

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

DOCKET FILE COPY ORIGINAL  
**ORIGINAL**  
RECEIVED

OCT 29 1998

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

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY  
GC Docket No. 96-55

PETITION FOR WAIVER OF PAGE LIMITATION

MCI WorldCom, Inc., pursuant to Section 1.48(b) of the Commission's Rules, 47 C.F.R. § 1.48(b), hereby requests permission to exceed the page limitation set forth in Section 1.429(g) of the Commission's Rules, 47 C.F.R. § 1.429(g), applicable to replies to oppositions to petitions for reconsideration, and hereby petitions for waiver, pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, of the timing requirements in Section 1.48(b) applicable to requests for permission to exceed page limitations. Good cause exists for both requests, and the Reply to Oppositions to Petition for Reconsideration of MCI WorldCom, Inc., accompanying this petition, should be accepted for filing.

The Report and Order in this docket (Order)<sup>1</sup> set forth the procedures concerning the treatment of material claimed to be confidential under the Freedom of Information Act (FOIA), including procedures governing the treatment of tariff cost support information. Because MCI WorldCom is so vitally dependent upon the incumbent local exchange carriers (ILECs) for

<sup>1</sup> Report and Order, FCC 98-184 (released Aug. 4, 1998).

No. of Copies rec'd ctk  
List ABCDE

interstate access services to enable it to serve its long distance service subscribers, it is crucial for MCI WorldCom to have access to ILEC access tariff cost support data in order to participate meaningfully in ILEC tariff reviews and investigations. Accordingly, MCI WorldCom's Petition for Reconsideration focused on those aspects of the Order that authorize the Commission to treat ILEC tariff cost support as confidential, thereby allowing either total nondisclosure of such data or disclosure only under a protective order. Such limited disclosure, or total nondisclosure, greatly prejudices MCI WorldCom's ability to participate in proceedings reviewing ILEC access rates and, accordingly, its interests in reasonable ILEC rates.

MCI WorldCom's Petition was opposed by two Bell Operating Companies (BOCs), one of which also referenced a detailed legal argument previously filed by the BOCs in the reply round of comments preceding the Order ("Reply Comments of Joint Parties"). As a result, it is necessary for MCI WorldCom to address a variety of issues in detail in its Reply to the BOCs' oppositions. It is therefore impossible to meet the page limitation governing replies to oppositions to petitions for reconsideration, especially since MCI WorldCom has addressed both of the oppositions and the referenced Joint Parties' Reply Comments in a single pleading. A 24-page Reply is necessary to rebut all of the BOCs' multiple arguments adequately.

Accordingly, MCI WorldCom requests that its Reply to

Oppositions to its Petition for Reconsideration be accepted for filing, notwithstanding its length in excess of the applicable page limitation. Addressing all of the BOCs' arguments in a single pleading will eliminate duplication and should facilitate the Commission's reconsideration process. See, e.g., Order, Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, et al., CC Docket No. 96-115, et al., DA 98-1184 (released June 23, 1998) (granting motion to exceed page limit for single opposition to multiple petitions for reconsideration).

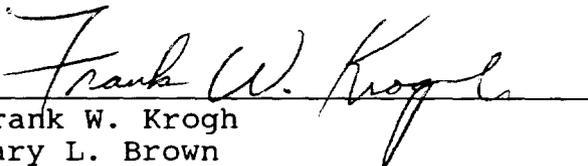
Furthermore, it would not have been possible for MCI WorldCom to file a request to exceed the page limitation only two business days after the receipt of the oppositions, as Section 1.48(b) requires, since MCI WorldCom had only just started reviewing the oppositions and the referenced Joint Parties' Reply Comments at that point in time. In any event, because MCI WorldCom is the only party to have raised the important due process and APA issues implicated by the nondisclosure of tariff cost support information, MCI WorldCom believes that acceptance of its Reply will be helpful to the Commission in its efforts to apply FOIA principles to tariff review and investigation proceedings in a way that advances the Commission's competitive and other goals and that conforms to constitutional and other legal requirements, based on as complete a record as possible. Accordingly, the public interest would be served by a waiver of

the requirements of Section 1.48(b) so that the Commission may consider, out of time, MCI WorldCom's request to exceed the applicable page limitation.

WHEREFORE, MCI WorldCom submits that good cause has been demonstrated for a waiver of Section 1.48(b) of the Commission's Rules so that the Commission can consider MCI WorldCom's request for permission to exceed the page limitation in Section 1.429(g) of the Commission's Rules and that good cause has been shown for such permission. MCI WorldCom accordingly requests that the Commission accept its Reply to Oppositions to its Petition for Reconsideration, filed herewith, as procedurally proper.

Respectfully Submitted,

MCI WORLDCOM, INC.

By: 

Frank W. Krogh  
Mary L. Brown  
1801 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006  
(202) 887-2372

Its Attorneys

Dated: October 29, 1998

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

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

REPLY TO OPPOSITIONS TO PETITION FOR  
RECONSIDERATION OF MCI WORLDCOM, INC.

MCI WORLDCOM, INC.

