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

**PR Docket Nos. 94-103, 94-105, 94-106, 94-108**

In the Matter of

Petition of Public Utilities Commission, State of Hawaii, for Authority to Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii

Petition of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates

Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut

Petition to Extend Rate Regulation Filed by the New York State Public Service Commission

**Adopted: February 9, 1995; Released: February 9, 1995**

By the Chief, Wireless Telecommunications Bureau:

**ORDER**

## I. INTRODUCTION

### A. Background

1. The Wireless Telecommunications Bureau ("Bureau") on January 25, 1995, adopted and released an Order ("*First Confidentiality Order*")[1] that determined the status of certain materials for which confidential status was requested by California and Connecticut, states that seek intrastate rate authority over commercial mobile radio services (CMRS) providers.[2] The *First Confidentiality Order* established procedures for treatment of such materials, and permitted subsequent confidentiality requests by Hawaii and New York, as well as re-submission by California and Connecticut of requests for confidentiality and associated materials that had not been properly submitted.[3]

2. In general, these states requested confidential treatment of materials filed, or sought to be filed, in support of their petitions, because those materials were obtained subject to confidentiality claims of carriers subject to the states' jurisdiction. The *First Confidentiality Order* permitted Hawaii and New York to submit supplemental materials referenced in their original petitions, provided such filings were accompanied by requests for confidential treatment as required by Section 0.459 of the Commission's Rules.[4] Neither of those states has chosen to do so, and thus the opportunity to make supplemental confidential filings has expired.[5] This *Second Confidentiality Order* resolves confidentiality issues arising from the supplemental filings, or from the failure to submit materials in accordance with requirements specified in the *First Confidentiality Order*.

### B. Summary of Decision

#### 1. Connecticut.

3. In the *First Confidentiality Order*, we noted that the state of Connecticut had recently filed additional materials accompanied by an apparently sufficient motion that we accept the materials for filing and a request that we afford confidential treatment to those portions of the filing submitted under seal.[6] We stated that we would address that motion shortly.[7] In this Order, we grant the Connecticut Motion in part and deny it in part. We accept those parts of the Connecticut filing that were not subject to a request for confidential treatment, listed in Section 1 of Appendix A. We accept and order limited disclosure, under the terms of a protective order, of those parts of the filing that were subject to a request for confidential treatment in this proceeding. Connecticut's request for confidentiality does not

[1] Order, PR Docket Nos. 94-103, 94-105, 94-106, 94-108, DA 95-111, adopted Jan. 25, 1995, released Jan. 25, 1995 (*First Confidentiality Order*).

[2] The captioned states petitioned for such authority under Section 332(c)(3) of the Communications Act. *See* Omnibus Budget Reconciliation Act of 1993 (Budget Act), Pub. L. No. 103-66, § 6002(c)(3), 107 Stat. 312, 394 (1993) (*codified at* Section 332(c)(3) of the Communications Act of 1934, 47 U.S.C. § 332(c)(3)).

[3] The materials involved were referenced in proceedings regarding the petitions filed by the People of the State of California and the Public Utilities Commission of the State of California (collectively, "CPUC" or "California"); the Connecticut Department of Public Utility Control ("DPUC" or "Connecticut"); the Public Utilities Commission of the State of Hawaii ("HPUC" or "Hawaii"); and the New York Department of Public Service ("NYDPS" or "New York").

[4] *First Confidentiality Order*, para. 6.

[5] On January 27, 1995, New York filed a letter with the Commission stating that it will not seek confidential treatment of additional data to support its petition. Letter from M. Helmer, General Counsel, State of New York Public Service Commission, to W. Caton, Acting Secretary, Federal Communications Commission (Jan. 27, 1995). As of the date of this Order, Hawaii has not made a filing to supplement its petition.

[6] *See First Confidentiality Order*, at para. 5; Connecticut, Motion for Leave to Accept Record and Request for Confidential Treatment, PR Docket No. 94-106, filed Jan. 9, 1995 ("Connecticut Motion").

[7] *See First Confidentiality Order*, para. 5.

satisfy the requirement under Section 0.459(b) of the Commission's Rules that requesters provide reasons for a confidentiality request and the facts upon which those reasons are based.[8] We grant the request in part, however, under discretion provided by Section 0.459(f) of the Commission's Rules.[9] Materials treated as confidential, and to be disclosed under the terms of a protective order, are listed in Section 2 of Appendix A. Finally, we do not grant Connecticut's request for confidential treatment of certain materials listed in Section 3 of Appendix A. These elements of the Connecticut submission not only lack the justification required by Section 0.459 of our Rules[10] to accompany Connecticut's request for confidential treatment, but also present additional difficulties for staff review and/or procedural implementation.

**2. California.**

4. In the *First Confidentiality Order,* we ordered California to file newly redacted and unredacted versions of its petition and accompanying appendices, in accordance with our confidential treatment determinations in that Order.[11] California complied with that Order, by submitting the required materials on February 2, 1995, and we now establish comment and reply dates.[12] In the *First Confidentiality Order,* we also stated that California could remedy procedural defects in its requested confidential filing of excerpted materials obtained from the state's Attorney General ("AG Excerpts"), by re-submitting that filing accompanied by appropriate affidavits or other evidentiary materials.[13] California chose to make such a remedial filing, and in this Second Order, we order limited disclosure of the AG Excerpts, subject to the terms of a protective order.

**3. Other filings.**

5. We stated in the *First Confidentiality Order* that if AirTouch Communications (AirTouch) and the Cellular Telecommunications Industry Association (CTIA) wish the Bureau to consider the affidavits of economist Jerry Hausman that were appended to their Oppositions to the California Petition, they must file information underlying those affidavits.[14] AirTouch made such a filing, and noted that it had previously provided such information to the CPUC.[15] The Commission therefore will consider the Hausman affidavit accompanying the AirTouch Opposition as it examines the merits in this proceeding. CTIA did not submit the described filing, and asserts that it has neither custody nor control of the data and cannot obtain the consent of individual carriers in the short time available.[16] Accordingly, the Hausman affidavit accompanying the CTIA Opposition will not be considered.

## II. REQUESTS FOR CONFIDENTIAL TREATMENT

**A. Connecticut**

6. Connecticut initially submitted supporting materials for its petition to retain regulatory control of the rates of wholesale cellular service providers. These materials were accompanied by two requests for confidential treatment, but failed to comply with the Commission's procedural rules. On January 20, 1995, Connecticut re-submitted its request.[17] In our *First Confidentiality Order,* we noted that the new submission appeared to comply with Section 0.459 of the Commission's Rules, but we deferred making any decision regarding the materials until we had an opportunity to review them more thoroughly.[18]

7. After further review, we have determined that Connecticut's request for confidential treatment fails to satisfy the requirements stated in Section 0.459(b) of the Commission's Rules,[19] that such requests state the reasons for withholding materials from inspection by the public, and specify the facts on which those reasons are based. In common with publicly disclosable materials, such confidential materials must also be clearly and specifically related to the contentions they are offered to support.[20] Given the need to expedite this proceeding to meet the statutory deadline, however, we have determined neither to deny Connecticut's request, nor to provide Connecticut additional time to cure its request. Rather, Bureau staff has conducted an independent review of these materials, in an effort to expedite the resolution of confidentiality issues and complete the record. For these limited purposes, we waive Section 0.459(b) on our own motion. *See also* Section 0.459(f), which applies to deficient requests for confidential treatment as well as materials submitted without an associated request. As described below, that review indicates that, with some exceptions, the materials submitted by Connecticut for which confidential treatment is requested are germane to the state's petition and warrant confidential treatment. We accordingly will consider as confidential most of the materials re-filed by Connecticut, but subject them to limited disclosure, pursuant to terms of the protective order already in force in the Connecticut cellular proceeding.[21]

