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DA 95-111

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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

ORDER

Adopted: January 25, 1995 **Released:** January 25, 1995

By the Chief, Wireless Telecommunications Bureau:

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I. INTRODUCTION

1. On August 10, 1993, Congress enacted the Omnibus Budget Reconciliation Act of 1993 (Budget Act), amending Section 332 of the Communications Act of 1934, which, *inter alia*, preempts state and local regulation of the rates and entry of commercial mobile radio services (CMRS).[1] The amended statute enables states to petition the Federal Communications Commission (Commission) for continued or new regulatory authority over the rates of intrastate CMRS offerings. In 1994, the Commission adopted rules for states to follow in submitting their petitions.[2] These rules describe types of "evidence, information and analysis" considered pertinent to the Commission's examination of market conditions and consumer protection.[3]

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[1] *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 ("the Act"), 47 U.S.C. § 332(c)(3)).

[2] 47 C.F.R. §20.13(a); Second Report and Order, Implementation of Sections 3(n) and 332 of the Communications Act, GEN Docket No. 93-252, 9 FCC Rcd 1411, 1504-05 ¶¶ 250-52 (1994) ("Second Report and Order").

[3] *Id.*, ¶ 252.

2. Eight states filed petitions by August 8, 1994, pursuant to the amended Communications Act, seeking to retain their ability to regulate CMRS rates. The Commission must complete all action on each petition, including any reconsiderations, within 12 months after the petition was filed.[4] Dockets were established to govern disposition of these petitions in an orderly fashion.[5]

3. In four of the eight proceedings, states have sought confidential treatment of materials submitted to support their petitions: those filed by the People of the State of California and the Public Utilities Commission of the State of California (collectively, "CPUC" or "California"); by the Connecticut Department of Public Utility Control ("DPUC" or "Connecticut"); by the Public Utilities Commission of the State of Hawaii ("HPUC" or "Hawaii"); and by the New York Department of Public Service ("NYDPS" or "New York"). This Order addresses confidentiality issues arising from those petitions. In general, these states request confidential treatment of supporting materials because they obtained these records subject to confidentiality claims of carriers that oppose the states' substantive petitions. This Order determines the status of materials for which confidential status was requested by California and establishes procedures for treatment of such materials. The same procedures will be applied to materials submitted by Hawaii and New York if they choose to supplement their petitions.

II. SUMMARY OF DECISION

4. California requested confidential treatment under Section 0.459 of the Commission's Rules for several elements of commercial and financial data that it submitted under seal with the Commission and redacted from its publicly filed petition. We have categorized the California data into three groups (A, B, and C), which are defined by the confidential nature of the data, as a result of subsequent consultations with the parties, including a group of six parties, affiliated with cellular companies, that submitted a draft protective order on December 22, 1994 (unlike these acceding parties, other carriers have remained silent, and US West has continued to categorically oppose filing or reliance upon any confidential materials).[6] The six acceding parties have withdrawn any claims for confidential treatment for naterials in Group A. These parties have acceded to limited disclosure under terms of a protective order for materials in Group B. These parties still

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[4] 47 U.S.C. § 332(c)(3)(B). While petitions for reconsideration of the Second Report and Order are pending, the Commission's decisions in that item remain in force, pursuant to the authority of Section 405 of the Communications Act, 47 U.S.C. § 405.

[5] *See* Public Notice, FCC Announces Establishment of Dockets for Materials Filed In Connection With State Petitions for Authority to Regulate Commercial Mobile Radio Service Rates, DA No. 94-1043 (Sept. 22, 1994).

[6] The six acceding parties are AirTouch, BellSouth, CCAC, L.A. Cellular, GTE, and McCaw. *See infra* ¶ 8 for a description of data in each category.

assert unqualified claims of confidentiality (*i.e.*, they oppose any form of disclosure) for materials in Group C. In this Order, we permit disclosure of the Group A materials,[7] adopt a Protective Order (set forth in Appendix A) to be applied to materials in Group B, and determine that materials in Group C need not be considered for confidential treatment at this time.

5. Connecticut initially submitted supporting materials 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, apparently in compliance with Commission Rules.[8] We will address any confidential materials in this recent submission by issuing a decision that will be informed by our analysis of similar materials in this Order. After the initial Connecticut requests were filed, two Connecticut cellular companies filed rate of return materials accompanied by requests for confidential treatment. These carriers ask for limited disclosure of their materials under a protective order already in force in Connecticut.[9] Because the parties to the state proceeding before the DPUC indicated their willingness to be bound by the protective order in the state proceeding, we adopt that protective order, set forth in Appendix B with minor revisions to accommodate this Federal proceeding, for application only to the BAMMC and Springwich submissions in PR Docket No. 94-106.

6. Hawaii and New York offered to supplement their petitions with confidential materials provided that they received advance assurances of "appropriate" treatment.[10] These two states did not in fact submit such supplemental materials, but offered to provide such materials if assured of confidential treatment by this Commission. Thus, the immediate focus of our confidentiality review is limited to California, although our findings here will guide the Bureau's disposition of future supplemental requests for confidential treatment of materials in the proceedings under Section 332(c)(3) of the Communications Act, as amended. In this Order we provide Hawaii and New York with a final opportunity to supplement their

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[7] Group A materials related to US West, however, as well as the other carriers that did not withdraw their claims of confidentiality, are subject only to limited disclosure pursuant to protective order, as discussed further *infra*.

[8] *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").

[9] *See* BAMMC, Request for Non-Disclosure of Confidential and Proprietary Financial Information, PR Docket No. 94-106 (Nov. 8, 1994) ("BAMMC Request"); Springwich, Request for Non-Disclosure of Confidential and Proprietary Financial Information, PR Docket No. 94-106 (Sept. 19, 1994) ("Springwich Request").

[10] *See* Hawaii, Petition for Authority to Extend Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii (Hawaii Petition) at 6; New York, Petition to Extend Rate Regulation (New York Petition) at 7.

petitions, consistent with Commission requirements, with materials that, if confidential, will be disclosed under terms of the Protective Order attached as Appendix A.

III. REQUESTS FOR CONFIDENTIAL TREATMENT

A. Requests for Confidential Treatment

7. ***California***. As noted, California submitted with its petition[11] various supporting materials for which it sought confidential treatment[12] under Section 0.459 of the Commission's Rules.[13] The confidentiality request was amended by the CPUC's September 14, 1994 and September 16, 1994 submissions[14] updating the request in order to exclude materials that are publicly available (collectively, "Request"). The materials filed under seal were redacted from the public version of the California petition.

