BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

RECEIVED

JUN 14 1996

Federal Communications Commission
Office of Secretary

DOCKET FILE COPY ORIGINAL

In the Matter of	)	
	)	
Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission	)	GC Docket No. 96-55

COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS, INC.

Paul B. Jones
Janis A. Stahlhut
Donald F. Shepheard

Time Warner Communications
Holdings, Inc.
300 Stamford Place
Stamford, CT 06902

Brian Conboy
John McGrew
Thomas Jones

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

ATTORNEYS FOR TIME WARNER COMMUNICATIONS HOLDINGS, INC.

June 14, 1996

Copy

0011040.01

TABLE OF CONTENTS

	Page
SUMMARY	i
I. INTRODUCTION	1
II. DISCUSSION	3
A. Public Participation Is A Critical Part Of The Regulatory Review Of Proposed Prices, Terms, And Conditions For CLEC Access To ILEC Services And Facilities	3
B. The Review Of Requests For Confidential Treatment Should Not Effectively Eliminate the Ability of TWComm and other CLECs To Participate In ILEC Tariff Reviews Or Similar Proceedings	5
C. The Commission Should Apply The Same Disclosure Policy At The Tariff Review And Tariff Investigation Stages	8
D. ILECs Should Bear The Burden Of Demonstrating That The Information Is "Confidential."	9
E. The Commission's Model Protective Order And Declaration Should Be Adopted With Minor Modifications	10
III. CONCLUSION	13

SUMMARY

TWComm's comments focus on the appropriate treatment of requests for confidential treatment of information submitted in regulatory proceedings with respect to the pricing, terms, and conditions under which incumbent local exchange carriers ("ILECs") provide facilities and services to TWComm and other competitive providers of local telecommunications services ("CLECs"). TWComm urges the Commission to take the following steps to assure that TWComm and other CLECs are afforded timely access to ILEC cost support data and other information which they require in order to fully analyze and comment upon the rates and other terms and conditions which ILECs seek to impose on TWComm and other would-be competitors:

- TWComm supports the Commission's proposal that ILEC confidentiality claims be resolved before a tariff is filed, and urges that rules be crafted to prevent ILECs from using such claims to delay or deny CLECs access to essential services and facilities under appropriate terms and conditions.

- TWComm believes that the same disclosure policies should apply at the tariff review and tariff investigation stages, and that ILECs should bear the burden of demonstrating that information submitted during either stage merits protection from full public disclosure.

- Where use of a protective order is justified, the Commission's policy should ensure that the terms of the order are no more restrictive than is necessary and do not impair the ability of CLECs to analyze and make use of all relevant information in preparing comments addressing proposed ILEC rates, terms, and conditions.

- The Commission's Model Protective Order and Declaration should be adopted, with certain changes, for use in the ILEC tariff review process and in other similar proceedings. In particular, the Model Order should allow for use of the information in question in other proceedings where the Commission finds that such use would be in the public interest.

In its comments, TWComm also notes that cost data and other information relating to the prices, terms, and conditions under which ILECs provide service to their competitors may be relevant to federal and state regulatory proceedings arising under Section 251 and 252 of the Communications Act. To ensure that disparate federal and state policies with respect to the treatment of confidential information do not impair the ability of the FCC and other regulatory authorities to fulfill their statutory responsibilities, the Commission should consider incorporating its model protective order and other key elements of its policy into the national guidelines to be established pursuant to Section 251(d) of the Act.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission	)	GC Docket No. 96-55

COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS, INC.

Time Warner Communications Holdings, Inc. ("TWComm"), by its attorneys, hereby submits its comments in response to the Commission's Notice of Inquiry and Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. INTRODUCTION

In its Notice, the Commission seeks comment on a broad range of issues related to the treatment of purportedly confidential information submitted to the Commission.[2] While all of these

---

1 See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, GC Docket No. 96-55, Notice of Inquiry and Notice of Proposed Rulemaking (released March 25, 1996) ("Notice").

2 The instant proceeding addresses only the treatment of "confidential" information submitted to the FCC in the course of various regulatory proceedings and activities. However, confidentiality issues may arise in other contexts as well. For example, in its comments in the Commission's local competition proceeding, TWComm describes certain problems which have arisen with respect to ILEC requests for confidential treatment of information exchanged with CLECs in the context of interconnection negotiations, and has urged the Commission to address these concerns in

issues are important, TWComm's comments focus solely on the appropriate disposition of incumbent LEC ("ILEC") requests for confidential treatment of information submitted in regulatory proceedings with respect to the pricing, terms, and conditions under which ILECs provide facilities and services to competitive access providers and competitive LECs (collectively "CLECs") such as TWComm.[3] As the discussion below indicates, TWComm believes that it is critical that the Commission take steps to assure that TWComm and other CLECs are afforded timely access to ILEC cost support data and other information which they require in order to fully analyze and comment upon the prices, terms, and conditions which ILECs seek to impose on TWComm and other would-be competitors. TWComm expresses no view with regard to the confidentiality procedures or policies applicable to proceedings other than those specifically addressed herein, recognizing that other approaches may be appropriate in other contexts.

