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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

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

Reply Comments of GTE

GTE Service Corporation ("GTE"), on behalf of its affiliated domestic telephone operating and wireless companies, respectfully submits its reply comments in response to the above-captioned Notice of Inquiry and Notice of Proposed Rulemaking.[1] There was broad support in the comments for the Commission's current policies, which appropriately balance the need to protect competitively sensitive information against the desire to facilitate public participation in the Commission's processes. With few exceptions, the comments suggest only "fine tuning" of the Commission's procedures in the interest of efficiency and fairness.

Perhaps it is not surprising that only one issue has generated significant debate, namely, the treatment of cost support data in the tariff review process. This controversy highlights GTE's fundamental recommendation that, because local exchange competition is growing, the Commission should allow the

[1] FCC 96-109 (released March 25, 1996), 61 Fed. Reg. 16424 (April 15, 1996) ("NOI/NPRM").

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incumbent LECs to be more responsive in the marketplace—particularly by reducing or eliminating the need to file cost support data. With the growth of competition, LEC rates can be presumed to be reasonable without detailed cost support. At the same time, because the market has become competitive, unit data detailing exchange or customer-specific information and cost support data detailing cost modeling assumptions are highly sensitive. Thus, Commission use of such data is unnecessary and competitor access to the data would be extremely damaging. Support for this view can be found in the Telecommunications Act of 1996, which states that new or revised tariffs "shall be deemed lawful" in 7 or 15 days unless the Commission institutes a hearing.[2] Congress could not have intended that there be elaborate public analysis of detailed cost support data within such a time frame. Moreover, any requirement that cost support be filed before the tariff filing would be directly contrary to the Act, whose purpose is to make LECs more responsive to the competitive environment.[3]

There can be no serious doubt that LECs' cost support information is confidential and its disclosure would accord substantial unfair competitive

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[2] 47 U.S.C. § 204(a)(3). This amendment is effective February 8, 1997.

[3] The recent change in the name of the Tariff Division to the "Competitive Pricing Division" dramatically illustrates this shift in the appropriate regulatory role "to look beyond traditional tariffing in order to promote a competitive communications environment." Common Carrier Action, Report No. CC 96-12 (April 26, 1996).

advantages if revealed.[4] Despite this, Time Warner advocates that ILECs should bear the burden of demonstrating that such information is confidential.[5] MCI takes this position to an extreme, arguing that dominant LECs' tariff support information must always be disclosed—no exceptions, no waivers.[6] Time Warner's position is unreasonable; MCI's unconstitutional.

In times past, before the development of local competition, it may have been reasonable for the Commission normally to make cost support available to the public and require carriers to show in particular cases why it should not be disclosed, because such cases would be infrequent. In the current intensively competitive market for telecommunications, more and more LEC cost information will be sensitive and more and more competitors will want to obtain this information to get business advantages that would never be available in an unregulated industry. In GTE's view the time has come to cease requiring cost data in tariff filings. Short of that, the Commission must recognize that disaggregated cost data and modeling assumptions are in every way similar to the commercial and financial information that is automatically exempt from routine disclosure under the Rules and should be accorded the same treatment.[7]

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[4] *See, e.g.*, Joint Parties Comments at 9-11, SBC Comments at 2-6, Sprint Comments at 2-3; *cf.* Time Warner Comments at 9. Even the most aggressive proponent of disclosure, MCI, does not dispute that this data is proprietary and makes no argument that its disclosure would be competitively harmless.

[5] Time Warner comments at 9-10.

[6] MCI Comments at 14-19.

[7] 47 C.F.R. §0.457(d)(1).

This cost data should not routinely be disclosed. Neither carriers nor the Commission should have to bear the burden of preparing and evaluating requests for confidential treatment; instead, such treatment should be the norm. For disclosure, a persuasive showing should be required that specific and concrete public benefits are reasonably anticipated. A showing that aggregated data is not accurate might constitute such a showing. It should rarely, if ever, be the case that such a showing could justify unlimited public disclosure; instead a protective order should be used to limit the likelihood of competitive injury.

MCI's extreme position would require LECs to disclose confidential information in all cases, without any chance for the Commission to balance competitive injury versus public need to know. As a matter of Fifth Amendment law, the Takings Clause[8] prohibits the FCC from denying carriers the ability to make economical use of their property. Proprietary cost data falls into the general category of trade secrets and therefore represent a constitutionally cognizable property interest.[9] Thus, while the use and disclosure of cost data may be "regulated to a certain extent," any federal rules that inordinately limit the use of this information would "go[] too far" and be "recognized as a taking."[10]

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8 "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

9 *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002-03 (1984) ("This general perception of trade secrets as property is consonant with a notion of `property' that extends beyond land and tangible goods and includes the products of an individual's `labour and invention'") (quoting 2 W. Blackstone, Commentaries).

10 *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Takings jurisprudence can be divided into two classes of cases. First, regulations that "deny all economically beneficial or productive use of [property]" represent per se takings, and are deemed unconstitutional without further inquiry.[11] Second, if a regulation does not "deny all economically beneficial" use of a piece of property to its owner, it is subjected to a two-part test which analyzes: (1) "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations"; and (2) "the character of the governmental action" (*e.g.* direct physical invasions are likely to be considered per se violations).[12]

A strong argument can be made that requiring a carrier to publicly disclose confidential cost data in order to introduce or revise a service offering denies the carrier "all economically beneficial or productive use" of this information. This is so because the value of this data lies in its use to justify the prices of new or additional services. MCI's proposal would certainly interfere with investment-backed expectations. If the ability to introduce or modify services quickly and flexibly is denied, businesses would have great difficulty growing. If competitors always can see a carrier's cost information for specific customers or exchanges, they will be able to preempt that carrier's market

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[11] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

[12] *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

initiatives, thus preventing the carrier from gaining new business or retaining existing customers.

In addition, MCI's suggestion that the FCC bind its hands to prohibit any waivers of a disclosure policy would violate the due process principles of administrative law. While agencies may proceed by the adoption of rules of general applicability, considerations of due process and equity require that, upon request, the agency consider whether grant of a waiver would better serve the public interest. "It is well established that an agency's authority to proceed in a complex area ... by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances."[13]

Consequently, GTE urges the Commission to implement the modest clarifications and improvements suggested in GTE's Comments and to adopt a rule specifically allowing the confidential treatment of disaggregated cost support data and cost modeling assumptions filed in tariff proceedings, subject to disclosure under a protective order when a persuasive showing is made that specific and concrete public benefits are reasonably anticipated.

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[13] United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755 (1972). See FPC v. Texaco, Inc., 377 U.S. 33, 40-41 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192, 204-05 (1956); NBC v. United States, 319 U.S. 190, 225 (1943); Southwest Pennsylvania Cable TV, Inc. v. FCC, 514 F. 2d 1343, 1347 (D.C. Cir. 1975); Community Service, Inc. v United States, 418 F.2d 709, 712 (6th Cir. 1969)

Respectfully submitted,

GTE SERVICE CORPORATION
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July 15, 1996