8. As described in the summary, we have divided these materials into three groups for purposes of reference. California seeks confidential treatment of materials on pages 29-34, 40-41, and 51-54 and in Appendices E, H, J, and M of its Petition. California cites as its bases for nondisclosure Sections 0.457(c) and 0.457(d) of the Commission's Rules, 47 C.F.R.

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[11] *See* California, Petition to Retain Regulatory Authority Over Intrastate Cellular Service Rates (California Petition).

[12] California requested "proprietary" treatment of materials, but as it referenced Sections of the Commission's Rules governing requests for "confidential" treatment, we refer to the filing as a request for confidential treatment of materials.

[13] *See* California, Request for Proprietary Treatment of Documents Used in Support of Petition to Retain Regulatory Authority Over Intrastate Cellular Service Rates, PR Docket No. 94-105 (filed Aug. 9, 1994) ("California Confidentiality Request"); letter from E. Levine, CPUC, to R. Harrison, Land Mobile & Microwave Div., Priv. Rad. Bur., dated Sept. 13, 1994, filed Sept. 14, 1994, at 2 ("September 14 submission"); letter from E. Levine to R. Harrison, dated Sept. 16, 1994, filed Sept. 16, 1994 ("September 16 submission").

[14] *See* September 14 submission, *supra* note 3; September 16 submission, *supra* note 3.

Publicly available information is not protected under Exemption 4. *See* CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987) ("[t]o the extent that any data requested under FOIA are in the public domain, the submitter is unable to make any claim of confidentiality."); Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989).

§§ 0.457(c) and 0.457(d),[15] which parallel Exemptions 3 and 4 of the FOIA.[16] These provisions respectively exempt from mandatory disclosure materials specifically exempted from disclosure by statute, and privileged or confidential trade secrets and commercial or financial information.[17] California asserts that these records were filed with the CPUC by cellular carriers subject to claims that the data were commercially sensitive and proprietary. In addition, California requests confidential treatment for materials referenced on pages 42, 45, and 75 of its Petition, which we refer to as the "AG Excerpts," citing as the bases for nondisclosure Sections 0.457(c) and 0.457(e) of the Commission's Rules, 47 C.F.R. §§ 0.457(c) and 0.457(e), which parallel Exemptions 3 and 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(3), (5) ("FOIA").[18] California asserts that these latter materials were

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[15] Section 0.457(c) provides that records not routinely available for public inspection include:

> Materials that are specifically exempted from disclosure by statute (other than the Government in the Sunshine Act, 5 U.S.C. 552 b): Provided, That such statute (1) requires that the materials be withheld from the public in such a manner as to leave no discretion on the issue, or (2) establishes particular criteria for withholding or refers to particular types of materials to be withheld.

47 C.F.R. § 0.457(c).

Section 0.457(d) provides that records not routinely available for public inspection include "[t]rade secrets and commercial or financial information obtained from any person and privileged or confidential, 5 U.S.C. 552(b)(4) and 18 U.S.C. 1905." 47 C.F.R. § 0.457(d)(2)(i).

[16] *See* September 14 Submission, at 1. California initially sought confidential treatment, in addition, of materials that it later conceded were publicly available. California filed an amended version of its public petition, containing those formerly redacted materials, located on pages 34-35, 40-42, 43-44, and 49 of its Petition, and in Appendices I and, in part, J. *See* September 14 Submission, September 16 Submission.

Exemption 4 of the FOIA exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from any person and privileged and confidential." 5 U.S.C. § 552(b)(4).

Exemption 3 of the FOIA exempts from mandatory disclosure material "specifically exempted from disclosure by statute . . . ." 5 U.S.C. § 552(b)(3).

[17] *Id.*

[18] *See* September 14 submission; September 16 submission; *see also* 47 C.F.R. §§ 0.457(c), (e); 5 U.S.C. §§ 552(b)(3), (5).

Exemption 3 of the FOIA exempts from mandatory disclosure material "specifically exempted from disclosure by statute . . . ," and Exemption 5 exempts "inter-agency or intra-

submitted to the CPUC by the state Attorney General's office, which acquired them in the course of an ongoing antitrust investigation and submitted them to the CPUC on condition that they would not be disclosed publicly without the Attorney General's consent.[19] Six parties affiliated with cellular interests (carriers and trade associations), the "six acceding parties," recently withdrew such claims in part for some of the materials and entirely for others.[20] US West and other, smaller carriers notably did not join this group of parties.

"Group A" materials are data, set forth in Appendix H of the California petition, for which the six acceding parties have entirely withdrawn their claims of confidentiality. The Group A materials include:

- Annualized per-subscriber data including revenues, operating expenses, operating income, and expenditures for plant;[21]
- Annualized subscriber growth for each carrier.[22]

"Group B" materials are those for which the six acceding carriers partially withdrew their claims of confidentiality, in that they accede to limited disclosure of the materials under a protective order. The Group B materials include:

- Information regarding cellular carriers' and resellers' market shares -- including, for example, the individual wholesale market shares of certain cellular licensees in certain years,[23] the combined cellular licensees' market share in specific markets,[24] the aggregate

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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).

[19] *See* California Confidentiality Request, at 2-3; September 14 Submission, at 2.

[20] *See* letter of D. Gross, filed in PR Docket No. 94-105 on Dec. 20, 1994, regarding meeting on that date between counsel for the carriers and Commission staff ("Carriers' December 20 filing"); *see also* letter of D. Gross and K. Abernathy, counsel for AirTouch, filed in PR Docket No. 94-105 on Dec. 22, 1994 (signed in addition by counsel for BellSouth Cellular Corporation, CCAC, L.A. Cellular, GTE, and McCaw, and attaching suggestions for revision of the Commission's draft protective order) ("Carriers' December 22 filing").

[21] California Petition at App. H.

[22] *Id.*

[23] *See* California Petition at 29, App. E.

