

PUBLIC NOTICE



FEDERAL COMMUNICATIONS COMMISSION

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COMMON CARRIER BUREAU SEEKS COMMENT ON REQUESTS FOR CONFIDENTIAL TREATMENT OF WIRE CENTER LINE COUNT DATA

PLEADING CYCLE ESTABLISHED

CC Docket No. 96-45

Release Date: May 12, 2000

Comment Date: June 26, 2000

Reply Comment Date: July 17, 2000

On April 6, 2000, the Commission denied to a limited extent requests by certain non-rural carriers for confidential treatment of quarterly line count data at the wire center level filed pursuant to sections 36.611 and 36.612 of the Commission's rules.¹ Specifically, the Commission denied requests by Anchorage Telephone Utility, Bell Atlantic, BellSouth Corporation, GTE Corporation, SBC, Sprint, and U S West, Inc. for confidential treatment of such data to the limited extent that the number of lines in wire centers receiving high-cost universal service support may be determined once the Commission releases the statewide carrier-by-carrier support amounts and the per-line support amounts available in a wire center.² The Commission did not

¹ See 47 C.F.R. §§ 36.611, 36.612; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, FCC 00-125 (rel. April 7, 2000) (*Line Count Confidentiality Order*).

² Letter from Steven R. Beck, Senior Attorney, U S WEST, Inc., to Magalie Roman Salas, Secretary (Jan. 7, 2000) (U S WEST 1st Quarter Request); Request for Confidential Treatment of Anchorage Telephone Utility (Jan. 11, 2000) (ATU Request); letter from Richard M. Sbaratta, General Attorney, BellSouth Corporation, to Magalie Roman Salas, Secretary (Jan. 7, 2000) (BellSouth Request); letter from Hope Thurott, Senior Counsel—External Affairs-FCC, SBC to Magalie Roman Salas, Secretary (Jan. 7, 2000) (SBC 1st Quarter Request); letter from Hope Thurott, Senior Counsel—External Affairs-FCC; letter from Gail L. Polivy, Assistant General Counsel, GTE Corporation, to Magalie R. Salas, Secretary (Jan. 13, 2000) (GTE 1st Quarter Request); Response of Bell Atlantic to Data Request (Jan. 7, 2000) (Bell Atlantic 1st Quarter Request); letter from Jay C. Keithley, Vice President, Law & External Affairs, Sprint, to Magalie Roman Salas (Dec. 30, 1999) (Sprint 1st Quarter Request). Some carriers also sought confidential treatment of the data filed with NECA on or before March 30, 1999. See SBC to Magalie Roman Salas, Secretary (March 30, 2000) (SBC 2nd Quarter Request); letter from Gail L. Polivy, Assistant General Counsel, GTE Corporation, to Magalie R. Salas, Secretary (March 20, 2000) (GTE 2nd Quarter Request). letter from Jay C. Keithley, Vice President, Law & External Affairs, Sprint, to Magalie Roman Salas (March 31, 2000) (Sprint 2nd Quarter Request); Response of Bell Atlantic to Data Request (March 31, 2000) (Bell Atlantic 2nd Quarter Request); Letter from Steven R. Beck, Senior Attorney, U S WEST, Inc., to Magalie Roman Salas, Secretary (April 6, 2000) (U S WEST 2nd Quarter Request). The BellSouth Request, filed January 7, 2000, sought

decide whether the line count data for wire centers that do not receive support from the Commission's high-cost universal service support mechanism for non-rural carriers should be afforded confidential treatment.³ The Common Carrier Bureau (Bureau) now seeks comment on whether such data should be afforded confidential treatment.

Carriers seeking confidential treatment of their wire center line count data claim that such data are trade secrets and commercial or financial information that fall within exemption 4 of the Freedom of Information Act (FOIA) and section 0.457(d) of the Commission's rules.⁴ They generally argue that disclosure of such data would cause them substantial competitive harm.⁵ As noted in the *Line Count Confidentiality Order*, we understand their claims to be based on the disaggregated nature of the data, i.e., the filing of line counts in individual wire centers, as opposed to total lines in the study area.⁶ In addition, the carriers generally claim that such data are not customarily released to the public.⁷

confidential treatment for the first quarter and subsequent data submissions, so BellSouth did not file a separate request for confidential treatment for the second quarter of 2000. Frontier Telephone of Rochester, Inc., (Frontier/Rochester) also sought confidential treatment of wire center line count data, but was not included in the *Line Count Confidentiality Order* because the letter was not received before that order was released. Frontier/Rochester receives no high-cost support so it is not possible to "reverse engineer" to determine its wire center line counts.

³ Pending the Commission's resolution of the issues raised by these confidentiality requests, the line count data for wire centers not receiving support, including that of Frontier/Rochester, will be made available pursuant to the interim protective order adopted April 7, 2000. See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Interim Protective Order, DA 00-773 (*Interim Protective Order*).

⁴ 5 U.S.C. § 552(b)(4); 47 C.F.R. § 0.457(d).

⁵ See, e.g., SBC 1st Quarter Request, at 2 (the data "would permit competitors to identify high concentrations of customers that may be valuable to a competitor's market approach"); ATU Request at 2 (stating that competitors would "gain an unfair competitive advantage over ATU in the local exchange market" because data could be used for pricing and marketing); BellSouth Request at 1 (disclosure would "enable competitors to target on a narrow geographic basis those areas where it would be most lucrative to compete with BellSouth"); GTE 1st Quarter Request at 1 (data could be used to evaluate operational and business plans); Bell Atlantic 1st Quarter Request at 2 (data could allow competitors to target area of highest concentration of customers); U S West 2nd Quarter Request at 2 ("Public disclosure of the detailed line count information, especially when provided on a wire center basis, would likely result in substantial competitive harm to U S West.").

