

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

In the Matter of the

Applications of

AT&T CORPORATION File Nos. 156-162-SAT-P/LA-95

GE File Nos. 169-173-SAT-P/LA-95
AMERICAN
COMMUNICATIONS, Inc.

For Authority to Construct, Launch,
and Operate Satellite Systems in the
20/30 GHz Band

ORDER

Adopted: January 26, 1996; Released: January 26, 1996

By the Chief, International Bureau:

1. In this *Order* we deny AT&T Corporation's and GE American Communications, Inc.'s individual requests for the Commission to withhold certain material, in the above-referenced applications, from public inspection.

BACKGROUND

2. In response to a Public Notice¹ announcing the filing of five satellite applications in the 20/30 GHz frequency band ("Ka-band") and establishing a "cut-off" date for the submission of competing applications in the Ka-band, the Commission received thirteen new, amended, or modified satellite applications for proposed systems in the Ka-band.² These applications were placed on Public Notice and we asked for comments from interested parties by December 15, 1995.³ In the Public Notice, the Commission required

all new applicants for licenses in the Ka-band to provide, among other things, all information specified in Section 25.140 of the rules.⁴ GE Americom and AT&T each requested that certain financial material in their applications be withheld from public inspection as confidential financial or commercial information.⁵

The AT&T Request

3. AT&T requested that Appendix E to its application, which includes three tables detailing the estimated capital investment, annual operating expenses, and revenue projections for its proposed Ka-band VoiceSpan satellite system, be treated as confidential. AT&T based its request for confidentiality on the assertion that this is "highly proprietary financial data" and "AT&T does not ordinarily publicly reveal information of this type. Moreover, in light of the competitiveness of the satellite market, divulgence of AT&T's detailed cost and revenue projections could lead to competitive harm."⁶

The GE Americom Request

4. GE Americom requested confidentiality for one page of its application: a table detailing investment and operating costs, estimated annual revenue requirements, and sources and amounts of estimated revenue from its proposed Ka-band satellite system, GE*Star. GE Americom asserts: "Confidential treatment of this information is required, due to its sensitive nature. The satellite communications industry is highly competitive, in terms of facilities and rates. This information contains strategic financial predictions on the price at which spacecraft will be acquired and the rates at which services on these spacecraft will be acquired by customers, disclosure of which would be extremely injurious if it fell into the hands of our competitors."⁷ GE Americom also asserts that this method of submitting confidential data was recently approved by the Commission, allowing AT&T to maintain confidentiality of financial data.⁸

Opposition to Requests

5. Comm, Inc., a wholly-owned subsidiary of Motorola, Inc., opposes the requests for confidentiality submitted by AT&T and GE Americom. In its *Opposition to Requests for Confidentiality*, Comm, Inc. contends "AT&T and GE Americom have not made an adequate showing as to why

¹ Public Notice, *Ka-Band Satellite Applications Accepted for Filing: Cut-Off Established for Additional Applications*, Report No. SPB-20, July 28, 1995.

² See AT&T Corporation (File No. 156-162-SAT-P/LA-95); Comm, Inc. (File Nos. 163-166-SAT-P/LA-95, 201-SAT-MISC-95); EchoStar Satellite Corporation (File No. 167/168-SAT-P/LA-95); GE American Communications, Inc. (File No. 169-173-SAT-P/LA-95); Hughes Communications Galaxy, Inc. (File Nos. 3/4-DSS-P/LA-94; CSS-94-021-025 and 174-181-SAT-P/LA-95); KaStar Satellite Communications Corp. (File Nos. 127-SAT-P/LA-95 and 203-SAT-P/LA-95); Lockheed Martin Corporation (File No. 182-186-SAT-P/LA-95); Loral Aerospace Holdings, Inc. (File Nos. 109-SAT-P/LA-95, 110-SAT-P-95, 187-SAT-AMEND-95, and 188/189-SAT-P/LA-95); Morning Star Satellite Co., (File No. 190-193-SAT-P/LA-95); NetSat 28 (File No. 194-SAT-P/LA-95); Orion Network Systems, Inc. (File Nos. 195-197-SAT-P/LA-95; 204-SAT-ML-95; 205/206-SAT-AMEND-95); PanAmSat Corporation (File Nos. 117-SAT-AMEND-95; 198/199-SAT-P/LA-95 and 202-SAT-AMEND-95) and

VisionStar, Inc. (File No. 200-SAT-P/LA-95).

³ Public Notice, Report No. SPB-29, DA 95-2273 (released November 1, 1995).

⁴ 47 C.F.R. § 25.140(c). Applicants for new satellite space stations must submit a "detailed statement of estimated investment and operating costs for the expected lifetime of the facility," 47 C.F.R. § 25.140(c), and a "detailed schedule of the estimated investment costs" and "[e]stimated annual revenue requirements." 47 C.F.R. § 25.114(c)(17).