[24] *Id.* at 32, App. E.

years,[23] the combined cellular licensees' market share in specific markets,[24] the aggregate market share held by resellers in the combined San Francisco and Los Angeles markets,[25] and resellers' annual percentage decline in market share for each market;[26]

- California's computation of the Herfindahl (H) Index for each market;[27]
- Capacity utilization statistics, including percentages of cell sectors in certain Metropolitan Statistical Areas (MSAs) that California asserts were underutilized in certain years, and California's computation of capacity utilization rates;[28]
- The number of subscribers provided with service by each carrier on each specific basic rate plan;[29]
- The aggregate number of customers associated with all discount plans of a given carrier;[30]

"Group C" materials are certain data, found in Appendix J of the California petition, for which the six acceding carriers maintain their claims of unlimited confidentiality. The Group C materials include:

- The number of subscribers provided with service by each carrier on each specific discount rate plan.[31]
- Materials, referenced in the California petition, that were obtained by CPUC from the state attorney general's office.

9. ***Connecticut.*** The Connecticut Department of Public Utility Control ("DPUC" or "Connecticut") initially requested confidential treatment of large volumes of the record from

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[23] *See* California Petition at 29, App. E.

[24] *Id.* at 32, App. E.

[25] *Id.* at 30, App. E.

[26] *Id.*

[27] *See* California Petition at 33-34. Note that California discusses the Herfindahl Index (H Index), which differs by a factor of 10,000 from the Herfindahl-Hirshman Index (the HHI).

[28] *See* California Petition at 51-53, App. M. California states that in the CPUC investigation of the wireless industry, the Administrative Law Judge (ALJ) has agreed to treat these materials as confidential. *See* California Confidentiality Request, at 2; September 14 Submission app. (California Administrative Law Judge's Ruling Granting in Part Motions for Confidential Treatment of Data, I.93-12-007, at 6 (capacity utilization data not included in list of materials to be publicly disclosed)).

[29] *See* California Petition, App. J.

[30] *See id.*

[31] *See* California Petition, App. J.

its investigation of the Connecticut cellular market.[32] We returned these materials to the state because its request did not segregate the allegedly confidential materials from publicly available and non-confidential information, nor identify the allegedly confidential materials, in accordance with Section 0.459(a) of the Commission's Rules, 47 C.F.R. § 0.459(a). Moreover, Connecticut did not describe the basis for its assertion that some or all of the submitted materials were confidential, as required by Section 0.459(b) of the Commission's Rules, 47 C.F.R. § 0.459(b), nor was the request filed with the Commission's Secretary in accordance with Section 1.4(f) of the Commission's Rules, 47 C.F.R. § 1.4(f). Connecticut subsequently returned with a revised request for confidential treatment and segregated accompanying materials.[33] This latest submission appears to remedy the defects of the prior Connecticut filings.

10. In addition, the two cellular licensees in Connecticut that are parties to this Federal proceeding, Bell Atlantic Metro Mobile Companies ("BAMMC") and Springwich Cellular Limited Partnership ("Springwich"), requested confidential treatment of rate of return data and analyses submitted to this Commission under seal.[34]

11. ***Hawaii.*** Hawaii states in its Petition that information regarding the number of customers of each CMRS company in the State is unavailable, due to those companies' reluctance to provide the HPUC with subscriber data absent a guarantee that the information will be protected from disclosure to other regulated companies.[35] Hawaii neither submits any information under seal nor formally requests confidential treatment of information. The HPUC makes no reference to the Commission's Rules governing confidential treatment of information or the Freedom of Information Act, nor does Hawaii assert that the number of subscribers is commercially sensitive.

12. ***New York.*** New York states in its Petition that carriers submit their "operating expenses and revenues, plant investment, and organizational and pricing information" to the NYDPS, which in turn compiles those data into annual reports.[36] New York is willing to submit the information gathered for its 1993 report on the status of cellular competition, but

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[32] On November 20, 1994, Connecticut delivered two Requests for Confidential Treatment of Materials to a Commission staff attorney. The second Request asked for confidential treatment of what appeared to be the entire docket of the state's Investigation into the Connecticut Cellular Service Market and the Status of Competition, Connecticut Department of Public Utility Control Docket No. 94-03-27. These requests were not filed with the Office of the Secretary.

[33] *See* Third Connecticut Request.

[34] *See* BAMMC Request; Springwich Request.

[35] *See* Hawaii Petition, at 6.

[36] *See* New York Petition at 7.

asserts that it will only file such information "pursuant to appropriate safeguards."[37] The NYDPS does not specify the safeguards to which it refers,[38] nor does it explain why it considers this information confidential. Such an explanation is necessary to satisfy Section 0.459(b) of the Commission's Rules, 47 C.F.R. § 0.459(b), which requires a statement of the reasons for nondisclosure and of the facts underlying the request for proprietary treatment.

B. Comments

13. The only comments received regarding confidentiality address the California request. The National Cellular Resellers Association (NCRA) has moved that the material be either disclosed or made available for review under a protective order, so as to provide sufficient opportunity for public comment on the California Petition.[39] Conversely, Nextel, a Specialized Mobile Radio licensee, asserts that there is adequate evidence in the public record to support continued intrastate rate regulation of cellular service providers.[40]

14. Facilities-based cellular carriers, on the other hand, have filed oppositions, and the Cellular Carriers Association of California filed a motion, contending that the state petition should be dismissed for failure of the state to sustain its burden of proof, as the material subject to confidentiality claims cannot be part of the proceeding's record because the state has issued no order releasing this material to the public (i.e., to the Commission).[41] Further, the carriers argued that without disclosure of the redacted information, interested parties are deprived of an opportunity to comment on data that may form the basis for the Commission's ultimate decisions on the merits in this proceeding.[42] These parties contended

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[37] *Id.* New York states, "should the [Commission] require specific information to make its determination, the company-specific information will be provided pursuant to appropriate safeguards." New York Petition at 7.

[38] *Id.*

[39] *See* NCRA Request for Access under a Protective Order, at 2.

[40] Nextel Reply at 15-16 & n.27.

[41] *See* AirTouch Opposition at 8 n.14, 9 (also contending that carriers' due process rights and parties' right to respond were violated because the CPUC's September 14th disclosures were submitted only two days before the deadline for filing responses to the Petition); Bay Area Cellular Telephone Company (BACTC) Opposition at 6, 3; CCAC Opposition at 107; Cellular Carriers Association of California Motion to Reject Petition or, Alternatively, Reject Redacted Information (Sept. 19, 1994) (CCAC Motion) at i-ii, 2, 8-16; L.A. Cellular Response to Petition at 6, 8 & n.7; McCaw Opposition at 28-29. *Cf.* AirTouch Opposition to NCRA Request, at 2-4, 9 (asserting that NCRA fails to state any justification for disclosure, and that the record as it stands is sufficient to permit the Commission to render a decision).

