effective review period.[128] We therefore adopted a procedure for handling confidentiality requests in this context.[129] A protective order will be issued where the submitting party includes with the tariff filing a showing by a preponderance of the evidence that the data should be accorded confidential treatment consistent with the provisions of the FOIA or makes a sufficient showing that the information should be subject to a protective order. To do this, a submitting party must comply with Sections 0.459(b) and (c) of our rules to demonstrate that its supporting data should be afforded confidential treatment. If it does so, a standard protective order will be issued. No written determination by the Bureau will be made because of the short time frames involved. If an investigation occurs, the Bureau can make a further determination concerning the carrier's entitlement to confidentiality.

38. Subsequent to *Tariff Streamlining*, the Common Carrier Bureau decided to apply the protective order adopted for streamlined tariffs in non-streamlined tariff filings where the submitting party demonstrates that cost support data should be afforded confidential treatment.[130] That decision was affirmed by the Commission.[131]

39. Although we specifically noted that the confidentiality procedures adopted in *Tariff Streamlining* were not binding on this proceeding,[132] we conclude that with certain modifications described below, the procedures adopted there should apply to both streamlined and non-streamlined tariff proceedings. By allowing release of confidential information under a protective order upon a showing by a preponderance of the evidence that confidential treatment is warranted, interested parties are afforded the opportunity to participate effectively in tariff proceedings, thus allaying the fears expressed by some commenters.[133]

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[128] *Notice*, 11 FCC Rcd at 12428; *see also Tariff Streamlining*, at 2212-13 n.232 (explaining how time frames under Section 0.459 of our rules and under the FOIA for handling confidentiality matters will exceed the streamlined tariff filing time frames).

[129] *Tariff Streamlining*, 12 FCC Rcd at 2212-14.

[130] *Southwestern Bell Telephone Co., Trans. No. 2646, FCC Tariff No. 73*, 12 FCC Rcd 10271 (Com. Car. Bur. 1997) (*Southwestern Trans. No. 2646*), *application for review denied*, 13 FCC Rcd 3602 (1997).

[131] *Southwestern Bell Telephone Co.*, 13 FCC Rcd 3602 (1997).

[132] *Tariff Streamlining*, 12 FCC Rcd at 2214-15. We note that there are petitions for reconsideration pending in *Tariff Streamlining* concerning, *inter alia*, the confidentiality approach adopted therein. Our decision here is without prejudice to revising those procedures in the *Tariff Streamlining Reconsideration* decision.

[133] *See* ALTS Reply Comments at 9; AT&T Reply Comments at 4; Time Warner Comments at 3; MCI Comments at 2-4.

We believe that the protective order approach appropriately balances the competing interests in such situations. We also disagree with those who suggest that the public interest concerns that underlie the history of open tariff proceedings are now outweighed by the submitter's need to protect competitively sensitive information.[134] Finally, although the commenters are split concerning the propriety of the pre-filing procedures,[135] we have thus far had a satisfactory experience with the procedures adopted in *Tariff Streamlining*, and see no reason to change them at this time. A number of parties suggested elimination entirely of our tariff support requirement,[136] but this recommendation is beyond the scope of this proceeding.

40. Accordingly, the procedures adopted in *Tariff Streamlining*, with the following modifications, will continue to govern confidentiality requests in tariff review proceedings. First, if a carrier seeks confidential treatment for tariff support information, it must either state that it will make its cost support information available to those signing a nondisclosure agreement, or file a request that the cost support information be kept entirely confidential. The request that information be released only pursuant to a protective order or that it be kept entirely confidential must include the supporting information required by Section 0.459(b) of our rules.[137] We note that in the latter case, streamlined filings are likely to be suspended if the Commission is unable to determine the lawfulness of the tariff within the appropriate time frame without public participation. This would allow us to rule on the request for complete confidentiality, which we believe would be granted only in the rarest of instances. In addition, the protective order to be used in tariff review proceedings will be the one adopted in this proceeding, in place of the one adopted in *Tariff Streamlining*. We note that the MPO we adopt here does not differ substantially from that previously adopted, and that we specifically noted in *Tariff Streamlining* that this proceeding might modify the protective order adopted there.[138]

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[134] *See* CBT Comments at 3; *see also* Joint Parties Comments at 15 (must preserve option of LECs to seek compete protection of cost data if circumstances warrant since violations of protective orders are hard to prove).

[135] *Compare* SBC Comments at 3; GTE Reply Comments at 2; Joint Parties Comments at 13-14 (indicating procedures satisfactory), *with* Time Warner Comments at 5-8 (expressing concern that pre-filing procedures could be used for delaying purposes). Even the Joint Parties appear to recognize that a pre-tariff filing procedure could be beneficial. Joint Parties Comments at 14.

[136] *E.g.*, SBC Comments at 6-7; GTE Reply Comments at 4.

[137] *See* ¶¶ 15-18, *supra* (describing the showing required under this section of our rules).

[138] *Tariff Streamlining*, 12 FCC Rcd at 2215.

41. We have decided not to establish different procedures for the tariff review and the tariff investigation stage because, although the decisions to allow tariffs to go into effect are non-final, non-judicially reviewable orders, we believe public comment is important in determining the lawfulness of rates at this stage, especially given the short time frames in streamlined proceedings. We believe the procedures adopted in *Tariff Streamlining* and reaffirmed here best accommodate the desirability of public comment within the short time frames available. We have also decided not to require filing of confidential information in advance of a tariff filing because that would cause delays in the tariff filing process Congress may not have intended.

