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

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FEDERAL COMMUNICATIONS COMMISSION
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GC Docket No. 98-03

In the Matter of)
)
Examination of Current Policy)
Concerning the Treatment of)
Confidential Information Submitted)
to the Commission)

PETITION FOR RECONSIDERATION
OF MCI WORLDCOM, INC.

MCI WORLDCOM, INC.

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SUMMARY

Although the Report and Order issued in this proceeding is a good first step in revising the Commission's FOIA procedures, the Order reflects a bias toward nondisclosure of tariff cost support data that is claimed to be confidential.

The Order states that the Commission will occasionally grant LECs' requests to keep tariff cost support data entirely confidential in certain undefined circumstances. Since constitutional due process and APA requirements prohibit final Commission decisions based on evidence not available to interested parties, this procedure, by permitting some rates to become effective or be found lawful based on secret cost support data, violates ratepayers' due process rights.

The Order also fails to spell out the circumstances under which cost support data will be kept entirely confidential. Since agency discretion must be exercised according to articulated standards in order to avoid arbitrary and capricious action, the Commission's failure to set forth such standards makes such nondisclosure doubly arbitrary and capricious.

Moreover, in the Tariff Streamlining Order, the Commission interpreted Section 204(a)(3) to preclude any possibility of damages liability for LEC streamlined tariff rates allowed to go into effect without suspension or investigation. By depriving ratepayers of any subsequent damages relief for the entire period that such rates are in effect, an order allowing a streamlined tariff into effect, once affirmed by the Commission, is a final,

reviewable order and thus must satisfy due process requirements. Accordingly, there are almost no circumstances, whether in the initial review of a challenged LEC streamlined tariff or in a full-fledged investigation of any tariff, in which the total nondisclosure of cost support data could ever be legal.

Furthermore, by requiring a quick decision on any LEC request for confidential treatment of tariff cost support without any consideration of opposing arguments, the procedures established in the Order effectively create a presumption in favor of such treatment. Whether or not such data is made available to others under a protective order, such a presumption is antithetical to the policies reflected in the public tariffing requirement and the Commission's regulations requiring the public filing of any tariff cost support and generates the overuse of burdensome protective orders for information that should not qualify as confidential. The restrictions imposed by protective orders stifle the full discussion of issues that is necessary for the Commission's development of effective policies. Accordingly, ILECs should be required to file any request for confidential treatment of tariff cost support in advance of the related tariff filing, so that the Commission can conduct a meaningful examination of the request in light of opposing comments.

Finally, even assuming the Commission's procedures with regard to tariff cost support are otherwise proper, they are still too cumbersome to permit meaningful public participation in streamlined tariff review proceedings and should be reconsidered.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
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PETITION FOR RECONSIDERATION
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Introduction

MCI Worldcom, Inc.¹ by its undersigned attorneys, hereby requests that the Commission reconsider and modify its Report and Order (Order) released in the above-captioned proceeding in the manner discussed below.² Although the Order is a step in the right direction toward a systematic revision of the Commission's procedures for dealing with information claimed to be confidential under the Freedom of Information Act (FOIA) and the Commission Rules and Regulations implementing the FOIA,³ the Order is marred by the Commission's apparent willingness to treat tariff cost support information as confidential without a searching examination and its tendency toward nondisclosure of such information when it is claimed to be confidential. The

¹ Comments were filed in this proceeding by MCI Telecommunications Corporation, a wholly-owned subsidiary of MCI Communications Corporation (MCIC). MCI Worldcom, Inc. is the successor to MCIC. "MCI," as used herein, will refer to MCI Telecommunications Corporation or to MCI Worldcom, depending on the context.

² FCC 98-184 (released August 4, 1998).

³ See Sections 0.441-0.470 of the Commission's Rules, 47 C.F.R. §§ 0.441-0.470.

insufficient disclosure of tariff cost support material that is made possible by the Order is inconsistent with the requirements of due process, the protections of the Administrative Procedures Act (APA) and the policies expressed in the public tariffing obligation.