Frank W. Krogh  
Mary L. Brown  
1801 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006  
(202) 887-2372

Its Attorneys

Dated: October 29, 1998

TABLE OF CONTENTS

I. The BOCs Have Failed to Address the Illegality of Total Nondisclosure of  
Tariff of Support Data.....1

    A. Opponents Have Not Demonstrated How Total Nondisclosure of  
    Tariff Cost Support Data Could Possibly Conform to Due Process  
    and APA Requirements.....2

        1. MCI WorldCom’s Due Process and APA Concerns Apply to  
        Any Tariff Investigation.....3

        2. The Same Due Process and APA Issues are Raised Whenever a  
        LEC Streamlined Tariff is Challenged.....8

    B. The Opponents Have Failed to Address the Arbitrariness of the  
    Commission’s Failure to Impose Any Standards to Govern Determinations  
    of Whether to Grant Requests for Total NonDisclosure of Tariff Cost  
    Support.....11

II. Opponents Have Failed to Address MCI WorldCom’s Policy Arguments for  
Public Disclosure of Tariff Cost Support.....15

III. Opponents Have Failed to Address MCI WorldCom’s Alternative Procedural  
Requests.....20

CONCLUSION.....23

## SUMMARY

The BOCs opposing MCI WorldCom's Petition for Reconsideration have failed to address the constitutional due process, Administrative Procedures Act (APA) and policy issues raised therein, and it should be granted.

An order granting a request for the total nondisclosure of tariff cost support material claimed to be confidential, by permitting secret ratemaking, would violate due process and would be arbitrary and capricious. Section 204(a) of the Communications Act is a "notice" and "hearing" provision, analogous to the provisions involved in U.S. Lines and other cases cited in MCI WorldCom's Petition. Thus, tariff investigations under the Communications Act are entitled to the same degree of APA and constitutional due process as those cases provide, with meaningful public participation predicated on access to all of the information before the agency.

Moreover, due process and APA concerns are triggered as soon as a LEC streamlined tariff is challenged, given the Commission's (incorrect) interpretation of Section 204(a)(3) of the Act in the Tariff Streamlining Order. Since a decision allowing a streamlined tariff to go into effect without suspension or investigation immunizes it from liability for damages, due process and the APA require that, once any LEC streamlined tariff is challenged, it is prohibited from taking effect until requesting parties have been given access to cost support data.

Opponents have also failed to address the absence of any

standards governing the determination of whether to grant requests for total nondisclosure of tariff cost support. There is nothing in the FOIA, the Commission's Rules or the Order that indicates the circumstances under which the Commission might grant a request for total nondisclosure rather than disclosure under a protective order. The absence of any standards governing such a choice is arbitrary and capricious.

Furthermore, treating tariff cost support as confidential, even with disclosure under a protective order, violates the Commission's Rules and the policies embodied in the tariffing requirement. The Commission's one-sided, semi-automatic confidentiality procedures in streamlined tariff reviews virtually guarantee that tariff cost support data will be treated as confidential, even in situations in which such treatment is not justified under FOIA standards. The Commission should require that LEC requests for confidential treatment of streamlined tariff cost support be filed sufficiently in advance of the tariff filing to provide ratepayers the opportunity to challenge the LEC's confidentiality request.

Finally, so as not to effectively deny parties' FOIA rights through undue delay, where a request for confidential treatment of tariff cost support material is denied, it should be made available at least under a protective order pending a decision on the LEC's application for review of such denial. Where a LEC has requested total nondisclosure of tariff support, the Commission should always suspend and investigate the tariff.

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

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

**REPLY TO OPPOSITIONS TO PETITION FOR  
RECONSIDERATION OF MCI WORLDCOM, INC.**

MCI Worldcom, Inc.,<sup>1</sup> by its undersigned attorneys, hereby replies to the oppositions filed by SBC Communications Inc. (SBC) and BellSouth Corporation (BellSouth) to the Petition for Reconsideration of MCI WorldCom, Inc., which sought modification of the Commission's Report and Order (Order) in the above-captioned proceeding (FCC 98-184 (released August 4, 1998)). As explained below, the two Bell Operating Company (BOC) opponents have failed to address the constitutional due process, Administrative Procedures Act (APA) and policy issues raised by MCI WorldCom's Petition, and it therefore should be granted.

**I. THE BOCS HAVE FAILED TO ADDRESS THE ILLEGALITY OF TOTAL  
NONDISCLOSURE OF TARIFF SUPPORT DATA**

**A. Opponents Have Not Demonstrated How Total Nondisclosure  
of Tariff Cost Support Data Could Possibly Conform to  
Due Process and APA Requirements**

In its Petition, MCI WorldCom explained that an order

---

<sup>1</sup> 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 prior to the formation of MCI WorldCom.

granting a request for the total nondisclosure of tariff support material claimed to be confidential, by permitting secret ratemaking, would violate due process and would be arbitrary and capricious. SBC's only response to this point is that such a finding would not be "automatic" but requires the submitting carrier to make the showing required by Section 0.459(b) of the Commission's Rules in order to obtain such treatment. SBC concludes that MCI WorldCom has not shown why its opportunity to oppose such a request does not satisfy due process requirements. BellSouth references the Reply Comments of the Joint Parties, filed by some of the BOCs in 1996, which, it maintains, demonstrated that no such constitutional or statutory concerns are implicated by the total nondisclosure of tariff cost support. Neither response meets the issue.