[42] *Id.*

that such an opportunity is required by Commission Rules, due process considerations, and the Administrative Procedure Act.[43] The cellular licensees did not seek full public disclosure of the redacted materials, however, because they contended that the data is indeed competitively sensitive.[44]

15. Initially, facilities-based California cellular carriers asserted generally that all of the data redacted by California is competitively sensitive, and its disclosure would lead to competitive injury.[45] The Cellular Carriers Association of California (CCAC), for example, asserted that subscriber and rate plan information is proprietary and sensitive and could be used to carriers' competitive disadvantage.[46] CCAC also contended that disclosure of aggregate numbers of subscribers (wholesale and retail) in total and on discount and basic rate plans, and rate plan information would permit competitors to tailor their marketing approaches to certain market groups, a strategy not possible in a truly competitive market.[47] CCAC asserted, for example, that competitors could copy successful rate plans, and that, if competitors learn which cell sites are most congested, they might target those areas for new advertising campaigns.[48] BACTC and LACTC argued that licensees' interest in nondisclosure outweighs NCRA's interest in viewing the data[49] and the government's interest in weighing this information in its decision on the merits.[50]

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[43] *Id.*

[44] *See, e.g.*, AirTouch Opposition at 9; CCAC Motion at 16-18.

[45] *See, e.g.*, AirTouch Opposition at 9; CCAC Motion at 16-18; AirTouch Opposition to NCRA Request for Access, at 1-2, 5-8; Bay Area Cellular Telephone Company (BACTC) Opposition to NCRA Request for Access, at 4-6; CTIA Opposition to NCRA Request, at 1-3; Los Angeles Cellular Telephone Company (LACTC) Opposition to NCRA Request for Access, at 5-8.

[46] CCAC Motion at 16-18.

[47] *Id.*

[48] CCAC Opposition to NCRA Request for Access, at 4-6. CCAC also notes that it provided this Commission with a study of the California cellular market that aggregates cellular rate trend information, and states that therefore the public record is sufficient to enable the Commission to make findings on the issues of the extent of cellular competition and the reasonableness of cellular rates, rather than resorting to an examination of the specific data submitted by California and public disclosure of the specific data. *Id.*, at 8-10.

[49] *See also* CTIA Opposition to NCRA Request for Access, at 1-3 (NCRA's request is not sufficiently supported); LACTC Opposition to NCRA Request for Access, at 4-5; GTE Informal Comment, by letter dated Oct. 27, 1994 ("GTE Informal Comment").

[50] BACTC Opposition to NCRA Request, at 12-15; LACTC Opposition to NCRA Request, at 5-8.

16. In addition, BACTC and GTE contended that the redacted data is not important to the CPUC's presentation or to the Commission's record.[51] GTE asserted that data indicating a decline or increase in market share are irrelevant to the competitiveness of a market, and that market share data does not indicate that a carrier earned a given share of the market due to failure of market competition.[52] GTE also contended that the information regarding total numbers of subscriber units, used by California to compare the relative success of carriers' offerings, reflects carrier growth without indicating how carriers competed for subscribers or why subscribers chose particular carriers.[53] The redacted financial data, GTE asserted, could illustrate a carrier's comparative management ability, rather than the extent of structural competition.[54] Similarly, GTE stated, the number of customers per rate plan does not illustrate levels of competition nor whether carriers are colluding or otherwise engaged in anticompetitive cooperation.[55] GTE also stated that there is no nexus between competition and cellular system capacity utilization.[56]

17. AirTouch, BellSouth Cellular, CCAC, L.A. Cellular, McCaw, and GTE, however, recently agreed to unlimited disclosure of the per-subscriber financial information and subscriber growth percentages for 1989-93, found in Appendix H to the California petition (the "Group C materials").[57] These carriers also agreed to limited disclosure of the "Group B" materials, pursuant to protective order, provided that the materials in Appendix J of the California Petition are aggregated by this Commission or the CPUC prior to disclosure (except that these carriers did not object to disclosure, without aggregation, of the total numbers of customers for each market on all basic rate plans and the total numbers of customers for each market on all non-basic rate plans).[58] These carriers nevertheless maintained their objection to disclosure on any other basis of the "Group C" data, consisting of the number of subscribers on each carrier's specific discount plans, in Appendix J, and also their categorical objection to disclosure in any form of the materials on pages 42, 45, and 75 of the California Petition (materials that California asserts were gathered in the course of the state Attorney General's investigation of the cellular industry).

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[51] *Id.* at 15-18; GTE Informal Comment, at 2-4.

[52] GTE Informal Comment, at 2-3.

[53] *Id.* at 10.

[54] *Id.*

[55] *Id.* at 4.

[56] *Id.* at 4-5.

[57] *See* Carriers' December 22 filing, at 2.

[58] *See* Carriers' December 20 filing; Carriers' December 22 filing.

18. California argues that any potential lack of opportunity to respond to redacted materials is a crisis of the carriers' own making.[59] The licensees voluntarily chose to forego this opportunity, the CPUC contends, as not one facilities-based carrier asked to review these materials under protective order or any other arrangement.[60] Furthermore, California argues, its own due process rights would be violated if the redacted data cannot be considered notwithstanding its relevancy and materiality to the CPUC petition.[61] In addition, California notes that much of the redacted information was made available for limited disclosure under a protective order currently in effect in California.[62]

19. The facilities-based cellular carriers and their trade association also argue that the CPUC's submission of confidential data violates state law, because the CPUC has issued no order releasing the redacted information to the public.[63] The Resellers respond that this Commission is not authorized to rule on procedural issues involving state law, but is

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[59] CPUC Reply at 107.

[60] *Id.*

[61] CPUC Reply at 2 & n.1 (noting that the carriers claim that the redacted version does not sustain California's burden of proof).

[62] California notes that none of the cellular carriers have ever challenged the CPUC administrative law judge rulings allowing protected disclosure of all information. It also states its belief that none of the carriers have ever refused to provide upon request to any party to the CPUC proceeding, including a cellular competitor, the information submitted to the CPUC. California Comments in Response to Draft Protective Order, at 3-5.

[63] BACTC, for example, states that Section 583 of the Calif. Pub. Util. Code makes it a criminal misdemeanor for any CPUC officer or employee to divulge information furnished to the CPUC by a public utility or affiliated business, except matters specifically made open to public inspection by statute, unless by order of the commission or a commissioner in the course of a hearing or proceeding. In furnishing an unredacted version to this Commission without issuing such an order, BACTC asserts that CPUC officers and employees violated CPUC's General Order No. 66-C, which makes it clear that confidential information obtained by the CPUC is not open to public inspection. BACTC Opposition at 7-8. *Accord,* AirTouch Opposition at 9 n.17; CCAC Motion at i, 5-6; L.A. Cellular Response to Petition at 3.

