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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

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

REPLY COMMENTS

General Communication, Inc. ("GCI"), pursuant to Section 1.415 of the Commission's Rules,^{1/} hereby submits its Reply Comments in the above-referenced proceeding.^{2/}

I. INTRODUCTION

The Freedom of Information Act ("FOIA") directs federal agencies to make information in their possession publicly available subject to limited exemptions, including an exemption for confidential commercial and financial information.^{3/} However, some participants in this proceeding, argue for categorizing tariff-related information as confidential, thus precluding review of such information in all cases. By these requests, parties seek to bypass the confidentiality analysis

^{1/}47 C.F.R. § 1.415.

^{2/}Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Notice of Inquiry and Notice of Proposed Rulemaking, GC Docket No. 96-55, FCC 96-109 (rel. March 25, 1996) ("NPRM").

^{3/}See 5 U.S.C. § 552

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pursuant to FOIA which generally requires disclosure of requested material if no exemption applies.^{4/}

GCI opposes any proposal to categorize materials as generally confidential and reiterates that an agency implementing the FOIA provisions must seek to grant FOIA requests generally. In any event, information should only be withheld pursuant to a case-by-case determination, and even then, only if the material squarely falls within one of the FOIA exceptions.

At times, it may be appropriate for the Commission to release information pursuant to a protective order, thereby balancing the interests between confidentiality and disclosure. In these instances, the protective order entered by the parties should not be limited to the model form proposed in the Notice of Inquiry. Parties must be able to tailor the terms of the protective order to account for the special circumstances of each request. Therefore, the efforts by some parties seeking to limit — in all cases regardless of need — the set of individuals eligible to review materials released pursuant to a protective order, should be rejected. If adopted, such a limitation could have the practical effect of barring inspection by the very persons whose expertise is required to conduct a meaningful review of the information.

^{4/5} U.S.C. § 552(b).

II. PROPOSALS THAT PROMOTE CLASSIFYING CATEGORIES OF INFORMATION AS CONFIDENTIAL MUST BE REJECTED

Most of the confidentiality requests made to the Commission generally are pursuant to FOIA Exemption Four, which protects "trade secrets and commercial and financial information obtained from a person and privileged or confidential."^{5/} A number of parties to this proceeding suggest that materials submitted in support of tariffs are per se confidential and competitively sensitive and thus, should be withheld from public inspection.^{6/} The Commission must not adopt such a standard, but instead adhere to its current policy of making cost support data "routinely available for public inspection."^{7/}

Customers — both carriers and consumers — may purchase services according to regulated tariffs. GCI, for example, is required to purchase access services under an Alascom tariff in order to complete long distance traffic. The Commission has imposed this requirement on GCI and other carriers in conjunction with its prohibition of facilities-based competition in the bush locations of Alaska. Particularly in a situation where the buyer has no other option than to purchase service pursuant to a regulated tariff, the Commission should not foreclose

^{5/}5 U.S.C. § 552(b)(4). See also NPRM at ¶ 4.

^{6/}See Ameritech, Bell Atlantic, Bell Communications Research, BellSouth, NYNEX, Pacific Bell and Nevada Bell and U S West ("Joint Parties") at 8; Cincinnati Bell at 3; GTE at 6; SBC Communications Inc. at 6-7.

^{7/}NPRM at ¶ 42 (citing 47 C.F.R. § 0.455(b)(11)). See also Comments of MCI at 14-18.

consideration of a FOIA request for disclosure in favor of a blanket exemption for information submitted pursuant to a tariff.

Indeed, Time Warner reports difficulties and delays, similar to GCI's experience, in attempting to review cost support data in association with virtual expanded interconnection service. In that case, the Common Carrier Bureau directed that the information be made available by Cincinnati Bell and Southwestern Bell pursuant to a protective order, but the decision is now subject to applications for review.^{8/} Time Warner states that this delay "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."^{9/}

In addition, Cincinnati Bell and Sprint suggest that the introduction of competition into various communications markets signifies the need for increased confidentiality.^{10/} Competition, however, is not the factor that the Commission should assess pursuant to a request for confidentiality, but rather it should apply the standards set forth in Critical Mass

^{8/}Time Warner Communications Holdings, Inc. at 5-7. See GCI at 5-6.