Whether or not a request for total nondisclosure could be challenged is irrelevant.<sup>2</sup> SBC fails to address MCI WorldCom's point that total nondisclosure of cost support can never be legal, at least once a local exchange carrier (LEC) "streamlined" tariff has been challenged or, in the case of any dominant carrier tariff, once a tariff investigation has been commenced. That ratepayers might occasionally defeat requests for total nondisclosure thus makes no difference here. Since the Commission's Order establishes a procedure that can never be

---

<sup>2</sup> Moreover, as explained in MCI WorldCom's Petition and in Part II of this Reply, infra, ratepayers in fact do not have an opportunity to challenge confidentiality claims in streamlined tariff review proceedings.

legal in a large proportion of all of the situations in which it will be applied, the Order should be modified to remove that procedure.

The 1996 Reply Comments of Joint Parties cited by BellSouth offered no more support for the Commission's decision to allow the total nondisclosure of cost support data. In fact, the portion of those comments that is cited by BellSouth concluded the entire discussion of the confidential treatment of tariff cost support with the statement that "[t]o the extent that the Commission continues to invite public participation in the tariff review process, it can permit limited access to confidential information through the use of protective orders."<sup>3</sup> At most, then, the BOC Joint Parties were ambivalent on the issue of total nondisclosure.

1. MCI WorldCom's Due Process and APA Concerns Apply to Any Tariff Investigation

More importantly, the Joint Parties' attempt to distinguish MCI WorldCom's precedents failed. For example, they characterized U.S. Lines v. FMC, 584 F.2d 519 (D.C. Cir. 1978), as essentially involving an agency's failure to consider antitrust aspects of a proposed agreement. They asserted that the language MCI WorldCom quoted from that decision was merely dicta concerning the agency's reliance on undisclosed ex parte contacts in a proceeding requiring "notice and an opportunity for hearing" and that the decision has no relevance to the

---

<sup>3</sup> Reply Comments of Joint Parties at 12-13, GC Docket No. 96-55 (filed July 15, 1996).

withholding of confidential information under Exemption 4 of the Freedom of Information Act (FOIA).

On the contrary, the court held in that case:

The failure adequately to consider antitrust implications is not the only defect in the Commission's decision.... Twice ... the Commission stated that it had made critical findings on the basis of data which was not included in the record of this case....

U.S. Lines, 584 F.2d at 533. These findings based on "blind references" (id.), which took up three pages of the opinion (id. at 533-36), were therefore just as much a basis for the court's reversal as the antitrust issue. The court equally faulted the agency, in a seven page discussion (id. at 536-43), for its reliance on the undisclosed ex parte communications mentioned by the Joint Parties. Thus, the blind references and ex parte communications were both of decisional significance in U.S. Lines.

Moreover, those issues were not merely a matter of a violation of the "agency's own rules," as the Joint Parties suggested. Rather, "the absence of any adversarial comment among the parties" concerning the undisclosed data and ex parte contacts on which the agency relied rendered the agency's decision arbitrary and capricious as well as a violation of the "hearing" requirement of Section 15 of the Shipping Act. Id. at 534-36, 539-42.

What we are confronted with, then, is an agency procedure denying meaningful participation to the public and an agency decision appearing to rest, at least in significant part, on communications never revealed to the protesting party or to the public. For a court to uphold this decision as satisfying the

'hearing' required by statute would be to do violence not only to Section 15 but to the basic fairness concept of due process as well.<sup>4</sup>

The Joint Parties attempted to brush aside U.S. Lines with the irrelevant assertion that, unlike the "notice and opportunity for hearing" requirement of Section 15 of the Shipping Act, Section 203 of the Communications Act, which imposes the tariffing requirement, does not create any procedural or substantive rights for parties to review tariff cost support materials. Section 204(a) of the Act, however, which sets out the procedures for tariff reviews and investigations, is a "notice" and "hearing" provision,<sup>5</sup> just like Section 15 of the Shipping Act. Thus, the same degree of APA and constitutional due process, with meaningful public participation predicated on access to all of the information before the agency, is required -- at least in tariff investigations under the Communications Act -- as was held to be required in U.S. Lines.

An even more remarkable, and irrelevant, suggestion of the Joint Parties is that, in a rulemaking proceeding, "[t]here is no

---

<sup>4</sup> Id. at 541. Sea-Land Service, Inc. v. FMC, 653 F.2d 544, 551 (D.C. Cir. 1981), reinforces the need for "meaningful public participation" under a "notice" and "hearing" proceeding. The Joint Parties also attempted to distinguish Sea-Land as a case concerning the right to participate in a hearing under Section 15 of the Shipping Act and not involving the issue of access to confidential data under the FOIA. The Joint Parties are wrong about Sea-Land for all of the same reasons they are wrong about U.S. Lines.

<sup>5</sup> Section 204(a) states, in relevant part: "Whenever there is filed with the Commission any new or revised charge ... the Commission may ... upon reasonable notice, enter upon a hearing concerning the lawfulness thereof...." 47 U.S.C. § 204(a)(1).

legal requirement under the [APA] for the Commission to allow interested parties to analyze and respond to the submissions of other parties."<sup>6</sup> As cases such as Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977), amply demonstrate, that is obviously incorrect. Rather, in a notice and comment rulemaking, the APA requires that all essential data be disclosed to all participants to allow the necessary "adversarial discussion among the parties."<sup>7</sup>

In any event, a tariff investigation under Section 204(a) is not a rulemaking. As discussed above, it is a "notice" and "hearing" provision, analogous to those provisions at issue in U.S. Lines and other cases cited in MCI WorldCom's Petition at 3-4. The APA principle that appears to have escaped the Joint Parties, as well as SBC and BellSouth in their recent oppositions, is that the "opportunity to participate" that they admit is required in a tariff investigation carries with it the need to disclose all essential data to requesting parties to

---

<sup>6</sup> Reply Comments of Joint Parties at 11 & n. 27.