42. Clarification of Section 0.455(b)(11). We do not agree with the Joint Parties that Section 0.455(b)(11) of the rules does not require public disclosure of tariff support material.[139] Such information is placed in the FCC Reference Center. We have considered requests that the information not be routinely disclosed as requests for waiver of Section 0.455(b)(11), and recently have imposed the protective order used in the *Tariff Streamlining* proceeding where granting such a waiver was appropriate.[140]

3. Rulemaking Proceedings

43. Section 553(b) of the Administrative Procedure Act[141] (APA) generally requires notice and an opportunity to comment before promulgation of a final agency rule. Specifically, the APA requires that a rulemaking notice include, among other things, "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[142] Further, after the required rulemaking notice has been provided, the agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" and "after consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."[143] The Commission generally has not afforded

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[139] *See* Joint Parties Comments at 24-25.

[140] *Southwestern Trans. No. 2646, supra.*

[141] 5 U.S.C. § 551 *et seq.*

[142] 5 U.S.C. § 553(b).

[143] 5 U.S.C. § 553(c).

confidential treatment to material submitted in rulemakings, although on rare occasions protective agreements have been used in the context of rulemakings.[144]

44. Material submitted in rulemakings will continue to be routinely available for public inspection because, as the commenters who addressed rulemakings acknowledge, rulemakings have a broad impact on the public, and wide public participation, with a full opportunity to comment, is contemplated by the APA.[145] An agency's decision to withhold information in the context of a rulemaking can have a significant impact on whether commenters have had meaningful notice and opportunity to comment on the bases of an agency's decision. One purpose of the requirement that agencies disclose the documents it deems relevant to a proceeding, therefore, is to ensure that interested parties have a full opportunity to participate in the proceeding by providing a different perspective on materials that may be relied upon by the agency.[146] A party filing comments in a rulemaking proceeding who thinks it has information that will significantly affect the decision on a proposed rule is free to submit it, of course. Nevertheless, other interested parties may not be deprived of the opportunity to challenge it.[147]

45. To the extent that submissions made in rulemakings involve sensitive commercial information, one option is to utilize protective orders, as has been our policy in other procedural settings. Protective orders generally are not practical solutions in rulemakings, however, because rulemakings frequently involve numerous parties. Use of

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[144] *See Letter from Independent Television to Roy Stewart*, MM Docket 94-123 (Mar. 28, 1995) (in the review of prime time access rules, examination but not copying of data based on Arbitron reports and NAB/BCFM financial reports allowed).

[145] *See* MCI Comments at 9-10, 12; Joint Parties Comments at 15-16; *accord*, AT&T Reply Comments at 8.

[146] *See Abbott Laboratories v. Young*, 691 F. Supp. 462, 467 (D.D.C. 1988) (disclosure to ensure interested parties have meaningful opportunity to participate in rulemaking), *remanded on other grounds*, 920 F.2d 984 (D.C. Cir. 1990), *cert. denied*, 502 U.S. 819 (1991); *see also, e.,g., Hawaii II*, 10 FCC Rcd at 2884; *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394-95 (D.C. Cir. 1973) (parties not informed of the basis of EPA standards where unavailable at time of publication of notice), *cert. denied*, 417 U.S. 921 (1976). *Cf.* GCI Comments at 6-7 (information should be available for comment so agency will not act on untested information).

[147] *See Westinghouse Electric Corp. v. United States Nuclear Regulatory Comm'n*, 555 F.2d 82, 95 (D.C. Cir. 1977) (submitter of confidential information in a rulemaking cannot submit such materials "under conditions which will in effect deprive other interested parties of the opportunity to challenge it before the agency or upon judicial review," *citing Schrieber*, 381 U.S. at 289-94).

protective orders could also inhibit full public participation in proceedings that are of broad public interest. Nonetheless, a blanket refusal to apply protective orders in the context of rulemakings, or refusal to consider information accompanied by a request for confidentiality, could ultimately result in the Commission not having access to information that is highly relevant to our ultimate decisions.[148] Accordingly, although we expect to act favorably upon them only in extremely rare instances, we will consider requests for confidential treatment that propose to limit the availability of confidential information in rulemaking proceedings to those who have executed a protective order.[149] Parties seeking confidential treatment should request the Commission to return the materials without considering them, pursuant to Section 0.459(e) of our rules, if the request for confidentiality is denied, as we expect it would be in most cases. We note, however, that the Commission cannot return information if a FOIA request has been filed.[150]

46. Parties should also consider the option of presenting information in a manner that reduces or eliminates its commercial sensitivity, since, if such options are available, or if public disclosure of the information does not present a serious potential for competitive harm, we would not be inclined to authorize protective orders.

4. Requests for Special Relief and Waivers

47. Parties affected by our rules have the right to seek special relief from the application of them. Sometimes they base their request for relief upon or otherwise put into issue information that is confidential. This may include financial information explaining cash flow, profitability, bankruptcy, corporate or partnership structure, or engineering standards.[151] Thus, we sought comment on whether, and under what circumstances, it is appropriate to protect from public disclosure information filed in such proceedings.

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[148] *See* Joint Parties Comments at 16.

[149] *See* MCI Comments at 12.

[150] *See Southwestern*, 12 FCC Rcd at 7774.

[151] *See* 47 C.F.R. § 76.7(a) (cable petitions for special relief).

48. The comments reveal no need to modify our existing confidentiality rules for use in Commission proceedings dealing with requests for relief or special waivers.[152] Thus, we will continue to consider requests for confidentiality on a case-by-case basis. Where appropriate, we may make information available only subject to a protective order.