CCAC and L.A. Cellular also note that Section 11181(f) of the California Government Code provides that the Attorney General's Office may "divulge evidence of unlawful activity discovered . . . from records or testimony not otherwise privileged or confidential, to the Attorney General or to any prosecuting attorney [responsible] for investigating the unlawful activity discovered, or to any governmental agency responsible for enforcing laws related to the activity discovered." These carriers assert that because the CPUC does not have authority to enforce antitrust violations, the California Attorney General's Office was not authorized to release the information to the CPUC. CCAC Motion at 6-8; L.A. Cellular Response to Petition at 6 n.4.

authorized to rule on confidentiality issues, which involve this Commission's own rules.[64] In addition, they cite California regulations in support of the contention that no procedural informality will invalidate the CPUC's action.[65] California argues that disclosure to the FCC does not constitute public disclosure under its state statute.[66]

20. Finally, CCAC and US West argued that the harm that would result from disclosure is recognized in the August 8 California ALJ ruling keeping this data confidential.[67] As NCRA and CRA note, however, that California ALJ ruling did not maintain strict confidentiality, but in fact ordered limited disclosure of much of the Group A data pursuant to the terms of a State protective order now in effect,[68] and that order was never formally contested.[69] Thus, in California, the parties to this Federal proceeding already have access to much of the Group A information.[70] This tends to vitiate the cellular carriers' assertions that even limited disclosure would lead to competitive harm. NCRA asserted that a protective

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[64] *See, e.g.*, Reply of the Cellular Resellers Association, Cellular Service, Inc. and ComTech Mobile Telephone Company (collectively, "Resellers"), at 25.

[65] The Resellers cite Sections 454(b) and 1701 of the Calif. Pub. Util. Code, which provide that the CPUC may adopt rules regarding showings required for proposed rate changes and procedures for disposition thereof either with or without a hearing, and that no informality in acquiring evidence shall invalidate a CPUC decision. *Id.*, at n.23. In addition, the Resellers cite CPUC Rule 14.2 of Practice and Procedure, which states that the CPUC may use its rulemaking authority for proceedings to establish rules and guidelines for classes of regulated entities, proceedings on rate making for regulated entities, and proceedings to modify prior CPUC decisions adopted by rulemaking. *Id.*

[66] California Comments in Response to Draft Protective Order, at 5-7.

[67] CCAC Motion at 16-18; US West Opposition to NCRA Request, at 1-4.

[68] *See* CRA Reply at 27 & n.24; NCRA Request for Access to California Petition Pursuant to the Terms of a Protective Order, at 2-3. California's protective order makes available information including the aggregate number of subscribers on each carrier's discount and basic rate plans, and the aggregate number of subscribers divided between retail and wholesale service. *See* Administrative Law Judge's Ruling Granting In Part Motions for Confidential Treatment of Data, I.93-12-007, at 6-7 (July 19 Ruling); Administrative Law Judge's Ruling Granting Motion for Modification of July 19, 1994 Ruling, I.93-12-007, at 7. In addition, California ordered disclosure of the total number of cell site sectors in operation (an aspect of capacity utilization). *See* July 19 Ruling, at 6.

[69] *See ex parte* filing of E. Levine, PR Docket No. 94-105, Jan. 17, 1995.

[70] *See* CRA Reply at 27 & n.24.

order would be the appropriate vehicle to provide the public with an adequate opportunity to comment on confidential information in the California petition.[71]

21. Commission staff have solicited public input at every stage regarding all aspects of the confidentiality issues. For example, FCC staff conducted a meeting September 30, 1994 on confidentiality issues, and by Public Notice on that date, sought comment on a draft protective order considered at that meeting.[72] Since that Public Notice, the Commission staff have received several *ex parte* communications from parties to the California proceeding, as well as comments on the draft protective order, and a proposed revision of the protective order submitted by several carriers on December 22, 1994.[73] Moreover, parties filed comments regarding the CCAC motion to reject the petition or, alternatively, to reject the redacted information, and the NCRA request that the Commission grant access to the redacted information pursuant to a protective order.[74] We have incorporated the resulting public debate in our decisions here.

C. Request for Production of Data

22. Questions arose not only with regard to the California Petition, but also regarding materials filed in support of other parties' pleadings. On October 11, 1994, California filed an emergency motion to compel production of data underlying the affidavits of Dr. Jerry Hausman that were filed in support of the AirTouch and CTIA oppositions to

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[71] NCRA Request for Access, at 2-3; NCRA Response to Oppositions to NCRA Request, at 1-4.

[72] Public Notice of Comment Sought on Draft Protective Order, DA 94-1083 (Sept. 30, 1994) (announcing that all interested parties could comment by October 7, 1994 on a draft protective agreement that had been distributed to all parties of record). All parties to the proceeding were given actual notice of the meeting and permitted to participate either in person or by telephone.

[73] *See, e.g.*, Carriers' December 20 filing; Carriers' December 22 filing. Parties filing Comments on the Draft Protective Order included AirTouch, Bay Area Cellular, CCAC, CRA, CTIA, GTE, L.A. Cellular, McCaw, PageNet, California, and US West.

[74] *See* CCAC Motion; Request for Access to California Petition for State Regulatory Authority Pursuant to the Terms of a Protective Order, filed by the National Cellular Resellers Association, at 3 (Sept. 19, 1994) (NCRA Request for Access). CRA filed comments on the CCAC Motion, and AirTouch, Bay Area Cellular, CCAC, CTIA, L.A. Cellular, McCaw, and US West filed comments on the NCRA request. On October 7, 1994, the Private Radio Bureau issued an Order finding that that the NCRA request was moot and dismissing it on that ground. Order Waiving Certain Pleading Rules and Denying Deferral of Filing Dates, DA No. 94-1117, PR Docket No. 94-105 (Oct. 7, 1994).