<sup>7</sup> Home Box Office, 567 F.2d at 55 (undisclosed ex parte communications invalidated FCC rulemaking). See also, Portland Cement Ass'n. v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974) ("[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of ... data that ... is known only to the agency").

Not surprisingly, the case cited by the Joint Parties, Chemical Leaman Tank Lines, Inc. v. United States, 368 F. Supp. 925 (D. Del. 1973), does not support their novel contention. There, the court held that an agency is not required to provide an oral hearing or an opportunity to file replies in a rulemaking proceeding. Id. at 946. There was no issue as to data that was submitted to the agency but withheld from other parties.

"ensure that parties ... are afforded the opportunities guaranteed them by statute meaningfully to participate" and to "provide a means by which a reviewing court, called upon to determine whether agency action is arbitrary and capricious, can secure needed guidance in the performance of this function from both the parties and the agency." U.S. Lines, 584 F.2d at 534.

Contrary to the suggestion of the Joint Parties that these cases have no bearing on information claimed to be confidential, the enactment of the FOIA did not modify the APA and constitutional requirements for a fair tariff investigation "hearing" under Section 204(a). Nothing in the FOIA or the Commission's FOIA Rules suggests that parties to a Section 204(a) "hearing" may be deprived of access to significant data upon which the Commission relies. If tariff cost support really is competitively sensitive, it may be treated as confidential under the FOIA, but it still must be disclosed, whether under a protective order or otherwise, in order to satisfy APA and due process requirements in a tariff investigation. Neither the Joint Parties nor the opponents cited any cases even suggesting the contrary.<sup>8</sup>

---

<sup>8</sup> The Joint Parties did assert that courts have held that tariff support information may be exempt from disclosure under Exemption 4 of the FOIA, citing Allnet Communications Services, Inc. v. FCC, 800 F. Supp. 984 (D.D.C. 1992), aff'd per curiam, No. 92-5351 (D.C. Cir. May 27, 1994) (Allnet FOIA). In that case, however, Allnet requested that tariff cost support data be publicly released, since it considered the terms of the protective order that had been approved to be too restrictive. See Reply Brief for Appellant at 2, Allnet FOIA, No. 92-5351 (D.C. Cir. filed Jan. 26, 1994) (noting Allnet's "interest in the release of as much segregable nonexempt information as possible

2. The Same Due Process and APA Issues Are Raised Whenever a LEC Streamlined Tariff is Challenged

Moreover, as MCI WorldCom explained in its Petition, these due process and APA concerns are triggered not only when a tariff investigation is ordered, but also as soon as a LEC streamlined tariff is challenged, in light of the Commission's interpretation of the new Section 204(a)(3) of the Communications Act in the Tariff Streamlining Order.<sup>9</sup> Since a decision allowing a streamlined tariff to take effect without suspension or investigation (once affirmed by the full Commission), is a final order that deprives ratepayers of the right to seek damages for the period the tariff is in effect, due process requires that once any LEC streamlined tariff is challenged, it may not go into effect unless requesting parties have been given access to cost support data. See MCI WorldCom's Petition at 6-9.

This fundamental change in the nature of initial tariff reviews under the Communications Act applicable to streamlined tariffs rebuts the Joint Parties' final argument -- namely, that courts have repeatedly held that cost support materials are "mere aids to the exercise of the agency's independent

---

to the public" so as to avoid "the cost and burden" of "onerous confidentiality agreements") (emphasis in original). Thus, that case did not test the principle MCI WorldCom asserts here -- that due process and APA concerns require that even cost support data that is exempt under the FOIA must be disclosed, whether under protective order or otherwise, to requesting parties in a tariff investigation or streamlined tariff review proceeding.

<sup>9</sup> 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.

discretion' regarding suspension and investigation that do not confer important procedural benefits upon individuals."<sup>10</sup> That was true for LEC tariff filings prior to the Commission's interpretation of Section 204(a)(3), and it is still true for other tariff reviews under the Communications Act and other statutes. It is no longer true, however -- assuming that the Commission correctly interpreted Section 204(a)(3) in the Tariff Streamlining Order -- for LEC streamlined tariffs.

The reason for this change is revealed in the cases cited by the Joint Parties. For example, in Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1234 (D.C. Cir. 1980), cert. denied sub nom., General Electric Co. v. FCC, 451 U.S. 976 (1981), the court held that the Commission's decision to accept a tariff filing was unreviewable.

The acceptance is non-final because it is the initiation of an administrative proceeding. The Commission merely accepted the tariff and did not rule on the lawfulness of the rates to be paid.... The act of acceptance creates no irreparable harm because investigatory hearings are available for examination of the filing on the merits.

In the passage from Aeronautical Radio quoted by the Joint Parties, the court went on to explain that it was the lack of a final decision on lawfulness and, thus, the absence of any irreparable harm to ratepayers, that justified the absence of any party's right of access to tariff cost support data.