⁵ Comm, Inc. filed an *Opposition To Requests for Confidentiality*, (November 6, 1995).

⁶ Letter from William F. Maher, Jr. (Counsel, AT&T) to William F. Caton (September 29, 1995).

⁷ Letter from Alexander P. Humphrey (Counsel, GE Americom) to William F. Caton (September 29, 1995).

⁸ See Order and Authorization, *Application of AT&T Corp. for Authority to Construct, Launch and Operate an Emergency Replacement Satellite in the Domestic Fixed-Satellite Service*, DA 95-1972 (Int. Bur., released September 15, 1995) at ¶ 2 n.3.

the required financial information should be withheld from public review."⁹ Comm, Inc. also asserts that other Ka-band applicants cannot properly comment on AT&T and GE Americom's applications without seeing all of the information submitted by AT&T and GE Americom, and that "it would be patently unfair to allow GE Americom and AT&T to withhold such information from public view while all of the other applicants fully disclosed the required financial information in reliance upon past precedent."¹⁰

DISCUSSION

6. The Commission's rules provide that any person submitting information or materials to the Commission may request that the information be withheld from public inspection.¹¹ However, the party must specifically request confidentiality for this information and the request "shall contain a statement of the reasons for withholding the materials from inspection and of the facts upon which those reasons are based."¹² The Commission's rules direct the "appropriate Bureau or Office Chief . . . to grant the request if it presents by a preponderance of the evidence a case for non-disclosure consistent with the provisions of the Freedom of Information Act, ["FOIA"], 5 U.S.C. § 552."¹³ The Commission's own rules on confidential submissions are based on FOIA Exemption 4. Exemption 4 provides that the government need not disclose "trade secrets and commercial or financial information obtained from a person, and privileged or confidential."¹⁴

7. The Commission's standard for determining whether commercial or financial information is "confidential" under Exemption 4 was set forth in *National Parks and Conservation Association v. Morton*: "[c]ommercial or financial matter is 'confidential' . . . if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."¹⁵ The entity or person seeking confidentiality must demonstrate actual competition and a likelihood of substantial competitive injury if the information is disclosed.¹⁶

8. The Commission's rules provide that "[c]asual requests" which do not contain the required statement of both a rationale and a factual basis for withholding information "will not be considered."¹⁷ We have stated that "confidentiality requests must be more than pro forma incantations of code-words like "sensitive" or "confidential,"¹⁸ and that while "conclusory and generalized allega-

tions" cannot support non-disclosure, neither is an elaborate economic analysis necessary to establish the likelihood of substantial competitive injury.¹⁹

9. Neither AT&T's nor GE Americom's request for confidentiality presents by a preponderance of the evidence a case for non-disclosure. These requests include only "conclusory" and "generalized" allegations of competitive harm. Although both AT&T and GE Americom submitted more information on the need for confidentiality in their respective replies to the *Opposition* than in their initial requests for confidentiality, neither has come close to demonstrating the likelihood of substantial competitive injury if the information is disclosed. Moreover, the potential for competitive harm to AT&T or GE Americom is minimal in light of the fact that all of the other applicants for competing Ka-band satellite systems publicly disclosed detailed cost and revenue projections of their proposed systems. Further, neither party argues that disclosure of the information required by the Commission would impair the Commission's ability to obtain such information in the future. The Commission's rules clearly require AT&T and GE Americom to satisfy Exemption 4 in order to justify nondisclosure.

10. AT&T asserts that "there is a very real risk that AT&T would be significantly harmed if this information was publicly divulged."²⁰ AT&T also asserts that because it will need to rely on outside vendors to build its satellites, AT&T could be "severely disadvantaged in negotiations with potential satellite manufacturers if they were privy to AT&T's own detailed cost estimates of the satellite construction costs."²¹ Further, "AT&T's ability to acquire satellites at the lowest possible cost could be severely compromised, which would result in AT&T potentially paying tens of millions of dollars more than necessary."²² Finally, AT&T is concerned that "if its competitors have access to detailed cost and revenue projections, they could use that information to disadvantage AT&T competitively. Such information would allow these competitors to anticipate and undercut AT&T's pricing strategies."²³

11. We are unpersuaded that the data listed in these tables is the type of detailed cost and pricing information the disclosure of which could result in competitive harm to AT&T and its vendors. The amounts in these tables are aggregate figures, rather than specific costs for individual expense items which could potentially be competitively harmful. AT&T also relies on the Commission's decision in the *MCHI Reconsideration Order*, which allowed confidential treatment recognizing the sensitive nature of vendor pricing. However, the *MCHI Reconsideration Order* was based on the fact that "very specific" competitively sensitive information had been submitted. It noted: "MCHI

⁹ See *Opposition* at 3.

¹⁰ *Id.*

¹¹ 47 C.F.R. § 0.459.