5. Formal Complaints

49. Section 208 of the Communications Act permits any party to bring before the Commission a complaint against a common carrier for acts or omissions in violation of either the Act or a Commission rule or order.[153] Our rules, in turn, establish both informal and formal procedures for handling such complaints.[154] Confidentiality issues frequently arise in formal complaint proceedings, especially in connection with discovery. Parties often use protective agreements to ensure the confidentiality of materials exchanged, and our formal complaint regulations include limitations on the manner in which an opposing party may use, duplicate, and disseminate proprietary materials obtained through discovery.[155]

50. Although the materials that a party obtains through discovery are not routinely filed with the Commission, parties may be directed to submit particular documents that the staff determines to be decisionally significant. In addition, parties may describe or include excerpts of materials that are subject to protective agreements in briefs or other pleadings filed in formal complaint cases. Thus, the Commission must sometimes resolve disputes in which significant portions of a lengthy and complicated record are subject to a protective agreement and a request for confidential treatment under Section 0.459. Consequently, we asked commenters to consider the most effective means of balancing our sometimes conflicting obligations to ensure protection of proprietary business data, to prevent undue

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[152] Only the Joint Parties commented on this issue, essentially stating that the Commission should consider requests for confidential treatment of information in these proceedings on a case-by-case basis. Joint Parties Comments at 16-17.

[153] 47 U.S.C. § 208.

[154] 47 C.F.R. § 1.711. An informal complaint may be lodged simply by forwarding to the Commission a brief letter explaining the dispute between a complainant and the carrier. 47 C.F.R. §§ 1.716-1.718. Formal complaints, however, are intended to provide an alternative to litigation in federal district court and are subject to various substantive and procedural requirements. 47 C.F.R. §§ 1.720-1.736.

[155] *See* 47 C.F.R. § 1.731; *CCB Complaint Rules*, 8 FCC Rcd at 2622.

delay in resolving formal complaints, and to produce decisions that adequately explain, by reference to a specific record, the basis for our disposition of a complaint.[156]

51. The parties generally suggested little change to our current treatment of confidential information submitted to the Commission during formal complaints,[157] and we agree that our current procedures are generally workable. We note, however, that the MPO adopted herein may be used by the parties to formal complaints and may be imposed by the Commission where parties cannot resolve discovery disputes between themselves. SBC's suggestion that we eliminate discovery in formal complaint proceedings[158] is beyond the scope of this proceeding. We address below the issue of whether portions of orders concerning confidential information should be issued under seal.[159]

6. Audits

52. The Commission has a statutory right of access to all accounts, records and memoranda, including all documents, papers, and correspondence kept or required to be kept by common carriers.[160] Often times, the detailed financial and commercial information inspected during an audit is commercially sensitive in nature. Indeed, Section 220(f) of the Communications Act[161] expressly prohibits the release of information gathered during an audit absent direction by the Commission or a court.

53. The Commission has publicly released aggregate data from audit reports only where (i) the summary nature of the data therein is not likely to cause the submitter substantial competitive injury; (ii) the release of the summary data and information is not likely to impair our ability to obtain information in future audits; and (iii) overriding public

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[156] *Notice*, 11 FCC Rcd at 12431.

[157] *See* Joint Parties Comments at 17-18; MCI Comments at 12-13; AT&T Reply Comments at 9.

[158] SBC Comments at 14. SBC's position was opposed by MCI in its Reply Comments at 5, and AT&T, in its Reply Comments at 8-9.

[159] *See* ¶¶ 63-65, *infra*.

[160] 47 U.S.C. § 220(c).

[161] 47 U.S.C. § 220(f).

interest concerns favor release of the report.[162] We sought comment on whether we should continue to follow this policy, and identification of the circumstances under which we should release audit information pursuant to a protective order.[163]

54. The Commission has a longstanding policy of treating information obtained from carriers during audits as confidential. Nothing in the *Notice* was meant to suggest, as some commenters feared, any changes in our policy in the regard.[164] Carriers have a legitimate interest in protecting confidential information, and we agree that disclosure could result in competitive injury to those who provide such information to the Commission. This policy is also designed to enhance the efficiency and integrity of our audit process by encouraging carriers to comply in good faith with Commission requests for information.[165] Moreover, the Commission considers the audit reports to be internal agency documents that, consistent with FOIA Exemption 5,[166] generally should not be disclosed to the extent they present staff findings and recommendations to assist the Commission in pre-decisional deliberations. Since we are able to make a finding that audit materials received from carriers generally fall within FOIA Exemption 4, and as an indication of the importance we place on upholding the confidentiality of these materials, we will amend Section 0.457 of our rules to indicate that information submitted in connection with audits, investigations and examination of records will not routinely be made available for public inspection.[167] In the context of a FOIA request, the Commission would still need to make a particularized determination that the information is exempt from disclosure.

55. As previously discussed, we have only rarely departed from the general policy of withholding audit information from public disclosure. Parties should note, however, that

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[162] *See, e.g., Bell Telephone Operating Companies*, FCC 94-418 (released Oct. 17, 1995). *See also, e.g., Bell Communications Research, Inc*, 7 FCC Rcd 891, 892 (1992); *BellSouth Corp.*, 8 FCC Rcd at 8130.

[163] *Notice*, 11 FCC Rcd at 12432-33.

[164] *See* SBC Comments at 11-12; Joint Parties Comments at 19-20.

[165] *See, e.g., J. David Stoner*, 5 FCC Rcd 6458, 6459 (1990) (*Stoner*); *Martha H. Platt*, 5 FCC Rcd 5742, 5743 (1990); *Scott J. Rafferty*, 5 FCC Rcd 4138, 4138 (1990); *Western Union Telegraph Co.*, 2 FCC Rcd at 4486.

[166] 5 U.S.C. § 552(b)(5).

[167] *See* SBC Comments at 12 (Commission should state specifically that audits are not routinely available); Joint Parties' Comments at 18-20 (recommending codification of policy).

as in the past, we may publicly disclose audit information in rare cases where the underlying concerns that normally lead us to withhold audit information from public disclosure are diminished by the minimal risk posed by the release of aggregate data or, where the data is otherwise not highly commercially sensitive and disclosure is justified by significant public interest factors.[168] Contrary to SBC's suggestion,[169] we do not believe that carriers need be given an opportunity to object to the proposed disclosure of audit data in aggregate form, where the data does not reveal the confidences of any individual company.