Cost justification information is submitted pursuant to

---

<sup>10</sup> Reply Comments of Joint Parties at 9 (quoting American Farm Lines v. Black Ball Freight Services, 397 U.S. 532, 538-39 (1970)).

the FCC's tariff filing rules primarily to aid the Commission in exercising its discretion as to investigation and suspension of tariff filings. ... An agency is permitted to relax, modify, or waive its filing requirements, and such action is not reviewable except upon a showing of substantial prejudice to the complaining party. Given the complaint remedy under the Communications Act, no substantial prejudice of an irreparable nature exists in this case.<sup>11</sup>

In the case of LEC streamlined tariffs, however, at least according to the Commission, acceptance of a tariff without suspension or investigation is, in fact, a decision that the tariff is "conclusively presumed to be reasonable and, thus, a lawful tariff during the period that the tariff remains in effect." Tariff Streamlining Order at ¶ 19. Accordingly, even if such a tariff is subsequently found to be unreasonable in a complaint proceeding, such a finding "would not subject the filing carrier to liability for damages for services provided prior to the determination of unlawfulness." Id. at ¶ 20. Thus, there is no further remedy, once a streamlined tariff is allowed to go into effect without suspension or investigation, during the period the tariff is in effect.

As MCI WorldCom explained in its Petition, that is the radical break with the conventional tariffing regime that renders the usual rules of agency discretion in accepting tariffs -- and the cases cited by the Joint Parties -- inapposite in the case of LEC streamlined tariffs. Unlike the situation in Aeronautical Radio, 642 F.2d at 1235, for example, there is "substantial

---

<sup>11</sup> 642 F.2d at 1235 (quoted in Reply Comments of Joint Parties at 11).

prejudice of an irreparable nature" once a streamlined tariff is allowed to go into effect. Accordingly, in the case of a streamlined tariff, the Commission no longer has the discretion to decide whether third parties challenging the tariff may have access to cost support data during the initial review of the tariff.

SBC and BellSouth add little in their oppositions to the previous discussion of this issue by the Joint Parties. BellSouth argues that since Congress created the right to seek damages in the first place, it may limit the period for which damages are available without infringing ratepayers' due process rights. That is interesting but irrelevant. MCI WorldCom is not challenging Section 204(a)(3) of the Act, as BellSouth suggests, nor is it even challenging, at least in this proceeding, the Commission's interpretation of that provision. Rather, accepting arguendo the Commission's interpretation of Section 204(a)(3), due process concerns must be satisfied as soon as a LEC streamlined tariff is challenged; because once it goes into effect, there is no further remedy for that tariff, no matter how unreasonable it may be, for the period that it remains in effect.

SBC argues, first, that since a ratepayer may still challenge a streamlined tariff, with or without access to the cost support, its due process rights are satisfied. As discussed above and in MCI WorldCom's Petition, however, both due process and APA requirements prohibit final agency decisions, in proceedings such as streamlined tariff reviews under Section

204(a), based on materials not available to other parties. That MCI WorldCom may challenge LEC streamlined tariffs therefore cannot satisfy due process and APA concerns if it has to do so blindfolded.

SBC next argues that the nondisclosure of cost support for LEC streamlined tariffs has little or no economic significance for ratepayers, thus eliminating any due process interest in such tariff reviews. That is because, according to SBC, the cost support at issue in the typical LEC tariff filing concerns new services, for which substitutes are generally available, either from the same carrier or others. Since ratepayers can always stick with the existing substitutes, SBC concludes that there is no economic impact resulting from the offering of a new LEC service, and thus no due process implications in the procedures used to review such new offerings.

There is no reason to expect, however, that there will be adequate substitutes for new services. In fact, just the opposite is often the case. For example, the incumbent LECs (ILECs) were required to file expanded interconnection tariffs, which were treated as new services,<sup>12</sup> precisely because there was no other way for competitive carriers to interconnect with the

---

<sup>12</sup> Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7491 n. 609 (1992), recon., 8 FCC Rcd 127 (1992), vacated in part and remanded sub nom. Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) (subsequent history omitted).

ILECs in order to provide competitive access services.<sup>13</sup> New services, therefore, are typically the offerings that require the most scrutiny and, accordingly, the most extensive participation of ratepayers. SBC's substitute service theory is therefore invalid. Accordingly, neither opponent has adequately addressed any aspect of MCI WorldCom's due process and APA concerns arising from the possibility of the total nondisclosure of tariff cost support materials, particularly in the context of LEC streamlined tariff filings, and the secret ratemaking resulting from such a procedure.

B. The Opponents Have Failed to Address the Arbitrariness of the Commission's Failure to Impose Any Standards to Govern Determinations of Whether to Grant Requests for Total Nondisclosure of Tariff Cost Support

MCI WorldCom also argued that the Order provided no standards or guidance by which the Commission might determine, in a particular case, whether to grant a request for total nondisclosure and that such lack of standards is itself arbitrary and capricious. "While SBC agrees" that such standards "might be useful," it asserts, without any explanation, that they "need not be created" now. SBC Opp. at 2. BellSouth's response is somewhat more substantive. It argues that Section 0.459(d) of the Commission's Rules, which references the "preponderance of the evidence" test in the FOIA, 5 U.S.C. § 552, provides the standard that MCI WorldCom says is lacking.