California's petition.[75] California also moved to strike the Hausman affidavit attached to the CTIA Opposition, for failure to include the data underlying Hausman's analyses.[76] California contends it has the right to review and respond to all information reviewed or relied on by commenters opposing its petition, including the underlying data used by Hausman and not provided by AirTouch or CTIA to the Commission or to other commenters.[77] CTIA opposed the CPUC's motion to strike, asserting that it does not have the data requested by CPUC, that it is unable as a trade association to authorize release of data provided directly to Hausman by member carriers, and that the CPUC failed to provide a legal basis for its request. These procedural issues are addressed below, following discussion of the confidentiality issues raised by the California petition.

IV. DISCUSSION

A. Requests Filed by the State of California

23. *Group A and Group B Materials: Confidentiality Analysis.* Parties may request confidential treatment of materials submitted to the Commission by submitting a request for nondisclosure that is consistent with the provisions of the FOIA.[78] California specifically claims that the market share data, the CPUC's computation of the H Index, the information regarding the number of subscribers associated with each carrier's basic rate plan and several

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[75] Emergency Motion to Compel Production to the California Public Utilities Commission of Information Contained in Opposition to California's Petition to Retain State Regulatory Authority over Intrastate Celular Service Rates (Oct. 11, 1994).

Hausman analyzed cellular pricing and competitiveness on the national level, in part on the basis of information provided directly by carriers and in part on the basis of information that he obtained from a consulting firm, Paul Kagan Associates.

[76] Motion by California to Strike Affidavit and Testimony of Jerry A. Hausman Appended to and Discusssed in the Opposition of CTIA (Oct. 11, 1994). The motion to strike followed a sequence of letters between CPUC and CTIA. The most recent of these was a CPUC letter of Oct. 4, 1994, seeking a firm commitment from CTIA by Oct. 7, 1994, to produce the requested information. The CPUC states in its motion to strike that CTIA did not respond to that letter.

[77] In support of its contention, California cites the Federal Rules of Evidence and three decisions: Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977); Nat'l Black Media Coalition v. FCC, 791 F.2d 1016 (2d Cir. 1986).

[78] *See* 47 C.F.R. § 0.459(d). In addition, as a threshold matter, requests for confidentiality must comply with the Commission's rules setting forth procedural requirements for submitting such requests. *See* 47 C.F.R. §§ 0.457, 0.459, 0.461.

discount plans, per-subscriber revenue and expenditure data, and capacity utilization data, all of which the CPUC redacted from its publicly filed petition, are entitled to confidential treatment because they would be exempt from disclosure under Section 0.457(d) of the Commission's Rules, which parallels Exemption 4 of the FOIA. That exemption permits withholding of "trade secrets or commercial or financial information obtained from a person and privileged or confidential."[79]

24. As a threshold matter, we note that we accept California's interpretation of its own state statute: as noted above, California argues that disclosure to the FCC does not constitute public disclosure under its state statute, and accordingly the materials at issue are properly before us.[80] We conclude that much of the information redacted by California, including the Group A and Group B data, consists of materials that may be withheld from disclosure pursuant to Section 0.457(d) of the Commission's Rules, 47 C.F.R. § 0.457(d).. The Commission has in some cases found that market share information is confidential, because disclosure could identify product or geographic market trends ripe for expansion.[81] Disclosure of California's calculation of the H Index might permit competitors to derive market share information. Data that would reveal a carrier's profit margins also "would be likely to enable a competitor to inflict substantial competitive harm."[82] In addition, courts have found that a company's actual costs, break-even calculations, and profits and profit rates are confidential and disclosure is likely to result in competitive harm.[83] Thus, disclosure of the per-subscriber revenues, operating expenses, expenditures for plant, and operating income statistics for cellular carriers could cause competitive injury. Consequently, we conclude that

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[79] 5 U.S.C. § 552(b)(4); 47 C.F.R. § 0.457(d). The issue of trade secrets is not raised here, because the limited disclosure of information at issue in this Order is authorized by Section 0.457 of the Commission's Rules, 47 C.F.R. § 0.457. *See* CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1151-52 & nn.138-39 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); Chrysler v. Brown, 441 U.S. 281, 301 (1979).

[80] California Comments in Response to Draft Protective Order, at 5-7.

[81] *See, e.g.*, 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).

[82] 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*)).

[83] *See* Gulf & Western Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979).

disclosure of much of the carrier information submitted by California would be likely to enable a competitor to inflict substantial competitive harm.

25. For these reasons we grant the request for proprietary treatment filed by California to the extent that it seeks confidential treatment for the Group A and Group B materials,[84] except as to several carriers who withdrew their confidentiality claims for the Group A materials.[85] The Group A materials pertaining to those carriers will be disclosed because they have not maintained their claim that disclosure is likely to cause them competitive injury. Because carriers aside from the acceding parties did not withdraw their confidentiality interests, and our preliminary review indicates that these materials involve commercial and financial records not routinely required to be made public by Section 0.459 of the Commission's Rules, the Group A data pertaining to carriers other than the six acceding carriers will be subject to limited disclosure under the Protective Order attached as Appendix A. This will permit counsel for other parties to examine the data for the limited purpose of participating in this proceeding. As many of these materials have been disclosed in the California state investigation subject to protective order, and six carriers have acceded to their full public disclosure in this proceeding, US West and other non-acceding parties will bear a heavy burden of persuasion if they seek to overturn this determination.

26. In regard to the Group B data, as described below, we grant the California request but, similarly, subject the data to limited disclosure under the Protective Order attached as Appendix A. In so doing, we conclude that Section 0.457(d) of the Commission's Rules, implementing 5 U.S.C. 552(b)(4) ("Exemption 4" of the Freedom of Information Act (FOIA)), protects from unqualified disclosure the redacted materials on pages 29-34, 40-41, 51-54 and in Appendices E, F, J, and M of California's Petition (Group B data).[86]

27. 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 a FOIA exemption, the government retains discretion to order release based on public interest grounds.[87] In

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[84] Again, Group C is our designation for the the per-subscriber financial information and subscriber growth percentages for 1989-93, found in Appendix H to the California petition

[85] *See* Carriers' December 20 filing; Carriers' December 22 filing.

[86] These materials, listed *supra* Sec. II(A), consist of market share statistics, California's computed H Index for each market, capacity utilization statistics, the number of subscribers on each carrier's specific discount and basic rate plans, the number of subscribers associated with all discount plans of a given carrier, annualized per-subscriber data, and annualized subscriber growth statistics.

[87] *Chrysler v. Brown,* 441 U.S. at 290-94.

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.[88]

Alternatively, even when information is critical to resolution of a public interest issue, the competitive threat posed by widespread disclosure under the FOIA[89] may outweigh the public benefit in disclosure.[90] 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.[91] 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.[92] 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.