8. In Section 2 of Appendix A, we list in full those materials that generally include the type of proprietary operating and marketing data that the *First Confidentiality Order* determined warrant confidential treatment. As we noted in the *First Confidentiality Order,* the Commission has previously determined that data describing a carrier's profit margins, as well as a company's actual costs, breakeven calculations, and profits and profit rates, and also market share information, are confidential and disclosure

---

[8] *See* 47 C.F.R. § 0.459(b).
[9] *See* 47 C.F.R. § 0.459(f).
[10] *See* 47 C.F.R. § 0.459.
[11] We granted California's Emergency Motion for Extension of Time on Jan. 30, 1995. *See* Order, PR Docket No. 94-105, DA 95-124, adopted January 30, 1995, released January 31, 1995.
[12] *See infra,* para. 25.
[13] *See First Confidentiality Order,* at para. 33.
[14] *Id.,* para. 38.
[15] See letter from D. Gross, AirTouch Communications (AirTouch) to W. Caton, Acting Secretary, Federal Communications Commission, dated Jan. 27, 1995.
[16] CTIA, Comments in Response to *First Confidentiality Order,* submitted Jan.30, 1995.
[17] *See* letter from M. Kohler, Assistant Attorney General, State of Connecticut, to W. Caton, Acting Secretary, Federal Communications Commission, PR Docket No. 94-105, dated Jan.9 , 1995, filed Jan.20, 1995 ("Third Connecticut Request").
[18] *See First Confidentiality Order,* at para. 5.
[19] *See* 47 C.F.R. § 0.459(b).
[20] *See* Alianza Federal de Mercedes v. FCC, 539 F.2d 732, 739 (D.C. Cir. 1976).
[21] That Order was adopted for this proceeding in the *First Confidentiality Order* as Appendix B.

would be likely to result in competitive harm.[22] For those reasons, we granted California's request that we accord confidential treatment to information including, *inter alia,* annualized per-subscriber data on revenues, operating expenses, operating income, and expenditures for plant; annualized subscriber growth for each carrier; information regarding cellular carriers' and resellers' market shares, capacity utilization statistics, the number of subscribers provided with service by each carrier on each specific basic rate plan, and the aggregate number of customers associated with all discount plans of a given carrier.[23]

9. Similarly, we here grant Connecticut's request that we accord confidential treatment to the January 20 materials that were covered by its protective order, for those elements listed in Part 2 of Appendix A. These materials contain financial information disclosing profit margins,[24] actual costs,[25] market share information,[26] and similar financial data.[27] We also include in Section 2 the brief of the Connecticut Attorney General, June 29, 1994, which clearly identifies confidential segments involving various economic data. Disclosure of these types of information could identify to competitors particular product or geographic markets or market trends, thereby causing competitive harm.[28]

10. We find that the Section 2 information, as described *supra* in paragraphs 7-13, 16, is likely to be useful to the Commission's analysis on the merits. Connecticut states in its petition that it intends to investigate rates of return and rate structures of wholesale providers, and the relationship between cellular carriers' costs and service rates.[29] Connecticut argues that Herfindahl-Hirschman concentration indices demonstrate a minimal threat to incumbents from competitive service providers, and that while carriers argued that vigorous competition exists, resellers contend the Connecticut market's duopoly characteristics enable underlying carriers to exercise substantial market power and impose excessive and unjust rates.[30] The underpinnings for these assertions are contained in the August 8, 1994 DPUC decision in Docket No. 94-03-27, attached to the Petition as Appendix A.

11. Thus, the data elements listed in Section 2 could easily constitute logical and relevant foundations for the arguments they are offered to prove, and we find that those arguments are germane to the demonstration Connecticut is required to make, under Section 20.13 of the Commission's Rules,[31] to support its petition regardless of whether they are ultimately persuasive. Accordingly, the submissions could well constitute a link in the chain of evidence leading to the Commission's ultimate decision on the merits. The Section 2 data is sufficiently germane to disposition of Connecticut's petition that it cannot be excluded from consideration of the issues on the merits. Such exclusion would in effect deny Connecticut the opportunity to make the demonstration, required by Congress and detailed in Section 20.13 of the Commission's Rules, by submitting relevant information. It is therefore desirable to afford the public an opportunity to comment on this data. Unlimited disclosure is not appropriate, however, due to the potential for competitive injury. Accordingly, we adopt the Protective Order attached as Appendix B to the *First Confidentiality Order* for use in this aspect of the Connecticut proceeding, and we order limited disclosure, pursuant to the Protective Order, of the data elements listed in Section 2.

---

[22] *See* First Confidentiality Order, ¶ 24, *citing, inter alia,* Request of R. May, FOIA Control No. 91-130, at 3 (1991) (withholding AT&T cost data associated with its provision of operator services) (*citing* National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 684 (D.C. Cir. 1976) (*National Parks II);* Gulf & Western Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979); Request of M. Stabbe, *supra,* at 3-4 (Feb. 7, 1992) (disclosure of percentage of subscribers on inside wire maintenance plans would reveal market concentrations and strategic initiatives by wireline carrier and could aid a new competitor by describing market trends or an existing competitor by identifying regions ripe for expansion); *but cf.* Request of R. Berg, at 5 (ordering disclosure of information related to interexchange carrier (IXC) market shares; also noting that relative market positions of various IXCs are already generally known).

[23] These materials were made subject to limited disclosure pursuant to the terms of a protective order, except that certain of these data elements pertaining to six particular carriers were subject to public disclosure because those carriers withdrew their confidentiality interests in those data.

[24] *See, e.g.,* App. A Sec. 2 element a, Springwich late-filed Exhibit 4, projection of five-year incremental costs including net cash flow after tax, annual operating expenses and revenue; App. A Sec. 2 element h, Bell Atlantic Metro Mobile late-filed Exhibit 15, describing four years' actual revenues and expenses for wholesale operations,, including net income; App. A Sec. 2 element d, Springwich forecasted revenue calculations for five years.

[25] *See, e.g.,* App. A Sec. 2 element a, Springwich late-filed Exhibit 4, five-year estimate of incremental costs.

[26] *See, e.g.,* App. A Sec. 2 element b, Springwich responses to request Nos. TE-5, TE-6, describing cellular end-user churn rate and monthly usage for individual resellers.

[27] *See, e.g.,* App. A Sec. 2 element a, Springwich late-filed Exhibit No. 7, actual/forecast customers compared to switch capacity; Sec. 2 element b, Springwich financial statements, balance sheets, and changes in partners' capital contributions; Sec. 2 element e, Springwich late-filed Exhibit No. 28, detail of actual charges from affiliates to Springwich Cellular Limited Partnership (four years); Sec. 2 element f, Litchfield responses to interrogatories TE-3 and TE-6, financial statements.