---

<sup>13</sup> Id. at 7373-74.

The problem with these responses is that there is nothing in the FOIA, the Commission's Rules or the Order that indicates or suggests when, or under what circumstances, the Commission might grant a request for total nondisclosure rather than disclosure under a protective order. The information that must be provided to justify a confidentiality request for tariff cost support data under Section 0.459(b) is the same, whether the filing carrier has made a "request that information be released only pursuant to a protective order or that it be kept entirely confidential." Order at ¶ 40. Both types of confidentiality request are subsumed under the standards of Section 0.459(b), governing all requests that information "not be made available routinely to the public." *Id.* at ¶ 11. All requests under Section 0.459(b), in turn, are subject to the "preponderance of the evidence" test in Section 0.459(d) cited by BellSouth. *Id.* at ¶ 19. Furthermore, the showing required to support a request for disclosure is the same, no matter which type of confidentiality request has been made. *See id.* at ¶¶ 15-20 (making no distinction based on the type of confidentiality request).

Contrary to BellSouth's assertion, therefore, there are no standards or guidance provided in the Order or the Commission's Rules governing the determination of whether tariff cost support will be treated as confidential, subject to disclosure under a protective order, or as entirely confidential. The only standards that are provided govern the choice between public release and some form of confidential treatment, pursuant to

Section 0.459. Because of the due process implications, discussed in MCI WorldCom's Petition, of a determination to grant a request for total nondisclosure of tariff cost support, as opposed to disclosure under a protective order, the absence of any standards governing such a choice is also arbitrary and capricious. SBC's cavalier assertion that there is no need to "create" such standards is an invitation to lawlessness.

II. OPONENTS HAVE FAILED TO ADDRESS MCI WORLDCOM'S POLICY ARGUMENTS FOR PUBLIC DISCLOSURE OF TARIFF COST SUPPORT

MCI WorldCom also explained in its Petition that treating tariff cost support as confidential, even with disclosure under a protective order, violates the Commission's Rules and the policies embodied in the tariffing requirement and that the Commission's willingness to treat such material as confidential has resulted in procedural problems that should be corrected. Because of the timing involved, the Commission's one-sided confidentiality procedures in streamlined tariff reviews virtually guarantee that tariff cost support data will be treated as confidential, including situations in which such treatment is not justified. Moreover, disclosure of such material under a protective order does not alleviate the burdens on ratepayers and, ultimately, on the Commission, of the stifling effects of protective orders. MCI WorldCom accordingly requested that the Commission's confidentiality procedures be modified to require LEC requests for confidential treatment of tariff cost support to be filed sufficiently in advance of the tariff filing itself to

allow ratepayer participation in the review of the confidentiality request.

Here, too, the opponents respond to arguments that were not made in the Petition. SBC asserts that MCI WorldCom objects to the "preponderance of the evidence" standard for determining whether cost support material should be treated as confidential. In fact, MCI WorldCom argued that the opportunity for ratepayer participation in the review of such confidentiality requests is necessary for a meaningful application of the preponderance of the evidence standard. It is irrational to apply a preponderance of the evidence test where only one party's evidence can be considered.

SBC then argues that, although the Commission may not extend the streamlined tariff notice period in Section 204(a)(3), a ratepayer can challenge any request for confidential treatment "as long as it acts promptly." SBC Opp. at 4. As MCI WorldCom explained in its Petition, however, that is obviously not the case. The Commission admitted in the Tariff Streamlining Order and again in the recent Order in this proceeding that "requests for confidentiality could not be resolved in the 7 or 15-day pre-effective review period." Order at ¶ 37. Accordingly,

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.... To do this, a submitting party must comply with Sections 0.459(b) and (c) of our rules.... 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. Id.

Thus, if a LEC includes a confidentiality request with its streamlined tariff filing that appears to meet the Section 0.459 criteria, a "protective order will be issued." There is no provision for participation by any other party in the semi-automatic decision to issue a protective order. Thus, by the time any other party is even aware of the filing of the tariff, the Bureau will have already decided, without input from any other party, that the cost support requires confidential treatment and can only be disclosed, if at all, under a protective order. There is therefore no opportunity to challenge the LEC's request for confidential treatment until after it has been granted, which is too late. In any event, "the short time frames involved" preclude any revisiting of the confidentiality issue before the tariff becomes effective.

The only exception is in the case of an investigation. "If an investigation occurs, the Bureau can make a further determination concerning the carrier's entitlement to confidentiality." Order at ¶ 37. In other words, unless an investigation is ordered, there is no opportunity to challenge a LEC's claim of confidentiality for streamlined tariff cost support. MCI WorldCom accordingly requested that such confidentiality requests be filed prior to the associated tariff filing, in order to provide ratepayers an opportunity to challenge the LEC's confidentiality request before, rather than after, the Bureau rules on it.

BellSouth argues that MCI WorldCom is asking the Commission

to "redraw" the "balance" established in the FOIA between the rights of the owner of confidential information and the rights of third parties to access such information. On the contrary, the one-sided, semi-automatic confidentiality procedures established in the Order fundamentally alter the balance struck in the FOIA by granting confidential treatment to cost support material in situations where such treatment is not justified under FOIA standards. The FOIA did not contemplate a procedure in which an agency could determine confidentiality based solely on the representations of the entity claiming confidentiality. The factual determinations that must be made concerning competition and the possibility of competitive injury resulting from disclosure require a meaningful review that tests the claims of confidentiality, rather than accepting them at face value.<sup>14</sup> It is not possible for such a review to be conducted without the participation of other interested parties.