I. THE COMMISSION'S DECISION TO PERMIT THE TOTAL NONDISCLOSURE OF TARIFF COST SUPPORT DATA SHOULD BE RECONSIDERED

The most egregious example of the Commission's tendency in the Order to treat tariff cost support as confidential is the Commission's decision that it will, in certain undefined circumstances, uphold requests for complete nondisclosure of tariff support information claimed to be confidential. In such situations, no other party would have access to the carrier's cost support data, even under a protective order, thus precluding effective public participation in the tariff review process. Although the Commission states that it "believe[s]" that requests for "complete confidentiality" -- i.e., total nondisclosure -- "would be granted only in the rarest of circumstances,"⁴ it gives no hint as to what those circumstances might be, or how the showing necessary for complete confidentiality might differ from the standard confidentiality showing required for information that will be disclosed only pursuant to a protective order.

⁴ Order at ¶ 40.

A. Total Nondisclosure of Tariff Cost Support Data
Violates Due Process and is Arbitrary and Capricious

As MCI explained in its comments, both due process and APA requirements prohibit Commission decisions based on materials not available to other parties. It is elementary that an agency's failure "to disclose the information upon which it relies" violates "quasi-adjudicatory" informal "notice" and "hearing" requirements.⁵ "The public right to participate in a hearing" upon reasonable notice "is effectively nullified when the agency decision is based ... on ... secret points...."⁶ Such "agency secrecy" permits "no opportunity for a real dialogue or exchange of views,"⁷ which does "violence not only to" an informal notice and hearing provision such as Section 204 of the Communications Act, "but to the basic fairness concept of due process as well."⁸

Commission decision-making based on unavailable data, with a concomitant failure to disclose essential public material, is arbitrary and capricious.⁹ To avoid this result, "the critical role of adversarial comment" requires timely disclosure of essential data.¹⁰ If an agency approves a rate based on data

⁵ See U.S. Lines Inc. v. FMC, 584 F.2d 519, 535, 539 (D.C. Cir. 1978).

⁶ Id. at 539.

⁷ Id. at 540.

⁸ Id. at 541. See also, Sea-Land Service, Inc. v. FMC, 653 F.2d 544, 551-52 (D.C. Cir. 1981).

⁹ U.S. Lines, 584 F.2d at 533-35, 541-43.

¹⁰ Id. at 542. See also, Home Box Office, Inc. v. FCC, 567 F.2d 9, 55 (D.C. Cir.), cert. denied, 434 U.S. 829

that is not available to interested parties, the "public" does not have "a chance to comment on the methodology the agency used to derive a rate from the data.... [T]he agency ... cannot function properly without having the benefit of such comments before it makes any final decisions."¹¹

Thus, by leaving open the possibility of total nondisclosure of cost support data in tariff reviews and tariff investigations, the Order makes it inevitable that rates will be allowed to go into effect or found lawful based on secret cost support data. Such secret ratemaking violates due process and is arbitrary and capricious.

B. The Order Fails to Specify the Standards Governing its Decision Whether to Grant Total Nondisclosure

To make matters worse, the Order provides no hint as to the circumstances under which such total nondisclosure might be allowed. In other words, from time to time, the Commission will exercise what it apparently views as its unbridled discretion to use tariff review and/or investigation procedures that violate due process as it sees fit. This will not do.

(1977) (citing need for "adversarial discussion among the parties").

¹¹ American Lithotripsy Society v. Sullivan, 785 F. Supp. 1034, 1036 (D.D.C. 1992). See also, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974) (citing "refusal of the agency to respond to what seem to be legitimate problems with the [agency's] methodology," which had not been made available prior to the close of the comment period, as "a critical defect in the decision-making process").

It is a bedrock principle of administrative law that agency discretion must be exercised according to articulated standards. Systematic "standards and principles that govern [agency] decisions in as much detail as possible" are necessary to "confine and control the exercise of discretion,"¹² "in order to reduce the risk of arbitrary and inconsistent action."¹³ As the U.S. Court of Appeals for the D.C. Circuit explained: "An agency cannot hide the standards under which it operates, for we are unable to evaluate whether its reasoning meets the reasoned decisionmaking requirement unless we know against what standards its factual findings have been judged."¹⁴ In terms that apply fully to the decision to permit total nondisclosure in undefined circumstances, courts have stated that "[w]here, as here, there are no standards governing the exercise of discretion ..., the scheme permits and encourages an arbitrary and discriminatory enforcement of the law."¹⁵ The Commission's failure to set forth standards governing its review of requests for total nondisclosure of tariff cost support thus makes such nondisclosure doubly arbitrary and capricious.

