewing or having access to such Submitting Party’s Highly Confidential Information. Each Submitting Party shall have an opportunity to object to the disclosure of its Highly Confidential Information to any such persons. Any objection must be filed at the Commission and served on Outside Counsel of Record representing, retaining, or employing such person as promptly as practicable after receipt of the relevant Declaration. Until any such objection is resolved by the Commission and, if appropriate, any court of competent jurisdiction prior to any disclosure, and unless such objection is resolved in favor of the person seeking access, persons subject to an objection from a Submitting Party shall not have access to Highly Confidential Information. If there is no objection or once such objection is resolved, the Submitting Party shall serve the documents of such party containing Highly Confidential Information on the requesting party’s Outside Counsel of Record, or if so requested, will make such material available for review at the offices of the Submitting Party’s Outside Counsel of Record.

9. Requests for Additional Disclosure. If any person requests disclosure of Highly Confidential Information outside the terms of this Protective Order, that request will be treated in accordance with Sections 0.442 and 0.461 of the Commission’s rules, 47 C.F.R. §§ 0.442, 0.461.

10. Use of Highly Confidential Information. Highly Confidential Information shall be used solely for the preparation and conduct of this proceeding as delimited in this paragraph and paragraphs 5, 11, and 12 herein, and any subsequent judicial proceeding arising directly from this proceeding and, except as provided herein, shall not be used by any person granted access under this Protective Order for any other purpose, including without limitation business, governmental, or commercial purposes, or in other administrative, regulatory, or judicial proceedings. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Highly Confidential Information nor otherwise learned of its contents. Should the Commission rely upon or otherwise make reference to the contents of any of the Highly Confidential Information in its decision in this proceeding, it will do so by redacting any Highly Confidential Information from the public version of the decision and by making the unredacted version of the decision available only to a court and to those persons entitled to access to Highly Confidential Information under this Protective Order.

11. Pleadings Using Highly Confidential Information. Persons described in paragraph 5 may, in any pleadings that they file in this proceeding, reference the Highly Confidential Information, but only if they comply with the following procedures:

a. Any portions of the pleadings that contain or disclose Highly Confidential Information must be physically segregated from the remainder of the pleadings. To the extent a document contains both Highly Confidential Information and non-Highly Confidential Information, the Submitting Party shall designate the specific portions of the document claimed to contain Highly Confidential Information and shall also submit a redacted version not containing Highly Confidential Information.

b. The portions of pleadings containing or disclosing Highly Confidential Information must be separated and accompanied by a separate letter to the Secretary of the Commission referencing this Protective Order.

c. Each page of any party's filing that contains or discloses Highly Confidential Information subject to this Order must be clearly marked: "**HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN AT&T SERVICES, INC. v. COXCOM, INC., CSR-8066-P before the Federal Communications Commission.**"

d. The highly confidential portion(s) of the pleading shall be served upon the Secretary of the Commission and the Submitting Party whose Highly Confidential Information has been included. Such confidential portions shall be served separately with a cover letter referencing this Order, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party as set forth in paragraph 2). A Submitting Party filing a pleading containing Highly Confidential Information shall also file two redacted copies of the pleading containing no Highly Confidential Information, which copy shall be placed in the Commission's public files. Parties should not provide courtesy copies of pleadings containing Highly Confidential Information to Commission staff.

12. Client Consultation. Nothing in this Protective Order shall prevent or otherwise restrict Outside Counsel of Record from rendering advice to their clients relating to the conduct of this proceeding and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of Highly Confidential Information; *provided, however*, that in rendering such advice and otherwise communicating with such client, Outside Counsel of Record shall not disclose Highly Confidential Information.

13. Violations of Protective Order. Should a person that has properly obtained access to Highly Confidential Information under this Protective Order violate any of its terms, that person shall immediately convey that fact to the Commission and to the relevant Submitting Party. Further, should such violation consist of improper disclosure or use of Highly Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The violating party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Highly Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of Outside Counsel of Record from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Highly Confidential Information or other information subject to a protective order in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any person using Highly Confidential Information in a manner not authorized by this Protective Order.