SBC disputes MCI WorldCom's assessment that, since the LECs are subject to so little competition, the cost support for most LEC streamlined tariffs is not likely to be confidential. SBC argues that MCI WorldCom has previously admitted that there is active competition for SBC high capacity services, citing MCI's requests for proposals (RFPs) for such services and MCI

---

<sup>14</sup> See, e.g., Pacific Architects and Engineers Inc. v. Renegotiation Board, 505 F.2d 383, 385 (D.C. Cir. 1974) (detailed justification that is necessary to support exemption of information from disclosure as confidential required that parties seeking disclosure "have an opportunity ... to dispute any factual or evidentiary assertions made" in support of confidential treatment).

WorldCom's public assurances that it will compete in the local residential service market. In the RFP case cited by SBC, however, MCI took precisely the opposite position from that now ascribed to it by SBC: it agreed with the Commission's finding that there is not yet a sufficient level of competition in high capacity services to allow LECs to offer preferential rates to select customers.<sup>15</sup> It is true that MCI WorldCom would like to compete in the local residential service market, but, until the BOCs cease their anticompetitive pricing and other monopolistic practices, local competition will not develop significantly.

As MCI WorldCom explained in its Petition, local and access service competition certainly have not developed to a significant degree to date, and LEC tariff cost support therefore is not likely to be competitively sensitive or, accordingly, confidential. See MCI WorldCom Petition at 14-15 & n. 31. Indeed, as MCI WorldCom pointed out in its recent Access Charge Reform Comments, access services enjoy a much higher level of earnings before interest, taxes, depreciation and amortization than local services.<sup>16</sup> Thus, since the semi-automatic, one-sided confidentiality review established in the Order for streamlined tariff cost support is likely to result in confidential treatment

---

<sup>15</sup> Southwestern Bell Telephone Co., Trans. Nos. 2433 and 2499, 11 FCC Rcd 1215, 1220 (1995), reversed sub nom., Southwestern Bell Tel. Co. v. FCC, 100 F.3d 1004 (D.C. Cir. 1996).

<sup>16</sup> MCI WorldCom, Inc. Comments at 1-2 & n. 2, Access Charge Reform, et al., CC Docket No. 96-262, et al. (filed Oct. 26, 1998). See also, id. at 2-21 (discussing absence of access competition).

in almost every case, it also follows that in most of those cases, such treatment will not be justified, unnecessarily burdening other parties and the Commission's streamlined tariff reviews.

III. OPONENTS HAVE FAILED TO ADDRESS MCI WORLDCOM'S ALTERNATIVE PROCEDURAL REQUESTS

In the alternative, MCI WorldCom argued that, at the very least, the Commission should require LECs to give ratepayers the option of entering into standing protective orders, which would automatically apply to any streamlined tariff filing, so that ratepayers really could make use of the cost support data in the short time allowed. SBC states that it is unaware of any problems faced by MCI WorldCom in the negotiation and use of protective orders under current procedures, so it opposes the proposal for a standing protective order. BellSouth asserts that such a device would constitute a major rule change requiring notice and comment.

SBC's convenient lack of awareness of the difficulties faced by MCI WorldCom in working out the details of a protective order and then trying to examine cost support data in the brief time remaining before a streamlined tariff becomes effective hardly negates the existence of those difficulties. Indeed, the time is typically so short in a streamlined tariff review that MCI WorldCom would incur a much greater burden in agreeing to the limitations of a protective order than it could possibly gain by a hurried review of the cost support data. BellSouth's notice

and comment objection is even more far-fetched, especially in light of the fact that MCI previously made the same request in seeking reconsideration of the Tariff Streamlining Order. The issue has therefore been in play for some time now, providing plenty of opportunities for all parties to comment.

Finally, MCI WorldCom requested that the Commission's FOIA review procedures be clarified and modified so as not to effectively deny parties' FOIA rights through undue delay. MCI WorldCom pointed out that where a request for confidential treatment of tariff cost support data is denied, the Order appears to allow the filing LEC to seek review of that denial, during which time, the cost support is kept entirely confidential. Such treatment during the FOIA review will effectively moot the issue, since the tariff will long since have become effective by the time the application for review is decided. MCI WorldCom accordingly requested that, where a request for confidential treatment of tariff cost support material is rejected, it should be made available at least under a protective order pending a decision on the LEC's application for review.

The opponents both argue that such an approach will effectively moot the FOIA review. That is no answer, however, since either approach moots some parties' rights. Either confidential information will be disclosed pending review or information that should have been disclosed is kept entirely confidential until it is no longer useful. The filing LEC has no

prior claim to have its rights preserved completely at the expense of ratepayers' equally significant due process and FOIA disclosure rights. Someone's rights must be compromised in this situation, and parties' expectations will be far less disrupted under MCI WorldCom's approach, especially in the situation of a streamlined tariff filing. That is because, in the typical situation where a LEC seeks confidential treatment for streamlined tariff support material, it only requests that the material be covered by a protective order, thus still permitting some disclosure. Thus, it would be irrational to allow the LEC to keep that material entirely confidential pending review of a denial of confidential treatment, since that is a higher level of protection than the LEC typically seeks for such material in the first place. The LEC's rights are not mooted at all in such a situation. Neither of the opponents addressed that anomaly.