56. The Joint Parties express concern about the indication in footnote 109 of the *Notice* that the Bureaus and Offices have the authority to disclose audit records where the information is required to be disclosed under the provision of the FOIA.[170] The Joint Parties suggest that audit information is confidential under the impairment prong of the National Parks test and thus is not required to be disclosed under the provisions of the FOIA.[171] While this may generally be true, the Commission's concerns about "impairment" of its ability to obtain relevant information in audits may be reduced depending upon the circumstances, including the nature of the audit and the relative sensitivity of the audit data.[172] Thus, it is possible that circumstances could arise in which the Commission, in the context of a FOIA matter, might determine that disclosure of audit data is required. We also note that the Commission has previously delegated authority to the Common Carrier Bureau to (1) approve the release to state public utility commissions of information that the Bureau may obtain during the course of audit activities and that falls within the common interest and jurisdiction of the Commission and the states, and (2) act on requests for audit information that are filed pursuant to the FOIA, including the authority to furnish copies of documents

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[168] *See* MCI Comments at 13

[169] *See* SBC Comments at 12.

[170] Joint Parties Comments at 21. *See also* GTE Reply Comments at ii (staff cannot release audit information under delegated authority).

[171] *Id.*

[172] *See Bell Communications Research, Inc.*, 7 FCC Rcd at 892; *National Exchange Carriers' Ass'n, Inc.*, 5 FCC Rcd 7184, 7185 & n.15 (1990); *Stoner*, 5 FCC Rcd at 6459.

and other records.[173] We continue to believe this delegation is fully consistent with section 220(f) of the Communications Act.[174]

7. Surveys and Studies

57. The Commission has authority to conduct studies and surveys needed to fulfill its regulatory functions.[175] Because these surveys and studies sometimes entail the submission of competitively sensitive information, we sought comment on how to protect their confidentiality.[176] We believe the best way to do so is to allow survey and study respondents to request confidential treatment pursuant to Section 0.459 to the extent they can show by a preponderance of the evidence a case for non-disclosure consistent with the FOIA.[177] Assessments of the confidentiality of this information will be made on a case-by-case basis, as the nature of the information obtained in surveys and studies vary greatly. Moreover, contrary to GTE's suggestion,[178] this information is not always voluntarily submitted. Ultimately, there is a need to assess whether these submission contain materials that would be customarily disclosed or are competitively sensitive to determine if they are as a matter of law entitled to Exemption 4 treatment. Therefore, we will not adopt, as the Joint Parties request, a general rule that surveys and study replies are entitled to confidential treatment.[179]

8. Other Proceedings

58. While we have discussed in some detail how confidential information will be treated in seven specific types of proceedings, we expect that the principles set forth in this

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[173] *Amendment of Parts 0, 1, and 64 of the Commission's Rules*, 5 FCC Rcd 4601, 4603 n.5 (1990); *see also Amendment of Part 0 of the Commission's Rules*, 57 RR 2d 1648, 1650 (1985).

[174] *See id.*

[175] *See, e.g.*, 47 U.S.C. §§ 543(k) (requiring survey of prices between competitive and noncompetitive cable television systems) and 403 (general authority to inquire into matters under the Communications Act).

[176] *Notice*, 11 FCC Rcd at 12433.

[177] *See* 47 C.F.R. § 0.459(d).

[178] *See* Joint Parties Comments at 23-24.

[179] *See id.*

Report and Order will also apply in other types of proceedings not specifically discussed above. Thus, for example, in revising our foreign carrier entry rules pursuant to the WTO Basic Agreement, the Commission concluded that United States international carriers classified as dominant due to a foreign affiliation could seek confidential treatment of some quarterly reports regarding provisioning and maintenance and circuit status.[180] We would expect to use the model protective order or a modified version thereof to protect confidential information if a sufficient case were made for confidential treatment of such reports. We also would expect to use the standard protective order where contributors to universal service support mechanisms justify non-disclosure of company-specific data pursuant to section 54.711(b) of the rules[181] as well as in proceedings under section 271 of the Communications Act regarding Bell Operating Company entry into interLATA services. We expect that the off-site inspection procedures described above may prove useful in certain merger proceedings involving voluminous materials that are subject to claims of confidentiality.[182]

D. Scope of Materials Not Routinely Available for Public Inspection

1. Categories of materials that are not routinely available for public inspection

59. As previously noted, Section 0.457(d) of our rules contains a list of categories of material that are not routinely available for public inspection, and therefore, do not require a request for confidential treatment under Section 0.459 in order to be withheld. Thus, we sought comment regarding whether the current list of materials that are not routinely available for public inspection is appropriate.[183]

60. We believe that TH&F's suggestion[184] that Section 0.457(d) be replaced with provisions that automatically accord confidential treatment to any non-public information that can offer a competitor an advantage over the submitting party is overly broad. As a practical

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[180] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd 23891, 24017-20 (1997).

[181] 47 C.F.R. § 54.711(b).

[182] *See* Section III.B., *supra*.

[183] *Notice*, 11 FCC Rcd at 12433-34.

[184] *See* TH&F Comments at 3; *see also* Aitken Comments at 2-3 (suggesting that customer lists and billing records should automatically be deemed privileged).

matter, even if such a standard could be deemed to satisfy the requirements of FOIA Exemption 4, considerable uncertainty would exist concerning which particular documents might fall within this general category. Absent an individualized request for confidentiality (which our rules already provide for), submitters, therefore, could not be certain that the Commission would afford particular documents confidential treatment. We also reject the Joint Parties' suggestion that we codify the *Critical Mass* standard and categorically include "information provided voluntarily to the Commission subject to a certification by the provider that such information is not customarily disclosed."[185] Since judicial standards on the issue of "voluntary" submission are highly fact-specific and continue to evolve, we believe it is better to look at such requests on a case-by-case basis under our current rules. Nevertheless, we do not agree that we should reject all proposals classifying specific categories of information as confidential, as one commenter suggested.[186] It is certainly possible to identify categories of information that are likely to fall within FOIA Exemption 4, and our rules currently do so. Identifying such categories reduces administrative burdens on submitters and the Commission.