[28] *See, e.g.,* letter from K. Shinevar, Vice President, General Counsel, CellularOne, to R. Murphy, Executive Secretary, DPUC (filed with the DPUC on May 5, 1994, received by the DPUC on May 6, 1994), attaching Litchfield County Cellular, Inc. (Litchfield) responses to certain CPUC Interrogatories. The Litchfield response to interrogatory TE-3 attaches financial reports for the years ending Jan.31, 1991 and Jan.31, 1992 as Appendices B and C (B was in fact later filed under letter dated May 18, 1994), including balance sheets showing assets and liabilities, operating expenses and losses, cash flows and increase in cash. *See also, e.g.,* letter from P. Tyrrell, Senior Attorney, Springwich Cellular Limited Partnership (Springwich), to R. Murphy (June 6, 1994), *attaching* the Springwich late filed Exhibit No. 3, Attachments A & B (revision dated June 6, 1994) (Springwich's five year projection of its cellular numbers service market share and subscriber base, given various hypothetical marketplace actions by competitors); letter from R.P. Knickerbocker, Jr., outside counsel for the Bell Atlantic Metro Mobile Companies (BAMMC), to R. Murphy (May 27, 1994), *attaching* the Bell Atlantic Metro Mobile Companies (BAMMC) late filed Exhibit No. 17 (dated May 27, 1994) (BAMMC's statements of assets, liabilities, revenues and expenses for its wholesale operations).

[29] Connecticut Petition at 4.

[30] *Id.*

[31] *See* 47 C.F.R. § 20.13.

12. Our finding that substantial competitive harm is probable does not automatically lead to withholding of desired information, because the Commission's Rules and the FOIA provisions they reflect are exemptions from required disclosure; they are not categorical bars to disclosure. Even when information falls within the scope of FOIA Exemption 4, the Commission retains discretion to order release based on public interest grounds.[32] In determining whether the public interest in disclosure is sufficiently compelling to outweigh a legitimate interest in the privacy of proprietary business data, the Commission has adhered to a policy whereby it:

> will not authorize the disclosure of confidential financial information on the mere chance that it might be helpful, but insists upon a showing that the information is a necessary link in a chain of evidence that will resolve a public interest issue.[33]

Alternatively, even when information is critical to resolution of a public interest issue, the competitive threat posed by widespread disclosure under the FOIA[34] may outweigh the public benefit in disclosure.[35] In such instances, disclosure under a protective order may serve the dual purpose of protecting competitively valuable information while still permitting limited disclosure for a specific public purpose.[36] The public interest in disclosure derives from the interest of parties to a proceeding in receiving adequate notice of potential bases for the agency decision, and an opportunity to comment on those grounds.[37] The courts have upheld agency nondisclosure of information where the material is not of decisional significance or where its omission from the record does not deprive parties of notice and a meaningful opportunity to comment.

13. The Commission and staff have applied these principles in analogous cases. In AT&T, FOIA Control No. 99-190, the Common Carrier Bureau distinguished between material of "critical significance" and data providing a "factual context" for the consideration of broad policy issues. The Bureau stated that resolving a confidentiality request entails determining not only the extent to which data might be helpful, but further whether its value outweighs the prospect of competitive harm likely to flow from release.[38] We considered the parties' comments and submissions, and we independently balanced the public interest in revealing the information and the private harm that could result from disclosure.[39]

14. However, there are several items included with the Connecticut refiling that not only lack the justification required to be supplied by Sections 0.457(d)(2)(i) and 0.459(a) & (b) of the Commission's Rules,[40] but also for which we cannot determine the confidentiality of on their face. These are listed in Section 3 of Appendix A, and include (a) depositions taken in the state proceeding, from which selected parties were excluded;[41] (b) one document presenting compilation of data with no identification except an exhibit number;[42] and (c) documents that do not explicitly identify the segments arguably warranting confidential treatment.[43] Some documents involves parties that did not sign the Connecticut protective order.[44] Nor is it readily apparent to what extent Connecticut may have relied on the submitted materials in its petition for authority to extend rate regulation of cellular radio service, nor in its reply comments to the Commission.

15. The Bureau has exerted significant effort to expedite consideration of these petitions and avoid delays associated with curative filings. We cannot, however, comb through supposedly confidential and germane documents page by page, or paragraph by paragraph, to construct the petitioner's showing of relevance to particular contentions in

---

[32] *Chrysler v. Brown*, 441 U.S. at 292-94; note 78, *infra*.

[33] *Classical Radio for Connecticut, Inc.*, 69 FCC 2d 1517, 1520 n.4 (1978).

[34] Under the FOIA, disclosure to one party generally compels disclosure to all parties. United States Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 771 (1989).

[35] *See, e.g.*, Commission Requirements for Cost Support Materials to be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526, 1533 (Com. Car. Bur. 1992) (*SCIS Disclosure Order), aff'd*, Order, 9 FCC Rcd 180 (1993); Memorandum Opinion and Order, In the Matter of Motorola Satellite Communications, Inc. Request for Pioneer's Preference to Establish a Low-Earth Orbit Satellite System in the 1610-1626.5 MHz Band, ET Docket No. 92-28 PP-32, FOIA Control Nos. 92-83, 92-88, 92-86, 7 FCC Rcd 5062, 5062 & n.7 (1992); *see also* Letter from G. A. Weiss, Acting Chief, Enf. Div., Common Carrier Bureau, FCC, to F. J. Berry, AT&T, 9 FCC Rcd 2610, 2613 (Enf. Div., Com. Car. Bur. 1994) (McCaw/AT&T Protective Order attached), *amended*, Letter from T. D. Wyatt, Chief, Formal Compl. & Inves. Branch, Enf. Div., Common Carrier Bureau, FCC, to Counsel for Parties of Record (dated May 20, 1994); In the Matter of American Telephone and Telegraph Co. and Craig O. McCaw, FCC No. 94-238, 9 FCC Rcd 5836, 5925 (denying Bell Companies' motion to waive the McCaw/AT&T Protective Order).

[36] *See id.*

[37] *See, e.g.*, Abbott Laboratories v. Young, 691 F. Supp. 462, 466-67 (D.D.C. 1988), remanded on other grounds, 920 F. 2d 984 (D.C. Cir. 1990), cert. denied *sub nom.* Abbott Laboratories v. Kessler, 112 S. Ct. 76, 116 L. Ed.2d 49 (1991).

[38] AT&T, FOIA Control No. 88-190 (Com. Car. Bur. Nov. 23, 1988). *See also* Butler, 6 FCC Rcd 5414, 5418 (1991).

[39] 47 C.F.R. § 0.461(f)(4); *see also, e.g.*, AT&T, FOIA Control No. 88-190 (Com. Car. Bur. Nov. 23, 1988).

[40] 47 C.F.R. § 0.457 (d)(2)(i) and 47 C.F.R. § 0.459(a) & (b).

[41] *E.g.*, Confidential Hearing Before DPUC, Docket No. 94-03-27, June 7, 1994 (Springwich excluded) ("June 7 Hearing").

[42] *See* Late-filed Ex. 29, June 7, 1994.

[43] *See, e.g.*, Brief of the Office of Consumer Counsel, June 29, 1994 (no portion identified as confidential); separate segment of June 7 Hearing, pp. 1440-1545, *supra* note 41 (indicated as confidential but parties excluded, if any, not identified); additional segment of June 7 Hearing, pp. 1580-1607; additional transcript segment of June 7 Hearing, pp. 1194-1372; additional segment of June 7 Hearing, pp. 1546-1579. *See also* Initial Brief of Springwich Cellular Limited Partnership, Protected Version, Docket No. 94-03-27, June 29, 1994.

[44] *See* Cellular Resellers Coalition Brief, Non-Public Version, Docket No. 94-03-27, June 29, 1994. While participation in the protected disclosure arrangements at the state level is not a requirement for participation in such arrangements in this proceeding, we are particularly concerned, in reviewing materials not accompanied by a properly specific confidentiality request, to preserve, as an initial matter, the confidentiality concerns of parties that did not agree to the protected disclosure process below.

its petition, and related demonstrations of confidential status and prospects of competitive harm. While a publicly disclosable filing may not be germane to the petition, the determination under our Rules whether to allow protected disclosure of confidential materials requires that we consider the benefit to the public of such disclosure, and the disclosure of irrelevant information confers no public benefit.