Where the LEC requests complete confidentiality for tariff cost support, and that request is denied and the data is ordered to be disclosed, either publicly or under a protective order, disclosure under protective order would partially moot the LEC's application for review of such denial, but that is clearly preferable to mooting the ratepayers' request to use such data in the tariff review. As MCI WorldCom requested in its Petition, the best way to resolve this dilemma would be for the Commission to clarify that it will always suspend a tariff and order an investigation where the filing LEC requests total nondisclosure for cost support. That way, there is some chance that the

application for review will be decided while the cost support can still be used in the investigation. It is especially crucial that the Commission follow this procedure in streamlined tariff reviews, since the initial review period is so short, and the tariff is immune to damages liability once it becomes effective.

BellSouth asserts that there is no reason for the Commission to limit its discretion in such a manner, but does not explain why, given the denial of rights that will occur otherwise. BellSouth's notice and comment argument also falls flat here. As MCI WorldCom explained in its Petition, at 19-20, the Order itself raised the issue of the application of FOIA review procedures to LEC streamlined tariffs by establishing the semi-automatic protective order procedure in such tariff reviews. Because the typical confidentiality request accompanying a streamlined tariff contemplates disclosure under a protective order, it is not clear how such a procedure will mesh with the practice of total nondisclosure pending review of the denial of confidentiality requests. Because the procedure established in the Order creates this disjunction with the FOIA review procedures, it is perfectly appropriate to raise the anomaly in a petition to review the Order, rather than in a new rulemaking, as BellSouth would prefer.<sup>17</sup>

---

<sup>17</sup> More generally, the drastic effects of nondisclosure in streamlined tariff reviews highlights the problems of delayed FOIA reviews overall. If those issues were not raised now, MCI WorldCom might well have been considered to have waived its rights to raise such matters in the future. Thus, BellSouth's plea to the Commission not to consider them should be rejected.

CONCLUSION

For the reasons set forth above and in MCI WorldCom's Petition, the Order should be reconsidered and modified to protect ratepayers' due process and APA rights and to ensure that tariff cost support will be given confidential treatment only in appropriate circumstances.

Respectfully submitted,

MCI WORLDCOM, INC.

By:   
Frank W. Krogh  
Mary L. Brown  
1801 Pennsylvania Ave., N.W.  
Washington, D.C. 20006  
(202) 887-2372  
Its Attorneys

Dated: October 29, 1998

**CERTIFICATE OF SERVICE**

I, Vivian Lee, hereby certify that a true copy of the foregoing Petition for Waiver of Page Limitation was served this 29th day of October, 1998, by hand delivery or first class mail, postage prepaid, upon each of the following persons:

Ameritech  
1401 H Street, N.W.  
Suite 1020  
Washington, DC 20005

Bell Atlantic Telephone  
Companies  
1320 North Court House Road  
8th Floor  
Arlington, VA 22201

Bell Communications Research,  
Inc.  
2101 L Street, N.W.  
Suite 600  
Washington, DC 20037

M. Robert Sutherland  
BellSouth Corporation  
1155 Peachtree Street, N.E.  
Suite 1800  
Atlanta, GA 30309-3610

US West, Inc.  
1020 19th Street, N.W.  
Suite 700  
Washington, DC 20036

Robert M. Lynch  
Durward D. Dupree  
Michael Zpevak  
Thomas Pajda  
SBC Communications, Inc.  
One Bell Plaza, 30th Floor  
Dallas, TX 75202

David L. Meier  
Cincinnati Bell Telephone  
201 E. Fourth Street  
P.O. Box 2301  
Cincinnati, OH 45201-2301

Joe D. Edge  
Tina M. Pidgeon  
Drinker, Biddle & Reath  
901 Fifteenth Street, N.W.  
Suite 900  
Washington, DC 20005

David J. Gudino  
GTE Service Corporation  
1850 M Street, N.W.  
Suite 1200  
Washington, DC 20036

Paul B. Jones  
Janis A. Stahlhut  
Donald F. Shephard  
Time Warner Communications  
Holdings, Inc.  
300 Stamford Place  
Stamford, CT 06902

Brian Conboy  
John McGrew  
Thomas Jones  
Willkie Farr & Gallagher  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, DC 20036

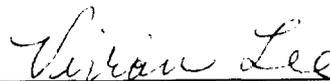
Curtis Knauss  
Aitken, Irvin, Lewin  
Berlin, Vrooman & Cohn  
1709 N Street, N.W.  
Washington, DC 20036

Daniel L. Brenner  
Loretta P. Polk  
1724 Massachusetts Ave., N.W.  
Washington, DC 20036

Barry A. Friedman  
Scott A. Fenske  
1920 N Street, N.W.  
Suite 800  
Washington, DC 20036

Jay C. Keithley  
Leon M. Kestenbaum  
Sprint Corporation  
1850 M Street, N.W.  
Suite 1110  
Washington, DC 20036

ITS  
Federal Communications  
Commission  
1919 M Street, N.W.  
Room 246  
Washington, DC 20554

A handwritten signature in cursive script that reads "Vivian Lee". The signature is written in dark ink and is positioned above a horizontal line.

Vivian Lee