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

[89] 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).

[90] *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).

[91] *See id.*

[92] *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).

28. 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.[93] 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.[94] We note that the Group A information are likely to be very useful to the Commission's analysis on the merits, in an indirect fashion. These data elements can be used as evidence that costs have fallen since 1989, and they explain the price movements. The data regarding expenditures for plant can be used to develop weights to average rate of return over the whole state. As California's burden includes proving arguments regarding rates of return and rate levels,[95] the Group A data is likely to be relevant to proving California's case on the merits. Based on this analysis, we order only limited disclosure of the Group A data.[96]

29. Following the precedent noted above, we now consider the extent to which the Group B information is reasonably likely to inform the Commission's ultimate decisions on the merits, and find that this data is likely to be relevant to proving California's case on the merits. California states in its petition that the market share information is offered to prove California's contention that relatively stable shares of the wholesale cellular market demonstrate limited competition, that resellers' collective share of the retail market for cellular services is dwindling, and that cellular licensees' share of the retail market is increasing.[97] The CPUC provides its calculation of the H Index for four markets in support of its argument that the marketplace is becoming less competitive.[98] The CPUC provides capacity utilization data to support its assertion that high prices for cellular service are not due solely to spectrum scarcity.[99]

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

[94] 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).

[95] *See* 47 C.F.R. § 20.13.

[96] Furthermore, we permit unlimited disclosure of this data as related to the six acceding carriers.

[97] California Petition at 29-32.

[98] *Id.* at 33-34.

[99] *Id.* at 51-53.

30. We find, without suggesting any view of the merits, that these submissions could easily constitute logical and relevant foundations for the arguments they are offered to prove, and we find that those arguments are relevant to the demonstration California is required to make, 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 Group B data is sufficiently relevant to disposition of California's petition that it cannot be excluded from consideration of the issues on the merits. Such exclusion would in effect deny California 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 A for use in the California proceeding, and we order limited disclosure, pursuant to the Protective Order, of the Group B data.

31. *Group C Materials.* The materials in Group C present different considerations: one data element is clearly not material to a Commission decision, and the other has not been authenticated as required by Section 20.13 of the Commission's Rules, 47 C.F.R. § 20.13.

32. The data in Appendix J of the California Petition, regarding the numbers of subscribers on each of the carriers' several discount rate plans, is not essential to California's arguments, while it poses substantial potential for competitive harm to the carriers. The carriers largely express concern about disclosure of the number of customers on each carrier's several specific discount plans,[100] and these statistics are neither included nor referenced in California's Petition. The carriers persuasively argue that even limited disclosure of these data would permit their competitors to target and attract groups of customers with great specificity by mirroring the existing discount plans. Thus, the Appendix J data will be disclosed only in part. Under the Protective Order, counsel may view Appendix J data including (1) the total number of customers (wholesale and retail) per carrier per MSA; (2) customer growth rates per MSA (percentages that can be derived with reasonable precision from customer totals); and (3) the number of customers on each carrier's basic plan per MSA. We will, however, delete from information on file with this Commission the number of customers subscribing to each carrier's specific discount plans. That information will not be disclosed in any manner in this proceeding, and it will be returned to the CPUC.

33. We have also included under Group C data the several textual passages in the California Petition that we refer to as the Attorney General (AG) Excerpts. These consist of references, on pages 42, 45, and 75, 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

[100] Carriers' December 20 filing; Carriers' December 22 filing.

Attorney General's consent.[101] The AG excerpts are based on internal cellular company documents that do not appear in full in the confidential version of the California petition.[102] Section 20.13(2)(vi) of the Commission's Rules, 47 C.F.R. § 20.13(2)(vi), expressly sets forth a strict standard for authentication, requiring support in the form of an affidavit by a person with personal knowledge, for allegations relevant to anti-competitive or discriminatory practices or behavior. Such allegations are at issue here; California is attempting to provide evidence of anti-competitive or discriminatory practices or behavior by cellular licensees. Thus, our rules require states to submit the appropriate affidavits, at a minimum,[103] before such contentions are even entertained. Because these materials were not filed with the necessary supporting affidavits, they will not be considered by the Commission and therefore we do not require disclosure of those Excerpts pursuant to the attached protective order. For this reason, and because we are permitting limited access to some of the Group A materials, we grant the CCAC Motion in part and deny it in part. If California wishes, it may re-file the Excerpts, accompanied by supporting materials that comply with Section 20.13 of the Commission's Rules,[104] and a request for confidential treatment, no later than January 30, 1995.

34. For purposes of PR Docket No. 94-105 and the Protective Order attached as Appendix A, therefore, Confidential Information shall consist of:

(GROUP B) a. Market share data as contained in pages 29 to 34 of the unredacted Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain State Regulatory Authority Over Intrastate Cellular Service Rates (Petition) and Appendix E thereto. The data on page 29 is disaggregated by carrier, and on pages 30-34, aggregated by market. Some data on page 30 is further aggregated by combining data in two markets. The data in Appendix E is aggregated as to resellers by market, and disaggregated for cellular carriers.

(GROUP B) b. Capacity utilization figures as contained in pages 50-53 of the unredacted Petition, and in Appendix M. This data is aggregated for the Los Angeles

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[101] *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, 1988) (*California Confidentiality Request*); September 14 Submission, at 2.

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

[103] A description or photocopy of at least the relevant portion of the source materials, *e.g.*, although not required, would provide additional indicia of context and origin of the excerpts.

[104] 47 C.F.R. § 20.13.

market on page 51 and Appendix M-1, and disaggregated as to specific carriers on pages 52-53 of the Petition and Pages M-1 to M-3 of Appendix M.

(GROUP B) c. Disaggregated, carrier-specific data regarding the number of customers per year, per rate plan, both wholesale and retail, as contained in Appendix J to the Petition, with the exception of the numbers of customers on each carrier's specific discount plans, which shall not be disclosed.

(GROUP A, BUT NOT PERTAINING TO THE SIX ACCEDING CARRIERS) d. Only for carriers other than those that we refer to as the six acceding carriers, annualized per-subscriber financial data, including revenues, operating expenses, expenditures for plant, operating income, and subscriber growth percentages for 1989-93, found in Appendix H to the Petition.