16. Accordingly, we grant in part and deny in part the Connecticut motion to accept its supplemental filing. We will publicly disclose those parts of the Connecticut filing that were not subject to a request for confidential treatment. We will disclose, under the terms of the protective order adopted for Connecticut in Appendix B of the *First Confidentiality Order,* those parts of the filing that were accorded confidential treatment in the Connecticut cellular investigation. The submitted materials listed in Section 3 of Appendix A to this Order, however, will not be considered by the Commission because, as described *supra* paragraph 14, they either were not referenced to elements of the state's petition -- *i.e.,* their relation to contentions in that petition has not been specifically asserted -- or the portions of documents that resulted in confidential treatment in the state proceeding are not sufficiently identified in the documents to enable staff review of public benefits or competitive harm possible from disclosure.

### B. California

#### 1. Background

17. California originally requested confidential treatment of several types of commercial and financial materials that it submitted under seal with the Commission and redacted from its publicly filed petition.[45] In the *First Confidentiality Order,* we categorized the California data into three groups (A, B, and C), which we defined according to the treatment accorded those materials at that juncture.[46] We permitted public disclosure of the Group A materials,[47] adopted a Protective Order for materials in Group B, and determined that it was unnecessary to consider whether materials in Group C merited confidential treatment at that time.[48]

18. We have reviewed the resubmitted California materials and conclude that the Group B materials may be disclosed as submitted, subject to the protective order attached to the *First Confidentiality Order* as Appendix A. California has properly removed from Appendix J the data elements that we found in the *First Confidentiality Order* were immaterial to California's petition (*e.g.,* the subscriber counts for individual rate discount plans).

19. For present purposes, therefore, we need consider only the treatment to be accorded the Attorney General (AG) Excerpts provided as part of California's resubmission of Group C materials. The AG Excerpts consist of references on pages 42, 45, and 75 of the unredacted California petition to materials that California asserts were acquired in the course of an ongoing antitrust investigation and submitted to the CPUC by the state Attorney General's office, on condition that the materials would not be disclosed publicly without the Attorney General's consent.[49] California initially requested confidential treatment for these materials, citing as the bases for nondisclosure Sections 0.457(c) and 0.457(e) of the Commission's Rules,[50] which parallel Exemptions 3 and 5 of the Freedom of Information Act ("FOIA").[51] The AG Excerpts are based on internal cellular company documents that did not appear in full in the confidential version of the California petition.[52] We stated in our *First Confidentiality Order* that the AG materials would not be considered by the Commission, because California did not accompany this element of its submission with affidavits as required by Section 20.13(2)(vi) of the Commission's Rules,[53] which expressly requires that allegations relevant to anti-competitive or discriminatory practices or behavior be supported by an affidavit from an individual with personal knowledge. Moreover, California did not initially submit source materials, or other indicia of context or credibility, for the allegations in the CPUC petition that supposedly were supported by reference to the AG Excerpts. We stated that California could choose to re-file the Excerpts if the new submission were accompanied by supporting materials that comply with Section 20.13 of the Commission's Rules and a request for confidential treatment.[54]

20. California has chosen to file the AG Excerpts a second time, accompanied by a renewed request for confidential treatment of these materials, and by supporting materials that the state asserts comply with Section 20.13 of the Commission's Rules. For reasons discussed below, we determine that this latest California submission complies with Sections 0.457, 0.459, 0.461, and 20.13 of the Commission's Rules,[55] and that the AG Excerpts are in fact entitled to confidential treatment. We also find that the AG Excerpts are relevant and material to California's showing in this proceeding, and that prospects of competitive harm from any public disclosure are outweighed by the benefit of limited disclosure subject to a protective order, which will allow parties to this proceeding to comment on

---

[45] *See* California, Petition to Retain Regulatory Authority Over Intrastate Cellular Service Rates (California Petition); *First Confidentiality Order,* at para. 7.

[46] *See First Confidentiality Order* at para. 8.

[47] Group A materials related to US West, however, as well as the other carriers that did not withdraw their claims of confidentiality, were subjected only to limited disclosure pursuant to protective order .

[48] *See First Confidentiality Order,* at para. 33.

[49] *See* Request for Proprietary Treatment of Documents used in Support of Petition to Retain Regulatory Authority over Intrastate Cellular Service Rates, P.R. File No. SP-3, at 2-3 (filed Aug. 9, 1994) ("California Confidentiality Request"); September 14 Submission, at 2.

[50] 47 C.F.R. §§ 0.457(c) and 0.457(e).

[51] *See* September 14 Submission; September 16 Submission. Exemption 3 of the FOIA exempts from mandatory disclosure material "specifically exempted from disclosure by statute . . .," and Exemption 5 exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to any party other than an agency in litigation with the agency." *See* 5 U.S.C. §§ 552(b)(3), (5).

[52] The confidential submission consists solely of the excerpts set forth in the text of the unredacted petition.

[53] 47 C.F.R. § 20.13(2)(vi).

[54] *See First Confidentiality Order,* at para. 33. We required California to make this submission by January 30, 1995, and later extended the time for the filing to February 2, 1995. *See* Order, DA 95-124, *supra* note 11.

[55] 47 C.F.R. §§ 0.457, 0.459, 0.461, and 20.13.

them.[56] We therefore order disclosure of the AG Excerpts under the terms of the Protective Order adopted as Appendix A of the *First Confidentiality Order*.

21. In a separate Petition for Clarification and Corresponding Extension of Time, submitted Jan.27, 1995 (California Clarification Petition), California states that the AG Excerpts concern marketing practices of certain cellular carriers and do not allege anti-competitive behavior.[57] California therefore objects to our requirement in the *First Confidentiality Order* that the excerpts be supported by an affidavit from a person with personal knowledge.[58] California asks why, if an affidavit from the cellular carrier preparing the source document underlying AG Excerpts is required by Section 20.13 of the Commission's Rules, a similar affidavit requirement is not imposed upon AirTouch and CTIA regarding the carrier-specific data relied on by Dr. Jerry Hausman.[59] California further contends that the *First Confidentiality Order* practically precludes the CPUC from relying on the AG information, because obtaining an affidavit from carrier personnel with direct knowledge of marketing plans would entail deposing them, and the Commission has not permitted formal discovery in these proceedings. California also implies that the CPUC does not possess subpoena powers under state law for this purpose.[60]

22. In its Opposition to California's Petition, submitted February 1, 1995 (AirTouch Opposition to California Clarification Petition), AirTouch contends that California's initial submission ignored the affidavit requirement, avers the evidentiary requirement should not now be disregarded, and characterizes the clarification request as an untimely petition for reconsideration of the evidentiary standard established by the *Second CMRS Report and Order* that adopted Section 20.13.[61] AirTouch states that the CPUC conducted discovery in its own investigation, undertaken to collect evidence to support its Petition, and so cannot invoke the lack of discovery under Commission procedures to justify its noncompliance with Section 20.13. AirTouch adds that the pricing data relied on by Hausman was not submitted to support allegations of anti-competitive conduct.[62]

23. In its Reply to the AirTouch Opposition, submitted February 3, 1995, California contends the marketing strategy information submitted by cellular carriers to the Attorney General and then obtained by the CPUC is no different than the type of financial and subscriber information submitted directly to the CPUC by those carriers.[63] Neither source of information, California argues, itself contains allegations of anticompetitive or discriminatory conduct, so that the affidavit requirement is inapplicable, and AirTouch should not be permitted to defeat the CPUC petition by preventing the submission of material and relevant information.[64]

24. The *First Confidentiality Order* restated the requirements of Section 20.13 of the Commission's Rules. Based on brief excerpts referenced by CPUC's Petition and the absence of any further explanation, the Bureau initially considered CPUC's AG submission as raising anti-competitive abuse issues.[65] We gave the CPUC an opportunity to resubmit the AG materials and satisfy the affidavit requirement of Section 20.13. As described *infra*, the CPUC resubmitted the AG materials and clarified that the materials were not proffered to allege anti-competitive behavior: California clearly stated in its resubmission of the AG materials that the information concerns the marketing practices of certain cellular carriers and does not allege anti-competitive behavior.[66] Thus, California did not submit supporting affidavits. We conclude, based on California's clarification, that the AG materials are submitted to demonstrate marketing practices, not anti-competitive behavior, and thus need not be supported by affidavit. We will accept the AG materials, consider them only for the purpose proffered, and as explained *infra* at paragraphs 28-34, will disclose the AG materials subject to protective order.