¹² Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

¹³ Industrial Holographics, Inc. v. Donovan, 722 F.2d 1362, 1367 n. 9 (7th Cir. 1983).

¹⁴ Coal Exporters Ass'n, Inc. v. U.S., 745 F.2d 76, 99 (D.C. Cir. 1984).

¹⁵ Jean v. Nelson, 711 F.2d 1455, 1502 (11th Cir. 1983) (quoting Papachristou v. City of Jacksonville, 405 U.S. 170-71 (1972)).

C. Under the Commission's Interpretation of Section 204(a)(3), These Due Process Concerns Are Triggered as Soon as a Streamlined Tariff Filing is Challenged

The Commission should also be aware that the due process stakes of its approach toward requests to treat tariff cost support as entirely confidential are now much higher than they were during the comment period in this proceeding. In its Tariff Streamlining Order,¹⁶ the Commission (incorrectly) found that pursuant to the "deemed lawful" phrase in Section 402(b)(1)(A)(iii) of the Telecommunications Act of 1996, adding Section 204(a)(3) to the Communications Act, a new local exchange carrier (LEC) tariff covered by the new provision that takes effect without prior suspension or investigation is conclusively presumed to be reasonable and thus lawful for the entire period that it is in effect. Accordingly, even if such a tariff is ultimately found unlawful, such finding cannot subject the filing LEC to liability for damages for the period prior to the finding of unlawfulness. In other words, an order allowing a LEC streamlined tariff into effect without suspension or investigation immunizes the rates established in that tariff from damages liability for the entire period that the rates remain in effect.¹⁷

Although MCI has sought reconsideration of this interpretation of the "deemed lawful" language in Section

¹⁶ Report and Order, In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, 12 FCC Rcd 2170 (1997), petitions for recon. pending.

¹⁷ Id. at 2181-84, ¶¶ 19-20, 24.

204(a)(3), the Commission's interpretation governs unless and until it is reconsidered. That interpretation effects a sea change in administrative law that greatly expands the role of due process in tariff review proceedings. Typically, an agency decision allowing a tariff to become effective is not final and thus is unreviewable because it does not represent a finding of lawfulness that precludes liability for damages in a subsequent complaint proceeding for the period the rate is in effect.¹⁸

Under the Commission's misreading of Section 204(a)(3) in the Tariff Streamlining Order, however, a decision to allow a LEC streamlined tariff to go into effect, once affirmed by the Commission, is final and reviewable. That is because, as MCI explained in its Petition for Reconsideration of the Tariff Streamlining Order, "an agency order is final for purposes of appellate review when it imposes an obligation, denies a right, or fixes some legal relationship...."¹⁹ Judicial review is appropriate in cases involving agency "orders of definitive impact, where judicial abstention would result in irreparable injury",²⁰ which can be shown where a party has "no practical

¹⁸ See Southern Railway Co. v. Seaboard Allied Milling Corp., et al., 442 U.S. 444, 454 (1979); Aeronautical Radio v. FCC, 642 F.2d 1221, 1234 (D.C. Cir. 1980), cert. denied, 451 U.S. 920 (1981).

¹⁹ Papago Tribal Utility Authority v. FERC, 628 F.2d 235, 239 (D.C. Cir.), cert. denied, 101 S.Ct. 784 (1980). See also, Ruckelshaus, 439 F.2d at 590 n. 8 ("The test of finality ... is ... whether [an order] imposes an obligation or denies a right with consequences sufficient to warrant review.")

²⁰ Papago, 628 F.2d at 238.

means of procuring effective relief after the close of the proceeding."²¹

If, as discussed above, the Commission is right about Section 204(a)(3), and an order allowing a LEC streamlined tariff into effect without suspension or investigation immunizes that tariff from damages as long as it is in effect, such order "denies a right" to damages forever. Such a determination, once affirmed by the full Commission, is final, not interlocutory, since it causes ratepayers, who have "no practical means of procuring effective relief" for the period that such a rate is in effect, "irreparable injury."