^{9/}Id. at 7. See also GCI at 6 ("GCI is likely the only private party having the expertise and knowledge to analyze the AT&T/Alascom model in question, and its review of all pertinent material would be beneficial for a complete analysis of the [cost allocation plan] and tariff.").

^{10/}Cincinnati Bell at 1; Sprint at 2.

Energy Project v. Nuclear Regulatory Commission^{11/} and in National Parks and Conservation Association v. Morton.^{12/} While the status of competition may have a bearing upon what is considered confidential commercial and financial information under Exemption 4, the advent of competition alone certainly does not negate the public policy interests supporting the disclosure of information submitted to federal agencies that is not confidential commercial information.^{13/}

The experiences of GCI and Time Warner demonstrate that efforts by interested parties to review and analyze materials that, according to the Commission, are "routinely available for public inspection" have been frustrated at every turn. The Commission must not establish blanket policies that exclude categories of materials from disclosure, which likely would prove to be an insurmountable hurdle to disclosure. Tariff cost support data must continue to be made available to the public. This especially holds true with respect to requests from parties who must purchase services pursuant to a particular tariff and who have the information and interest to provide a complete analysis of the data. The advent of local exchange competition does not affect this assessment, nor does it diminish the

^{11/}975 F.2d 871 (D.C. Cir. 1992), cert. denied, __ U.S. __, 113 S. Ct. 1579 (1993).

^{12/}498 F.2d 765 (D.C. Cir. 1974).

^{13/}See GCI at 2-5.

Commission's obligation to assess confidentiality requests pursuant to the established standards.

III. THE TERMS OF PROTECTIVE ORDERS SHOULD NOT BE UNDULY LIMITED

GCI acknowledged in its Comments that protective orders may result in the availability of information to limited parties and/or individuals. GCI cautioned against requiring parties to adhere to a form protective order, however, and advised instead that parties should be permitted to propose language for a protective order so that it may be tailored to the circumstances of the proceeding.^{14/} Contrary to this position, some parties have suggested placing specific limits on protective order terms. For example, the Joint Parties support modifying the model protective order to limit the "number and types of people" with access to materials released pursuant to a protective order.^{15/} Similarly, Cincinnati Bell advocates a proceeding by which the submitter of information can object to the authorized representative,^{16/} and MCI proposes limiting the Authorized Representative to the requesting party's counsel and staff.^{17/}

GCI opposes placing limits, outside of the context of a particular request, on the individuals who may access documents

^{14/}GCI Comments at 12.

^{15/}Joint Parties at 6. See also SBC Communications, Inc. at 9 (objecting that the model protective order does not limit the number of persons with access to the information).

^{16/}Cincinnati Bell at 4.

^{17/}MCI at 20.

under a protective order. Information covering a variety of subjects can be requested, and analysis of disclosed information could require the expertise of individuals whose access could be limited by premature restrictions. While limiting access to information at the outset may not appear to be an imposing restriction presuming that independent experts may still review the material, not all companies will have the resources necessary to secure in every instance outside experts for review of information acquired pursuant to a protective order. GCI recognizes that in particular cases, review by outside experts only may be entirely appropriate depending on the type of information being released; however, this result should not be preordained by memorializing such a requirement in a template model protective order. In order to permit meaningful review of information released pursuant to a protective order, parties should have the flexibility to negotiate the appointment or restriction of Authorized Representatives.^{18/}

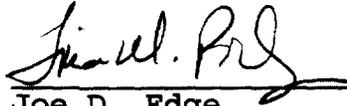
IV. CONCLUSION

For these reasons, GCI urges the Commission to adopt policies in this proceeding that will maximize the availability of information upon which the Commission sets policies and issues

^{18/}The primary basis for limiting Authorized Representatives is the concern that information will be used for marketing purposes to the detriment of the party submitting the information. Marketing experts are not within the set of Authorized Representatives whose expertise may be required to analyze information.

decisions. Therefore, the Commission should reject any proposals to grant confidential status to information submitted pursuant to a tariff proceeding. Proposals that limit the flexibility of parties to draft the terms of protective agreements also should be rejected.

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July 15, 1996

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