**2. Comments**

25. AirTouch and the Los Angeles Cellular Telephone Company (LACTC) assert that the CPUC violated both state law and CPUC's own rules regarding disclosure by ignoring the public record in the California proceeding and relying upon confidential information obtained from the Attorney General.[67] LACTC also asserts that disclosure would compromise the ability of California cellular carriers to obtain a fair adjudication in any proceeding that flows from the California AG's investigation and also in this proceeding.[68] Any disclosure of this information, even under protective order, in any setting other than a public adjudicatory proceeding in the state of California where "proper rebuttal can take place" would be improper.[69] According to LACTC, disclosure would violate California law and Section 0.457(g) of the Commission's rules, which covers investigatory records compiled for law enforcement purposes.[70]

26. The Cellular Carriers Association of California (CCAC) asserts that information contained in the Attorney General's investigation could be exploited by a competitor if that competitor implies to the public that a specific carrier is engaged in unlawful conduct. This, the CCAC states, could deprive the carrier of its right to an impartial adjudication of the matters under investigation.[71] McCaw

---

[56] Because parties commented previously on the use of Attorney General materials, we do not defer resolution of this issue for additional comments. As noted *infra*, parties wishing to challenge the confidentiality analysis of the AG Excerpts may file applications for review prior to February 17, 1995.
[57] California Clarification Petition at 4.
[58] *Id.* at 5.
[59] *Id.* at 6.
[60] *Id.* at 5.
[61] AirTouch Opposition to California Clarification Petition at 5-6.
[62] The issues arising from the Hausman materials submitted by CTIA are considered *infra* at paras. 35-38.
[63] CPUC Reply to AirTouch Opposition at 2.
[64] *Id.* at 2.
[65] *First Confidentiality Order* at para. 33.
[66] California Clarification Petition at 4.
[67] AirTouch Comments on Draft Protective Agreement, at 3; LACTC Comments on Draft Protective Agreement, at 6-8.
[68] *Id.* at 8.
[69] LACTC Comments on Draft Protective Agreement, at 7-8.
[70] LACTC Comments on Draft Protective Agreement, at 6-8.
[71] CCAC Comments on Draft Protective Agreement, at 8.

asserts that no information obtained by the CPUC from the California Attorney General, nor any carrier-specific information, should be released under any circumstances, and such information should be returned immediately to the CPUC.[72] US West states that disclosure of the confidential and commercial proprietary data of California cellular carriers, as well as information which is part of the California Attorney General's investigation, on any basis, would cause competitive harm and raise significant antitrust concerns.[73]

27. The CPUC states that the AG Excerpts are relevant, material, and essential to the California petition.[74] It also asserts that claims that CPUC violated state law in submitting to the FCC information under seal obtained from the Attorney General, and information obtained from cellular carrier proceedings are baseless since CPUC has not publicly disclosed any information provided to it under seal. The CPUC argues that disclosure to the FCC does not constitute public disclosure. The CPUC contends that its only duty is to uphold the public interest and protect California consumers from paying unjust and unreasonable rates for cellular service.[75]

### 3. Discussion

28. It is unnecessary for us to determine whether state law may have been infringed or violated for purposes of conducting these federal proceedings, as alleged by some of the parties. While LACTC contends that even protected disclosure of the AG Excerpts outside the California proceeding is improper without provision for "proper rebuttal," the protective order and related procedural decisions in this Order will enable LACTC and all parties to review and comment on the materials. We need not address the applicability of Section 0.457(g) asserted by LACTC because California did not request confidential treatment under this Rule, the California Attorney General consented to the CPUC submission of this material, the material was previously released pursuant to a protective order in the state proceeding, and we have discretion to disclose data.

29. The CPUC re-submission also includes an affidavit from Ellen S. LeVine, the CPUC attorney responsible for preparing the California petition. The LeVine affidavit describes her staff's review and copying of internal documents that were first obtained by the Attorney General from two facilities-based cellular carriers as part of its antitrust investigation. The affidavit is accompanied by copies of the documents from which the Excerpts in the petition were taken. This material establishes the authenticity of the documents. The AG Excerpts have not been characterized by the CPUC petition as constituting evidence of anticompetitive abuse, and California explicitly states that the materials do not allege anticompetitive behavior.[76] Thus, the affidavit requirement of Section 20.13 of the Commission's Rules does not apply to the AG materials. We next consider the treatment to be accorded these materials.

30. There is no dispute as to the possibility of substantial competitive harm from public disclosure of the statements contained in the unredacted petition that rely on AG Excerpts. The quotations are excerpted from internal company marketing documents that disclose the companies' various contemplated responses to present and anticipated competition, including specific marketing initiatives. The CCAC contends, as noted, that information from the Attorney General's investigation could be exploited by a competitor to suggest that a carrier is involved in unlawful conduct. At the same time, however, there is a strong benefit of having these materials considered by the parties to this proceeding in commenting on California's petition. The pricing and marketing behavior of facilities-based cellular carriers is directly relevant to the required statutory determination whether market conditions in California adequately protect subscribers from unreasonable rates. Without suggesting our view on the merits, or the weight to be accorded these materials, we find that these materials are logical and relevant foundations for the factual demonstration CPUC seeks to make, and so could constitute a relevant component of the factual basis leading to the Commission's ultimate decision on the merits.

31. As described in the *First Confidentiality Order*, the finding that substantial competitive harm from unrestricted disclosure is probable does not lead to automatic withholding of these materials. We then must determine whether the public interest in disclosure is sufficiently compelling to outweigh the risk of competitive harm.[77] In this instance, disclosure of the marketing and pricing practices of facilities-based cellular operators could be competitively harmful. That information, however, is directly relevant to the required statutory determination, and so is of "critical significance" for the determination of whether the Commission should extend intrastate rate authority to CPUC.[78] As we explained in the *First Confidentiality Order*, "the public interest in disclosure derives from the interest of parties to a proceeding in receiving adequate notice of potential bases for the agency decision, and an opportunity to comment on those grounds."[79] At the same time, we reject CCAC's argument that the possible use of such materials by competitors to suggest improper or unlawful practices is a cognizable concern for purposes of our confidentiality determination. Such usage of materials does not come within the purview of competitive harm as contemplated by Exemption 4.[80] In these circumstances, limit-

---

[72] McCaw Comments on Draft Protective Agreement, at 2-3.

[73] US West Comments on Draft Protective Agreement, at 2.

[74] CPUC Comments on Draft Protective Agreement, at 1-2, 8-9.

[75] *Id.* at 5-7.