B. California Motion to Compel Production of Data

35. On October 11, 1994, California filed an emergency motion to compel production of data underlying the affidavits of Dr. Jerry Hausman that were filed in support of the CTIA and AirTouch Oppositions to the California petition.[105] California also moved to strike the Hausman affidavit attached to the CTIA Opposition, for failure to include the data underlying Hausman's analysis.[106] California contends that it has the right to review and respond to all information reviewed or relied on by commenters opposing its petition, including the underlying data used by Hausman and not provided by AirTouch or CTIA to the Commission or to other commenters.

36. In opposition to the CPUC's motion to compel production, CTIA asserts that it does not have the data requested by CPUC, that it is unable as a trade association to authorize release of data provided directly to Hausman by member carriers, and that the CPUC failed to provide a legal basis for its request.[107] CTIA argues that it does not have the information provided to Hausman by cellular carriers or Paul Kagan Associates.[108] CTIA also asserts that PR Docket No. 94-105 is neither an adjudicatory hearing nor a rulemaking required by law to be made on the record after opportunity for hearing, and contends that, absent a FOIA

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[105] Emergency Motion to Compel Production, *supra* note 75.

[106] Motion to Strike, *supra* note 76.

[107] Opposition of CTIA to the Motion by California to Strike Affidavit and Testimony of Jerry A. Hausman (Oct. 17, 1994).

[108] *Id.* at 2.

determination, compelling production of these records would convert the proceeding into a hearing that would require production of the documents as a precondition to designation for hearing.[109] In addition, CTIA states the Commission has previously ruled against discovery of sensitive documents prior to designation, or in the investigatory stage of a proceeding.[110]

37. Limited discovery is permitted by the Commission's Rules not only in situations involving proceedings designated for hearing, but also in certain specific contexts such as proceedings to prescribe a rate of return.[111] No such proceedings are involved here, however, and the California proceeding has neither been designated for hearing nor subjected to discovery procedures, nor does Section 20.13 of our Rules provide for discovery in these proceedings. The discretion accorded regulatory agencies in ordering their procedures, when specific matters are not expressly subjected to the requirements of formal rulemaking or adjudicative process by statutory requirement, is well established.[112] The cases that California cites do not support its argument, because they involve situations in which the Commission or other regulatory authority had actual custody of the records in dispute, while in this instance the Commission has not received Hausman's supporting data from any source. Nor are the Federal Rules of Evidence, which govern presentation of testimony in trial proceedings, at issue in an administrative context that, as noted, has not been designated for formal adjudicative hearing. We have granted parties every opportunity for formal and informal input, but permitting motion practice and discovery at this late stage would burden the Commission to the extent that we could not meet our statutory deadline.[113] For all these reasons, we dismiss California's motions, and we similarly will dismiss any future discovery requests in these state petition proceedings as improperly filed without sanction in the Commission's Rules.

38. At the same time, the absence of these supporting materials from the record substantially discounts the weight to be accorded Hausman's analysis, which is premised in

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[109] *Id.*

[110] *Id.*

[111] *See* 47 C.F.R. §§ 0.311, 65.1, 65.103.

[112] *See, e.g.*, Western Union v. F.C.C., 804 F.2d 1280, 1292 (D.C. Cir. 1986) (the Commission has broad discretion in choosing the procedures the Commission will use to perform its statutory duties); Bell Telephone of Pennsylvania v. F.C.C., 503 F.2d 1250 (3rd Cir.), *cert. denied*, 422 U.S. 1026 (1974) (the Commission has broad discretion to use differing procedures in differing contexts as required for the proper dispatch of business).

[113] CTIA is inaccurate in its assertion that compelling production of the Hausman supporting data would transform this proceeding into a formal adjudication. Although our rules provide that discovery rules may be followed after a proceeding is designated for hearing, they do not state that application of discovery rules, in part or in full, will turn a proceeding into a formal adjudication. *See* 47 C.F.R. §§ 1.311, 1.311(a).

any event on data from other states. If AirTouch and CTIA wish the Commission to consider Hausman's analysis in its substantive review of California's petition, those carriers must provide the Commission with the underlying data used to conduct Hausman's analysis, accompanied by a request for confidential treatment if appropriate pursuant to Sections 0.457, 0.549 and 0.461 of the Commission's Rules, 47 C.F.R. §§ 0.457, 0.549 and 0.461, by January 30, 1995. If the carriers choose this approach, and if the Commission determines the request for confidential treatment is justified, then California and other parties in Docket No. 94-105 will be afforded access to that data on the same schedule that is established in para. 42 for other supplemental filings, and the terms of the protective order in Appendix A.

C. Connecticut Requests; Offers to Supplement Petitions in Hawaii and New York Proceedings

39. As noted *supra* in paragraphs 5 and 9, Connecticut has re-submitted confidential materials, apparently in compliance with the Commission's Rules.[114] As this filing was submitted a scant four business days prior to release of this Order, we will examine it on the same schedule as set forth in paragraphs 41 and 42 in regard to supplemental confidential submissions from New York and Hawaii.

40. The rate of return data and analyses that Springwich and BAMMC submitted to the FCC under seal[115] are already subject to a protective order in the DPUC investigation, and the carriers simply ask that the existing order be adopted in the instant proceeding. The carriers' requests comply with the Commission's procedural rules, and our review satisfies us that these materials satisfy the exemptive criteria of Section 0.457(d) of the Commission's Rules. The parties have agreed to protected disclosure of carrier-furnished data elements in the Connecticut proceeding, and we see no reason to depart from protective procedures adopted by Connecticut and accepted by the carriers. Reasons of comity and simplicity, as well as administrative convenience, persuade us to order limited disclosure of these materials pursuant to the Connecticut protective order, attached as Appendix B. Comments and replies regarding these materials shall be filed according to the schedule set forth in para. 42.

41. If New York and Hawaii wish, they may submit the supplemental materials to which they alluded in their petitions, accompanied by a request for confidential treatment, in accordance with Sections 0.457, 0.459 and 0.461 of the Rules, no later than January 30, 1995. The materials referenced by these states appear to consist of those types of materials that we have determined in this Order may be disclosed pursuant to protective order. If such a request from either state for confidential treatment is filed, the Bureau will promptly

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[114] *See* Third Connecticut Request; 47 C.F.R. §§ 0.459(a), (b).

[115] *See* Request for Non-Disclosure of Confidential and Proprietary Financial Information, filed in PR Docket No. 94-106 by BAMMC on November 8, 1994; Request for Non-Disclosure of Confidential and Proprietary Financial Information, filed in PR Docket No. 94-106 by Springwich on September 19, 1994.