---

establishing national standards for the conduct of such negotiations pursuant to Section 251 of the Telecommunications Act of 1996. See Comments of TWComm in CC Docket 96-98 at 18-19, 22-23.

3 While the Commission's Notice and TWComm's comments deal most extensively with the need for policies which ensure adequate public participation in FCC tariff review proceedings, TWComm believes that the general approach described in these comments should be adopted for use in all federal and state regulatory proceedings pursuant to Sections 251 and 252 of the Communications Act, as amended, dealing with the prices and other terms and conditions applicable to an ILEC's provision of facilities and services to its CLEC competitors. See discussion at 11, n.16, infra.

II. DISCUSSION

In order to become a viable competitor in the provision of access and local switched telephone service as well as in other telecommunications markets, TWComm must obtain access to ILEC facilities and services under appropriate prices, terms and conditions. The company therefore has a substantial interest in ensuring that the prices, terms, and conditions under which an ILEC proposes to offer such facilities and services are carefully scrutinized by regulators, pursuant to rules which afford all interested parties meaningful opportunity to review, analyze, and comment upon the ILEC's proposal.

A. Public Participation Is A Critical Part Of The Regulatory Review Of Proposed Prices, Terms, And Conditions For CLEC Access To ILEC Services And Facilities.

Particularly during this critical period of transition to a competitive marketplace for local telecommunications services, the ability of interested parties such as TWComm and other CLECs to analyze and prepare informed comments on proposed ILEC service arrangements is essential to ensuring effective regulatory review of the prices and other terms and conditions of access to ILEC facilities and services. Parties whose businesses depend upon the outcome of review proceedings are often willing and able to engage in more thorough analyses of ILEC proposals than the regulators' limited time and resources permit. Any denial of or restriction on interested parties' access to cost support data or other information that an ILEC provides to regulators in the

course of their review obviously limits the interested parties' ability to contribute to the review proceedings. As the Commission observes in the Notice, "[p]ublic participation in Commission proceedings cannot be effective unless meaningful information is made available to the interested parties."[4] In the absence of such participation, ILECs may be allowed to implement proposals that regulators would not otherwise have permitted, had they received the benefit of TWComm's or other interested parties' analyses.

The need for meaningful public participation in tariff and other similar proceedings is particularly acute where the ILEC's facilities and services are being made available for use by would-be competitors. Absent a rigorous review, ILECs have a strong incentive to adopt pricing practices designed to artificially raise their competitors' costs of doing business. The imposition of such inflated costs operates to limit the ability of CLECs to pass the benefits of lower costs of production on to consumers in the form of lower prices. In some cases, the imposition of unreasonable prices, terms, and conditions for essential inputs may prevent CLECs from entering the market altogether, thus completely denying consumers the benefits of competition.

---

4 Notice at ¶ 31.

B. The Review Of Requests For Confidential Treatment Should Not Effectively Eliminate the Ability of TWComm and other CLECs To Participate In ILEC Tariff Reviews Or Similar Proceedings.

In the tariff context, the clear benefits of public scrutiny just described have prompted the Commission to establish a general policy of making cost support data available to the public.[5] TWComm is concerned, however, at the increasing tendency of ILECs to seek confidential treatment of cost support data that is critical to a meaningful analysis of proposed ILEC charges.

For example, in connection with its participation in the FCC's still-pending investigation of LEC virtual expanded interconnection service ("VEIS") tariffs in CC Docket 94-97, TWComm and other competitive local service providers repeatedly have filed requests under the Freedom of Information Act seeking access to cost support data which Cincinnati Bell and Southwestern Bell sought to withhold from public disclosure.[6] In its FOIA requests, TWComm noted that the LECs' refusal to

---

5 See id. at ¶ 43.

6 See e.g., Letter from John L. McGrew to Andrew S. Fishel, May 1, 1995, regarding Freedom of Information Act Request for Certain Cost Data Filed with the FCC in Cincinnati Bell Telephone Company's Direct Case, CC Docket No. 94-97, Phase I (FOIA Request Control No. 95-223); Letter from John L. McGrew to Andrew S. Fishel , May 1, 1995, regarding Freedom of Information Act Request for Certain Cost Data Filed with the FCC in Southwestern Bell Telephone Company's Direct Case, CC Docket No. 94-97, Phase I (FOIA Request Control No. 95-211).

disclose the requested information made it impossible for TWComm and other interested parties to fully analyze the LECs' VEIS tariffs and provide meaningful assistance to the Commission in ascertaining whether the rates proposed are "just and reasonable" and otherwise lawful.