⁶ *Line Count Confidentiality Order* at para. 10. Since the inception of the Commission's high-cost loop support program, carriers have been required to file line count and cost data at the study area level and such data always have been publicly available.

⁷ See e.g., Sprint 2nd Quarter Request at 1 ("It is the companies' practice to withhold this information from public inspection as proprietary in all circumstances."); U S West 2nd Quarter Request at 2 ("It is U S West's practice to withhold this information from public inspection as proprietary in all circumstances."); Bell Atlantic 2nd Quarter Request at 2 ("Bell Atlantic keeps these data confidential and has not made the data publicly available."); SBC 1st Quarter Request at 3 ("This information has been maintained on a confidential basis within the SBC Companies and would not ordinarily be disclosed to parties outside the company.")

We seek comment on whether line count data at the wire center level constitute either trade secrets or commercial or financial information within the meaning that these terms are given in the context of the FOIA. A trade secret is “a secret, commercially valuable plan, formula, process, or device that is used in the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”⁸

The terms “commercial or financial information” are given their ordinary meaning for purposes of the FOIA.⁹ Commercial or financial information that is submitted on a mandatory basis is “confidential” under exemption 4 of FOIA when disclosure of the information is likely “to cause substantial harm to the competitive position of the person from whom the information was obtained.”¹⁰ In addition, we seek comment on whether line count data at the wire center level are publicly available from other sources such as state commissions.

We also seek comment on whether there is a compelling public interest in disclosing the wire center line count data even if such data were to be considered confidential under exemption 4.¹¹ The Commission’s rules permit disclosure of commercially sensitive information upon a “persuasive showing” of the reasons in favor of releasing the information.¹² Consistent with the

⁸ *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983); *see also AT&T Information Systems, Inc. v. GSA*, 627 F. Supp. 1396, 1401 n. 9 (D.D.C. 1986); *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, GC Docket No. 96-55, Report and Order, FCC 98-184, 13 FCC Rcd 24816, 24818 (1998) (*Confidential Information Policy Report & Order*).

⁹ *See Public Citizen health Research Group*, 704 F.2d at 1290.

¹⁰ *See National Parks and Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks*). This is the “competitive injury” prong of the applicable standard under the *National Parks* two-part test. The other part of the test is whether disclosure would be likely “to impair the Government’s ability to obtain necessary information in the future.” 498 F.2d at 770. Where the information is compelled, rather than voluntary, the Government’s interest is in ensuring its continued reliability. *See Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 878 (D.C. Cir. 1992) (*en banc*), *cert denied*, 507 U.S. 984 (1993) (*Critical Mass*). The public and private interests identified in the *National Parks* test are not exclusive. The D.C. Circuit Court of Appeals subsequently distinguished between voluntary and compelled information in applying the *National Parks* test. The competitive injury part of the *National Parks* test applies to mandatory data submissions. *See Critical Mass*, 975 F.2d at 878. *See also Confidential Information Policy Report & Order*, 13 FCC Rcd at 24819. Non-rural incumbent local exchange carriers are required to file wire center line count data under sections 36.611 and 36.612 of the Commission’s rules. 47 C.F.R. §§ 36.611, 36.612. Competitive eligible telecommunications carriers must file wire center line count data in order to receive high-cost universal service support. 47 C.F.R. § 54.307.

¹¹ For example, if the Commission were to rerun the model using the wire center line count data, a determination that such data are confidential would preclude the Commission from posting the rerun model on the Web. In contrast to the Commission’s previous practice, the model results would only be available subject to a protective order.

¹² 47 C.F.R. §§ 0.457, 0.457(d)(1), 0.457(d)(2). While exemption 4 of FOIA, 5 U.S.C. § 552(b)(4), allows an

United States Supreme Court's decision in *FCC v. Schreiber*,¹³ the rules also contemplate that the Commission will engage in a balancing of the interests favoring disclosure and non-disclosure. In balancing these public and private interests, the Commission has been sensitive to ensure 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.

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before **June 26, 2000**, and reply comments on or before **July 17, 2000**. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998). Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit electronic comments by Internet e-mail. To receive filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address.>" A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554.

Parties also must send three paper copies of their filing to Sheryl Todd, Accounting Policy Division, Common Carrier Bureau, Federal Communications Commission, 445 Twelfth Street S.W., Room 5-B540, Washington, D.C. 20554. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20037.

Pursuant to section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, this proceeding will be conducted as a permit-but-disclose proceeding in which *ex parte* communications are permitted subject to disclosure.

agency to withhold business competitive information from public disclosure, the Trade Secrets Act acts as an affirmative restraint on an agency's ability to release such information, except as "authorized by law." *See* 18 U.S.C. § 1905, *and see CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1151-52 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988). Section 0.457 of the Commission's rules, 47 C.F.R. § 0.457, and section 254 of the Communications Act, 47 U.S.C. § 254, constitute the requisite legal authority for such disclosure of competitively sensitive information. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979).

¹³ 381 U.S. 279, 291-92 (1965).

The full text of this document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, DC, 20554. This document may also be purchased from the Commission's copy contractor, International Transcription Service, Inc. (ITS), 1231 20th Street, NW, Washington, DC 20036, telephone 202-857-3800, facsimile 202-857-3805.

For further information, contact Katie King, Accounting Policy Division, Common Carrier Bureau at (202) 418-7400, TTY (202) 418-0484.