Procedural due process requirements must be satisfied "before an individual is finally deprived of a property interest."²² Since ratepayers may be "finally deprived" of a right to damages by a Commission decision allowing a LEC streamlined tariff to go into effect without suspension or investigation, procedural due process requirements are triggered whenever such a tariff is challenged by a petition to reject or to suspend and investigate, not just at the point where the Commission decides to investigate the tariff.²³ The Commission is therefore

²¹ Id. at 240.

²² Matthews v. Eldridge, 424 U.S. 319, 333 (1976).

²³ Tariff investigations have always been subject to due process requirements. See, e.g., American Television Relay, Inc. (ATR), 63 FCC 2d 911, 921 (1977) (referring to parties' "right of due process"), aff'd Las Cruces TV Cable v. FCC, 645 F.2d 1041 (D.C. Cir. 1981); American Telephone and Telegraph Co., 65 FCC 2d 295, 297 (1977).

precluded from the use of procedures that violate ratepayers' due process rights in the initial review of any challenged LEC streamlined tariff, as well as any tariff investigation. The secret ratemaking that would be effected by the total nondisclosure of LEC cost support for such a tariff, as discussed above, would render any decision to allow the tariff into effect arbitrary and capricious and a violation of due process. The absence of any standards to govern the decision when to engage in such secret ratemaking doubly invalidates any such decision.

Accordingly, there are virtually no circumstances, whether in the initial review of a challenged LEC streamlined tariff or in a full-fledged investigation of any tariff, that the total nondisclosure of cost support data could ever be legal, especially given the absence of any standards governing the decision to allow such nondisclosure. MCI submits that it is pointless, as well as arbitrary and capricious, to announce a procedure that can almost never be legally carried out. The decision in the Order to permit the total nondisclosure of tariff support data at the Commission's discretion should therefore be reconsidered and reversed.

II. THE PROCEDURES IN THE ORDER CREATING A PRESUMPTION THAT ILEC TARIFF COST SUPPORT DATA WILL BE TREATED AS CONFIDENTIAL, EVEN IF DISCLOSED UNDER PROTECTIVE ORDER, ALSO VIOLATE THE POLICY GOALS OF THE PUBLIC TARIFFING REQUIREMENT

As MCI also explained in its comments in this proceeding, as well as in its Petition for Reconsideration of the Tariff Streamlining Order, treating tariff cost support data submitted

by monopoly incumbent LECs (ILECs) as confidential, whether or not it is made available to others under a protective order, violates the Commission's rules and the policies embodied in the tariffing requirement. The Commission's inappropriate willingness to treat such data as confidential in ILEC tariff review proceedings, whether involving streamlined tariffs or otherwise, has resulted in various procedural problems that should be corrected on reconsideration.

The Commission has reaffirmed its approach in the Tariff Streamlining Order of permitting LECs to submit tariff cost support data under a protective order "upon a showing by a preponderance of the evidence that confidential treatment is warranted."²⁴ As MCI explained in its Petition for Reconsideration of the Tariff Streamlining Order, however, the Bureau will not have time to conduct a meaningful examination of an ILEC's confidentiality request in a streamlined tariff review. Since the cost data supporting a streamlined tariff has to be made available under a protective order almost immediately if it is going to be of any use, the Bureau will not have the benefit of opposing comments before it has to decide whether to treat such data confidentially.

Although the Commission has made the requirements for any confidentiality request under Section 0.459(b) of its Rules more rigorous, it is difficult to understand how a "preponderance of the evidence" test can fairly be applied without taking into

²⁴ Order at ¶ 39.

account opposing comments. In such a situation, it is almost inevitable that the submitting LEC will have been found to have met the "preponderance of the evidence" test, since its request is the only evidence that the Bureau will have reviewed. Given the relative absence of local service competition, it is unlikely that under a fair procedure, an ILEC's cost support data could be found to be competitively sensitive and thus confidential under Section 0.457(d) of the Commission's Rules. Under the Commission's one-sided procedure, however, such a finding is almost guaranteed, as long as the ILEC goes through the motions of making the required showing. Thus, it is inevitable that the quick, one-sided procedure established in the Order for addressing requests to treat tariff cost support as confidential will result in grants of such requests on insufficient grounds.