In response to these requests, the Common Carrier Bureau directed that the requested information be made available to the requesting parties, pursuant to a protective order drafted by the Bureau staff.[7] However, the affected ILECs repeatedly have resisted making disclosure even on this basis. Both Southwestern Bell and Cincinnati Bell have filed applications for review of the Bureau's decision to make the requested information available, albeit on a restricted basis, which remain pending before the Commission.[8]

---

7 See Letter from Kathleen M.H. Wallman, Chief, Common Carrier Bureau, to John L. McGrew (released August 16, 1995) regarding FOIA Request Control No. 95-223; Letter from Kathleen M.H. Wallman, Chief, Common Carrier Bureau, to John L. McGrew (released June 16, 1995) regarding FOIA Request Control No. 95-211.

8 See Application for Review of Cincinnati Bell Telephone Company of the Common Carrier Bureau's letter ruling, FOIA Control No. 95-223 (August 30, 1995); Application for Review of Southwestern Bell Telephone Company of the Common Carrier Bureau's November 1, 1994 letter ruling in response to initial requests by other CLECs for SWBT's VEIS cost support data, FOIA Control Nos. 94-310, 325, 328 (November 16, 1994). Over the past year, the Commission staff on several occasions has solicited input on revised versions of the protective order appended to the Bureau's letter rulings, which include additional restrictions designed to address concerns raised by the ILECs and their equipment vendors. While TWComm has indicated a willingness to accept the conditions included in the Bureau's original protective

This costly, time-consuming, and thus far unproductive effort to secure access to ILEC VEIS cost support data leads TWComm to share the concern implicitly expressed by the Commission in its Notice[9] that delay in the resolution of requests for confidentiality will effectively prevent interested parties from analyzing and formulating meaningful objections to an ILEC's proposed rates, terms and conditions, particularly given the streamlined LEC tariffing requirements adopted in the 1996 Act. Accordingly, TWComm strongly urges the Commission to take steps to ensure that its experience in the VEIS proceeding -- where delays associated with the review of FOIA requests have effectively denied TWComm and other CLECs the opportunity to fully review and comment upon the appropriateness of the affected tariffs -- is not repeated in future proceedings.

In this regard, the Commission has proposed that ILEC confidentiality claims be resolved before a tariff is filed.[10] The intent of such a policy would be to limit the opportunity for ILECs to use assertions of confidentiality to prevent meaningful review of their proposals. While TWComm supports this proposal in principle, TWComm cautions, however, that any change in procedure should be carefully crafted so that ILECs are not

---

order, it has declined to accept the more restrictive terms included in the revised proposals

9 See Notice at ¶ 44.

10 See id.

permitted to invoke the new procedure to delay the tariff review process as a whole, thus depriving CLECs of services and facilities they need in order to compete.

C. The Commission Should Apply The Same Disclosure Policy At The Tariff Review And Tariff Investigation Stages.

While TWComm supports the Commission's proposed requirement for early submission of confidentiality requests, it does not agree with the suggestion[11] that different disclosure policies may apply at the tariff review and tariff investigation stages. Interested parties can make valuable contributions at both the initial tariff review stage and the formal investigation stage. Adoption of a policy which focuses on the need for disclosure primarily in instances where an investigation has already been initiated would impair the ability of interested private parties to secure the information they need to participate in the crucial first stage of the review and make their concerns known before a potentially anticompetitive tariff goes into effect. Moreover, the implementation of such a policy would place added weight on the Commission's resources and ability to detect problems in advance and reject, suspend, or investigate the ILEC tariff. Sound policy therefore should encourage full public participation both in the initial review and in subsequent investigations.

---

[11] See id. at ¶ 45.

The suggestion that parties unsatisfied with a decision not to investigate a tariff still retain the right to file a compliant under Section 208 is beside the point. The fact that the Act may afford affected parties further remedies in no way justifies limiting the effectiveness of the opportunity for prior review of ILEC tariff proposals. To the contrary, it would be far more efficient to permit the fullest possible review at the earliest possible time, i.e. at the point when the ILEC files its proposed tariff with the Commission

D. ILECs Should Bear The Burden Of Demonstrating That The Information Is "Confidential."

The Commission proposes the use of generic protective agreements as one means of balancing the protection of confidential information with the Commission's established policy in favor of public participation in tariff review and related proceedings.[12] Protective orders may indeed be warranted in some circumstances where the information in question genuinely deserves protection from full public disclosure. However, as the Commission has recognized, the use of such orders imposes costs and burdens on regulators and the parties subject to them.[13] In addition to the administrative burdens they create, protective orders typically restrict the use of the underlying information to a single proceeding or set of proceedings. This latter

---

[12] See id. at ¶ 44.