61. We conclude that certain programming contracts fall squarely within Exemption 4. As noted by HBO and NCTA, the Commission has consistently recognized that disclosure of programming contracts between multichannel video program distributors and programmers can result in substantial competitive harm to the information provider and has afforded confidential treatment to such contracts in a variety of contexts.[187] We believe that protecting such confidential information is compatible with the public interest, and the requirements of FOIA Exemption 4. Therefore, we amend Section 0.457 of our rules to state that programming contracts between programmers and multichannel video programming distributors will not be routinely available for public inspection. We note, however, that, consistent with our current rules, such contracts may be made available subject to the MPO in situations where they are relevant to the dispute at hand, *e.g.*, program access complaints.

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[185] Joint Parties Comments at 24.

[186] *See* GCI Reply Comments at 3.

[187] *See Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, 11 FCC Rcd 18223, 18293 n.131 (1996) (rejecting arguments that OVS operators should comply with the same disclosure requirements as common carriers); *National Rural Telephone Cooperative On Request for Inspection of Records*, 5 FCC Rcd 502, 503 (1990); *Letter from Meredith J. Jones to Wesley R. Heppler and Paul Glist*, 10 FCC Rcd 9433, 9434 (1995) (declining to adopt a blanket exemption for programming contracts without notice and comment); *Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, 3391 n.103 and 3419 (1993); *see also* HBO Reply Comments at 4-6; NCTA Comments at 5.

62. The Joint Parties urge expanding the list of information not routinely available for public disclosure to include "[i]nformation submitted in connection with audits, investigations and examination of records."[188] We addressed the recommendation in the previous discussion on audit material, where we expanded the list of information not routinely available for public inspection to include that type of data.[189]

2. Use of confidential information in decisions.

63. The submission of confidential materials to the Commission can pose problems in the drafting of agency decisions. Materials submitted under claims of confidentiality may form the basis for an agency decision, and, hence, may have precedential value. Therefore, one important factor in deciding whether parts of an order should be sealed is whether the non-public sections have significant precedential importance. In any event, such information would not be disclosed without first permitting the requesting party to seek Commission review and or a judicial stay pursuant to Section 0.459(g) of our rules.

64. In most instances, we expect it will be possible to write an order without publicly revealing the confidential information. In some instances, this may involve stating a conclusion that does not reveal confidential information, backed up by a citation to confidential information in the record that generally will have been available to parties signing a protective order. In other instances, orders may refer to industry-wide data that is aggregated in a manner that does not reveal confidential information. Some commenters suggest that submitters should be notified and given the opportunity to object, even when the data is aggregated, prior to the release of the data.[190] As discussed above,[191] we disagree. Aggregation of data ensures that confidential materials are released in a form that removes confidentiality issues. Similarly, releasing an order that cites to but does not reveal confidential information remedies confidentiality concerns. We therefore decline to adopt the commenters' suggestion as a matter of routine policy.

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[188] Joint Parties Comments at 24.

[189] *See* ¶ 54, *supra*.

[190] Joint Parties Comments at 27; CBT Comments at 9-10. *But see* MCI Reply Comments at 10 (decisions and information upon which they rely must be made public).

[191] *See* Section C.6., *supra*.

65. In *SBC Communications*, the court suggested that an order relying on confidential materials might be released all or in part under seal.[192] We have only rarely engaged in this practice,[193] and are not aware of its widespread use by other administrative agencies, although we note that the courts do utilize this approach. We consider this option to be a last resort when reference to confidential materials is necessary to support our decisions. In such cases, we note, the sealed decision and the confidential part of the record can be transmitted to the court under seal if judicial review is sought.

E. Clarifications to Commission Rules

66. Deferral of rulings on confidentiality requests. In the *Notice*, we sought comment on codifying the existing Commission practice of sometimes deferring action on requests for confidentiality if no request for inspection has been made.[194] Many of the commenters support amending the Commission's rules to defer ruling on a request for confidentiality until a request for inspection has been made.[195] Codification of the deferral practice will have the salutary effect of conserving administrative resources. As AT&T notes, this process is more efficient because in many instances, no one will ask for disclosure of the information for which confidential treatment has been requested.[196] This practice does not, as TH&F suggests, impose any hardships on the submitting party who, TH&F asserts, needs to know if its submission will be treated confidentially.[197] As long as the request for confidential treatment remains pending before the Commission, the information will be treated confidentially.

67. We will amend Section 0.459 to indicate that, based on considerations of administrative efficiencies, rulings on requests for confidentiality may in some instances be deferred until a request for inspection has been made. In other instances, including, for

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[192] *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1492 (D.C. Cir. 1995).

[193] *See In the Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee*, 12 FCC Rcd 19985, 20000, App. E (1997).

[194] *Notice*, 11 FCC Rcd at 12435.

[195] See Joint Parties Comments at 11-13, 25; Sprint Comments at 4; CBT Reply Comments at 7; CBT Comments at 7; GTE Comments at 8; AT&T Reply Comments at 10; and Kay Reply Comments at 4.

[196] *See* AT&T Reply Comments at 10.

[197] *See* TH&F Comments at 5.

example, where the information is gathered specifically so that it may be published in Commission reports, rulings on requests for confidentiality would likely be made even in the absence of requests for inspection. Consistent with the suggestion of the Joint Parties and CBT,[198] we will provide in our rules that the submitter will be notified of a request for inspection. At the time a request for inspection is made, the submitter may supplement its request for confidentiality, or revise it.