[76] California Petition for Clarification, Jan.27, 1995, at 4.

[77] *First Confidentiality Order* at paras. 27-28. We note that the Commission has authority under Sections 0.457(d)(1) and (d)(2)(i) of our Rules, 47 C.F.R. § 0.457(d)(1) & (d)(2)(i), to disclose trade secrets and commercial or financial information obtained from any person and privileged or confidential, even though that data falls within the purview of Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4). Chrysler v. Brown, 441 U.S. 281, 290-294 (1979). Under the Trade Secrets Act, 18 U.S.C. § 1905, an agency's decision to release such data must be "authorized by law." *See Chrysler*, 441 U.S. at 294-316. Commission rules permitting disclosure of Exemption 4 materials upon a "persuasive showing" constitute the authorization required. 47 C.F.R. § 0.457(d)(1) & (d)(2)(i). *See* Letter to Jonathan E. Canis, Swidler & Berlin from Kathleen M. H. Wallman, FCC, 9 FCC Rcd 6495, 6495-96 (1994) (Wallman Letter).

[78] *See* AT&T, FOIA Control No. 88-190 (Com. Car. Bur. Nov. 23, 1988). *See also* Robert J. Butler, 6 FCC Rcd 5414, 5418 (1991).

[79] *First Confidentiality Order* at para. 27.

[80] *See* Silverberg v. HHS, 1991 WL 633740, slip op. at 10 (D.D.C. June 14, 1991) (not reported in F. Supp.) (possibility

ed disclosure of the AG Excerpts to the parties to this proceeding, pursuant to a protective order, appropriately balances the competing concerns and is consistent with the Commission's policies in prior decisions.[81]

32. For purposes of PR Docket No. 94-105 and the Protective Order attached to the *First Confidentiality Order* as Appendix A, therefore, Confidential Information as described in para. 34 of that Order is expanded to include (i) the references to internal company documents on pages 42, 45, and 75 of the unredacted CPUC Petition submitted February 2, 1995, and (ii) the affidavit submitted February 2, 1995 by Ellen LeVine, and internal company documents attached to that affidavit for authentication.

33. The Bureau has also reviewed the re-submitted California appendices for compliance with terms of the *First Confidentiality Order,* and finds the materials categorized in that Order as Group A and Group B have been included in the unredacted materials to the extent specified by that Order, and that the Group C materials from Appendix J (the subscriber counts for individual rate discount plans) have been expunged from the unredacted materials as specified.

34. Because this Order has deferred effectiveness with respect to the AG Excerpts, Commission staff will mask the references to AG Excerpts in the unredacted CPUC petition to enable immediate review of the petition. When the Order becomes effective regarding protected disclosure of the AG Excerpts, an unmasked (*i.e.,* wholly unredacted) version of the petition will be made available to parties who have filed an executed protective order with the Secretary.

## III. HAUSMAN AFFIDAVIT

35. The *First Confidentiality Order* required that AirTouch and CTIA provide the underlying data used to conduct Jerry Hausman's (Hausman) analysis, and a request for confidential treatment as appropriate, if they wish the Commission to consider Hausman's analysis in its substantive review of the petition.[82] AirTouch responded on January 27, 1995, noting that it had previously supplied that underlying data.[83] CTIA submitted comments January 30, 1995, asserting that it has neither custody nor control of the raw data relied on by Hausman to prepare his supporting affidavit for CTIA, and cannot obtain the consent of individual carriers who submitted their data to Hausman on the premise of confidential treatment in the short filing window provided.[84] CTIA avers there is no basis for the Commission's decision to exclude the Hausman affidavit "even without access to the underlying data," asserting that the Commission has not hesitated in other matters to rely on aggregated analyses of raw data, and that the CPUC and other parties have access to the relevant data for California markets at issue here, and to the sources identified by Dr. Hausman as the basis of his other data.[85]

36. In its Reply to the CTIA Comments, submitted February 2, 1995, California argues that it should not be made to guess at assumptions and data underlying Hausman's results placed in the record by CTIA, because the reliability and accuracy of Hausman's analysis might be questioned or disproved by third-party review.[86] The generally available data elements cited in the CTIA comments, California states, are meaningless without knowledge of how Hausman combined it with other data that he relied on which CTIA refuses to provide. While CTIA "selectively cites" to some of Hausman's source data, California asserts, it does not indicate which data was used, which rejected, and whether the data used was adjusted in any way.[87] In addition, CPUC notes that Hausman relied on national data, while CPUC has access only to state data, and in any case CPUC cannot determine if it possesses the data relied on by Hausman until that data is identified.

37. The Commission has in other circumstances required that underlying confidential materials provided by third parties be disclosed, subject to protected disclosure arrangements, when necessary to determine the reliability of data submitted to the Commission. For example, in the *SCIS Disclosure Order,*[88] the staff of the Common Carrier Bureau first examined proprietary computer models on a limited, *in camera* basis, and then, having confirmed the "presence and importance of multiple decision points and data elements" in that aspect of the cost development process for Open Network Architecture rate elements, concluded that some ability to examine the effects of those models' variables when developing unit investment was necessary "to undertake reasoned analysis of an individual carrier's rates and the differences between individual carriers."[89] The Bureau then required that parties be afforded an opportunity

---

that competitors might "distort" requested information and thus cause submitter embarrassment insufficient for showing of competitive harm); Badhwar v. United States Dep't of the Air Force, 622 F. Supp. 1364, 1377 (D.D.C. 1985) ("fear of litigation" insufficient for showing of competitive harm), *aff'd in part & rev'd in part on other grounds,* 829 F.2d 182 (D.C. Cir. 1987).

[81] *See Wallman Letter, supra* note 78. *See also* Commission Requirements for Cost Support Materials to be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526, 1533 (Com. Car. Bur. 1992), *aff'd,* Order, 9 FCC Rcd 180 (1993); Memorandum Opinion and Order, In the Matter of Motorola Satellite Communications, Inc. Request for Pioneer's Preference to Establish a Low-Earth Orbit Satellite System in the 1610-1626.5 MHz Band, ET Docket No. 92-28 PP-32, FOIA Control Nos. 92-83, 92-88, 92-86, 7 FCC Rcd 5062 n.7 (1992).

[82] *First Confidentiality Order* at para. 38. We take this opportunity to correct a typographic error in that text; references therein to Section 0.549 of the Commission's Rules should refer to Section 0.459.

[83] AirTouch noted the supporting materials were provided, pursuant to a confidentiality agreement, to CPUC on Sept. 30, 1994, and that the Hausman affidavit attached to AirTouch comments was not the subject of California's Motion to Strike dated Oct. 7, 1994.

[84] CTIA Comments in Response to Commission's January 25, 1995 Order, at 1-2.o

[85] *Id.* at 3-4.

[86] CPUC Reply at 2-3.

[87] *Id.* at 3-4.

[88] *See* Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526 (Com. Car. Bur. 1992), *affirmed* Commission Requirements for Cost Support Material to be Filed with Open Network Architecture Access Tariffs, 9 FCC Rcd 180 (1993)(*SCIS Disclosure Review Order*). *See also* Open Network Architecture Tariffs of Bell Operating Companies, Order Terminating Investigation, 9 FCC Rcd 440 (1993) (*ONA Investigation Final Order*).

[89] *SCIS Disclosure Order,* 7 FCC Rcd at 1534-35 (paras. 42, 48).

to examine and operate the actual software program, and separately referred aspects of the carriers' ONA rate development process to an independent auditor for review.