The Commission asserts in the Order that release of the information under a protective order affords interested parties the opportunity to participate in tariff proceedings, "thus allaying the fears expressed by some commenters,"²⁵ as if making the information available obviated the need for a serious examination of the confidentiality of the data. There are significant public and private costs, however, to any procedure that makes it likely that weak confidentiality claims will be upheld, whether or not the covered information is made available to others under protective order. Accordingly, it is important that the Commission's procedures with regard to tariff cost

support claimed to be confidential make it possible for the Commission to conduct a searching examination of such claims.

As MCI has repeatedly explained, tariff cost support data should almost never be treated as confidential, in light of the Commission's rules requiring dominant carriers to file public cost support. "[T]he Commission's established practice is to require public filing of cost support for tariffs,"²⁶ and the disclosure of such information comports with the APA's fundamental interest in deciding administrative matters on a public record, discussed above, and the strong statutory preference for disclosure established by the FOIA.²⁷

Section 0.455(b)(11) of the Commission's Rules provides that tariff schedules, all documents filed in connection therewith, and all communications related thereto shall be publicly available.²⁸ Such a rule, furthermore, is essential to carry out the Commission's administration of the public tariffing requirements of Section 203 and 412 of the Communications Act.²⁹

²⁶ Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526 (CCB 1992), review denied, 9 FCC Rcd 180 (1993), recon. denied, Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, FCC 95-27 (released Feb. 14, 1995).

²⁷ Id. at 1532.

²⁸ See also, Section 0.451(a) of the Commission's Rules.

²⁹ See MCI Telecommunications Corp. v. AT&T Co., 114 S.Ct. 2223, 2231 (1994) ("The tariff-filing requirement is ... the heart of the common carrier section of the Communications Act.") Section 412 provides that "[t]he copies of [the required tariffs] ... filed with the Commission ... shall be preserved as public records in the custody of the secretary of the Commission...."

A tariff is a public document and must be supported with information that is as available to the public as the tariff itself. Section 203(a) requires that tariff filings "shall contain such other information ... and be posted and kept open for public inspection ... as the Commission may by regulation require...." The Commission's statement that Section 0.455(b)(11) will be waived whenever it is found appropriate to treat such data as confidential under a protective order³⁰ begs the question. The Commission has not justified the semi-automatic waiver of the public cost support requirement upon request anymore than it has justified the semi-automatic grant of ILEC requests for confidentiality, at least under current competitive conditions.

Moreover, such casual acceptance of confidentiality claims covering tariff support data and the resulting protective orders are inherently burdensome. When information is treated as confidential, parties obtaining access to such information are required to file two sets of pleadings: a confidential filing "under seal" and a redacted public version. The Commission must ensure that the non-public versions of such pleadings are handled in a manner that preserves their confidentiality. As a result, the public has access only to the incomplete record in the public file. Confidential treatment also creates burdens for the Commission's decision-making process, which are discussed in the Order (at ¶¶ 63-65). Moreover, participants in the proceeding

³⁰ Order at ¶ 42.

who must sign nondisclosure statements in order to obtain access to the cost support data have to make sure that they never reveal the information in public discussions or in other activities or proceedings, thereby restricting unreasonably the effective discharge of their employment responsibilities. Such restrictions incur a public cost as well, since they stifle the full discussion of issues that is necessary for the Commission's development of effective policies.

Given the importance of the Commission's rules and policies favoring public cost support, the Commission's announced procedures making the grant of an ILEC's request for confidential treatment of tariff cost support data virtually automatic should be reconsidered in light of current competitive conditions. There is still almost no competition in any category of local service.³¹ Even two-and-a-half years after the enactment of the

³¹ Memorandum Opinion and Order at ¶¶ 168, 170 & n. 465, 172, 183, Application of Worldcom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to Worldcom, Inc., CC Docket No. 97-211, FCC 98-225 (released Sept. 14, 1998) (ILECs still dominant in both residential and large business local service and access service markets, with 98.6% of all local exchange and exchange access revenues); Further Notice of Proposed Rulemaking at ¶ 51 & n. 151, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20, and 1998 Biennial Regulatory Review --Review of Computer III and ONA Safeguards and Requirements, CC Docket No. 98-10, FCC 98-8 (released Jan. 30, 1998) (BOCs remain overwhelmingly dominant providers of local exchange and exchange access services, accounting for about 99.1% of the local service revenues in their service territories); Memorandum Opinion and Order at ¶ 22, Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina, CC Docket No. 97-208, FCC 97-418 (released Dec. 24, 1997) (BellSouth's share of the local service market in South Carolina is 99.8%).