F. Other Issues

68. Changing the title of Section 0.457(d) and deleting the introductory paragraph. The Commission also proposed to amend the title of Section 0.457(d) of its rules to describe better the Section's contents as follows: "Certain trade secrets and commercial or financial information obtained from any person and privileged or confidential--categories of materials not routinely available for public inspection."[199] GTE suggests leaving out the word "certain," as it may lead to confusion.[200] We will adopt this proposal along with GTE's suggested amendment. We will also delete as unnecessary the introductory paragraph of Section 0.457(d), which is derived from the June 1967 Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, and does not necessarily reflect the current state of the law concerning Exemption 4.

69. Defining "Required" vs. "Voluntary" Some parties seek clarification of the *Critical Mass* required/voluntary distinction[201] as applied to our confidentiality rules. For example, the Joint Parties seek modification of Section 0.459(e) to state that information is "required" if provided in response to a direct Commission order, a subpoena, or other legal process.[202] GCI more broadly suggests that all information submitted in response to any Commission request for information should be considered "required."[203] As a more general matter, we decline to make these clarifications, preferring that the distinction between "required" and "voluntary" for Exemption 4 purposes be examined on a case-by-case basis,

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[198] *See* Joint Parties Comments at 27; CBT Comments at 8.

[199] *Notice*, 11 FCC Rcd at 12435-36.

[200] *See* GTE Comments at 8.

[201] *See* ¶ 4, *supra*.

[202] Joint Parties Comments at 24.

[203] GCI Comments at 8-11.

in light of the evolving case law. As discussed above, the provision in section 0.459(e) of the rules governing the return of materials that are submitted voluntarily was adopted prior to *Critical Mass*. For purposes of this rule, our use of the term "voluntary" was not intended to be co-extensive with the legal distinctions articulated in the *Critical Mass* decision. We shall also modify section 0.459(e) to clarify that, if the information is subject to a request for inspection, it will not be returned.[204]

70. The Joint Parties also suggest that Commission should routinely withhold "[i]nformation provided voluntarily to the Commission subject to a certification by the provider that such information is not customarily disclosed."[205] As we discussed above, when requesting that information be afforded confidential treatment, a submitter will be required to indicate whether information provided is customarily disclosed to the public and the extent of any prior disclosure. We will assess this submission in making our confidentiality determination.

71. Opportunity to comment. We agree with CBT that if the information belongs to third parties, they should be afforded the opportunity to participate in the Commission proceeding resolving the confidentiality issue.[206] Section 0.459 will be amended accordingly.

72. Clarification of review procedures. While Kay, Lurya, and Aitken seek modification of the procedures for review of confidentiality rulings,[207] we find no need to do so, as these matters are already addressed by the Commission's current rules.[208] Specifically Section 0.459(g) provides that, if a request for confidentiality is denied, the requester may, within five working days, file an application for review by the Commission. If the application for review is denied, the requesting party will be afforded 5 working days in which to seek a judicial stay of the ruling.[209] In such circumstances, the material is not

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[204] *See Southwestern*, 12 FCC Rcd at 7774.

[205] Joint Parties Comments at 24.

[206] CBT Comments at 8 n.7.

[207] *See* Kay Comments at 4-5; Aitken Comments at 3-4; Lurya Comments at 2.

[208] 47 C.F.R. 0.459(g).

[209] *Id.*

released until the court denies a stay request.[210] Similar provisions govern situations in which the records are the subject of a FOIA request.[211] We believe that these procedures provide parties with sufficient opportunity to obtain timely and independent review of Bureau and Commission decisions denying confidentiality.

73. Deletion of obsolete references and renumbering of rules. We will take this opportunity to update Section 0.457(d)(1) of our Rules.[212] Under Section 0.457(d)(1)(i), financial reports filed under former Section 1.611 are not routinely made available for public inspection. Section 1.611 of our Rules was deleted when we eliminated the regular filing of financial reports by broadcast stations.[213] We also no longer require radio or television networks to file financial reports.[214] However, these reports are permanent records and therefore still exist.[215] We will therefore amend Section 0.457(d)(1)(i) to indicate that financial reports submitted pursuant to former Section 1.611 remain not routinely available for public inspection. The parenthetical to Section 0.457(d)(1)(i) states that "fees paid on consummation of the assignment or transfer of a broadcast station licenses, pursuant to § 1.1111 of this chapter, are computed from information contained in financial reports submitted pursuant to § 1.611. Information and correspondence concerning such computations are not routinely available for public inspection." Fees for the assignment or

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[210] *Cf.* 47 C.F.R. § 0.461(h)(4) ("If a motion for stay is not made . . . the record will be produced for inspection"). It follows that if a motion for stay is made and denied, the record will be produced for inspection. In this regard, we have clarified our rules accordingly.

[211] 47 C.F.R. §§ 0.461(i)(4) and 0.461(j).

[212] 47 C.F.R. § 0.457(d)(1).

[213] The financial reporting requirement was transferred from Section 1.611 to Section 73.3611 in *In the Matter of Radio and Television Broadcasting*, 72 F.C.C.2d 534 (1979), App. A. ¶ 63. After Section 73.3611 was eliminated in *Radio Broadcast Services, Amendment of Form 324, Annual Financial Report of Broadcast Stations*, 51 RR 2D 135 (1982), Section 1.611 was deleted from our rules. *Oversight of Radio and Television Broadcast Rules*, 50 FED. REG. 13972, 13973 (1985).

[214] *Id.*

[215] The Commission's record retention schedule, NCI-173-79-3, Item 86 (Sept. 21, 1981), provides that Annual Financial Reports of Networks and Licensees of Broadcast Stations are transferred to the Federal Records Center when they are three years old, are offered to the National Archives when they are 30 years old, and should not be destroyed.

transfer of broadcast stations are now set by statute as reflected in Section 1.1104 of our rules.[216] Therefore, we will eliminate the parenthetical portion of Section 0.457(d)(1).