38. While the raw data and calculations involved here are notably less complex, they are essential to understanding the basis for Hausman's assertions. Without providing these data to petitioner and to Commission staff, the Commission cannot consider those assertions. The burdens of obtaining permission from carriers or other parties supplying data are inherent in the kind of study Hausman undertook. The interposition of a trade association cannot serve to reduce or eliminate the obligation of the actual parties in interest to substantiate their contentions as required. The Bureau therefore affirms its determination in the *First Confidentiality Order* and the Hausman affidavit in support of the CTIA Opposition to California's petition will not be considered.

## IV. PROCEDURES FOR OBTAINING ACCESS TO MATERIALS UNDER TERMS OF PROTECTIVE ORDER

39. Parties to PR Docket Nos. 94-105 and 94-106 who seek to inspect confidential materials are required, as explained in the *First Confidentiality Order,* to file an executed copy of the appropriate declaration (for the Protective Order provided as Appendix A to the *First Confidentiality Order)* or protective order itself (for the Protective Order provided for use in PR Docket No. 94-106, as Appendix B to the *First Confidentiality Order)* with the Secretary of the Commission, and are hereby requested to file a courtesy copy with the Chief, Policy Division, Wireless Telecommunications Bureau. Parties are encouraged, in the interest of expedition, to obtain confidential materials directly from petitioners, provided that the executed protective order is on file with the Secretary of this Commission, when that procedure is more convenient. Parties needing to review confidential materials on file at the Commission should contact the Policy Division, Wireless Telecommunications Bureau.

40. *Connecticut.* This Order is effective February 17, 1995 with respect to the confidential materials submitted by Connecticut on January 20, 1995, and determined, *supra* paras. 7-13, 16, to warrant disclosure subject to protective order. This deferred effectiveness provides Connecticut an opportunity to apply for review of the staff determination respecting treatment of these materials. *See* Section 0.459(g) of the Commission's Rules.[90]

41. *California.* This Order is immediately effective with respect to the confidential materials submitted by California on February 2, 1995, other than the AG Excerpts, and is effective with respect to the AG Excerpts February 17, 1995. This deferred effectiveness provides parties to that proceeding an opportunity to apply for review of the staff determination respecting treatment of these materials. *See* Section 0.459(g) of the Commission's Rules.[91] Because this Order defers effectiveness with respect to the AG Excerpts, Commission staff will mask the references to AG Excerpts in the unredacted petition to enable immediate review of the petition. When the Order becomes effective regarding protected disclosure of the AG Excerpts, an unmasked version of the petition will be made available to parties who have filed an executed protective order with the Secretary.

42. Comments on all the confidential materials considered in this Order are due no later than February 24, 1995, and replies are due no later than March 3, 1995. In the event that an application for review or other filing requires the Bureau to stay the effect of its decision in PR Docket No. 94-105, providing for protected disclosure of the AG Excerpts, or its decision in PR Docket No. 94-106, providing for protected disclosure of certain materials submitted by Connecticut on January 20, 1995, this schedule for comments and replies will be maintained for all other elements of the California and Connecticut petitions disclosed under protective orders, and a subsequent Order will establish a separate schedule for comments and replies on materials subject to application for review or other challenge.

## V. ORDERING CLAUSES

43. Accordingly, pursuant to Section 0.459(d) of the Commission's Rules, IT IS ORDERED that the Motion to Accept Supplemental Pleading and the Request for Confidential Treatment filed by the state of Connecticut IS GRANTED IN PARTand IS DENIED IN PART as described in paragraphs 7-16.

44. IT IS FURTHER ORDERED that, pursuant to Section 0.459(d) of the Commission's Rules, the Request for Proprietary Treatment of Documents Used in Connection with Petition to Retain Regulatory Oversight of Cellular Service Rates in California, filed by the state of California on February 2, 1995, IS GRANTED as described in paragraphs 31-34.

45. Parties to PR Docket No. 94-105 who seek to inspect the unredacted version of the California petition and related Appendices filed with the Commission February 2, 1995 may obtain those documents by filing an executed copy of the Protective Order attached to the *First Confidentiality Order* as Appendix A with the Secretary of this Commission. After the executed Protective Order is filed with the Secretary, parties may obtain confidential information from the California Public Utilities Commission or from the Policy Division, Wireless Telecommunications Bureau. For this purpose, Confidential Information shall consist of those materials described in paragraph 34 of the *First Confidentiality Order* and the additional materials described in paragraph 32-34.

46. Parties to PR Docket No. 94-106 who seek to inspect the materials filed by Connecticut on January 20, 1995 may obtain those documents after February 16, 1995, assuming no application for review or stay request has been submitted, by filing an executed copy of the Protective Order attached to the *First Confidentiality Order* as Appendix B with the Secretary of this Commission. After the executed Protective Order is filed with the Secretary, parties may obtain confidential information from the Connecticut Department of Public Utility Control or from the Policy Division, Wireless Telecommunications Bureau. For

[90] 47 C.F.R. § 0.459(g).
[91] *Id.*

this purpose, Confidential Information shall consist of those materials listed in Section 2 of Appendix A of this Order.

47. IT IS FURTHER ORDERED that parties in PR Docket No. 94-105 who elect to inspect the confidential materials submitted by the California Public Utilities Commission on February 2, 1995, and parties in PR Docket No. 94-106 who elect to inspect the confidential materials submitted January 20, 1995 by the Connecticut Department of Public Utility Control, SHALL FILE comments on those materials no later than **February 24, 1995**, and SHALL FILE reply comments no later than **March 3, 1995**.

48. IT IS FURTHER ORDERED that, if confidentiality determinations made in PR Docket Nos. 94-105 or 94-106 by this Order are subject to application for review or other challenge prior to February 17, 1995, parties SHALL FILE comments on confidential materials not subject to challenge on the schedule specified in paragraph 42.

49. This Order is issued under delegated authority and, in order to meet the statutory deadline set forth in Section 332(c)(3)(B) of the Communications Act, 47 U.S.C. 332(c)(3)(B), is effective upon adoption except as noted *supra* paras. 40-42. Parties to PR Docket Nos. 94-105 or 94-106 may, no later than February 16, file an application for review by the Commission of the confidentiality determinations made herein. *See* Section 459(g) of the Commission's Rules, 47 C.F.R. § 0.459(g).

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

Attachments

# Appendix A

Description of items submitted by Connecticut on January 20, 1995 with the state's request for confidential treatment.

## SECTION 1 -- CONNECTICUT MATERIALS THAT WILL BE PUBLICLY DISCLOSED.

**a. Application**
Request to Establish a New Docket on DPUC's Own Motion

**b. Administrative**
Docket Assignments and Schedules

**c. Correspondence**
Testimony of Jan Mizeski, Director of Management and Billing Systems, Escotel Cellular Inc. and The Phone Extension, Inc.

Testimony of Gary Schulman on behalf of Bell Atlantic Systems, Inc.

Objection to Late-Filed Responses of the Cellular Carriers, and Motion to Compel Disclosure of Additionally Requested Financial Information

Connecticut Department of Public Utility Control Reply to Opposition Comments of the Wholesale Cellular Providers

DPUC Investigation into the Connecticut Cellular Service Market and the Status of Competition Protective Order

**d. Motions**
Petition of the Attorney General State of Connecticut to Intervene

Objection to Responses to Interrogatories of the Cellular Carriers, Motion to Deny

Requests For Protective Orders and Motion to Compel Disclosure of Financial Information and Objection to Metro Mobile Requests for Late Filing of Expert Testimony and Motion to Deny Admission of Late-Filed Expert Testimony

**e. Notice of Hearings, Meetings, and Minutes**

**f. Secretary Returns**

DPUC Investigation Into the Connecticut Cellular Service Market and the Status of Competition Draft Decision and Final Decision

**g. Briefs**

Litchfield Acquisition Corporation's Memorandum Opposing the Filing of a Petition with the Federal Communications Commission For Retention of Authority to Regulate Cellular Wholesale Rates

Brief of Metro Mobile Cts of Hartford, Inc. , Metro Mobile Cts of New Haven, Inc., Metro Mobile Cts of Fairfield County, Inc., Metro Mobile Cts of Windham, Inc. and Metro Mobile of New London, Inc.