Telecommunications Act of 1996, no Bell Operating Company (BOC) has yet made the showing required by Section 271(d) for entry into in-region long distance service. There is therefore no possible justification for the presumption effectively established by the Commission's procedures that ILEC cost support is competitively sensitive and therefore confidential.

Unless and until competition gains a foothold in the local service market, therefore, the Commission's confidentiality procedures in tariff review proceedings must be modified to allow a more serious review of ILEC confidentiality requests. In the rare instance where ILEC cost support data might be competitively sensitive, the ILEC should file its request for confidential treatment sufficiently in advance of its tariff filing so that parties who might want to file petitions challenging such a tariff can oppose the request for confidentiality and the Bureau can rule on the request, in light of the opposing arguments, prior to the tariff filing.

Given the relative infrequency of ILEC tariff filings that could possibly be based on competitively sensitive cost support data, this procedure should not be unduly inconvenient, nor should it add a significant amount of time to ILEC tariff reviews. Ratepayers can be expected to file oppositions to such ILEC requests in 3 or 4 work days, and the Bureau should be able to act within 3 or 4 additional work days. If the Bureau denies the request, the cost data would then be filed publicly with the tariff transmittal. If the request is granted, the cost support

would be made available under a protective order.

The Commission states that it decided not to require the 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."³² It is not clear why that should be the case, however, since the Commission also found that "we have thus far had a satisfactory experience with the [pre-filing] procedures adopted in Tariff Streamlining, and see no reason to change them at this time."³³ Those procedures require the filing of the Tariff Review Plans, including all cost support, in advance of the annual access filing. Since the pre-filing procedures have worked well for annual access cost support data, there is no reason that the occasional request to treat cost data in support of annual access or other tariff filings as confidential should not also be filed in advance of the tariff. Because of the relative absence of local competition, good faith requests to treat ILEC cost support data as confidential should be rare enough that the administrative burden would be de minimis.

III. THE COMMISSION'S FOIA PROCEDURES ARE TOO CUMBERSOME IN THE STREAMLINED TARIFF ENVIRONMENT

Even aside from all of the procedural problems discussed above, the Commission's confidentiality procedures still operate

³² Order at ¶ 41.

³³ Id. at ¶ 39.

too slowly in the streamlined tariff context. As MCI pointed out in its Petition for Reconsideration of the Tariff Streamlining Order, even with a model protective order (MPO), ratepayers must still make individual arrangements with the LEC to prepare and sign the required nondisclosure statements, make arrangements to inspect the confidential material (sometimes on one day's notice) and then request copies of the information. All of that activity can consume too much valuable time, especially given the requirement that petitions challenging streamlined tariffs be filed within 3 or 7 days of the tariff filing, as the case may be.

Accordingly, LECs should be required to give ratepayers the option of entering into a standing protective agreement. Under such a standing agreement, a ratepayer would not be required to enter into a separate agreement for each tariff filing. Instead, the LEC would automatically provide a copy of any confidential cost support information to the ratepayer's authorized representative, simultaneously with the filing of the tariff transmittal with the Commission. The Order and MPO should be modified to reflect at least this change. Otherwise, the Commission will not achieve its stated objective of a workable streamlined tariff review process with meaningful public participation.

IV. THE COMMISSION SHOULD CLARIFY ITS FOIA REVIEW PROCEDURES

One other problem with the Commission's FOIA practices is

its failure to resolve review proceedings within a reasonable time, thereby effectively denying parties' FOIA rights. Section 0.459(g) of the Commission's Rules provides that the party submitting records to the Commission may file an application for review of a decision denying its request for confidential treatment of such records, and Section 0.461(h) provides that an application for review of a decision on a request for inspection of records may also be filed, either by the party submitting the records or the party requesting disclosure. In both cases, the information at issue will be treated as entirely confidential -- i.e., not subject to disclosure even under a protective order -- during the pendency of the review proceeding and any judicial stay proceeding.³⁴