74. Section 0.457(d)(1)(iii) of our rules provides that "Schedules 2, 3, and 4 of financial reports submitted for cable television systems pursuant to § 76.403 of this chapter" are not routinely available for public inspection. Section 76.403 was deleted in 1983 and cable television financial reports were eliminated at that time.[217] While the Commission indicated that reports previously filed under Section 76.403 would continue to be afforded confidentiality under Section 0.457(d),[218] these reports have been destroyed pursuant to our records retention schedules.[219] In addition, Section 0.457(d)(1)(iv) of our rules indicate that the "annual fee computation forms submitted for cable television systems pursuant to § 76.406 of this chapter" are not routinely available for public inspection. These forms are no longer used. Section 76.406 was deleted from our rules in 1982.[220] Under our record retention schedules, any such forms previously filed should have been long since been destroyed.[221] We will therefore eliminate Sections 0.467(d)(1)(iii) and 0.467(d)(1)(iv) from our rules as unnecessary. If the reports have inadvertently not been destroyed, however, we intent that they remain not routinely available.

75. Section 0.457(d)(2) lists various materials submitted confidentially to the Commission prior to March 25, 1974. We will renumber this subsection as part of Section 0.457(d)(1). We will also renumber current Section 0.457(d)(2)(i) as a new Section 0.457(d)(2).

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[216] 47 U.S.C. § 158(g); 47 C.F.R. § 1.1104.

[217] *Cable TV Financial Report*, 54 RR 2d 799, 803 (1983).

[218] *Id.* at 800 n.1.

[219] The Commission's record retention schedule, NC-173-75-1, Items 21, 22, and 23 (July 28, 1975), indicates that cable systems annual reports are transferred to the Federal Records Center after three years and destroyed ten years later. If the reports have inadvertently not been destroyed, they remain not routinely available.

[220] *Cable Television Service; Amendment of the Commission's Rules Concerning the Computation of the Cable Television Annual Fee Requirement, of a Specific Section and Cable Television System Reports Requirement of a Specific Section*, 47 FED. REG. 8783 (1982).

[221] *See* NC-173-75-1, Items 21, 22, and 23 (July 28, 1975) (cable systems annual reports are transferred to the Federal Records Center after three years and destroyed ten years later).

IV. FINAL REGULATORY FLEXIBILITY ACT CERTIFICATION

76. Our *Notice* incorporated an initial regulatory flexibility analysis of the proposed rules. No comments were received. Section 604 of the Regulatory Flexibility Act, as amended,[222] requires a final regulatory flexibility analysis in a notice and comment rulemaking proceeding unless we certify that "the rule will not, if promulgated, have a significant economic impact on a significant number of small entities."[223] The rule modifications adopted herein largely codify the Commission's existing practices regarding confidential information, and therefore will not have a substantial economic effect on small entities. We therefore certify, pursuant to Section 605(b) of the Regulatory Flexibility Act, that the rules will not have a significant economic impact on a substantial number of small entities. The Office of Public Affairs, Reference Operations Division, shall send a copy of this Report and Order, including this certification and statement, to the Chief Counsel for Advocacy of the Small Business Administration.[224] A copy of this certification will also be published in the Federal Register notice.

V. PAPERWORK REDUCTION ACT

77. This Report and Order contains new and modified information collections. As part of the Commission's continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this Order, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days from date of publication of this Order in the Federal Register. Comments may address the following: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Written comments on the proposed and/or modified information collections must be submitted on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to

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[222] 5 U.S.C. § 604.

[223] 5 U.S.C. § 605(b).

[224] *See* 5 U.S.C. § 605(b).

Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to <jboley@fcc.gov>. For additional information concerning the information collections contained in the Report and Order contact Judy Boley at 202-418-0214.

VII. ORDERING CLAUSES

78. IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303(r) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 303(r) and 403, this Report and Order is hereby ADOPTED and Part 0 of the Commission's rules ARE AMENDED as set forth in Appendix B, effective 90 days following publication in the Federal Register and after OMB approval, unless a notice is published in the Federal Register stating otherwise.

79. IT IS FURTHER ORDERED that the Office of Public Affairs, Reference Operations Division, shall send a copy of this Report and Order, including the Regulatory Flexibility Act certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX A

PARTIES FILING COMMENTS AND REPLY COMMENTS

COMMENTING PARTIES:

Aitken Irvin Berlin Vrooman & Cohn, LLP (Aitken)
Cincinnati Bell Telephone Company (CBT)
General Communications, Inc. (GCI)
GTE Service Corp. (GTE)
Ameritech, Bell Atlantic, Bell Communications Research, BellSouth, NYNEX, Pacific Bell, Nevada Bell and US West (Joint Parties)
James A. Kay, Jr. (Kay)
Law Offices of Alan M. Lurya (Lurya)
MCI Telecommunications Corporation (MCI)
National Cable Television Association, Inc. (NCTA)
SBC Communications, Inc. (SBC)
Sprint Corporation (Sprint)
Thompson Hine & Flory, P.L.L. (TH&F)
Time Warner Communications Holdings, Inc. (Time Warner)

REPLY COMMENTS:

Aitken Irvin Berlin Vrooman & Cohn, LLP (Aitken)
Association for Local Telecommunications Services (ALTS)
AT&T Corporation (AT&T)
Cincinnati Bell Telephone Company (CBT)
General Communications, Inc. (GCI)
GTE Service Corp. (GTE)
Home Box Office, Inc. (HBO)
Ameritech, Bell Atlantic, Bell Communications Research, BellSouth, NYNEX, Pacific Bell, Nevada Bell and US West (Joint Parties)
James A. Kay, Jr. (Kay)
MCI Telecommunications Corporation (MCI)
SBC Communications, Inc. (SBC)
Time Warner Communications Holdings, Inc. (Time Warner)
Thompson Hine & Flory, P.L.L. (TH&F)

APPENDIX B

RULES

(AMENDED LANGUAGE HIGHLIGHTED)

Part 0 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 0 – COMMISSION ORGANIZATION

1. The authority citation for Part 0 continues to read as follows:

AUTHORITY: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

2. Section 0.457 is amended by changing the title for subsection (d), by deleting the introductory paragraph of subsection (d) and subsections (d)(1)(iii) and (d)(1)(iv), by amending the text of subsection (d)(1)(i), by adding new subsections (d)(1)(iii) and (d)(1)(iv), by renumbering Section 0.457(d)(2) as subsection 0.457(d)(1)(v), and by renumbering Section 0.457(d)(2)(i) as Section 0.457(d)(2) so that subsection (d) reads as follows:

§ 0.457 Records not routinely available for public inspection.