¹² 47 C.F.R. § 0.459(b).

¹³ 47 C.F.R. § 0.459(d).

¹⁴ 5 U.S.C. § 552(b)(4).

¹⁵ 498 F.2d 765, 770 (D.C. Cir. 1974).

¹⁶ *In re Application of Motorola Satellite Communications Inc. For Authority to Construct, Launch, and Operate a Low Earth Orbit Satellite System in the 1616-1626.5 MHz Band and Application of Mobile Communications Holdings Inc. For Authority to Construct the Ellipso Elliptical Orbit Mobile Satellite System*, 10 F.C.C. Rcd. 56 (hereinafter *Motorola/MCHI Confidentiality Order*), on recon *Mobile Communications Holding, Inc.* ("MCHI

Reconsideration Order") 10 F.C.C. Rcd.1547 (1994). *In re MTS & WATS Market Structure* 4 F.C.C. Rcd. 6527, 6528 (1989). See generally *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 877-79 (D.C. Cir. 1992 *en banc*), cert. denied, 113 S. Ct. 1579 (1993).

¹⁷ 47 C.F.R. § 0.459(c).

¹⁸ *Motorola/MCHI Confidentiality Order* at 57.

¹⁹ *In re National Exchange Carrier Ass'n, Inc.* 5 F.C.C. Rcd. 7184, (1990) (quoting *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680-81(D.C. Cir. 1976)).

²⁰ AT&T Reply at 2.

²¹ *Id.* at 3.

²² *Id.* at 3.

²³ *Id.*

has posited a number of mechanisms by which disclosure of the information, especially information concerning individually negotiated prices, could result in competitive harm to it and to its vendor shareholders."²⁴ By contrast, AT&T has only stated in general terms the potential for competitive harm. Furthermore, AT&T's concerns that competitors may be able to anticipate AT&T's pricing strategy appear unfounded, since the projections submitted have no binding effect on AT&T's pricing strategy.²⁵

12. In its Reply to the *Opposition*, GE expands on the reasons set forth in its initial request why the financial data in question is competitively sensitive: "Disclosure of GE Americom's costs of building and launching Ka-band satellites, as well as the revenues it expects to earn would give Motorola and the other Ka-band applicants sensitive competitive information about GE Americom's services in this band that they could use to GE Americom's detriment."²⁶ However, this is still a generalized contention on GE Americom's part and we disagree with GE Americom that it explained "in full" how disclosure of the financial information to competitors, such as Motorola, would cause GE Americom to suffer substantial competitive harm.²⁷

13. AT&T and GE also cite *Application of AT&T Corp. for Authority to Construct, Launch and Operate an Emergency Replacement Satellite in the Domestic Fixed Satellite Service*, DA 95-1972 ¶ 2 n.3, (Intl. Bur., released Sept. 15, 1995) for the proposition that the Commission will not require the disclosure of competitively sensitive data where it is unnecessary. However, in deciding that case we specifically indicated that the request was unopposed. In this case an opposition has been filed.

14. Finally, the assertion by both AT&T and GE Americom that Comm. Inc. has not established any need for this financial information is unavailing.²⁸ There is no burden on a party opposing a request for confidentiality to demonstrate its need for the financial information, particularly when the Commission's rules require an applicant to submit such data in the first place.²⁹ Furthermore, placing a burden on a party requesting disclosure is particularly unfair given that the party may not be in a position to make a showing until it knows the contents of the information it is seeking access to. Furthermore, the Commission's rules require the party requesting confidential treatment of information to satisfy Exemption 4 in order to justify non-disclosure.

CONCLUSION

15. Accordingly, IT IS ORDERED that AT&T Corporation's request for confidential treatment of the three tables detailing estimated capital investment, annual operating expenses and revenue projections from its proposed Ka-band system IS hereby DENIED.

16. IT IS FURTHER ORDERED that GE American Communications, Inc.'s request for confidential treatment of the table depicting the investment and operating costs,

estimated annual revenue requirements, and sources and amounts of estimated revenue from its proposed Ka-band system IS hereby DENIED.

17. IT IS FURTHER ORDERED that any interested parties can file supplemental comments based on these released data no later than ten business days after the data are released.

18. IT IS FURTHER ORDERED that this Order be effective upon adoption this 26th day of January, 1996.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

²⁴ See *MCHI Reconsideration Order* at 1548.

²⁵ In this regard, the projections differ from information submitted in connection with rate-regulated or price-capped services.

²⁶ *Reply of GE American Communications, Inc.* at 2.

²⁷ *Id.* at 1.

²⁸ See AT&T Reply at 1 and GE Reply at 3.

²⁹ It is only *after* information has been treated as confidential under 47 C.F.R. § 0.459 that an interested person must show reasons to justify a request for inspection of documents. See 47 C.F.R. § 0.461(c).