14. Termination of Proceeding. The provisions of this Protective Order shall not terminate at the conclusion of this proceeding. Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), persons described in paragraph 5 shall destroy or return to the Submitting Party the relevant documents containing Highly Confidential Information as well as all copies and derivative materials made, and shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Highly Confidential Information has been retained by any person having access thereto, except that Outside Counsel of Record may retain, under the continuing strictures of this Protective Order, two copies of pleadings (one of which may be in electronic format) submitted on behalf of a party. Any Highly Confidential Information contained in any copies of pleadings retained by Outside Counsel of Record to a party pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with this Protective Order unless such Highly Confidential Information is released from the restrictions of this Protective Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction. The provisions of this paragraph 14 regarding the retention of Highly Confidential Information, any documents containing such information, and copies of same, shall not be construed to apply to the Commission or its staff.

15. No Waiver of Confidentiality. Disclosure of Highly Confidential Information as provided herein by any person shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Highly Confidential Information. Reviewing parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use Highly Confidential Information to seek disclosure in any other proceeding; and

(c) agree that accidental disclosure of Highly Confidential Information shall not be deemed a waiver of any privilege or entitlement as long as the Submitting Party takes prompt remedial action.

16. Subpoena by Courts, Departments, or Agencies. If a court or a federal or state department or agency issues a subpoena or orders production of Highly Confidential Information that a party has obtained under terms of this Protective Order, such party shall promptly notify in writing each Submitting Party of the pendency of such subpoena or order. Consistent with the independent authority of any court, department, or agency, such notification must be accomplished such that the Submitting Party has a full opportunity to oppose such production, which shall be at least five (5) business days prior to the production or disclosure of any Highly Confidential Information.

17. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed necessary or to the rights of parties executing the attached Declaration to request further or renewed disclosure of Highly Confidential Information.

18. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and an agreement between the party executing the attached Declaration and the Submitting Party.

19. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j), and 47 C.F.R. §§ 0.457(d) and 76.1003(k), and Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4).

ATTACHMENT A

DECLARATION

In the Matter of)	
)	
AT&T Services, Inc. and)	
Pacific Bell Telephone Company)	
d/b/a SBC California)	
d/b/a AT&T California,)	
Complainants,)	
)	
v.)	File No. CSR-8066-P
)	
CoxCom, Inc.,)	
Defendant.)	
)	
Program Access Complaint)	

I, _____, hereby declare under penalty of perjury that I have read the Protective Order that has been entered by the Commission in this proceeding, and I understand it. I agree to be bound by its terms pertaining to the treatment of Highly Confidential Information submitted by parties to this proceeding, and I agree that I shall not disclose or use Highly Confidential Information except as allowed by the Protective Order.

Without limiting the foregoing, to the extent that I have any employment, affiliation, or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or public interest organization), I acknowledge specifically that my access to any Highly Confidential Information obtained as a result of the Protective Order is due solely to my capacity as (1) Outside Counsel of Record or (2) other person described in paragraph 5 of the foregoing Protective Order, and that I will not use such Highly Confidential Information in any other capacity; nor will I disclose such Highly Confidential Information except as specifically provided in the Protective Order.

I acknowledge that it is my obligation to ensure that: (1) Highly Confidential Information is used only as provided in the Protective Order; and (2) documents containing Highly Confidential Information are not duplicated except as specifically permitted by the terms of the Protective Order, and I certify that I have verified that there are in place procedures, at my firm or office, to prevent unauthorized disclosure of Highly Confidential Information.

I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement between the undersigned and the Submitting Party.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Protective Order.

(signed) _____

(printed name) _____

(representing) _____

(title) _____

(employer) _____

(address) _____

(phone) _____

(email) _____

(date) _____