* * * * *

(d) ***Trade secrets and commercial or financial information obtained from any person and privileged or confidential – categories of materials not routinely available for public inspection, 5 U.S.C. 552(b)(4) and 18 U.S.C. 1905.***

(1) The materials listed in this subparagraph have been accepted, or are being accepted, by the Commission on a confidential basis pursuant to 5 U.S.C. 552(b)(4). To the extent indicated in each case, the materials are not routinely available for public inspection. If the protection afforded is sufficient, it is unnecessary for persons submitting such materials to submit therewith a request for non-disclosure pursuant to s 0.459. A persuasive showing as to the reasons for inspection will be required in requests for inspection of such materials submitted under § 0.461.

(i) Financial reports submitted by licensees of broadcast stations pursuant to former § 1.611 or by radio or television networks are not routinely available for inspection.

(ii) Applications for equipment authorizations (type acceptance, type approval, certification, or advance approval of subscription television systems), and materials relating to such applications, are not routinely available for public inspection prior to the effective date of the authorization. The effective date of the authorization will, upon request, be deferred to a date no earlier than that specified by the applicant. Following the effective date of the authorization, the application and related materials (including technical specifications and test measurements) will be made available for inspection upon request (see § 0.460).

(iii) information submitted in connection with audits, investigations and examination of records pursuant to 47 U.S.C. § 220.

(iv) programming contracts between programmers and multichannel video programming distributors.

(v) Prior to July 4, 1967, the rules and regulations provided that certain materials submitted to the Commission would not be made available for public inspection or provided assurance, in varying degrees, that requests for nondisclosure of certain materials would be honored. See, e.g., 47 CFR (1966 ed.) 0.417, 2.557, 5.204, 5.255, 15.70, 21.406, 80.33, 87.153, 89.215, 91.208, 91.605 and 93.208. Materials submitted under these provisions are not routinely available for public inspection. To the extent that such materials were accepted on a confidential basis under the then existing rules, they are not routinely available for public inspection. The rules cited in this subdivision were superseded by the provisions of this paragraph, effective July 4, 1967. Equipment authorization information accepted on a confidential basis between July 4, 1967 and March 25, 1974, will not be routinely available for inspection and a persuasive showing as to the reasons for inspection of such information will be required in requests for inspection of such materials submitted under § 0.461.

(2) Unless the materials to be submitted are listed in paragraph (d)(1) of this section and the protection thereby afforded is adequate, it is important for any person who submits materials which he wishes withheld from public inspection under 5 U.S.C. 552(b)(4) to submit therewith a request for non-disclosure pursuant to § 0.459. If it is shown in the request that the materials contain trade secrets or commercial, financial or technical data which would customarily be guarded from competitors, the materials will not be made routinely available for inspection; and a persuasive showing as to the reasons for inspection will be required in requests for inspection submitted under § 0.461. In the absence of a request for non-disclosure, the Commission may, in the unusual instance, determine on its own motion that the materials should not be routinely available for public inspection. Ordinarily, however, in the absence of such a request,

materials which are submitted will be made available for inspection upon request pursuant to § 0.461, even though some question may be present as to whether they contain trade secrets or like matter.

* * * * *

3. Section 0.459 is amended by revising paragraphs (b), (d), and (e) to read as follows:

§ 0.459 Requests that materials or information submitted to the Commission be withheld from public inspection.

* * * * *

(b) Each such request shall contain a statement of the reasons for withholding the materials from inspection (see § 0.457) and of the facts upon which those records are based , **including:**

(1) identification of the specific information for which confidential treatment is sought;

(2) identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission;

(3) explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged;

(4) explanation of the degree to which the information concerns a service that is subject to competition;

(5) explanation of how disclosure of the information could result in substantial competitive harm;

(6) identification of any measures taken by the submitting party to prevent unauthorized disclosure;

(7) identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties;

(8) justification of the period during which the submitting party asserts that material should not be available for public disclosure; and

(9) any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

* * * * *

(d) **(1) The Commission may defer acting on requests that materials or information submitted to the Commission be withheld from public inspection until a request for inspection has been made pursuant to § 0.460 or § 0.461. The information will be accorded confidential treatment, as provided for in § 0.459(g) and § 0.461, until the Commission acts on the confidentiality request and all subsequent appeal and stay proceedings have been exhausted.**

(2) Requests which comply with the requirements of paragraphs (a) and (b) of this section will be acted upon by the appropriate Bureau or Office Chief, who is directed to grant the request if it presents by a preponderance of the evidence a case for non-disclosure consistent with the provisions of the Freedom of Information Act, 5 U.S.C. 552. If the request is granted, the ruling will be placed in the public file in lieu of the materials withheld from public inspection. A copy of the ruling shall be forwarded to the General Counsel.

* * * * *

(e) If the materials are submitted voluntarily (i.e., absent any direction by the Commission), the person submitting them may request the Commission to return the materials without consideration if the request for confidentiality should be denied. In that event, the materials will ordinarily be returned (e.g., an application will be returned if it cannot be considered on a confidential basis). **Only** in the unusual instance where the public interest so requires will the materials be made available for public inspection. **However, no materials submitted with a request for confidentiality will be returned if a request for inspection is filed under § 0.461.** If submission of the materials is required by the Commission and the request for confidentiality is denied, the materials will be made available for public inspection.

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