Unfortunately, the treatment of the information subject to a FOIA application for review as entirely confidential has resulted in the de facto denial of applications filed by parties requesting disclosure, even where the application was ultimately granted. For example, the Bureau granted in part FOIA requests filed by MCI and other parties for cost support data submitted by Southwestern Bell Telephone Company (SWB) in connection with its virtual collocation tariff on November 1, 1994.³⁵ SWB filed an application for review of that partial grant on November 16,

³⁴ See Sections 0.459(g), 0.461(h)(4) and 0.461(i) of the Commission's Rules; Order at ¶ 72.

³⁵ Letter from Kathleen M.H. Wallman, Chief, Common Carrier Bureau, FCC, to Jonathan E. Canis, Frank W. Krogh and Richard J. Metzger, FOIA Control Nos. 94-310, -325, -328, 9 FCC Rcd 6495 (CCB 1994).

1994. The Commission did not rule on SWB's application until May 23, 1997 in the SWB FOIA Review Order.³⁶ There was a similar delay in ruling on MCI's application for review of an order waiving the public cost support requirement for data submitted with other SWB transmittals in the virtual collocation proceeding.³⁷

In both cases, the cost support material remained entirely undisclosed for at least two years while the applications for review were pending, thereby delaying any effective public participation in the ongoing virtual collocation tariff investigation as to such material during those review periods. When the material was finally made available under protective order, it could not possibly still have been confidential, having lost whatever competitive sensitivity it once might have had, and it was too stale to be of any use to the parties in any event.³⁸

This type of delay in FOIA review proceedings requires certain clarifications and modifications in the rules set forth in the Order. First, it is not clear how the semi-automatic

³⁶ Southwestern Bell Telephone Company, on Requests for Inspection of Records, FOIA Control Nos. 94-310, -325, -328, Memorandum Opinion and Order, 12 FCC Rcd 7770 (1997).

³⁷ See Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Application for Review, CC Docket No. 94-97, Order, FCC 98-89 (released May 15, 1998).

³⁸ Cf. MCI Comments at 1-2, Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, CC Docket No. 94-97 (Aug. 27, 1998).

confidential treatment of tariff cost support will mesh with the FOIA review procedures. For example, if a request for confidential treatment for cost support in connection with a LEC streamlined tariff is denied, so that it would have to be publicly disclosed without a protective order, the LEC could apply for review of such denial under Section 0.459(g) of the Commission's Rules. If the data were to be kept entirely confidential during the pendency of the review proceeding, the tariff would long have since become effective and therefore immune to damages relief by the time the application for review was denied. The Commission therefore should make it clear that, where a request for confidential treatment of tariff cost support material is completely rejected, the material must be made available at least under a protective order pending a decision on an application for review filed by the submitting LEC.

Second, a similar problem may arise, in the event that the Commission rejects the argument in Part I, supra, and permits LECs to request complete confidentiality for cost support. Where such a request in connection with a streamlined tariff is denied, and the cost support is required to be disclosed under a protective order, keeping it entirely confidential pending decision on the LEC's application for review of that decision will moot the issue. The Commission states in the Order that "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,"³⁹ but the Commission should clarify on reconsideration that streamlined tariffs will always be suspended where the LEC is seeking complete confidentiality for cost support. In that way, there at least will be a possibility that interested parties will have access to the material under a protective order before the tariff becomes effective.

Finally, Section 0.461(k) of the Commission's Rules requires that the Commission act on applications for review of orders on requests for inspection of records in 30 working days, in all cases. That requirement has not always been followed, although most situations are not as extreme as the SWB FOIA Review Order mentioned above. In order not to delay tariff and other proceedings, the Commission should adhere to the timetables in its FOIA regulations. If it cannot, it should make whatever adjustments are necessary in related proceedings, so that no party is prejudiced by such delays. For example, in tariff investigations, where there has been a substantial delay in ruling on a FOIA application for review, and cost support material has been completely withheld in the interim, the LEC should be required to update the material so that it is relevant when and if it is made available and, to the extent that the cost support data is not updated, the LEC should be required to justify its continued competitive sensitivity and confidentiality in light of its age.

³⁹

Order at ¶ 40.