**h. Reply Briefs**

Litchfield Acquisition's Reply Brief

Reply Brief of the Office of Consumer Counsel

Reply Brief of the Attorney General

Reply Brief of Springwich Cellular Limited Partnership (Erratum to Reply Brief)

Reply of the Attorney General of the State of Connecticut

**i. Late-Filed Exhibits**

LFE-11 Submitted by NCRA
NCRA LRE 10 & 11
Document 7 Changing Channels: Voluntary Reallocation of UHF Television Spectrum

Document 8 Memo of U.S. in Opposition to AT&T's Motion for a Waiver of Section 1(D) of the Decree in Connection w/its Acquisition of McCaw

Escotel Submission of Late File Exhibits Nos. 22, 23, 26, and 27

Springwich LFE No. 21 FCC's Broadband PCS Decision

**j. Video**

**k. DPUC Decision**

l. Exceptions/Comments

Litchfield Exceptions to the Draft Findings and Statement Regarding Desire for Oral Argument

Written Exceptions and Notification of Intent to Make Oral Argument of Metro Mobile

Atty General of Connecticut Comments

Office of Consumer Counsel's Comments

Exceptions of Springwich Cellular

DPUC Investigation Into The CT Cellular Service Market and the Status of Competition

pp. 1-139
" 372-653
" 654-908
" 909-1180
" 1181-1190
" 1430-1439
" 1608-1615
" 1617-1732
" 1733-1783

---

## SECTION 2 -- MATERIALS THAT WILL BE DISCLOSED SUBJECT TO THE PROTECTIVE ORDER IN APPENDIX B OF THE *FIRST CONFIDENTIALITY ORDER*.

a. Late filed exhibit No. 3, Attachment A; dated May 27, 1994
Springwich's five-year projection of cellular numbers.

Late filed exhibit No. 4, Attachment A; dated May 27, 1994
Springwich's long-run incremental analysis cost study and forecast assumptions

Late filed exhibit No. 7, Attachment A; dated May 27, 1994
Springwich's analysis showing actual subscribers vs. theoretical switch capacity.

Late filed exhibit No. 9, Attachment A; dated May 27, 1994
Copy of Springwich Cellular Limited Partnership Agreement

b. Response to request No. TE-3, Attachment A; dated May 6, 1994
Springwich's wholesale financial statements and annual cost and revenue data

**Response to request** No. TE-5, Attachment A; **dated May 6, 1994**
Springwich's cellular end-user churn data

**Response to request** No. TE-6, Attachment A; **dated May 6, 1994**
Springwich's monthly average minutes of use per wholesale subscriber, from 1985 - present.

**c. Response to request** No. TE-6, **dated April 18, 1994**
Bell Atlantic Metro Mobile: Average Usage Per month - Connecticut only

**d. Late filed Exhibit** No. 34, Attachment A; **dated June 16, 1994**
Springwich forecasted revenue calculations

**e. Late filed Exhibit** No. 2, Attachment A; **revised June 6, 1994**
Springwich: planned operating revenues, operating expenses, net operating income, partners' equity, and distributions to partners, for 1991, 1992, and 1993; Springwich Partnership: detailed revenues, operating income and operating expenses, for 1991, 1992, and 1993; Springwich's financial projections.

**Late filed Exhibit** No. 3, Attachments A & B; **revised June 6, 1994**
Springwich's five year projection of its cellular service market share and subscriber base, given various hypothetical marketplace actions by competitors.

**Late filed Exhibit** No. 28, Attachments A, B, & C; **revised June 6, 1994**
Springwich's list of charges from affiliates, description of charges from affiliates, method of allocation, detail of charges from affiliates to Springwich, and Springwich's detailed operating expenses.

**f. Response To TE-6,** date May 18, 1994
Litchfield's monthly average of minutes of use per wholesale subscriber, from Jan. 1992 to April 1994. (Excepting from confidential treatment in any form, however, associated responses to TE-1 and TE-2, describing Litchfield's offering since 1991 and attaching wholesale tariff with 1991 rates, unchanged since.)

**Exhibit B, May 18,** 1994
Litchfield's financial statements.

**g. Litchfield's responses** to Interrogatories TE-1 **through TE-18, filed under letter dated May 5, 1994, received** May 6, 1994 **by DPUC, including,** ***inter alia*****:**
Response to TE-3: appending financial reports for the years ending Jan. 31, 1991 and Jan. 31, 1992 as Appendices B and C (B was in fact later filed under letter dated May 18, 1994), including balance sheets showing assets and liabilities, operating expenses and losses, cash flows and increase in cash.

**h. Late-filed Exhibit** 15, **dated May 27, 1994**

Bell Atlantic Metro Mobile's statement of wholesale operations' revenues and expenses

Late-filed Exhibit 16, dated May 27, 1994

Late filed Exhibit 17, dated May 27, 1994

Bell Atlantic Metro Mobile's statements of wholesale operations' assets and liabilities and wholesale operations' revenues and expenses.

i. Brief of the Attorney General of Connecticut

## SECTION 3 -- CONNECTICUT MATERIALS THAT WILL BE DELETED FROM THE COMMISSION FILES AND WILL NOT BE CONSIDERED IN THE COMMISSION'S DECISION ON THE MERITS.

a. Cellular Resellers Coalition Brief

b. Confidential Hearing of the DPUC Investigation pp. 1373-1429
In camera session for Bell Atlantic

c. Brief of the Office of Consumer Counsel

d. Confidential Hearing of the DPUC Investigation pp. 1440-1545- Testimony

e. Confidential Hearing of the DPUC Investigation pp. 1580-1607- Testimony

f. Initial Brief of Springwich Cellular Limited Partnership

g. Confidential Hearing of the DPUC Investigation pp. 1194-1372- Testimony

h. Confidential Hearing of the DPUC Investigation pp. 1546-1579- Testimony

i. Late-filed Ex. 29, dated June 7, 1994
1993 Unaudited MetroMobile monthly revenues, estimated expense allocation. (Item is not specifically mentioned either in the protective order or in the DPUC's Jan. 9, letter requesting confidential treatment.)

j. Late-filed Ex. 16, dated May 27, 1994, revised June 3, 1994
Connecticut Wholesale Cellular report documenting revenue, expense and subscriber information. (Item is not specifically mentioned either in the protective order or in The DPUC's Jan. 9, letter requesting confidential treatment.)

## APPENDIX B

### Parties Whose Pleadings in PR Docket Nos. 94-105 or 94-106 are Referenced in Second Confidential Treatment Order

California
PR Docket No. 94-105

Airtouch Communications (Airtouch)
California Public Utilities Commission (California or CPUC)
Cellular Carriers Association of California (CCAC)
Cellular Telecommunications Industry Association (CTIA)
Los Angeles Cellular Telephone Co. (L.A. Cellular)
McCaw Cellular Communications, Inc. (McCaw)
US West Cellular of California (US West)

Connecticut
PR Docket No. 94-106

Connecticut Department of Public Utility Control (Connecticut or DPUC)