[13] See id. at ¶ 31.

limitation can mean that other proceedings to which the protected information is relevant, but in which use of the information is not permitted by the relevant protective order, must be conducted without the benefit of a complete record.[14] The resulting damage to public policy can be significant

To minimize the potential adverse effects associated with the use of protective orders, therefore TWComm recommends that ILECs bear the burden of demonstrating that the information they seek to protect is worthy of protection. In addition, where the use of a protective order is justified, the terms of the order should be no more restrictive than is necessary to protect the affected ILEC's legitimate interests, without unduly impairing the ability of CLECs and other interested parties to analyze and make use of all relevant information in preparing comments addressing proposed ILEC rates, terms, and conditions.

E. The Commission's Model Protective Order And Declaration Should Be Adopted With Minor Modifications.

Perhaps the most effective means of assuring that protective orders will be no more restrictive than necessary is, as the Commission proposes in the Notice,[15] to develop a "Model Protective Order and Declaration" ("Model Order") for use during

---

[14] TWComm recommends below a change to the Commission's proposed Model Protective Order that at least partially addresses this problem.

[15] See id. at ¶ 45.

the tariff review process and in other similar contexts.[16] Moreover, the adoption of a standard agreement with appropriate terms and conditions should obviate the need for lengthy negotiations over the terms of such orders, similar to those in which TWComm has been forced to engage in the context of the VEIS proceeding.

In general, TWComm believes that the Model Order proposed by the Commission provides a suitable basis for balancing the interests of ILECs asserting a need for confidential treatment with the interests of CLECs and others seeking to obtain access to purportedly confidential information. TWComm would propose, however, that the Commission modify the restrictive language found in paragraphs 7b, 9, 12, and 14 which provides that information subject to the Model Order may be used only "in this proceeding."[17] In this regard, TWComm urges the Commission to

---

16 Cost data and other information relating to the prices, terms, and conditions which an ILEC provides facilities and services to its would-be competitors may be relevant to a variety of federal and state regulatory proceedings arising under Sections 251 and 252 of the Communications Act, as amended. To ensure that disparate policies with respect to the treatment of confidential information submitted to regulators at the federal and state level do not impair the ability of the Commission and other regulatory authorities to fulfill their statutory responsibilities, TWComm believes it would be appropriate for the Commission to consider incorporating its model protective order and other key elements of its policy with respect to the treatment of "confidential" information relating to ILEC rates, terms, and conditions into the national guidelines to be established by the Commission pursuant to Section 251(d).

17 In addition, TWComm believes that the restrictions on the eligibility of certain individuals to obtain access to the

revise its Model Order for use in the review of ILEC rates, terms and conditions to allow use of the information in question in other proceedings as well, if the Commission finds that such use would be in the public interest. This addition is important because, as mentioned, it is often the case that information provided in one proceeding materially informs the analysis of issues at stake in another proceeding.[18]

The most common example of this phenomenon occurs in the review of tariffs. Assume "ILEC A" submits confidential cost support information for a tariff. After the completion of the "ILEC A" tariff review proceeding, "ILEC B" then files a tariff to provide the same service. Parties who were permitted access to confidential information supplied in the "ILEC A" tariff review should be allowed to use that same information as the basis for benchmark comparisons in the "ILEC B" tariff review proceeding. In such a case, the Commission should be permitted

---

relevant information contained in paragraphs 7(a) and 7(b) are both unwieldy and unnecessary, in light of the language adopted in paragraph 11, which bars any use of confidential information "for competitive business purposes." TWComm also urges that language be added to paragraph 14 of the Model Order, clarifying that the obligation to destroy "all Confidential Information as well as all copies and derivative materials" does not apply to materials which constitute attorney work product

18 For similar reasons, TWComm believes that the language included in paragraph 15 which requires reviewing parties to "agree not to use information derived from any confidential materials to seek disclosure in any other proceeding" is inappropriate and should be eliminated.

to find that it is in the public interest to permit parties to use the relevant information in the other related proceeding.

III. CONCLUSION

The Commission should adopt appropriate rules governing ILEC requests for confidential treatment of information submitted in regulatory proceedings addressing the pricing, terms, and conditions under which ILECs provide facilities and services to CLECs, in a manner consistent with these comments.

Respectfully submitted,

Brian Conboy
John McGrew
Thomas Jones

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

ATTORNEYS FOR TIME WARNER COMMUNICATIONS HOLDINGS, INC.

Paul B. Jones
Janis A. Stahlhut
Donald F. Shepheard

Time Warner Communications
Holdings, Inc.
300 Stamford Place
Stamford, CT 06902

June 14, 1996